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NO. 37510-2

WASHINGTON STATE SUPREME COURT

TIMOTHY REEVES

Appellant/Defendant

v.

COMPUTER SOLUTIONS, et. al.

Respondent.

RESPONDENT'S ANSWER TO APPELLANT'S

MOTION FOR DISCRETIONARY REVIEW

(Treated as an answer to petition for review)

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I. INTRODUCTION

Appellant's (hereinafter "Reeves") First Amended Complaint alleges six causes of action which are all fatally flawed because: [1] no causal connection exists between the alleged causes of action and alleged damages; [2] Reeves has made no effort whatsoever to mitigate the damages he has, if any; [3] Reeves' alleged inability to work is res judicata; and, [4] Reeves has no damages.

Assuming, all the facts alleged by Reeves are true, he still fails to make out a prima facie case for any of his causes of action. Reeves fails to offer even a scintilla of medical testimony to show that he was not able to go through vocational training; or, that he is not able to work, or, that he has a permanent total disability.

Even without vital and necessary medical testimony, Reeves nevertheless argues that had New Horizon failed him, or, reported to L&I that Reeves was incapable of completing vocational training at New Horizons, that L&I would have granted him a total permanent disability pension. Reeves presented testimony and made those same arguments to L&I with no success. L&I ruled and the Superior Court affirmed on

appeal that due to the lack of supporting medical testimony, Reeves failed

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to prove either a temporary or permanent total disability; and, Reeves in fact was capable of working.

Finally, in his Motion for Discretionary Review, Reeves fails to show that the issues he wishes this Court to accept for Discretionary Review fall within any of the considerations Governing Acceptance of Review provided for in RAP 13.4. Accordingly, this Court should deny Reeves' Motion for Discretionary Review.

II. STATEMENT OF THE CASE

Reeves is a 06A electrician, control voltage electrician, and an electrical administrator. CP 42 and 45. On May 5, 2011, while working for Standard Heating and Plumbing, Reeves was injured in an industrial accident. CP 43. Reeves indicates that he wrenched his right shoulder and forearm. CP 44.

Mr. Reeves had appointments with a number of doctors and none of those doctors were willing to rate him as 100% disabled. CP 45. In 2012, Reeves began meeting with vocational counselor, Sue Imholt. CP 46. Reeves and Imholt discussed getting Reeves into a computer learning program at SCC. Reeves ruled that out because he could not work from

home and he could not attend classes 5 day a week, 6 or 7 hours a day. CP 47.

Reeves described the limitations on his ability to participate in a retraining program as follows:

I have trouble with consecutive days, two, three days in a row; my arm gets worse and worse till finally I just - - I can't even get cleaned up some mornings if I do that.

CP 47. Reeves was of the opinion that he was physically incapable of doing the training offered by SCC. CP 48.

Reeves agreed to attend computer training at New Horizons because he would have a day between classes and could work from home.

CP 48. Reeves refused to sign a contract that would make him financially responsible for his training at New Horizons if L&I did not pay because the contract to provide the classes was with L&I. CP 49-50 and 56.

Reeves stated that he had no contract with New Horizons and that New Horizons' contract was with L&I. CP 55-56.

Reeves claims he missed more than 20% of the classes due to his right shoulder injury. CP 51. Reeves also claims he did only 20% of his homework assignments due to his right shoulder injury. CP 52-53.

L&I was paying Reeves \$2,274 a week as long as he stayed in the New Horizons program. CP 54. Reeves knew L&I would stop these payments if he dropped out of the New Horizons computer training program. CP 54.

Job placement services were available to Mr. Reeves but he refused to take advantage of those services. CP 58. Mr. Reeves was encouraged to take the Certified Billing and Coding Specialist certification test, but he refused to do this as well. CP 58. Mr. Reeves did not cooperate in developing an exit plan in anticipation of leaving New Horizons. CP 59. Mr. Reeves was offered workshops on Resume building and interviewing skills which he also refused. CP 57.

From the date of his injury, May 5, 2011 through the date of his deposition, January 15, 2020, Mr. Reeves never applied for a single job. CP 59-60. Mr. Reeves' position is that there is no job he could do which would allow him to work a flexible schedule that only required him to work when he felt able to do so. CP 60-61.

Paragraph 2.5 of Plaintiff's first amended complaint states: "He (Mr. Reeves) did not finish homework because of inability, pain, and lack

of understanding related to his underlying industrial injury.” CP 3. When asked about this at his deposition, Mr. Reeves conceded that it was his industrial injury that prevented him from doing the work at New Horizons. CP 61.

Mr. Reeves testified at his L&I hearing that he was unable to work because of: “Pain in the shoulder, continual use of the shoulder, not being able to function on consecutive days. Some days I don’t even drive.” CP 62. In an Order, L&I “determined that Mr. Reeves was able to work and terminated time-loss compensation as paid through March 25, 2016.” CP 35. Mr. Reeves believes that L&I should have found him to be 100% disabled and entitled to a pension for life. CP 63.

None of Mr. Reeves’ medical providers testified at the L&I hearing. CP 63. There was nothing New Horizons could have done to get Mr. Reeves through the computer training program. CP 64.

At the L&I hearing a vocational expert by the name of Dan McKinney testified on Mr. Reeves’ behalf. CP 64. Mr. McKinney testified that Mr. Reeves should never have been placed in a computer vocational training program. CP 64. Mr. McKinney was unable to

identify any type of vocational training which Mr. Reeves was capable of doing. CP 64. Mr. Reeves was unable to identify even one vocational training program that he could succeed at or wanted to try. CP 63. Mr. Reeves also conceded that no one at New Horizons ever asked him to write down a lie. CP 63.

Mr. Reeves appealed L&I's finding that he could work to the Spokane County Superior Court under Cause No. 18-2-00500-5. CP 34. Honorable Raymond F. Clary, Superior Court Judge presided at the hearing. Judge Clary entered Findings of Fact, Conclusions of Law and Judgment on November 2, 2019. CP 34–37. Several of the findings of fact and conclusions of law entered by Judge Clary on November 2, 2019 bear upon the present motion for summary judgment.

Finding of fact 1.2.2 states:

Based on the entire record, there is insufficient medical testimony to: establish a prima facie case that Mr. Reeves' May 5, 2011 industrial injury was a proximate cause of any condition; and, establish that Mr. Reeves had any temporary or permanent total disability from any such condition.

CP 35.

Conclusion of Law 2.2.2 – 2.2.4 are consistent with the foregoing finding of fact. CP 36. Conclusion of Law 2.4 affirmed that Mr. Reeves was able to work and that his monthly payments were properly stopped. CP 36. Conclusion of Law 2.5 provides:

The Department order dated November 2, 2016, which affirmed the Department order dated August 29, 2016, which affirmed the Department order dated July 5, 2016, that granted Mr. Reeves an award for permanent partial disability consistent with 26 percent of the amputation value of the right arm (at or above the deltoid insertion or by disarticulation of the shoulder) and closed Mr. Reeves' workers' compensation claim, is correct and is affirmed.

CP 36.

III. POINTS AND AUTHORITIES

[A] Considerations Governing Acceptance of Review by the Supreme Court.

RAP 13.4 (b) sets forth four considerations governing acceptance of review by the Washington Supreme Court. Reeves has cited no Supreme Court decision or Appellate Court decision which is in conflict with the Court of Appeals Decision which is the subject of Reeves' Motion.

In his statement of issues presented, Reeves fails to identify any significant question of law under either Washington's Constitution or the Constitution of the United States of America. Reeves' Motion for Discretionary Review pages 4-5. Nor does Reeves indicate the issues he wants reviewed by this Court involve issues of substantial public interest that should be reviewed by this Court. *Id.* Accordingly, Reeves' Motion for Discretionary Review should be denied.

[B] The Court Correctly Affirmed the Superior Court's Order Dismissing Plaintiffs' Claims based upon Reeves' failure to establish a causal connection between his alleged causes of action and his alleged damages.

[1] Mr. Reeves' negligence claim was properly dismissed on summary judgement.

In a negligence claim, the plaintiff must establish that: (1) the defendant owes the plaintiff a duty to conform to a certain standard of conduct; (2) a breach of that duty; (3) a resulting injury; and (4) proximate cause between the breach and the injury. *Cameron v. Murray*, 151 Wn. App. 646, 651, 214 P.3d 150 (2009).

In his first amended complaint Mr. Reeves alleges:

3.4 COMPUTER SOLUTIONS OF SPOKANE, INC. failed to establish proper guidelines and failed to follow said guidelines for grading, assessment or testing of Mr. Reeves' abilities;

3.5 Failure to establish and follow proper guidelines lead to Mr. Reeves being found employable when he was not;

3.5 COMPUTER SOLUTIONS OF SPOKANE, INC. was in regard to its action with Mr. Reeves [so in original copy]

3.6 As a result of said misrepresentation Mr. Reeves has lost benefits under his workman's compensation claim and is unable to find work or have the skills to find work.

CP 6. The reason Mr. Reeves lost benefits under his workman's compensation claim is that he did not present the medical testimony necessary to make out a prima facie case for a temporary or permanent disability. CP 35. L&I found, and the Superior Court affirmed, that Mr. Reeves was able to work. CP 36. Clearly, no causal connection exists between any negligence by the defendants and L&I cutting off Mr. Reeves' benefits.

Similarly, Reeves shows no causal connection between his allegations that he does not have the skills to find work. His testimony was that there is no work available that he would be able to do because of his industrial injury. CP 60-61. In addition, Reeves testified that there was

no vocational training program he could succeed in due again to his industrial injury. CP 63. Moreover, Mr. Reeves has not applied for even one job from May 5, 2011, through the present.

Mr. Reeves failed miserably to show the Superior Court a causal connection between the negligence he alleges and the damages he alleges. This is fatal to Mr. Reeves' negligence claim and the Court of Appeals correctly affirmed the Superior Court's dismissal of this claim on summary judgment.

[2] The Court of Appeals correctly affirmed the Superior Court's dismissal of Mr. Reeves' Unfair Business Practices Claim.

In his First Amended Complaint Mr. Reeves alleges:

4.5 Mr. Reeves was injured in his ability to find work, or to keep worker's compensation benefits to help support him in his life by COMPUTER SOLUTIONS OF SPOKANE, INC.

4.6 COMPUTER SOLUTIONS OF SPOKANE, INC. provision of false information was a proximate cause of Mr. Reeves' injuries.

A causal link is required between the unfair or deceptive acts and the injury suffered by Mr. Reeves. *Transamerica Title Ins. Co. v. Johnson*, 103 Wash.2d 409, 693 P.2d 697 (1985). The need to find a causal link between the alleged acts and the plaintiff's injury has been the focus of a

number of prior decisions of both our Supreme Court and the Court of Appeals. See, e.g., *Lidstrand v. Silvercrest Indus.*, 623 P.2d 710, 28 Wash. App. 359 (1981); *Transamerica Title Ins. Co. v. Johnson*, 103 Wash.2d 409, 693 P.2d 697 (1985); *Smith v. Olympic Bank*, 103 Wash.2d 418, 693 P.2d 92 (1985); *Nuttall v. Dowell*, 31 Wash.App. 98, 639 P.2d 832 (1982).

The uncontroverted facts demonstrate no causal link between the acts of New Horizons and the alleged injuries and/or alleged damages of Mr. Reeves. Again, the reason Mr. Reeves lost benefits under his workman's compensation claim is that he did not present the medical testimony necessary to make out a prima facie case for a temporary or permanent disability. L&I found, and the Superior Court affirmed, that Mr. Reeves was able to work. Clearly, the Court of Appeals correctly affirmed the Superior Court's finding that no causal connection exists between any alleged unfair business practices by the defendants and L&I cutting off Mr. Reeves' benefits.

Similarly, Reeves shows no causal connection between his allegations that he does not have the skills to find work. His testimony

was that there is no work available that he would be able to do because of his industrial injury. In addition, he testified that there was no vocational training program he could succeed in due again to his industrial injury. Moreover, Mr. Reeves has not even applied for one job from May 5, 2011, through the present. CP 59-60.

Mr. Reeves simply failed to show the Superior Court a causal connection between the alleged unfair business practices of New Horizons and the damages and injuries he alleges. This is fatal to Mr. Reeves' unfair business practices claim and the Court of Appeals correctly affirmed the Superior Court's dismissal of this claim on summary judgment.

[3] The Court of Appeals correctly affirmed the Superior Court's dismissal of Mr. Reeves' Tortious Interference with Business Expectancy Claim.

In paragraph 5.2 of his First Amended Complaint, Mr. Reeves alleges:

5.2 At the time of this incident Mr. Reeves and COMPUTER SOLUTIONS OF SPOKANE, INC. had a business relationship with the probability of future economic benefit. (If they retrained him, he could go back to work).

CP 7. Recall that at his deposition, Mr. Reeves testified that he had no contract with New Horizons.

In paragraph 5.6 of his First Amended Complaint, Mr. Reeves alleged Defendants “conduct was a proximate cause of Mr. Reeves’ inability to work and lack of benefits under the Worker’s compensation laws.” CP 7.

Again, in the absence of proof of a causal connection between the conduct complained of and the damages alleged, Reeves’ claim of Tortious Interference with a Business Opportunity fails. L&I denied Mr. Reeves’ claim because he did not present any medical testimony to support his claim of temporary or permanent disability. CP 35-36. Mr. Reeves was found to be able to work but he has never applied even once for a job since his industrial injury. This claim should also be dismissed for failure to show a causal connection between the alleged wrongful conduct and the alleged damages.

[4] Mr. Reeves Outrage Claim was correctly dismissed by the Superior Court and affirmed by the Court of Appeals.

In order for Reeves' claim of Outrage to survive summary judgment he needed show: (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) Reeves actually experienced emotional distress. *Lyons v. US Bank National Assoc.*, 181 Wn.2d 775 (2014).

In this claim Mr. Reeves does not even allege any damages. There is no allegation of Mr. Reeves suffering extreme emotional distress and no medical evidence to support such a claim even if it had been made. Nor, has Mr. Reeves shown a causal connection between the alleged harm and the alleged wrongful conduct. Thus, the Superior Court correctly dismissed this claim on summary judgment and the Court of Appeals correctly affirmed the Superior Court.

[C] The Superior Court correctly dismissed all Reeves' Claims based upon Reeves' failure to mitigate his damages, if any he has.

In Washington, a plaintiff has a duty to mitigate his damages. In *Northwest Collectors, Inc. v. Enders*, 74 Wn.2d 585, 446 P.2d 200, (1968), the trial court ruled that the plaintiff had a duty to mitigate damages and

could have done so by leasing the equipment at issue to another party. Our Supreme Court affirmed the trial court. *Id.* The duty to mitigate damages applies to a claim for lost earnings. *Kubista v. Romaine*, 87 Wn.2d 62, 67, 549 P.2d 491 (1976).

The doctrine of mitigation of damages, sometimes referred to as the doctrine of avoidable consequences, prevents recovery for those damages the injured party could have avoided by reasonable efforts taken after the wrong was committed.

Bernsen v. Big Bend Elec. Coop., Inc., 68 Wn.App. 427, 433, 842 P.2d 1047 (1993).

Clearly, in the present case, Mr. Reeves made no effort whatsoever to mitigate his alleged lost wages. He was capable of working but made absolutely no effort to apply for a job from May 5, 2011, through the present. For this reason Mr. Reeves cannot show the essential element of damages, and his claims should be dismissed.

[D] The Superior Court correctly dismissed Reeves' Claims based upon the issues decided against Reeves in his appeal to the Superior Court of L&I findings that he could work, and that he had no temporary or permanent disability.

Mr. Reeves' claims in this case are barred by the doctrine of res judicata. The doctrine of res judicata rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings. *Marino Prop. Co. v. Port Comm'rs*, 97 Wash.2d 307, 312, 644 P.2d 1181 (1982) (quoting *Walsh v. Wolff*, 32 Wash.2d 285, 287, 201 P.2d 215 (1949)).

Mr. Reeves has thoroughly litigated the issues of: whether he is capable of working; and, whether he has a permanent partial or total disability. Res judicata precludes Mr. Reeves from again litigating these issues in the present case.

Proving that he is not capable of working; and, that he has a permanent total disability are essential elements of all of Mr. Reeves' claims. Because, Mr. Reeves cannot relitigate these issues in the case at bar, all his claims failed and were correctly dismissed by the Superior

Court on summary judgment and correctly affirmed by the Court of Appeals.

[E] The Superior Court correctly entered an Order Dismissing Plaintiffs' Claims based upon Reeves' inability to prove any damages and this dismissal was correctly affirmed by the Court of Appeals.

Lenore D. Romney, Reeves' damages expert, based her opinion upon patently false assumptions. CP 92-102. She assumed Reeves was capable of being retrained. She also assumed Reeves was capable of working had he been retrained. In view of Reeves' allegations and testimony, Ms. Romney's opinions are based upon completely false assumptions. Again, Reeves fails to make out a prima facie case for damages. Damages represent a requisite element to all Reeves' claims. The absence of proof of a prima facie claim for damages represented grounds for summary dismissal of Reeves' case; and, the Court of Appeals correctly affirmed the Superior Court.

The damages Reeves seeks in this case are the amounts he would have received had L&I granted him a total permanent disability. It

follows that in order to obtain such damages, Reeves has to prove that he is totally and permanently disabled. In opposition to the summary judgment motion Reeves presented not one scintilla of evidence showing he is totally and permanently disabled.

Expert medical testimony is necessary to establish causation where the nature of the injury involves medical factors which are beyond a lay person's knowledge, necessitating speculation in making a finding. *Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wn. App. 675, 685, 183 P.3d 1118 (2008). “Medical testimony must be relied upon to establish the causal relationship between the liability-producing situation, and the claimed physical disability resulting therefrom. . .” *O’Donohue v. Riggs*, 73 Wn.2d 814, 824 (1968).

Reeves had to make out a prima facie case for permanent total disability to survive summary judgment. He was unable to do so without medical evidence. Reeves produced no medical evidence at summary judgment. Without medical evidence Reeves cannot prove damages, which is a requisite element of all of his claims. Summary dismissal of

Reeves' case was correctly ordered by the Superior Court and affirmed by the Court of Appeals.

Reeves' alleged damages amount to a claim that he cannot get worker's compensation benefits from L&I for a permanent total disability. Only L&I can award such damages. Unfortunately, for Mr. Reeves, L&I has ruled he is not entitled to a pension for life because he is capable of working and has no permanent total disability. Thus, Mr. Reeves has no provable damages and all his claims were correctly dismissed on summary judgment because damages represent an essential element of all of Reeves alleged claims.

IV. CONCLUSION

Based upon the foregoing points and authorities, Respondents respectfully request that this Court deny Reeves' Motion for Discretionary review.

Respectfully Submitted this 22 day of June, 2021.

Herman, Herman & Jolley, P.S.

By: 

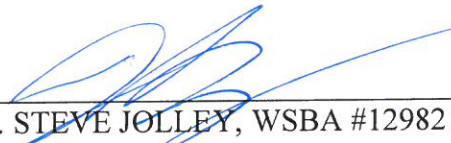
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J. STEVE JOLLEY, hereby certifies under penalty of perjury that on June 22, 2021, I deposited a copy of the preceding pleading in the U.S. Mail postage prepaid and addressed as follows:

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