ORIGINAL

NO. 45504-8-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

BESSIE WILLIAMS,

Plaintiff/Appellant,

vs.

JOHN DOE, FIRST TRANSIT, INC.; CITY OF TACOMA; CENTRAL BIBLE EVANGELICAL CHURCH,

Defendants/Respondents.

BRIEF OF RESPONDENTS FIRST TRANSIT and PHILIP HALSTEN

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I. INTRODUCTION

First Transit and Philip Halsten (collectively "First Transit") ask this Court to affirm the trial court's decision granting First Transit's motion for summary judgment.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not abuse its discretion by refusing to allow Ms. Coleman to continue to appear in the case after Mr. Britton withdrew as counsel.
2. The trial court did not abuse its discretion by refusing to grant a second continuance pursuant to CR 56(f) and CR 6(b).
3. The trial court did not abuse its discretion by striking the untimely affidavits of Carol Williams and Alkenneth Gurley.
4. The trial court did not err in granting First Transit and Philip Halsten's Motion for Summary Judgment.

III. RESTATEMENT OF THE CASE

A. Procedural Facts

The procedural history of this litigation has been tortured; therefore First Transit will focus on those facts relevant to this appeal. On June 18, 2013, local counsel for Ms. Williams, David Britton, who was the

attorney that submitted a *pro hac vice* application for Ms. Williams' Michigan counsel, Ms. Coleman, filed a notice of intent to withdraw, indicating that he was no longer going to represent Ms. Williams or associate with Ms. Coleman. (Clerk's Papers ("CP") at 377-78.) Despite the lack of counsel of record for Ms. Williams, First Transit timely served Ms. Coleman and Ms. Williams with a copy of their Motion for Summary Judgment on August 2, 2013. (CP at 669-71.) Ms. Coleman failed to respond to First Transit's motion by the original August 19, 2013 deadline. (CP at 653.)

New local counsel, Michael Ewetuga, filed a notice of appearance on August 21, 2013, but did not serve it on First Transit. (*Id.*) He then contacted First Transit's counsel on Thursday, August 22, 2013, to request an extension of time to respond. (*Id.*) Although First Transit refused, noting that counsel needs to move the court for an extension, Ms. Williams never filed anything before the August 30, 2013 summary judgment hearing date. (*Id.*) Instead, Mr. Ewetuga argued at the hearing that he had insufficient time to move for an extension because he had other motions on his calendar and had not been feeling well. (Verbatim Transcript of Proceedings ("TP") at 4.) He also stated at the hearing that because he was new to the matter, additional time should be granted for

him to evaluate the claim and assess whether an opposition should be filed. (TP at 8.)

The Court granted Mr. Ewetuga's oral motion to extend the date by which to respond to First Transit and Central Bible's motions for summary judgment until September 9, 2013. (TP at 8-9.) At that time, the Court directed Mr. Ewetuga to file and serve a response—or, a letter to counsel and the Court saying that no response was to be filed—no later than the close of business on September 9, 2013. (*Id.*) As First Transit's Second Reply reflects, no response was received by the end of the day on September 9, 2013. (CP at 654.) Despite Mr. Ewetuga's request to the court and argument that he needed additional time to evaluate the claim, Ms. Williams' opposition to First Transit's motion for summary judgment was filed by Ms. Coleman. (*Id.*) Ms. Williams did not file her response and supporting declarations until Wednesday, September 11, 2013–two days after the Court directed those pleadings to be filed and served. (*Id.*)

At the second summary judgment hearing on September 20, 2013, Mr. Ewetuga appeared with an email from Ms. Coleman sent the night before telling him that she could not attend the hearing. (TP at 16.) The trial court noted that it had not received working papers from Mr. Ewetuga and that although Ms. Coleman filed documents, "her admission as pro

hac vice had not been reaffirmed because Mr. Britton had withdrawn from the case." (TP at 12-13.)

The trial court held that Ms. Coleman's materials were untimely, not in compliance with Pierce County Local Rules because no working copies were provided, and that the court could not consider them because Ms. Coleman was not licensed in Washington. (TP at 17.) The trial court considered the summary judgment motions unopposed and granted both the motion brought by Central Bible Evangelical Church and the motion brought by First Transit and Mr. Halsten. (TP at 18.) The trial court also denied Ms. Coleman's email request for a second postponement as moot. (TP at 19.)

B. Facts Related to Respondents First Transit's Motion for Summary Judgment

1. Ms. Williams' Complaint.

Ms. Williams filed her Complaint on October 25, 2011, against First Transit and Central Bible. (CP at 537.) With respect to First Transit, Ms. Williams alleges that she was driven to the Central Bible Church in a shuttle bus on or about October 26, 2008. (CP at 538, ¶ 9.) Ms. Williams alleges that Mr. Halsten was running while pushing her wheelchair on the sidewalk and that she was injured when the wheel of the wheelchair hit a raised crack in the sidewalk, stopping the wheelchair abruptly and causing

her to fall forward out of the wheelchair. (*Id.*) Ms. Williams alleged that her injuries were caused by First Transit's breach of their duties. (*Id.* at ¶ 12-13.)

2. Declaration of Philip Halsten.

Mr. Halsten worked as a shuttle driver for First Transit from July 6, 2007 until August 8, 2010. (CP at 530, ¶ 1.) He was trained by First Transit to properly address wheelchair bound passengers in compliance with the requirements of the American Disabilities Act. (*Id.* at ¶ 3.)

Ms. Williams was a regular, everyday rider that Mr. Halsten transported to various locations, including churches that she attended. (CP at 531, ¶ 4.) Prior to October 26, 2008, the date of this incident, he never had any trouble transporting her or problems pushing Ms. Williams to any of her prior locations. (*Id.*) In fact, prior to October 26, 2008, he never had any problems transporting any of his other wheelchair bound passengers. (*Id.*)

Ms. Williams had a habit of not keeping her feet on the footrests of her wheelchair, even though Mr. Halsten regularly and routinely reminded her that she needed to do so for safe transport. (*Id.* at ¶ 5.) He estimates that he had to remind her to place her feet on her footrests nearly every time he transported her. (*Id.*)

On October 26, 2008, the date of the accident, Mr. Halsten transported Ms. Williams to the Central Bible Evangelical Church ("Church") for the first time. (*Id.* at ¶ 6.) On that day, he pulled into the Church's parking lot; he unloaded Ms. Williams from the shuttle van; and then he assisted Ms. Williams into the Church, at her direction. (*Id.*) Once they were inside the Church, Ms. Williams then remarked that the meeting she was attending was on the second floor of the Church, not on the floor in which they initially entered the building. (*Id.*)

There was no elevator service in the Church to transport Ms. Williams from the floor where they entered the Church to the second floor where Ms. Williams believed the meeting was to occur. (*Id.* at ¶ 7.) As a result, they exited the basement/first floor, so that Mr. Halsten could push Ms. Williams in her wheelchair up the sidewalk to the main entrance of the Church to access the second floor. (*Id.*)

The sidewalk was a paved sidewalk that ran immediately adjacent and parallel to the side of the Church and then ran immediately in front of the Church, to the main entrance. (*Id.* at ¶ 8.) Based upon his training, it was Mr. Halsten's opinion that it was safer to push Ms. Williams up the sidewalk to the front of the Church, rather than reload her back into the shuttle bus to transport her less than one block to the front of the Church and offload her again. (*Id.*)

It was not physically possible for Mr. Halsten to run while pushing Ms. Williams while going uphill, toward the front of the Church. (*Id.* at ¶ 9.) On that day, he weighed approximately 300 pounds. (*Id.*) Ms. Williams weighed approximately 250 pounds. (CP at 542.) At Mr. Halsten's weight, and given how much Ms. Williams weighed, he was physically not capable of "running" with her, while pushing her up the sidewalk, as she alleges. (CP at 532, ¶ 9.) In fact, he did not run. (*Id.*) Mr. Halsten was walking while pushing Ms. Williams up the sidewalk, toward the front of the Church. (*Id.*)

Before he started to push Ms. Williams up the sidewalk toward the front of the Church, Mr. Halsten again reminded Ms. Williams that she needed to put her feet in the wheelchair footrests. (*Id.* at ¶ 10.) Because he was confident she had done so, Mr. Halsten then proceeded to push her up the sidewalk. (*Id.*) Ms. Williams failed to keep her feet in the footrests and, as he proceeded to push her, she removed her feet from the wheelchair footrests, unbeknownst to Mr. Halsten. (*Id.*) Because Ms. Williams did not keep her feet on her wheelchair footrests, her foot got caught on a portion of the sidewalk, causing her to fall forward and out of her wheelchair. (*Id.*)

3. Ms. Williams' Deposition Testimony.

At her deposition on June 24, 2013, Ms. Williams had little recollection of the details regarding what happened on October 26, 2008. She testified that she told Mr. Halsten not to push her up the hill, because she felt she "was too big for him to go up this hill." (CP at 546:14-15.) She then said that he was running up the hill, even though she could not say how fast they were going, did not view his legs, and did not see him physically running. (CP at 549:14-21.) In fact, there were no witnesses.

Likewise, her recollection of what exactly caused the incident was unclear. Ms. Williams did not remember where Mr. Halsten initially parked. (CP at 547:7-15.) She did recall seeing a crack or a hole in the sidewalk and could not say which side of her wheelchair hit the crack or if it was both sides. (CP at 550:21-23.) She also could not say how much time passed between the time she saw the crack and when the incident took place. (CP at 550:12-14.) She could not even recall where the incident occurred after being shown photographs of the Church. (CP at 551:1-4.) At first, Ms. Williams did not have a memory of using her footrests on October 26, 2008. (CP at 554:2-24.) Then, she later said that she had a memory of her feet being on the footrests. (*Id.*) That said, she testified that she could not recall whether the components making up the

wheelchair footrests were actually attached to her chair on the day of the incident. (CP at 552:24-25; 553:1-5).[1]

IV. ARGUMENT

A. The trial court did not abuse its discretion by refusing to allow Ms. Coleman to continue to appear in the case after Mr. Britton withdrew as counsel.

Washington's Admission to Practice Rule 8(b) states that an out-of-state lawyer:

> may appear as a lawyer in any action or proceeding *only* (i) with the permission of the court or tribunal in which the action or proceeding is pending, *and* (ii) in association with an active member of the Washington State Bar Association, who shall be the lawyer of record therein, responsible for the conduct thereof, and present at proceedings unless excused by the court or tribunal.

APR 8(b) (emphasis added). Granting an attorney's application to practice law in Washington is left to the discretion of the trial court. *Hahn v. Boeing Co.*, 95 Wn.2d 28, 33, 621 P.2d 1263 (1980).

On June 18, 2013, local counsel for Ms. Williams, David Britton, who was the attorney that submitted a *pro hac vice* application for Appellant's Michigan counsel, Ms. Coleman, filed a notice of intent to withdraw, indicating that he was no longer going to represent Ms.

[1] At her deposition, Ms. Williams admitted that she did not even have her footrests attached to her wheelchair that day and was not using the footrests. Instead, her feet were just resting on the floor. (CP at 555:12-17.)

Williams or associate with Ms. Coleman. (CP at 377-78.) At that point, Ms. Williams had no counsel of record and Ms. Coleman could no longer appear in association with Mr. Britton.

Although First Transit is not aware of a Washington case addressing this particular situation, APR 8(b) is clear that an out-of-state lawyer may not appear unless he or she is associated with a licensed Washington attorney. In order for Ms. Coleman to continue to appear in this case Mr. Ewetuga, or another Washington-licensed attorney, needed to submit a new *pro hac vice* application on Ms. Coleman's behalf. Ms. Coleman had two months to associate with local counsel between the time Mr. Britton withdrew as counsel and the first summary judgment hearing date, and an additional month between the first and the second hearing dates. Ms. Coleman failed to do so.

At the first hearing, the trial court specifically directed Mr. Ewetuga, as new counsel of record, to respond to the motions for summary judgment or to notify counsel that no response was forthcoming by September 9, 2014. (TP at 8-9.) Mr. Ewetuga did not file or serve anything, and did not notify counsel for First Transit of Ms. Williams' position. (CP at 654.)

Based on a plain reading of APR 8(b) and the circumstances in this case, the trial court did not abuse its discretion in refusing to allow Ms.

Coleman to appear as counsel for Ms. Williams. Although Ms. Williams does not make the connection clear, the natural consequence of Ms. Coleman's lack of association with Washington counsel was that she could not file documents with the court as counsel for Ms. Williams. The trial court did not abuse its discretion in refusing to consider Ms. Coleman's untimely and improper submissions.

B. The trial court did not abuse its discretion by refusing to grant a second continuance pursuant to CR 56(f) and CR 6(b).

1. Ms. Williams did not seek a continuance pursuant to CR 56(f).

Although Ms. Williams states that the court erred in not granting a continuance pursuant to CR 56(f), no request for such a continuance was made.

CR 56(f) allows the trial court to continue a summary judgment hearing "if the nonmoving party shows a need for additional time to obtain additional affidavits, take depositions, or conduct discovery." *Building Indus. Ass'n of Wash. v. McCarthy,* 152 Wn. App. 720, 742, 218 P.3d 196 (2009). The trial court's decision is reviewed for manifest abuse of discretion. *MacKay v. MacKay,* 55 Wn.2d 344, 348, 347 P.2d 1062 (1959). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *In re Marriage of Littlefield,* 133 Wn.2d 39, 940 P.2d 1362 (1997). In the

context of a CR 56(f) continuance request, the trial court does not abuse its discretion if "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact." *Turner v. Kohler,* 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

At the second summary judgment hearing, Mr. Ewetuga explained to the court that he had received an email from Ms. Coleman the night before telling him she was unable to attend. (TP at 16.) The court noted that Ms. Coleman's email asked for a postponement, but found that the request was moot because Ms. Coleman was not licensed and the court could not consider her materials. (TP at 19.)

Although the precise content of Ms. Coleman's email is not clear, Mr. Ewetuga did not request a continuance for the purpose of obtaining additional affidavits or discovery to oppose the motion for summary judgment. There was no mention of additional evidence, nor was there any explanation of the reason for Ms. Coleman's many delays. The trial court could not have granted a CR 56(f) continuance because Ms. Williams did not request one. The trial court's decision to deny Ms. Coleman's unexplained email request for a second postponement of the

summary judgment hearing was reasonable, and therefore was not an abuse of discretion.

2. Ms. Williams did not seek a continuance of the summary judgment hearing or filing deadline extension pursuant to CR 6(b).

Civil Rule 6(b) provides that the trial court:

> for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect . . . .

CR 6(b). Eight factors have been identified for determining whether a delay resulted from excusable neglect:

> (1) The prejudice to the opponent; (2) the length of the delay and its potential impact on the course of judicial proceedings; (3) the cause for the delay, and whether those causes were within the reasonable control of the moving party; (4) the moving party's good faith; (5) whether the omission reflected professional incompetence, such as an ignorance of the procedural rules; (6) whether the omission reflected an easily manufactured excuse that the court could not verify; (7) whether the moving party had failed to provide for a consequence that was readily foreseeable; and (8) whether the omission constituted a complete lack of diligence.

Keck v. Collins, 325 P.3d 306, 314-15 (Wash. Ct. App. 2014) (citing Karl B. Tegland, Washington Practice: Rules Practice § 48:9, at 346 (2d ed. 2009)).

At the first summary judgment hearing, the trial court granted a three week continuance to allow Mr. Ewetuga to review the case and respond to the motion, if appropriate. (TP at 8.) At the second hearing, the trial court noted that it had not received working papers or a response from Mr. Ewetuga. (TP at 12-13.) In response Mr. Ewetuga did not request additional time to file a response, nor did he explain Ms. Coleman's untimely submission. Instead he said, "I did impress it on her that . . . [i]t was time for us to be serious about the case and file the necessary papers that we needed to file. And when that did not happen, my first reaction was to file a notice of withdrawal, because I'm not used to doing stuff like wasting the Court's time." (TP at 15.)

The only continuance that was requested, other than the postponement request in Ms. Coleman's email, was when Mr. Ewetuga suggested that the trial court hear First Transit's motion the following week. (TP at 16.) Mr. Ewetuga made no attempt to explain why Ms. Coleman's submissions were untimely or why he himself, as counsel of record, did not file anything or notify Respondents' counsel as he was previously directed to do by the trial court. Mr. Ewetuga did not move for additional time to properly submit materials in opposition to the motions for summary judgment.

Because no explanation was provided for the failure to comply with the trial court's clear deadline, and no extension requested, the trial court could not have found that the delay resulted from excusable neglect. The trial court did not abuse its discretion in refusing to consider the untimely and improper submission by Ms. Coleman, or in refusing to continue the summary judgment hearing for a second time.

C. The trial court did not abuse its discretion by striking the untimely affidavits of Carol Williams and Alkenneth Gurley.

Ms. Williams lists in her assignments of error that the trial court erred in striking the affidavits of Carol Williams and Alkenneth Gurley. Ms. Williams' brief does not elaborate on this statement and offers no argument as to why the trial court's decision not to consider Ms. Coleman's untimely and improper submission was in error.

"Trial courts have discretion whether to accept untimely filed documents."[2] *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn. App. 654, 660, 246 P.3d 835 (2011) (citing *O'Neill v. Farmers Ins. Co.*, 124 Wn. App. 516, 521, 125 P.3d 134 (2004)). Discretion is abused "when it is exercised on untenable grounds or for untenable

[2] The Court in *Keck v. Collins* reviewed the trial court's timeliness rulings de novo, but noted that the court "consistently has applied the abuse of discretion standard to trial court timeliness rulings in summary judgment proceedings." 325 P.3d 306, 321 n.5 (Wash. Ct. App. 2014).

reasons." *Id.* (citing *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). As discussed above, "once a deadline has passed, courts can accept late filings only if a motion is filed explaining why the failure to act constituted excusable neglect. *Id.* (citing CR 6(b)(2); *Davies v. Holy Family Hosp.,* 144 Wn. App. 483, 500, 183 P.3d 283 (2008)).

The trial court was within its discretion to strike Ms. Williams' filings for several reasons. First, Ms. Coleman filed the response to First Transit and Central Bible's motions for summary judgment and the related declarations two days after the deadline imposed by the trial court at the first summary judgment hearing. (TP at 17.) As discussed above, Mr. Ewetuga did not move for an extension pursuant to CR 6(b)(2) and did not explain why his failure or Ms. Coleman's failure to meet the deadline constituted excusable neglect.

Second, as discussed above, the trial court found that Ms. Coleman was no longer associated with local counsel after Mr. Britton withdrew from the case, and therefore the court could not consider her filings. (TP at 17.) Finally, the trial court also found that neither Ms. Coleman nor Mr. Ewetuga had submitted working copies of the filings, as required by Pierce County Local Rules. (TP at 12-13, 17; PCLR 7(a)(7).)

The trial court's ruling that it could not consider Ms. Williams' untimely and improper submissions was reasonable and was not an abuse of discretion.

D. The trial court did not err in granting First Transit and Philip Halsten's Motion for Summary Judgment.

1. Summary Judgment Standard.

The Court of Appeals reviews a summary judgment *de novo,* performing the same inquiry as the trial court. *Colorado Structures*, 159 Wn. App. at 661. Summary judgment must be granted unless the non-moving party comes forward with evidence showing there is a genuine issue of material fact for trial. CR 56(e). This means that a party seeking to avoid summary judgment cannot simply rest upon the allegations of his pleadings; he must affirmatively present admissible, factual evidence upon which he relies. *Mackey v. Graham*, 99 Wn.2d 572, 576, 663 P.2d 490 (1983).

If the Appellant "fails to make a showing sufficient to establish the existence of an element essential" to his or her case, there can be no genuine issue of material fact. *Davis v. State,* 102 Wn. App. 177, 184, 9 P.3d 1191, *review granted,* 142 Wn.2d 1016, 16 P.3d 1265, *affirmed*, 144 Wn.2d 612, 30 P.3d 460 (2000); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party is entitled to summary judgment when

there is a "complete failure of proof concerning an essential element of the nonmoving party's case [which] necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323. Where, as is the case here, Appellant fails to prove an essential element of the claim, all other facts are immaterial and summary judgment is appropriate. *Davis*, 102 Wn. App. at 189 (citing *Celotex Corp.*, 477 U.S. at 323).

Under CR 56(e), Ms. Williams cannot simply rely upon the mere allegations of her pleading. Rather, affidavits or other evidence as provided in CR 56 must set forth specific facts showing that there is a genuine issue for trial. *See Kennedy v. Sea-Land Service, Inc.*, 62 Wn. App. 839, 856-57, 816 P.2d 75 (1991).

Although First Transit argues that this Court should review the motions for summary judgment as unopposed, summary judgment is still appropriate even if this Court considers Ms. Williams' untimely and improper submissions in opposition.

2. The Court of Appeals must review a summary judgment ruling based on the record considered by the trial court.

Special Rule for Order on Summary Judgment, RAP 9.12, states that the appellate court will consider *only* evidence and issues called to the attention of the trial court. *See* RAP 9.12 (emphasis added). The Rule

further provides that "documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel." *Id.* First Transit and Central Bible have moved separately to strike the improperly designated documents and for the Court to sanction Ms. Williams for failing to comply with RAP 9.12.

The Court's "task [is] to review a ruling on a motion for summary judgment based on the precise record considered by the trial court." *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 754-55, 162 P.3d 1153 (2007) (citing *Wash. Fed'n of State Employees, Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 849 P.2d 1201 (1993); *Green v. Normandy Park Riviera Sec. Cmty. Club,* 137 Wn. App. 665, 678, 151 P.3d 1038 (2007)). While the Court considers "all the facts submitted and make all reasonable inferences from those facts in favor of the non-moving party, we will consider only evidence and issues called to the attention of the trial court." *Wash. Fed'n of State Employees,* 121 Wn.2d at 156-57 (quoting *Bohn v. Cody,* 119 Wn.2d 357, 362, 832 P.2d 71 (1992); RAP 9.12). "The purpose of this limitation is to effectuate the rule that the appellate court engages in the same inquiry as the trial court." *Id.* (citing *Southcenter View Condo. Owners' Ass'n v. Condo. Builders, Inc.*, 47 Wn. App. 767, 736 P.2d 1075 (1986), *review denied,* 107 Wn.2d

1028 (1987) (factual allegations raised in appellate brief did not preclude summary judgment where unsupported in trial court record)).

In Ms. Williams' Clerk's Papers, she has designated five pleadings not considered by the trial court: Ms. Williams' Response to First Transit's Motion for Summary Judgment, Ms. Williams' Response to Central Bible's Motion for Summary Judgment, and the declarations of Carol Williams, Alkenneth Gurley, and Katrina Coleman. (CP at 609-626.) These pleadings were specifically struck from the trial court's orders granting summary judgment. (CP at 691-696.) Ms. Williams did not receive a supplemental order of the trial court allowing her to include these pleadings, nor did Respondents stipulate that these pleadings could be designated. Ms. Williams has not made a motion pursuant to RAP 9.13 to object to the trial court's decision regarding the record.

Ms. Williams has not complied with RAP 9.12, therefore these documents should not be considered by this Court in its review of the trial court's ruling. For the reasons explained above, the trial court found that it could not consider Ms. Williams' untimely and improper submission, and therefore considered the motions for summary judgment as unopposed. (TP at 17-18.) In engaging in the same inquiry as the trial court, this Court should also consider First Transit's motion for summary judgment as unopposed.

3. Carol Williams' speculative declaration does not create a question of fact to defeat summary judgment.

Even if the Court considers Ms. Williams' untimely and improperly filed response, the trial court's ruling granting summary judgment in First Transit and Phil Halsten's favor should be affirmed. Ms. Williams has no evidence creating a question of fact as to whether First Transit breached a duty to her. Ms. Williams improperly attempts to create a question of fact about whether Mr. Halsten was running through Carol Williams' speculative declaration testimony.

A non-moving party may not rely upon speculation, argumentative assertions or in having affidavits considered at face value, but must set forth specific facts that sufficiently rebut the moving party's contentions and demonstrate that a genuine issue of material fact exists. *See, e.g., Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

In her June 24, 2013 deposition Ms. Williams was unable to provide any facts to support her contention that Mr. Halsten was running while pushing her wheelchair up the sidewalk—she either did not recall or could not provide any testimony related to the speed by which she was being pushed. Instead, all she continued to say is that he was going too fast because he was running.

Specifically, when asked how fast Mr. Halsten was pushing her, she testified that she did not remember. (CP at 682:22-24.) This question was asked of her more than once and, again, she testified that she did not know how fast Mr. Halsten was pushing her:

> Q. But you don't know how fast you were going?
>
> A. No, I – no, I don't. Phil was running.

(CP at 549:20-21.) When pressed further for facts to support her contention that Mr. Halsten was running, such as what rate of speed he was traveling, Ms. Williams deflected and failed to give a substantive response:

> Q. Are you telling me that just based on speed, you feel that he was running, the speed that were you traveling up the hill?
>
> A. Well, he said he pumped iron – pump iron every day. He was able to handle that.
>
> Q. Okay. I'm just trying to figure out how you –
>
> A. I understand that, yes.
>
> Q. So you just felt that the speed was too fast?
>
> A. I don't know what I felt. I don't know.
>
> Q. I guess I'm trying to figure out how you – how you know he was running, or why you're saying he was running?
>
> A. He was running.

(CP at 683:20-25, 549:1-6.)

Indeed, Ms. Williams has no baseline by which to compare the speed of her wheelchair as it was traveling on this instance, as compared to any other times her wheelchair had been pushed by Mr. Halsten. Although Ms. Williams could recall having been transported by Mr. Halsten in the past, she could not recall where Mr. Halsten had transported her or whether he ever transported her in a wheelchair. (CP at 678:20-25; 679:1-14; 681:23-25; 682:1; 684:6-11.) Absent any baseline by which to compare the rate of speed on this instance, her testimony related to speed is nothing more than speculation.

The declaration of Carol Williams does not create a question of fact as to whether Mr. Halsten was running. She claims that because she had to get "momentum" to push her mother up a small incline at some point, that Mr. Halsten must have been running up the paved sidewalk. (CP at 621, ¶ 9.) Carol Williams' declaration lacks foundation and is pure speculation. Carol Williams was not at the scene at the time of the incident, did not witness the incident, nor did anyone else witness the incident. She also provides no basis for her statements related to the level of the incline of that sidewalk, as compared to any other incline where she pushed her mother; the weight of Ms. Williams; or the size or strength of Mr. Halsten or her size or strength. Further, Carol Williams provides no

estimate as to the steepness of the incline, nor can she, she is not an expert in this field. ER 702 ("a witness *qualified as an expert* by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."). Thus, testimony offered by Carol Williams does not create a question of fact as to whether Mr. Halsten ran while pushing Appellant up the sidewalk.

In the end, all that remains are Ms. Williams' conclusory and speculative statements that Mr. Halsten was running and—without more—these self-serving statements do not create a question of fact as to whether Mr. Halsten breached a duty.[3] Ms. Williams says that Mr. Halsten was running, but she has no evidence that he was, in fact, doing so. There is simply no evidence to refute Mr. Halsten's unequivocal assertion that he was not running, and that he could not run given his weight and Ms. Williams' size. (CP at 532, ¶ 9.) Because Ms. Williams cannot prove that a duty was breached by Respondents First Transit, the trial court's summary judgment ruling should be affirmed.

[3] In fact, Ms. Williams' testimony that Mr. Halsten was running directly conflicts with her initial contention that she felt that Mr. Halsten could not push her up the hill because of her weight. She testified that she "was too big for him to go up this hill." (CP at 680:6-20.) To testify that Mr. Halsten ran with her up the hill, when she felt that he could not push her at all initially, does not make sense.

4. Ms. Williams has no evidence that Mr. Halsten breached any duty when he decided to push her wheelchair up the sidewalk.

Ms. Williams has presented no evidence or expert testimony that Mr. Halsten breached any duty to her when he decided to push her wheelchair up the paved sidewalk toward the front of the church, rather than load her back into the shuttle. As Mr. Halsten testified, his decision to push Ms. Williams' wheelchair up the paved sidewalk was consistent with his training and was in accord with First Transit's policies and procedures.[4] (CP at 531-32, ¶ 8.)

As discussed in First Transit's Motion for Summary Judgment, simply because Ms. Williams fell out of the wheelchair does not mean that Mr. Halsten's decision to push her up the paved sidewalk was in breach of any duty. *See Walker v. King County Metro*, 126 Wn. App. 904, 908-09, 109 P.3d 836 (2005) (additional citation omitted) (A common carrier is not the insurer of its passenger's safety, and negligence should not be presumed or inferred from the mere happening of an accident). In the absence of any specific facts which show that there was a policy or procedure in place that was violated, Mr. Halsten's decision was a proper

[4] Ms. Williams has no expert to support her contention that Mr. Halsten should have reloaded her in the shuttle, rather than push her up the paved sidewalk toward the front of the church, nor has she presented any evidence that any policies or procedures were violated.

and reasonable exercise of his discretion and was consistent with his training. To survive a motion for summary judgment, a party must respond to the motion with more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues. *Id.* at 909 (additional citation omitted). Ms. Williams has failed to do so here. Summary judgment dismissal was warranted because there is no evidence that First Transit beached any duty to Ms. Williams.

5. Ms. Williams cannot prove that First Transit caused her injuries.

There is also no evidence that First Transit's alleged breach of a duty caused Ms. Williams to fall from her wheelchair. As Ms. Williams contends, it was the fact that her wheelchair hit a crack in the sidewalk that caused her to fall from her wheelchair. (CP at 538, ¶ 9.) Thus, even if Mr. Halsten was traveling at a speed greater than a walk, which First Transit denies, there is no evidence that the speed of the wheelchair caused Ms. Williams to fall. Instead, it was the fact that the wheelchair impacted the crack in the paved sidewalk that caused her fall. Thus, even if First Transit breached a duty to Ms. Williams, which they deny (as there is no evidence that they did so), there is also no evidence that any alleged breached caused Ms. Williams to fall from her wheelchair.

In addition, the Court should again disregard Carol Williams' speculative declaration testimony that "there is no way [Ms. Williams'] feet could have come off" the foot rest. (CP at 621, ¶ 10.) Significantly, in her deposition, Ms. Williams initially testified that she could not recall whether the wheelchair even had its footrests on it at the time of the incident or whether she used them that day.

> Q. Okay. Did your wheelchair at that time have footrests?
>
> A. I don't remember that.
>
> Q. Okay. Did you use footrests?
>
> A. I do use them, yes.
>
> Q. Do you have a memory of using them on that day?
>
> A. No.

Ms. Williams continued to testify that she still had no memory of the footrests being on her wheelchair:

> Q. Okay. So do you have a memory of whether or not the footrests were installed on the wheelchair as of October 26, 2010, the day of this incident?
>
> A. Yes.
>
> Q. They were on the wheelchair?
>
> A. I can't remember, but. . .

(CP at 685:20-25; 686:1-5; 24-25; 687:1-4.)

It was not until asked whether her feet touched the sidewalk, did she then testify that her feet were on the footrests, apparently the same footrests she previously could not remember having been on the wheelchair. (CP at 687:14-25; 688:1-9.)

Given Ms. Williams' testimony, the only thing that is clear is that her memory of where her feet were at the time of the incident is suspect. When viewing Ms. Williams' testimony and Carol Williams' declaration collectively, she cannot prove that any alleged breach by First Transit caused her alleged injuries. The trial court's ruling granting summary judgment dismissal should be affirmed.

V. CONCLUSION

The trial court did not abuse its discretion when it refused to allow Ms. Coleman to appear, refused to consider Ms. Williams' untimely and improper submissions, or when it refused to continue the summary judgment hearing for a second time, and it did not err when it granted First Transit's motion for summary judgment. First Transit respectfully requests that this Court affirm the trial court's ruling.

RESPECTFULLY SUBMITTED this 22nd day of July, 2014.

BETTS, PATTERSON & MINES, P.S.

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Attorneys for Respondents First Transit, Inc.

CERTIFICATE OF SERVICE

I, Karen Langridge, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on July 22, 2014, I caused to be served upon counsel of record at the addresses below a true and correct copy of the following document:

Respondents' Brief

Stephen Gift Skinner Andrews & Skinnger PS 645 Elliot Ave W. Suite 350 Seattle, WA 98119-3911	By Email and Regular Mail
Bessie Williams Care of: Katrina Coleman 530 South Pine Lansing, MI 48933	By Certified US Mail; Return Receipt Requested No. 7013 1710 0002 3742 6284

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of July, 2014.

Karen Langridge

Karen Langridge
Legal Assistant