Supreme Court No. 98171-0

Court of Appeals No. 78637-7-I

THE SUPREME COURT
OF THE STATE OF WASHINGTON

CATHERINE MICHELE NAGY,

Appellant-Petitioner,

v.

EMPRES HOME HEALTH OF BELLINGHAM, LLC, et al.

Respondents.

Appeal relating to Whatcom County Superior Court
Case No. 17-2-02238-37 (Hon. Charles R. Snyder)

RESPONDENTS' ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENTS

This answer to the Petition for Review is filed by the Defendants-Respondents in this appeal, referred to herein as "Eden Health".

II. ISSUES PRESENTED FOR REVIEW

The issues raised by the Petition can be stated as follows:

(1) Did the Court of Appeals commit legal error and abuse its discretion in granting Eden Health's motion to strike certain arguments raised by Petitioner, where those arguments were raised for the very first time in Petitioner's reply brief on appeal, and where those arguments were unsupported by any valid evidence in the record below? [No.]

(2) Does a discretionary decision on a motion to strike in an unpublished decision issued by the Court of Appeals warrant review by the Supreme Court under the RAP 13.4(b) factors? [No.]

III. STATEMENT OF THE CASE

Eden Health moved for summary judgment below on the sole ground that the plaintiff's claims against the principal (Eden Health) had been released by the clear text of her written settlement agreement with the agent (Miller), which was signed and approved both by plaintiff and by her attorney. CP 12 to 20.

In opposing the motion, plaintiff made exactly three arguments:

(1) that, following *Glover v. Tacoma General Hospital*, 98 Wn. 2d 708, 658 P.2d 1230 (1983), a settlement with an agent does not release the principal by operation of law unless the court first finds that the settlement amount was reasonable and made with an agent who was solvent;

(2) that the *text* of the settlement agreement did not state an intent to release Eden Health because it contained only "boilerplate" language about "principals" and did not specifically "name" Eden Health as one of the released parties; and

(3) that the "equities" required Eden Health to be "held financially responsible" regardless of the text of the settlement agreement. CP 71 to 83.

At oral argument, plaintiff's counsel limited his arguments to these same three contentions. *See* Transcript. The court rejected those contentions and granted Eden Health's motion.

In her Opening Brief before the Court of Appeals, plaintiff limited her assignments of error to the exact same three arguments listed above. *See, e.g., id.* at p. 5 (table of contents showing these three arguments) & p. 6 (listing these same three arguments under heading "Issues Pertaining to Assignment of Errors").

Indeed, aside from a few minor additions (specifically, a paragraph on the appellate standard of review and a brief discussion about "covenants not to sue"), the entirety of plaintiff's "Argument" section in her Opening Brief was simply copied-and-pasted from her trial court opposition brief. *Compare* App. Brf. at 9-26 *with* CP 74 to 82.

As a result, Eden Health's response brief on appeal focused on those same three arguments. *See* Resp. Brf. at 12-21.

In contrast, plaintiff's Reply Brief on appeal then departed from all prior arguments in asserting that the trial court committed error by failing to look outside the four corners of the settlement agreement and consider "extrinsic evidence" regarding the intentions of the settling parties. *See id.* at p. 5.

Thus, for the very first time in this proceeding, the Reply Brief discussed issues like "integrated" *vs.* "non-integrated" contracts, asserting (without evidence or authority) that the contract in this case was not integrated.[1]

[1] Plaintiff offered no explanation for her belief that this contract was not integrated, and she did not address the contractual language to the contrary, such as where it is stated that "no promise or inducement has been offered except as herein set forth" or that the agreement was "executed without reliance upon any statement or representation by the person or parties released…or any other person…." CP 9.

For the very first time, the Reply Brief asserted that "extrinsic evidence" should govern the interpretation of the text of this written settlement agreement based on the "context rule."

For the very first time, the Reply Brief cited to previously-unreferenced cases on the admissibility and significance of extrinsic evidence to contract interpretation. *See, e.g., id.* at pp. 11-17 (relying upon *Butler v. Thomsen*, 2018 Wn. App. LEXIS 2962 (Dec. 31, 2018) (unpublished opinion) and *Stephens v. Gillispie*, 126 Wn. App. 375, 108 P.3d 1230 (2005), neither of which had previously been cited to or relied upon by plaintiff.)

Given these new arguments raised in the Reply Brief, Eden Health then filed a Motion to Strike to strike them, which plaintiff opposed.

In the Court of Appeals' unpublished and unanimous opinion, it began by discussing—and granting—Eden Health's motion to strike, finding that the new arguments raised in the Reply Brief violated RAP 10.3(c) and RAP 2.5. *See id.* at pp. 3-5. In addition to finding that the Reply Brief arguments were in fact new, the Court of Appeals agreed that plaintiff's new "context rule" argument could not be supported by "evidence of Nagy's unilateral or subjective intent." *Id.* at p.5

The Court of Appeals then went on to consider and reject the three assignments of error that had been actually raised by plaintiff. *See id.* at

pp. 6-11. Notably, Petitioner-Plaintiff is *not* here seeking review by the Supreme Court regarding any of those determinations. *See* Petition. Rather, her Petition is concerned only with the decision on the Motion to Strike. *Id.*

Subsequently, a *pro se* non-party litigant filed a motion to publish the opinion, which the Court of Appeals denied.

IV. ARGUMENT

A. The Court of Appeals Did Not Abuse Its Discretion in Granting the Motion to Strike.

It is well-established and without question that the Court of Appeals has the discretionary authority to strike any new assignments of error or legal arguments that are raised for the first time on appeal. *See generally Lewis v. Mercer Island*, 63 Wn. App. 29, 31, 817 P.2d 408 (1991) ("Matters not urged at the trial level may not be urged on appeal"); *see also Lipscomb v. Farmers Ins. Co. of Wash.*, 142 Wn. App. 20, 33, 174 P.3d 1182 (2007) ("This court ordinarily will not consider issues raised for the first time on appeal unless they involve a manifest error affecting a fundamental constitutional right"); *cf.* RAP 2.5 (giving appellate court discretion to refuse any claim of error being raised for the first time in the appellate court).

Another well-established and uncontroversial rule is that an appellant's reply brief on appeal must "be limited to a response to the issues in the brief to which the reply brief is directed." RAP 10.3(c); *see also* RAP 10.3(a) (stating corollary rule that all assignments of error must be contained within the appellant's opening brief).

As a result, appellate courts have routinely stricken and/or disregarded reply briefs to the extent they have raised new contentions or authorities. *See Lewis*, 63 Wn. App. at 31 (granting motion to strike a portion of the appellant's reply brief that raised an argument that was presented neither to the trial court nor in the appellant's opening brief); *see also Dang v. Ehredt*, 95 Wn. App. 670, 677, 977 P.2d 29 (1999) (granting motion to strike; noting that "[t]hese arguments are raised in this court for the first time in the reply brief, and were never raised before the trial court. Out of fairness to the trial court and opposing parties, such arguments are not considered.")

This is an important and well-established rule in this state. *See also, e.g., In re Pers. Restraint of Rhem*, 188 Wn. 321, 327, 394 P.3d 367 (2017) ("we will not review an issue that was raised and argued for the first time in a reply brief"); *Cowiche Canyon Conservatory v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration"); *In re Marriage*

of Sacco, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990) ("This court does not consider issues raised for the first time in a reply brief").

Here, the Court of Appeals did not abuse its discretion in granting the motion to strike, for two independent reasons:

1) Appellant's Reply Brief Raised New Assignments of Legal Error Not Previously Raised in This Proceeding.

To justify the new arguments made in her Reply Brief on appeal, plaintiff focuses on a passing reference made by Eden Health in its Respondents' Brief below to the holding of *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). But, as the Court of Appeals recognized, Eden Health cited to *Berg* only to reinforce a basic proposition of contract law, and not to introduce new issues into the appeal:

> But Eden cited to the *Berg* case solely for the well-established proposition that the role of the court is to determine "the meaning of what is written, and not what was intended to be written." *Berg*, 115 Wn.2d at 669 (quoting *J.W. Seavey Hop Corp. v. Portland, Or. v. Pollack*, 20 Wn.2d 337, 349, 147 P2d 310 (1944). Eden did not cite *Berg* to inject the issue of context into this case, and its reference to *Berg* did not open the door for Nagy to raise entirely new arguments in support of reversing the trial court.

Opinion below, at p. 5; *see also* Brief of Respondents, below, at p. 20 (containing sole passing reference to *Berg*, made within a string cite regarding the "well-established rules of contract interpretation" that a

party cannot disregard, or try to re-write, what is written in an agreement, in responding to plaintiff's third assignment of error that the "equities" should require Eden Health to be liable regardless of the text of the agreement).

Of course, in her Reply Brief, plaintiff was free to challenge Eden Health's citation to *Berg* or to otherwise try to bolster her third assignment of error. That was not the point of the Eden Health's Motion to Strike.

Rather, what Eden Health disputed was the fact that the Reply Brief presented *brand new legal arguments for why the trial court had erred,* arguments which had never been raised in her opening brief or before the trial court. This included (a) a contention that the contract in this case was not fully "integrated"; and (b) a contention that "extrinsic evidence" should govern this contract's interpretation (along with new, previously-uncited case law on the role of such extrinsic evidence in contract interpretation).

Nowhere had plaintiff made either argument before. While Petitioner now points to various statements made in prior briefing regarding plaintiff's "intent", those statements were all made within the context of her second assignment of error, which was that the *text* of the settlement agreement did not state an intent to release Eden Health because it contained only "boilerplate" language about "principals" and

did not specifically "name" Eden Health within the agreement as being a released party. *See* Appellant's Opening Brief, at pp. 18-21.

That assignment of error was focused only on the meaning of words within the agreement; there was no argument made about whether the agreement was fully "integrated" and/or whether that interpretation should be guided by "extrinsic evidence". Rather, those particular arguments were first raised in the Reply Brief. Eden Health never had an opportunity to brief those legal issues. The trial court had never considered those legal issues.

The Motion to Strike was therefore directed at a classic instance of a new assignment of error being raised for the first time on appeal and in a Reply Brief, and the Court of Appeals acted correctly and well within its discretion in striking it.

2) The Statement in Plaintiff's Declaration Was Not Offered as Extrinsic Evidence on Contract Interpretation.

Even if plaintiff's new arguments were to have been considered, the fact remains that they were still unsupported by any valid evidence below; as a result, summary judgment remained appropriate.

For example, as noted in footnote 1, above, despite plaintiff's arguments about the lack of "integration", the settlement agreement itself

contained terms that supported that the agreement was integrated, and plaintiff never offered any evidence to suggest otherwise.

Plaintiff places great weight on a single sentence in her declaration below:

> I feel that it would be fundamentally unfair to grant Employer summary judgment motion as I proceeded in good faith and it was never my intention to release Employer by signing the personal release for Employee.

See Petition, at p.9.[2]

Notably, this evidence was offered in support of plaintiff's third argument below, namely, that it would be inequitable or unjust to enforce the contract as written. At no time was such evidence offered as "extrinsic evidence" to govern the interpretation of the contract. To the contrary, plaintiff made only textual arguments for interpretation regarding the alleged inadequacy of using only "boilerplate" language to release "principals".

In any event, even assuming for the sake of argument that plaintiff preserved legal arguments on "extrinsic evidence", the above-quoted statement in plaintiff's declaration was *not* legitimate "extrinsic evidence"

[2] All of the other quotations included within the Petition are from the briefing written by plaintiff's counsel below, not from the plaintiff's declaration.

given that Washington follows the objective manifestation theory of contracts:

> If a written contract is not a complete expression of the parties' agreed-upon terms, the terms not included may be proved by extrinsic evidence *if they do not contradict the written terms*. But, Kennard offered no extrinsic evidence to support her position. She *relied exclusively* on her own declaration as to her intent and understanding. However, *subjective intent of one party to an agreement does not establish the intent of the parties*.

In re Marriage of Lee, 176 Wn. App. 678, 690, 310 P.3d 845 (2013) (citations omitted) (italics added); *see also Wilkinson v. Chiwawa Cmts. Ass'n*, 180 Wn.2d 241, 251, 327 P.3d 614 (2014) (noting that extrinsic evidence is "used to illuminate what was written, not what was intended to be written", and that courts do not consider extrinsic evidence "that would vary, contradict or modify the written word" or "show an intention independent of the instrument").

The Court of Appeals below agreed. *See* Opinion, at p. 5 (citing to *Hollis v. Garwall*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999) and agreeing that "evidence of Nagy's unilateral or subjective intent about the meaning of the release is not admissible for purposes of the context rule").

Thus, in sum, all of the new legal contentions raised in plaintiff's Reply Brief below were properly stricken not only because they were not previously raised or preserved by plaintiff, but also because one party's

subjective intent is not valid or competent evidence to contradict or modify the written terms of a contract. The Court of Appeals did not abuse its discretion in so concluding.

B. The Ruling at Issue Does Not Meet Any RAP 13.4(b) Factors.

RAP 13.4(b) sets forth four considerations on whether a petition for review may be accepted by the Supreme Court. *See id.* The Petition here does not even cite to—let alone apply—any of these factors.

Rather, it is evident that the sole issue raised by Petitioner does not involve conflicting decisions, does not involve a "significant question of law under the Constitution", and does not involve "an issue of substantial public interest".

The granting of the Motion to Strike here was based on well-established and uncontroversial legal principles. The outcome was determined by a case-specific review of the pleadings and the evidence, which will not be applicable or useful in any future cases. The opinion itself is unpublished, meaning that it will be "nonbinding" authority going forward. GR 14.1(a). Indeed, the fact that the opinion was unpublished shows that the Court of Appeals panel did *not* view any of the factual or legal issues to be significant enough to warrant publication. RAP 12.3(d) (standards governing publication).

V. CONCLUSION

Based on the foregoing, the Court of Appeals appropriately granted Eden Health's Motion to Strike below, and it does not warrant further consideration or review by this Court.

Dated this 5th day of March, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2020, I caused to be served a copy of the **RESPONDENTS' ANSWER TO PETITION FOR DISCRETIONARY REVIEW** on the following persons(s) in the manner indicated below at the following address(es):

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