No: 46347-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

FEARGHAL MCCARTHY; CONOR MCCARTHY, a minor, by and through Fearghal McCarthy, his father; and CORMAC MCCARTHY, a minor, by and through Fearghal McCarthy, his father,

Appellants

vs.

COUNTY OF CLARK, CITY OF VANCOUVER, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, CHILDREN'S PROTECTIVE SERVICES,

Respondents

Appeal from the Superior Court of Clark County
Case No: 08-2-04895-4

SUPPLEMENTAL REPLY BRIEF OF APPELLANT FEARGHAL MCCARTHY

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RULES

I. SUPPLEMENTAL ARGUMENT

1. The trial court's exclusion of Patricia's correction pages to her deposition was an abuse of discretion.

In *Keck v. Collins*, No. 90357-3, 2015 WL 5612829 (Wash. Sept 24, 2015), the Supreme Court held that the exclusion of evidence presented on summary judgment on procedural grounds is an abuse of discretion absent the court's consideration of the three *Burnet*[1] factors. *Keck v Collins,* No. 90357-3, at 9-11. In *Keck*, no dispute existed as to the untimeliness of a declaration. In contrast, here, it is hotly disputed that Patricia failed to comply with CR 30(e) as to timeliness; genuine issues of material fact exist in that regard.[2] Regardless, the trial court abused its discretion because it failed to consider or make findings as to the three *Burnet* factors prior to excluding Patricia's corrections as corrections to her deposition testimony.[3]

2. Patricia's corrections to her testimony preclude summary judgment.

The City, State and County rely upon material "facts" cited to Patricia's uncorrected deposition testimony to support summary judgment. But Patricia testified that her uncorrected testimony "lacks integrity and is not rooted in fact" due to the improper influence of City employee Ms. Petty, who, when viewing all factual inferences in Appellants' favor, attempted to suborn

[1] *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1977).

[2] See Fearghal's Opening Brief, ¶III.Q, pgs 30-32; ¶IV.J, pgs 74-77. Fearghal's Reply Brief, ¶III.F, pgs 20-23. Further, the City relied upon the written deposition testimony of Robin Kraemer, which was prejudicially taken in total disregard of CR 31. Id.

[3] These three factors are whether a lesser sanction would suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the other party. Exclusion of Patricia's deposition testimony was unwarranted because: (1) genuine issues of material fact exist as to whether Patricia failed to submit her corrections within 30 days as required by CR 30(e); (2) no allegations were made that Patricia's violations were willful or deliberate - on the contrary, the court reporter failed to comply with CR 30(e) by not providing Patricia with a copy of her deposition transcripts; and (3) there was no substantial prejudice to the City because no trial was scheduled and final summary judgment order was not entered until May 9, 2014, almost four years later.

perjury by promising Patricia free legal aid in exchange for Patricia's false deposition testimony. CP 742, #35. Fearghal's Opening Brief, ¶III.P, pgs 29-30. Patricia's corrected deposition testimony reduces most of the "facts" that Respondents rely upon to mere fiction. Because these "facts" do not exist due to the trial court's improper exclusion of Patricia's corrected testimony, summary judgment dismissal of all Appellants' claims should be reversed.

Patricia's corrected deposition testimony evidences that Ms. Petty engaged in investigative and other non-advocacy activities. Fearghal's Opening Brief, ¶III.G, IV.F. Fearghal's Reply Brief, ¶III.C. Thus, genuine material facts evidence that Petty stepped outside the shield of prosecutorial immunity by conducting and directing investigative activities; and by directing Patricia to testify falsely in civil proceedings concerning child placement. Absolute immunity for prosecutors cannot be established on summary judgment when genuine issues of material fact exist. Hannum v. Friedt, 88 Wn. App, 881, 886, 947, P.2d 760 (1997).

3. The purpose of summary judgment is to determine whether prima facie evidence exists to support a jury trial.

"The purpose of summary judgment is not to cut litigants off from their right of trial by jury *if they really have evidence which they will offer on a trial,* it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exists.*'" *Keck,* at 10-11, (emphasis original), citing *Preston v. Duncan,* 55 Wn.2d 678, 683, 349 P.2d 605 (1960).

This holding has broad application to evidentiary issues on summary judgment and should govern the applicability of the "substantial factor" test to factual causation in this action. This is because this is a multiple causation case

with multiple bad actors who are responsible for a common injury, which is the harmful placement decisions that separated Fearghal from his children.

This holding also applies to Dr. Boehnliem's testimony as to Fearghal's diagnosable emotional distress. Only a prima facie showing of injury or factual causation is necessary to defeat summary judgment. See *Keck,* at 14.

This *Keck* holding also buttresses Fearghal's arguments that: (1) all evidence in the record is admissible against the City; and (2) certain claims against the City were not abandoned because they share common facts with the negligent investigation claim. Fearghal's Reply Brief, ¶III.E.1 & ¶III.E.2.

4. The County's affirmative statute of limitations defense is precluded because the County failed to file a notice of cross-appeal.

On summary judgment, the Court's "overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action." *Keck* at 10; citing *Burnet,* 131 Wn.2d at 498; citing CR 1. This holding applies to the County's failure to assert a statute of limitations affirmative defense in the trial court, and buttresses Fearghal's arguments as to waiver and equitable estoppel. See Fearghal's Reply, ¶III.A, pgs 1-3. Moreover, the County failed to file a notice of cross-appeal necessary to assert a statute of limitations affirmative defense on appeal. See *Robinson v. Khan,* 89 Wn. App. 418, 420, 948 P.2d 1347 (1998), (a notice of cross-review is essential if a respondent seeks affirmative relief by asserting the affirmative statute of limitations defense on appeal.)

RESPECTFULLY SUBMITTED ON OCTOBER 29, 2015.

Fearghal Mc Carthy

Fearghal Mc Carthy, Appellant, pro-se

DECLARATION OF SERVICE

I hereby declare that on October 29th, 2015, I served the foregoing SUPPLEMENTAL REPLY BRIEF OF APPELLANT FEARGHAL MC CARTHY on:

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by the following indicated method or methods:

[x] by **transmitting via electronic mail in accordance with the agreement of the person(s) served,** a full, true and correct copy thereof to the attorney at the e-mail address number shown above, which is the last-known e-mail address for the attorney's office, on the date set forth below.

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct on October 29th,2015 at Vancouver, Washington.

Fearghal McCarthy