

64078-0

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NO. 64078-0-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

JON C. REYNOLDS AND KAREN RUTH REYNOLDS, husband
and wife and the marital community composed thereof;

Respondents/Plaintiffs

v.

CHRISTOPHER HAMILTON DEAN AND JANE DOE DEAN,
husband and wife and the marital community composed thereof,
and BELLINGHAM SCHOOL DISTRICT #501,

Appellants/Defendants.

REPLY BRIEF OF APPELLANTS DEAN

JILL SMITH, WSBA #30645
BRET S. SIMMONS, WSBA #25558
Attorneys for Defendants/Appellants Dean

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ORIGINAL

CASES

Amend v. Bell, 89 Wn.2d 124, 127, 570 P.2d 138
(1977).....2

Argument on Reply

The superior court, in this case, made two determinations: the first involved how broadly to construe the pleadings, and the second involved the question of whether defendant Dean was in his personal, or professional, capacity when he caused this accident. The District stands by its earlier Brief, on the issue of how to construe the pleadings. This Reply is directed, therefore, only to the second issue—the question of whether plaintiff Reynolds presented adequate evidence to avoid summary judgment, about the “personal capacity” of defendant Dean.

On the issue of Dean’s employment status at the time of the accident, the trial court made the determination that a “credibility” issue existed. That “credibility” issue was that defendant Chris Dean mis-remembered the name of the person for whom he was shopping for an office chair—first testifying that it was Elaine Perkins, and then correcting himself to testify that it was, in fact, Sharon Thomas. There is *no dispute* that both women were employed, at different times, as the secretary for the Bellingham School District Maintenance Office, and that Dean was shopping for the secretary’s office chair in his professional capacity as

Maintenance Supervisor.

The District argued that the identity of the secretary was not a genuine issue of *material* fact, in light of the fact that Dean's task was work-related, either way. But the trial court denied summary judgment. Based on the "credibility" issue, it held that it could not grant summary judgment. ("The issues that you mentioned, that being issues of credibility, it seems to me more likely it is recollection or faulty recollection. But I think that is sufficient because I am not making a factual determination right now.") (Vbt. Rp. Proc. at 18-19).

In plaintiff's Response, plaintiff again relies heavily on the proposition that "credibility" issues should not be decided on summary judgment. Curiously, plaintiff then cites the case of *Amend v. Bell*, 89 Wn.2d 124, 127, 570 P.2d 138 (1977). This court should carefully review *Amend*—it makes exactly the point on which the District relies, in seeking dismissal.

The court in *Amend* discussed, in one holding, the presumption of agency, and how that presumption can be rebutted.

In *Amend*, the court found that the presumption of agency had been rebutted by testimony of one of the parties, Bell, about his employment capacity at the time. In its second, more pertinent

holding, the *Amend* court then went on to discuss the inter-relationship between credibility issues and summary judgment. The plaintiff in *Amend* was arguing that Bell should not be believed on the agency issue, because Bell had given questionable testimony on *other* issues (speeds of the cars, and intoxication). The court rejected this “credibility” standard. The *Amend* court acknowledged the general rule that trial courts should not resolve summary judgment hearings if there are genuine issues of fact, and that if the dispute comes down to having to choose which witness to believe, on a material issue, summary judgment is in appropriate. *Amend*, 89 Wn. 2d at 126. However, it then held that, to deny summary judgment based on a “credibility” issue, the credibility issue must “be based on more than argument and inference *on collateral matters*,” that the credibility issue raised must be on a primary (or “material”) issue:

Excluding the issue of impeachment, we conclude that the uncontradicted evidence established that there was no genuine issue of material fact. A presumption is not evidence; its efficacy is lost when the opposite party adduces prima facie evidence to the contrary. *Bates v. Bowles White & Co.*, 56 Wash.2d 374, 353 P.2d 663 (1960). The depositions and affidavit were uncontradicted. Plaintiff presented no facts in rebuttal, but instead relied on the presumption to *129 carry his burden of establishing the existence of a material fact. But the presumption had become a nullity. In effect, plaintiff presented no factual

dispute to the court. Therefore, the summary disposition of the issue was appropriate.

However, plaintiff argues that the testimony of defendant Bell was impeached. Plaintiff's argument has twofold significance. One, to overcome the presumption that an employee was acting within the scope of his employment, the defendant's evidence must be unimpeached. This is but another way of saying that there must be no genuine issue of credibility. Second, the court should not resolve a genuine issue of credibility at a summary judgment hearing. If such issue is present, the motion should be denied. An issue of credibility is present if there is contradictory evidence or the movant's evidence is impeached. Balise v. Underwood, 62 Wash.2d 195, 381 P.2d 966 (1963).

The fault with plaintiff's argument lies with the matters asserted to constitute impeachment. Plaintiff attempts to attack the credibility of defendant Bell's testimony about scope of employment by arguing that there are weaknesses in his testimony concerning speed and intoxication.

Defendants concede that credibility issues may preclude a summary judgment in appropriate circumstances but argue, correctly, that such issues must be based on more than argument and inference on collateral matters. To hold that disputed facts about other issues preclude a summary judgment without facts related to the issue in point would abrogate the summary judgment procedure. We agree with the court in Rinieri v. Scanlon, 254 F.Supp. 469, 474 (D.C.S.D.N.Y.1966):

(T)he party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and that the opposing party may not merely recite the incantation, "Credibility," and have a trial on the hope that a jury may disbelieve factually uncontested proof.

This rule is equally applicable to the presumption issue.

Plaintiff did not raise a genuine issue of material fact on this point and dismissal of the corporation defendant is affirmed.

Amend, 89 Wn. 2d at 127-28. In other words, witness Bell's potentially erroneous testimony on collateral issues (speed and intoxication) did not make his testimony "non-credible" on agency issues, especially when the agency issues were otherwise completely un rebutted.

In this case, just like in *Amend*, the plaintiff may arguably have "impeached" Chris Dean about which fellow employee for whom he was purchasing the chair—*i.e.*, a collateral issue. But that impeachment does not relate to the primary issue, which is whether Dean was in the scope of his employment at the time. Whether Dean shopped for Taylor or Thomas, he was shopping for an office chair, in his role as purchaser of office equipment, as the Supervisor for the Maintenance Department. Plaintiff has presented no evidence to rebut the fact that Dean was, therefore, in his professional capacity at the time. Like in *Amend*, plaintiff here should not be able to "merely recite the incantation, "credibility," and have a trial[.]" *Amend*, 89 Wn. 2d at 128. Summary judgment should have been granted to defendant Dean.

DATED this 14th day of June, 2010.

Respectfully submitted,



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BRET S. SIMMONS, WSBA #25558
Attorneys for Appellants Dean

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DECLARATION OF MAILING

JILL SMITH, WSBA #30645
ERIC E. ROY, WSBA #21138
Attorneys for Appellants DEAN and BELLINGHAM SCHOOL
DISTRICT

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JEFFREY BROWN, hereby declares:

On June 14, 2010, I mailed via U.S. Postal Service a true and correct copy of the following documents:

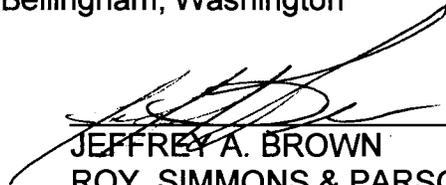
Reply Brief of Appellants Dean and this declaration addressed to:

Attorney for Respondents:

Gregory S. Marshall
Attorney at Law
1604 Hewitt Avenue, Suite 602
Everett, WA 98201

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

Dated this 14th day of June 2010 at Bellingham, Washington



JEFFREY A. BROWN
ROY, SIMMONS & PARSONS
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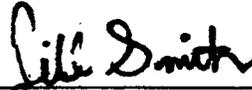
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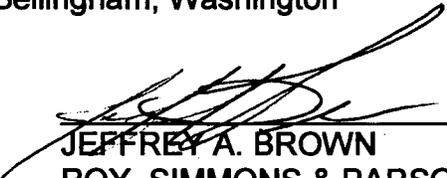
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