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NO. 64078-0

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

JON C. REYNOLDS and KAREN RUTH REYNOLDS, husband and  
wife, and the marital community comprised thereof,

Plaintiffs/Respondents,

v.

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

Defendants/Petitioners.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIV #1  
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BRIEF OF RESPONDENTS

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I. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. Does plaintiffs' complaint sufficiently allege an alternative cause of action against defendant Christopher Dean individually by including his spouse and their marital community?
- B. Do an employee's inconsistent statements regarding the purpose of his trip during which he caused a collision create a genuine issue of material fact as to his credibility and whether he was acting within the scope of his employment when he caused the collision?

II. STATEMENT OF THE CASE

A. Procedural Background

This appeal stems from plaintiffs' personal injury claims arising from an automobile collision that occurred on September 30, 2005. Plaintiffs sustained injuries when their vehicle was hit from behind by defendant Christopher Dean, an employee of defendant Bellingham School District ("BSD"). (CP 90-94)

Through their former counsel, plaintiffs served a Notice of Claim on the Bellingham School District on August 7, 2008. (CP 79) As

settlement negotiations were unsuccessful, plaintiffs filed a summons and complaint in Whatcom County Superior Court on September 11, 2008. (CP 90-93) Defendants brought a CR 12(b)(1) motion to dismiss, which was subsequently converted to a CR 56 motion for summary judgment, based on plaintiffs' failure to wait the requisite 60 days after filing their Notice of Claim under RCW 4.96.020 before filing the summons and complaint. (CP 80-86) As the statute of limitations passed just weeks after plaintiffs filed their lawsuit, refiling the summons and complaint was no longer an option.

The trial court denied the motion to dismiss defendants Dean as individuals, however, declining to rule on factual issues, because defendant Dean's conflicting statements as to the purpose of his trip presented a genuine issue of material fact for trial regarding the scope of his employment. (RP 18-19)

**B. Statement of the Facts**

While plaintiffs' primary theory of liability was against BSD through respondeat superior with defendant Dean acting as an agent or employee of BSD, their Complaint also alleged liability against defendant Dean and his wife and their marital community. (CP 90-93) Plaintiffs

also alleged that all the acts of Mr. Dean relevant to the cause of action were done on behalf of the communities composed of the defendants. (CP 92) Moreover, plaintiffs' complaint reserved the right to amend the parties and causes of action throughout the complaint to conform to the evidence. (CP 93)

At the hearing before the lower court held on July 31, 2009, plaintiffs' former counsel argued that the complaint contains an alternate pleading of personal liability, pointing out that the only way the community could be liable would be if Mr. Dean were held liable as an individual, rather than as an employee. (RP 17-18)

In his first deposition, Mr. Dean testified that he was on his way to Office Depot on the Guide Meridian in Bellingham to research out the cost of a secretarial chair for Elaine Perkins who worked for the BSD maintenance facility. (CP 108) He later testified in a second deposition that there never was a purchase order for a chair and one was never purchased in September or October of 2005. (CP 148-49) He further testified that Elaine Perkins was not employed by the BSD in September 2005 and that Sharon Thomas was the secretary at that time. (CP 155) Plaintiff's former counsel asked Mr. Dean additional questions about the

purpose of his trip at that point, although defense counsel restricted his answers as the second deposition was limited in scope. (CP 155-58)

### III. ARGUMENT

#### A. Plaintiffs' Complaint Sufficiently Alleged Individual Liability Against Defendants Dean

Defendants argue that plaintiffs' complaint cannot be construed to contain an alternate claim against defendant Dean based on personal liability. However, the rules of pleading are so liberal that it is very difficult for counsel to draft a pleading so badly as to lose his client's rights. *RTC Transport, Inc. v. Walton*, 72 Wn. App. 386, 391 n.4, 864 P.2d 969 (1994).

Under the liberal rules of procedure, pleadings are intended to give notice to the court and the opponent of the general nature of the claim asserted. *Lewis v. Bell*, Wn. App. 192, 197, 724 P.2d 425 (1986). Although inexpert pleading is permitted, insufficient pleading is not. *Lewis*, 45 Wn. App. At 197. "A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests." *Lewis*, 45 Wn. App. At 197 (citation omitted); *Molloy v. City of Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993) (complaint must apprise defendant of the nature of plaintiff's claims and legal grounds upon which claim rests). A complaint for relief should contain: "(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled. CR 8(a).

*Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 23-24, 974 P.2d 848 (1999).

Moreover,

“[a] claim is adequately pleaded if it contains a short, plain statement showing that the pleader is entitled to relief, and a demand for judgment based thereon. *Christensen v. Swedish Hospital*, 59 Wash.2d 545, 368 P.2d 897 (1962). It is not necessary for a plaintiff to plead facts ‘constituting a cause of action.’

*Schoenig v. Grays Harbory Community Hospital*, 40 Wn. App. 331, 337, 698 P.2d 593 (1985) (citing *Hofto v. Blumer*, 74 Wash.2d 321, 444 P.2d 657 (1968); *Simpson v. State*, 26 Wash.App. 687, 615 P.2d 1297 (1980)).

Even if the plaintiff’s theory is not made clear in the pleading, it may be made clear in a later proceeding. *Schoenig*, 40 Wn. App. At 331.

Plaintiffs primarily alleged that defendant Christopher Dean was acting within the scope of his employment for BSD at the time of the collision. (CP 92-93) However, plaintiffs also named Christopher Dean and his spouse and their marital community individually in the complaint (CP 90) and alleged at paragraph 4.5 that all the acts of Mr. Dean relevant to the cause of action were done on behalf of the communities composed of the defendants. (CP 92) Moreover, paragraph 7.1 of plaintiffs’ complaint reserves the right to amend the parties and causes of action

throughout the complaint to conform to the evidence. (CP 93)

At the hearing before the lower court held on July 31, 2009, plaintiffs' former counsel argued that the complaint does contain an alternate pleading of personal liability in paragraph 4.5, pointing out that the only way the community could be liable would be if Mr. Dean were held liable as an individual in addition to liable as an employee. (RP 17-18)

Accordingly, although plaintiffs' complaint did not specifically spell out their claim against defendant Dean individually the complaint, the inclusion of his spouse and the community, in conjunction with counsel's argument at the July 31, 2009 hearing, was sufficient to put defendants on notice of their alternate theory of liability.

B. A Genuine Issue of Material Fact Exists as to Whether Defendant Dean Was Acting Within the Scope of His Employment

Plaintiffs' claims against defendants Dean and their marital community individually should survive summary judgment because the complaint was filed and served within the three-year statute of limitations prescribed by RCW 4.16.080(2), and the 60-day notice requirement of RCW 4.96.020 applies only to local governmental agencies and their

agencies, not to individuals.

This court reviews an order granting or denying summary judgment de novo, engaging in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). All facts must be viewed in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham*, 154 Wn.2d at 26.

"One who moves for summary judgment has the burden of proving that there is no genuine issue of facts, irrespective of whether he or his opponent would, at the trial, have burden of proof on issue concerned." *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960). While there may be a presumption of agency when an employee is driving his employer's vehicle, that presumption can be overcome by competent

evidence. *Amend v. Bell*, 89 Wn.2d 124, 127, 570 P.2d 138 (1977). When contradictory evidence is presented, or the moving party's evidence is impeached at a hearing on summary judgment, an issue of credibility is present; the court should not resolve a genuine issue of credibility at that juncture and should deny such motion. *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963).

In *Amend*, the plaintiff sought to establish that the defendant driver was acting within the scope of employment at the time of the collision. The defendant presented uncontroverted evidence which negated the presumption of agency, and the dismissal of the claim against the employer was affirmed. 62 Wn.2d at 128-29. Conversely, in the present case, the plaintiffs submit that the presumption of agency should be negated because a genuine issue of credibility exists.

Mr. Dean testified in his first deposition that he was on his way to Office Depot on the Guide Meridian in Bellingham to research out the cost of a secretarial chair for Elaine Perkins who worked for the BSD maintenance facility. (CP 108) He later testified in a second deposition that there never was a purchase order for a chair and one was never purchased in September or October of 2005. (CP 148-49) He further

testified that Elaine Perkins was not employed by the BSD in September 2005 and that Sharon Thomas was the secretary at that time. (CP 155) in fact, no chair was ever purchased during that time frame. (CP 148-49) Plaintiff's former counsel asked Mr. Dean additional questions about the purpose of his trip at that point, although defense counsel restricted his answers as the second deposition was limited in scope. (CP 155-58)

Mr. Dean's inconsistent statements present a question as to his credibility. While identity of the person for whom he was researching chairs may not ultimately establish plaintiff's claim against defendant Dean, the inconsistency and credibility issue raise the possibility that he was actually acting outside the scope of his employment. So long as his conduct was within the scope of employment at the time of the collision, he is protected under the BSD's umbrella and does not risk personal liability. His financial risk if found to be personally liable to plaintiffs is motive enough to deceive, thereby putting his credibility at issue and rendering his inconsistent statements material.

#### IV. CONCLUSION

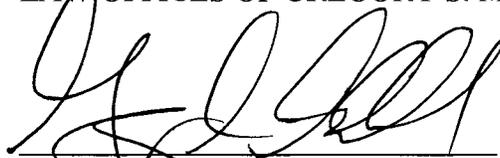
Defendant Dean's motion for summary judgment was properly denied by Judge Uhrig because their alternative theory of personal liability

was sufficiently pled and Mr. Dean's inconsistent statements cast doubt upon the actual purpose of his trip when he caused the collision that injured the plaintiffs. Consequently, when viewing the facts presented in the light most favorable to plaintiffs, a genuine issue of material fact exists as to whether Mr. Dean was acting individually or as an employee of BSD at the time of the collision. If plaintiffs can establish that Mr. Dean's trip was personal in nature, RCW 4.96.020 does not apply. Plaintiffs' complaint was filed within the three years from the date of loss and therefore should not be dismissed.

Plaintiffs respectfully request that the lower court's denial of summary judgment be affirmed and that this case be remanded for trial against defendants Dean individually.

Respectfully submitted this 3<sup>rd</sup> day of June, 2010.

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CERTIFICATE OF MAILING

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Gregory S. Marshall, WSBA #18248  
Attorney for Respondents Reynolds

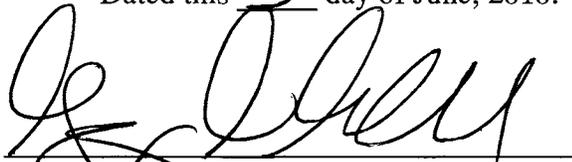
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I, Gregory S. Marshall, hereby certify that on June 3, 2010, I  
mailed a true and correct copy of the Brief of Respondents, postage  
prepaid, to:

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Dated this 3 day of June, 2010.

A handwritten signature in black ink, appearing to read 'Gregory S. Marshall', written over a horizontal line.

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June 3, 2010

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Re: *Reynolds et ux. v. Dean, et ux., and Bellingham School District*  
Case No. 64078-0

Dear Clerk:

Enclosed please find the original Brief of Respondents and the Certificate of Mailing in the above referenced matter. Please conform and return the title page copies to this office in the enclosed self-addressed envelope.

Thank you for your attention to this matter.

Yours very truly,

  
Gregory S. Marshall

Enclosures

cc: Karen & Jon Reynolds

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