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No. 64462-9-I

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

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STATE OF WASHINGTON

Nigusie T. Birru, et ux., Appellants

v.

Pacific Rail Services, LLC., et. ano., Respondents

REPLY BRIEF OF APPELLANTS

Shakespear N. Feyissa
Attorney for Appellant
1001 4th Ave. Plaza Suite 3200
Seattle, WA 98154
Phone (206) 292-1246
Fax (206) 783-5853

D. Argument

A. REED'S DEPOSITION SHOULD HAVE BEEN ADMITTED INTO EVIDENCE AND READ.

The trial Court clearly erred in refusing to admit into evidence and consider the deposition transcript of PRS's manager Charles Reed. Yes, it is true that Reed testified at trial. Reed made several inconsistent statements at his trial testimony compared with his deposition testimony. Although counsel for Plaintiffs had a chance to cross-examine Reed, there was not enough time to point out, impeach, and show Reed's numerous and all inconsistent statements. There was not enough time to impeach Reed and address all the issues raised from a deposition that lasted over 2 hr. 40 minutes.

The Defendants conveniently argue, in their response brief, that Reed testified at trial therefore his deposition should not have been admitted into evidence. Defendants state that Reed's deposition is "...merely cumulative testimony that would have offered nothing to Reed's trial testimony." *Respondent's Brief at pg. 18*. The Respondent did not offer examples showing that Reed's deposition was a mere "cumulative" and identical to his trial testimony. Or, does the Defendants rebut Plaintiffs claim of specific and several instances of Reed's denial,

amendment, and changing of his testimony enumerated in the Plaintiffs' opening brief.

The Defendants claim that Reed thoroughly testified, examined and cross-examined does not hold water. The 1.5 hours cross-examination of Reed was mostly wasted trying to impeach a deliberately uncooperative, adversarial, and argumentative witness. At trial, Reed denies most of the questions he was asked stating that he does not recall or goes on giving lengthy answers. Since Reed substantially changed his deposition testimony at trial on material issues, the only option left was to essentially depose him at the stand, but that would have resulted in wasting the Court's time and disrupt the trial schedule. After all, the Court is offered Reed's deposition and could read it instead of relying on time constrained cross-examination.

Again, there was simply not enough time to complete Reed's cross-examination and impeach him in every inconsistent point at trial. Given the tight schedule of the Court and instruction and pressure from the Court to complete the trial within that week, there was no possibility Reed can be impeached adequately at trial to excuse refusal to admit his deposition. It is true that the trial was under a tight schedule and pressure to complete the trial on a date certain.

To illustrate, there were two medical expert witnesses, who were scheduled to testify the same afternoon Reed testified, and the two medical experts did not have a flexible schedule. Both Physical Therapist Izette Swan, and family practitioner Dr. Steven Dresang were waiting to testify and it was extremely difficult to schedule and have these types witnesses to testify in King County Court where trials never go on schedule. They had to testify at specific time and date. It is known that King County Superior Court often has trials on standby, reschedules, reassigns and changes dates frequently making difficult for medical and other witnesses to testify. This case was not exempt from this reality. Therefore, we were under great pressure to wrap up Reed's deposition and get the Medical experts on the stand.

The Court records are clear as to the motions filed to have the medical experts examined through video, but the Defendants successfully objected to the motion. Hence, the medical expert witnesses had to testify that afternoon, August 25, 2009, and they had testify at the exact time they were scheduled to testify because the difficult of scheduling medical experts. Please see CP 337-338 to see the Trial Court's schedule for the medical expert testimony.

Birru offered, contrary to the allegation by the Respondent, to the Court the deposition of Reed and pleaded with the Court to read Reed's

deposition. Reed's deposition shows that Reed clearly, unambiguously, and firmly contending Birru did not break any yard rules, Birru did not violate the rule that states yard equipments have the right of way, and that Reed feels, and his investigation as an "expert" concluded that Birru was not at fault. What else could Birru has presented to the Court in offering to admit Reed's deposition? The deposition of a manger who argues that he is an expert in investigating truck accidents, a manager who is assigned and was named as Defendants' expert witness on liability, and found that Birru did not violate any rules should not have been excluded.

The offer to admit Reed's deposition did not fall short of any requirements set by Courts in this State. The deposition was offered at few stages of the trial and the Court repeatedly rejected the offer. Attorney for the Plaintiffs made a plea to the Court that justice requires admitting the deposition because of its content. The Plaintiffs pointed out that Reed's deposition and trail testimony are far apart. The Plaintiffs further pointed out to the Court that Reed's deposition contains crucial testimony on liability or fault in the case. The Court persisted in its refusal. The trial Court in its refusal to admit Reed's deposition stated that the trail testimony was enough to determine liability findings in this case. As a result, the court made several factual and legal error, and Plaintiffs

did bring to the Court's attention that the Court's decision without Reed's deposition would not be just or proper.

The Court, for instance, did not find that Reed was a trained expert to reach or determine liability matters. Reed, however, vehemently disagrees with the trial judge's finding in his deposition and repeatedly affirm that he is an "expert." His experience and training qualifies him as an expert as stated in the Plaintiffs opening brief. The Court should read or even skim through Reed's deposition in this case, so the Court could have avoided making grave errors of facts and law. In essence, Reed repeatedly admits that Birru was not at fault for the crash at PRS terminal.

The Court seems to ignore the evidence presented and only relied on partial evidence to make its final decision in this case. It is clear that the trial Court did not exercise its discretion or applied the law properly when it denied admitting a deposition that would have changed the outcome of this case. In light of the absence of any liability experts in this case, the Court should have more carefully examined the deposition of Reed before ruling.

The Defendants argument that the exclusion of Reed's deposition is harmless is without any supporting evidence. The exclusion is very harmless that it resulted in preventing the judge from having sufficient facts in this case, and rule against the Plaintiffs. The cases that are cited

by the Defendants are not analogous to the case at hand, and greatly differ from the facts and circumstance of the case at bar. The Defendants go further and claim that Birru did not offer any testimony that were absent at trial, but were in Reed's deposition. That is simply not true and reading the Plaintiffs brief would clearly indicate what testimonies were missing, inaccurate, and inconsistent at trial, but were available in the deposition.

Plaintiffs Brief accurately quotes the inconsistency of Reed's testimony, and the Court's erroneous reliance on Reed's limited trial testimony. For instance, the Court resorted to speculations, conjecture, and guessing when it found that "...Mr. Birru was simply not paying attention...." CP 99. The fact of the matter is Birru was paying attention, was not distracted, or obstructed unlike the top pick that hit him, and he was never been accused of otherwise.

Reed repeatedly stated that Birru did nothing wrong to cause the accident. Thus, the Court did not have any evidence, direct or circumstantial, to reach the finding that Birru was not paying attention. Had the Court read Mr. Reed's deposition it would have easily avoided the mistake of accusing Birru of not paying attention. The Plaintiffs brief had pointed out several instances where Reed's deposition could have changes he outcome of the final finding of this case.

Additionally, the fact that the trial Court ignored or did not give weight to the fact that Birru was outside what is called “the yellow line” that trucks were not suppose to cross, showed the Court’s lack of sufficient information as to the importance and critical nature of the yellow safety line. The deposition of Reed goes in further detail and depth to show the importance of being outside of the yellow safety line. Indeed, Reed initially stated, at his deposition, that Birru was inside the yellow line, and changed his deposition after he was confronted with color photos showing Birru’s truck outside the yellow line. Reed, at trial, fidgeted in answering questions and desired to see his deposition testimony on several occasions during his trial testimony.

The Court should have read the deposition because depositions are, unlike trials, taken in an office, where relative to trials are less stressful and tense to allow one to remember things in a clam and comfortable fashion. The Court should have put that into account this as well when Reed’s deposition was offered. Reed may have been simply nervous and was under trial pressure to have forgotten many facts he testified to at his deposition. The Court, at least, could have simply skimmed through Reed’s deposition in response to the repeated and specific request from Plaintiffs counsel. The Plaintiffs were simply asking the Court to have

more information, evidence, and make an informed decision in this case.

Sadly, that did not happen in this case.

Simply put, Reed was an expert. The Court stated that he was not. Reed stated that no yard rules including the yield the right of way rules were violated. The Court finds that the yard rules were violated. Reed stated that he did not find Birru at fault for this accident even though he investigated the accident. The Court finds that Birru was fully at fault. Reed never mention about Birru not paying attention, pressed for schedule, or Birru doing anything wrong to cause the accident. The Court finds that Birru was not paying attention, and he was at fault for the accident. Reed states that crossing the yellow line would have been a violation. The Court finds that the fact that the yellow line is not crossed is not material. Reed states that his investigation was complete without even taking statement from Birru, but he is confident based on his experience and training he is a qualified investigator. The Court finds that Reed is a “good manager” but he is not trained as an investigator.

Depositions are expensive, time consuming, and are a crucial part of litigation. Clearly, the Court Rules allow Depositions to be used “for any purpose” because of their importance to the fact finder to reach the truth of the matter. If depositions are only used to impeach a witness on the stand at a trial on few issues, but are excluded for any and all other

purposes, then the Court Rules and cases could have indicated the same. However, the Court Rules plainly state and allow deposition to be used for any purpose. Thus, the intent of the Court Rule on using deposition for “any purpose” should be applied here, for the testimony contained in Reed’s deposition would have changed the outcome of this case.

In sum, contrary to the contention by the Defendants, Plaintiffs have identified several key and material points in which the trial Court could have benefited from reading Reed’s deposition.

B. THERE WAS A BREACH OF DUTY AGAINST BIRRU

The Court finds that there was no duty owed to Birru, therefore, there was no breach of that duty. The Court applying the Negligence standard found that there was no duty owed to the Plaintiffs in this case. The Defendants owed no duty to the Plaintiffs, the Court seem to reason. The Court’s reasoning is not based on evidence, and did not apply the ordinary care and negligence elements properly to this case.

The Defendants state that the Court finds that the top pick driver and co-defendant, O’shields, was an experienced driver of a top pick. The Court further finds there was nothing improper for Mr. O’Shields **driving in reverse without any warnings** heading to a repair shop from a stack, or, an alley of containers. Yes, Birru did not present a report, or, has his experts testified because of the frequent changes in the trial date. Still,

common sense and anyone who possess a driver license knows that driving in reverse, or backing out of an alley requires an adequate warning and vision before proceeding. Here, the top pick was in a place it was not suppose to be.

The particular top pick in question did not have a load, it was not loading or unloading, it was not designed to be driven around but to be parked in one place and load and unload containers. On the other hand, the truck, Birru, was exactly where he was suppose to be. He was trying to get out of the premises exactly as it was suppose to be done. The evidence clearly shows that the top pick was not operated in a careful and prudent manner.

For example, the mechanic, Mr. Morgan, PRS witness, testified that it would be very hard to break or stop the top pick suddenly as O'shields claim to do upon allegedly seeing Birru's truck. The Court, on the other hand, finds that Mr. O'shields stopped and braced himself for the impact upon noticing Birru. The evidence presented by a veteran of driving, repairing, and maintaining the top pick, Mr. Morgan, was not given any weight by the trial judge.

There was no evidence to support the claim of O'shields stopping the top pick and "bracing for impact" other than the Court's own baseless inferences. Also, the Court repeatedly stated that this is not motor vehicle

accident. Still, the Defendants in their response brief and throughout the trial stated that this case a simple car accident. Had this been car accident, a person driving backward from an alley would at fault. Even if one takes the trial judge's finding and say it was Birru who has to watch out for top picks, then one must ask the question how could Birru watch out a top pick that was heading from one end of the terminal to the other backing (reversing) from an alley of container more than three story high? The Court in its finding holds Birru to unreachable standard of responsibility when it found him to be at fault of not stopping or moving to an object that he could not possible see.

There is no dispute that top pick was backing up or was in reverse. There is no dispute that top pick was coming from an alley of containers. There is no dispute that top pick was not doing what it was designed to do at the time of the accident. It is also undisputed that Birru, at the time of the accident, was exactly where he suppose to be, and doing exactly what he suppose to do. The Court concluded that PRS and O'shields lack of duty arises out of the sign posted at the terminal entrance stating yard equipments have right of way. **No one, no expert, no witness, or no evidence presented for the Court to conclude that Birru violated the yard rule or the terminal rule, none whatsoever.** Birru probably did not need experts to prove that a top pick or crane driving in reverse from an

alley of containers to a repair shop crashing into his truck was responsible for his injuries and damages.

Clearly, the Defendants herein owed a duty of care to Birru who enters their premises to conduct business. He was there by their invitation and had responsibility from harming or endangering him by creating dangerous situations. Here, the backing up of a top pick from stack of containers at a busy time of the terminal created dangerous conditions for Birru and other truck drivers entering and exiting PRS' terminals.

In this case, the yard rule, could not possibly be interpreted and applied at all times and all circumstances, to exempt the defendants from liability. If one simply can avoid liability by posting a vague, general, and unclear rule stating "...yard equipments have right of way," then our civil system and society is in great danger for anyone can easily erect such rules. From social engineering aspect, not reversing this case sets a dangerous precedent for any company, groups, or individual can make any unreasonable, vague, and general rule and avoid any responsibility.

Thus, if there is an instance that begs or cries for holding defendants liable for creating unreasonably dangerous condition and trying to get away, then this case is a prime candidate because even PRS's manager could not find the Plaintiff Birru to be at fault. Consequently, in what reasoning, based on what fact/s, what evidence, what inferences, and

what testimony the Court could conclude that Birru was at fault for this accident is a question that needs to be asked here. The answer, based on the evidence presented, the question would undoubtedly result in reversal of the judgment against Birru.

In conclusion, regarding the breach of duty, the duty owed to a business invitee who was doing what he was there to do, did not violate any rules, did not engage in an act or omission that could result in an accident, and crashed by heavy machinery in reverse without warning should be clear. Therefore, the Defendants failed to point out to this Court, other than parroting the trial judge, how and why the ruling of the trial Court below should stand.

There was a duty owed to Birru, and that duty was breached by Defendants, and there is no evidence to suggest otherwise.

C. PLAINTIFFS SUBPOENA OF ERIC STRANDBERG

The assertion by Defendants that Eric Strandberg was not served with the subpoena is not true. Defendants' attorney clearly instructed Plaintiffs' counsel to have any communication with the witness through him because they were employed by Pacific Rail Services ("PRS"), the co-Defendant in this case. For Defendants' Counsel to claim that the Plaintiffs' counsel should have gone and personally served Eric Strandberg is not genuine. Counsel for Plaintiffs before trial, in a timely manner, served

Defendants counsel with subpoena's for Eric Strandberg. Defendant's counsel admits of receiving the subpoena for Eric Strandberg. Eric Strandberg was employed by PRS and as such was represented by PRS' counsel, therefore, Plaintiffs counsel felt he cannot ethically go and serve Mr. Stranberg. The fact of the matter is Defendants' counsel had better access, knew the situation, and availability of Eric Strandberg instead of submitting incomplete copy of his deposition in lieu of have him testified in open Court.

Again, most importantly, Defendants make a false assertion that the trial Court "...did not rely whatsoever on Stranberg's opinion in issuing its Finding of Facts and Conclusion of Law" *Defendants Brief at 26*. This simply not true. The judge issued an oral ruling of his finding or verdict. In his verdict, he clearly stated that he found Strandberg's deposition to be very helpful. His oral verdict and findings were what his written findings suppose to mirror.

Over the Plaintiffs objections, the trial Court essentially adopted Defendants submitted Finding of Facts and Conclusion of Law. In the written finding, the Court omitted how it reached its decision, namely how it found Eric Strandberg's deposition useful in its rulings.

Therefore, the Court relied and found Stranberg's incomplete deposition and refused to admit Reed's deposition.

VI. CONCLUSION

For the reasons set out above, Appellants respectfully request that the Court of Appeals find the trial Court erred in denying Appellants' motion for a new trial and reverse and remand the case to the trial Court for new trial.

RESPECTFULLY SUBMITTED this 13th day of September 2010.


Shakespear N. Feyissa, WSBA # 33747
Attorney for Appellants.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **REPLY BRIEF OF APPELLANTS** on:

Mr. Thomas G. Waller
BAUER MOYNIHAN & JOHNSON LLP
2101 FOURTH AVENUE - SUITE 2400
SEATTLE, WASHINGTON 98121-2320

ATTORNEYS FOR RESPONDENTS

by causing full, true, and correct copies thereof by personally serving and delivering one and true copy of this brief, on September 13, 2010, to Mr. Thomas G. Waller at their last-known office address listed above.

Shakespear N. Feyissa
Shakespear N. Feyissa
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