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COURT OF APPEALS

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STATE OF WASHINGTON

No. 35068-8-II

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COURT OF APPEALS,

DIVISION TWO

OF THE STATE OF WASHINGTON

Steve Aust, Appellant

v.

Terry Clark Anderson, Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Terry Anderson intentionally assaulted Steve Aust, a deputy sheriff, during his response to a domestic dispute that involved Mr. Anderson and his wife.

Subsequently, three years after Mr. Anderson assaulted Deputy Aust, Plaintiff Aust filed his Complaint for Damages in this case. Rather than allege the torts of assault and battery against Defendant Anderson, Plaintiff Aust, as his sole cause of action, alleged only that Defendant Anderson committed the “tort of negligence” arising from his assault of Plaintiff Aust.

Defendant Anderson filed a Motion for Summary Judgment wherein he contended that Plaintiff Aust asserted a negligence cause of action in order to avoid the two year statute of limitations for the torts of assault and battery. The trial court granted the summary judgment motion.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1 The trial court did not err when it entered its Order Granting Defendant’s Supplemental Motion for Summary Judgment.

Issues Pertaining to Assignments of Error

No. 1 Mr. Anderson intentionally assaulted Deputy Aust. Three years after Mr. Anderson assaulted Deputy Aust, Plaintiff Aust filed his

Complaint for Damages in this case. Rather than allege the torts of assault and battery against Defendant Anderson, Plaintiff Aust, as his sole cause of action, alleged only that Defendant Anderson committed the “tort of negligence”. The statute of limitations for the torts of assault and battery is two years, while the statute of limitations for negligence actions is three years. Do the uncontested facts in this case determine the applicable statute of limitations rather than Plaintiff Aust’s attempt to characterize the cause of action as one of negligence?

III. STATEMENT OF THE CASE

On March 18, 2002, Terry Anderson had an argument with his then wife, Deborah Anderson. CP 80. Both Terry and Deborah were at their Chehalis, Washington residence. CP 80. As a result of the argument, Deborah went crying to the bedroom and called Lisa Hellam, the daughter of Deborah and Terry. CP 80. Mr. Anderson went to the living room and watched television. CP 80. After watching television for a short period of time, Mr. Anderson went to the bedroom to get a pillow. CP 80. Deborah, who was talking to Lisa on the telephone, temporarily ceased the conversation by putting the phone into her lap while Mr. Anderson was in the room retrieving the pillow. CP 80, 81. Mr. Anderson obtained the pillow and went back to the living room to watch television. CP 81.

Apparently, when Deborah put the phone into her lap and was nonresponsive, Lisa assumed that something bad had happened. CP 81. Consequently, Lisa called 9-1-1. CP 81. Lisa also came to the Anderson residence and went into the bedroom with Deborah while Mr. Anderson watched television. CP 81. Shortly thereafter, sheriff's deputies came to the residence. CP 81.

Two sheriff's deputies came to the residence door and knocked. CP. 81. Mr. Anderson answered the door. CP 81. The deputies were Deputy Sprouse and Deputy Aust. CP 81. The deputies asked Mr. Anderson if he was Terry Anderson, and Mr. Anderson confirmed his identity. CP 81. The deputies asked if Mr. Anderson's wife was present. CP 81. Mr. Anderson told them that she was in the bedroom, and asked if they wanted to talk to her. CP 81. The deputies declined and announced that they were coming into the residence. CP 81. Mr. Anderson attempted to shut the door, but the deputies pushed through the doorway. CP 81.

When the deputies attempted to push through the doorway, Mr. Anderson initially had one hand on the door and one hand on the wall. CP 81. Deputy Sprouse tried to take Mr. Anderson to the ground, and Mr. Anderson threw him out of the way. CP 81. Deputy Aust then grabbed Mr. Anderson. CP 81. Deputy Aust and Mr. Anderson struggled, and then Mr. Anderson drove Deputy Aust backwards toward some cabinets.

CP 81. When Mr. Anderson and Deputy Aust reached the cabinets, Mr. Anderson pinned Deputy Aust against the cabinets by grabbing Deputy Aust's throat and driving Deputy Aust's head, neck and torso backwards over the cabinet countertop. CP 81. While Mr. Anderson had Deputy Aust pinned against a cabinet, Deputy Spouse started to reach for his pepper spray. CP 81. Mr. Anderson told Deputy Spouse that if Deputy Spouse sprayed Mr. Anderson, Mr. Anderson would crush Deputy Aust's throat. CP 81. After some discussion, Mr. Anderson released Deputy Aust and allowed the deputies to handcuff him. CP 81. Deputy Spouse then transported Mr. Anderson to jail in his car. CP 81.

The State of Washington charged Mr. Anderson with four criminal counts arising from the March 18, 2002 incident. CP 82. Mr. Anderson eventually pled guilty to counts II and III, which were charges of Assault in the Third Degree under RCW 9A.36.031(1)(g), and counts I and IV were dismissed. CP 82, 84-99.

Subsequently, on March 18, 2005, three years after Mr. Anderson assaulted Deputy Aust and Deputy Spouse, Plaintiff Aust filed his Complaint for Damages in this case. CP 82, 102. Rather than allege the torts of assault and battery against Defendant Anderson, Plaintiff Aust, as his sole cause of action, alleged only that Defendant Anderson committed the tort of negligence arising from the March 18, 2002 incident. CP 82,

104. Nowhere in his complaint did Plaintiff Aust allege that Defendant Anderson carelessly used excessive force. CP 102-105.

Defendant Anderson filed a Motion for Summary Judgment in January of 2006. CP 100. In support of the Motion for Summary Judgment, Defendant Anderson also filed his Declaration of Defendant in Support of Motion for Summary Judgment. CP 80-99. Defendant Anderson's declaration contained a recitation of the events that occurred on March 18, 2002. CP 80-82. Plaintiff Aust submitted no evidence to contest the evidence contained in Defendant Anderson's declaration. In fact, Plaintiff Aust, in his Plaintiff's Summary Judgment Response, stated that he "[did] not contest the facts alleged by defendant." CP 61.

An initial hearing on Defendant Anderson's Motion For Summary Judgment took place on March 10, 2006, and a subsequent hearing on Defendant's Supplemental Motion for Summary Judgment took place on April 27, 2006. The trial court granted Defendant Anderson's Supplemental Motion for Summary Judgment, and entered an order granting the motion on June 9, 2006. CP 1-4.

IV. ARGUMENT

A. THE TWO YEAR STATUTE OF LIMITATIONS FOR ASSAULT AND BATTERY GOVERNS THIS CASE

For the reasons that follow, the two year statute of limitations for the torts of assault and battery governs this case rather than the three year statute of limitations for actions based on negligence. Mr. Anderson committed the crime of Assault in the Third Degree—Law Enforcement Officer under RCW 9A.36.031(1)(g) against Deputy Aust. This crime required that Mr. Anderson act intentionally. The civil causes of action for Mr. Anderson’s criminal assault of Deputy Aust were the torts of assault and battery, which are intentional torts. In tort law, negligent conduct excludes intentional conduct. Thus, the three year statute of limitations is inapplicable to causes of action for the torts of assault and battery. In order to circumvent the two year statute of limitations, Plaintiff Aust carefully crafted his complaint to avoid asserting causes of action for the torts of assault and battery, and in their place alleged the “tort of negligence”.

1. The crime of Assault in the Third Degree—Law Enforcement Officer under RCW 9A.36.031(1)(g) is a crime that requires an intentional act

In this case, Mr. Anderson committed, pled to, and was found guilty of two counts of the crime of Assault in the Third Degree—Law Enforcement Officer under RCW 9A.36.031(1)(g). This statute defines Assault in the Third Degree as follows:

Assault in the Third Degree

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

...

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault;

RCW 9A.36.031(1)(g). The Washington Criminal Code does not include a definition for the word “assault” as used in RCW 9A.36.031(1)(g).

However, to obtain a conviction for assault under that subsection, the State must prove that the defendant intended to commit and did commit an assault against another person. *State v. Brown*, 140 Wn.2d 456, 470, 998 P.2d 321 (2000). The mens rea is not some lesser mental state such a recklessness or negligence. Rather, intent is the specific mens rea of third degree assault of a law enforcement officer, and is a nonstatutory element of assault. *State v. Finley*, 97 Wn. App. 129, 135, 982 P.2d 681 (1999).

The current legal position or theory of counsel for Plaintiff Aust is inconsistent with the legal theory or position that was advocated by the prosecutor’s office when it charged Mr. Anderson in the criminal proceeding on behalf of the State of Washington. Specifically, the Lewis County Prosecutor’s Office charged Mr. Anderson for committing intentional crimes. Subsequently, in Plaintiff Aust’s Complaint for Damages, the Lewis County Prosecutor’s Office contended that Defendant

Anderson negligently assaulted Plaintiff Aust. Now, the Lewis County Prosecutor's Office contends that Defendant Anderson carelessly used too much force during his contact with Plaintiff Aust, and thereby caused Plaintiff Aust's injuries.

Certainly the plaintiffs in the original criminal case and this case are different, i.e., the State of Washington as opposed to Plaintiff Aust in his individual capacity, but the difference in parties does not justify a difference in underlying legal theory.¹ If Mr. Anderson had only negligently assaulted (the phrase "negligently assaulted", for purposes of this motion, is oxymoronic) Plaintiff Aust, then the State of Washington would not have been justified in charging Mr. Anderson with the crime of Assault in the Third Degree, an intentional crime.

2. The torts of assault and battery are intentional torts

In this case, the torts of assault and battery are the civil causes of action for Mr. Anderson's criminal act of assaulting Deputy Aust. The torts of assault and battery are intentional torts, and thus, they accurately apply to his intentional harmful or offensive contact with Deputy Aust.

¹ The representation of Plaintiff Aust by the Lewis County Prosecuting Attorney's Office to recover compensation for Plaintiff for injuries allegedly sustained by Plaintiff Aust, and his attorney fees, seems highly questionable at best. RCW 36.27.050 prohibits special emoluments: "No prosecuting attorney shall receive any fee or reward from any person, on behalf of any prosecution, or for any of his official services, except as provided in this title, nor shall he be engaged as attorney or counsel for any party in any action depending upon the same facts involved in any criminal proceeding." RCW 36.27.050.

Battery is the intentional infliction of a harmful bodily contact upon the person of another. *Garratt v. Dailey*, 46 Wn.2d 197, 200, 279 P.2d 109 (1955). More specifically, a battery is a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact or apprehension that such contact is eminent. *McKinney v. Tukwila*, 103 Wn. App. 391, 408, 13 P.3d 631 (2000).

Battery is an intentional tort; the tortfeasor must intend a harmful or an offensive touching. *Garratt*, 46 Wn.2d at 200-2001. *Bundrick v. Stewart*, 128 Wn. App. 11, 18, 114 P.3d 1204 (2005). *McKinney*, 103 Wn. App. at 408. *Honegger v. Yoke's*, 83 Wn. App. 293, 297, 921 P.2d 1080 (1996). *Orwick v. Fox*, 65 Wn. App. 71, 85, 828 P.2d 12 (1992).

The tort of assault is any act of such a nature that causes apprehension of a battery. *McKinney*, 103 Wn. App. at 408. More specifically, an actor is subject to liability to another for the tort of assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such contact, and (b) the other is thereby put in such eminent apprehension.

Brower v. Ackerley, 88 Wn. App. 87, 93, 943 P.2d 1141 (1997).

Restatement (Second) of Torts § 21.

Assault, like the tort of battery, is also an intentional tort. *Brower*, 88 Wn. App. at 92. *Honegger*, 83 Wn. App. at 297.

3. Negligent conduct excludes intentional conduct

Negligence is conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm; It does not include conduct recklessly disregarding of an interest of others. Restatement (Second) of Torts § 282 (1965). In fact, negligence includes only such conduct as creates liability for the reason that it involves a risk and not a certainty of invading the interest of another; It therefore excludes conduct which creates liability because of the actor's intention to invade a legally protected interest of the person injured or of a third person. Restatement (Second) of Torts § 282, cmt d (1965).

In this case, liability did not arise because Defendant Anderson's conduct created a risk of invasion of Plaintiff Aust's interests. Rather, Defendant Anderson's conduct toward Plaintiff Aust created liability because he intentionally battered and/or assaulted Plaintiff Aust. In other words, his conduct did in fact, or with certainty, invade Plaintiff Aust's interests. It did not merely create a risk of invasion.

4. The three year statute of limitations is inapplicable to causes of actions that are specifically enumerated in RCW 4.16

Washington law requires that actions can only be commenced within the periods provided in RCW 4.16 after the cause of action has accrued. RCW 4.16.005. The statute of limitations for negligence is set forth in RCW 4.16.080. Specifically, RCW 4.16.080 states that:

The following actions shall be commenced within three years:

...
(2) An action . . . for any other injury to the person or rights of another not hereinafter enumerated;

RCW 4.16.080(2). This statute does not specifically use the word “negligence”, but Washington Courts have consistently held that the statute of limitations for negligence is three years. *Hill v. Withers*, 55 Wn.2d 462, 464, 348 P.2d 218 (1960). *Washington v. Boeing Company*, 105 Wn. App. 1, 18, 19 P.3d 1041 (2000). *Giraud v. Quincy Farm and Chemical*, 102 Wn. App. 443, 449, 6 P.3d 104 (2000). *Funkhouser v. Wilson*, 89 Wn. App. 644, 664, 950 P.2d 501 (1998). See *Reichelt v. Johns-Manville Corporation*, 107 Wn.2d 761, 769, 733 P.2d 530 (1987).

The statute of limitations for the torts of assault and battery is two years. Specifically, RCW 4.16.100 states that:

Within two years:

(1) An action for libel, slander, assault, assault and battery, or false imprisonment

RCW 4.16.100.

The general limitations language that is contained in RCW 4.16.080 defers to the more specific statutes of limitation that follow it, and thus, is self limiting. Specifically, RCW 4.16.080(2) states that, “The following actions shall be commenced within three years: . . . (2) An action . . . for any other injury to the person or rights of another **not hereinafter enumerated** RCW 4.16.080(2) (emphasis added). This phrase, “not hereinafter enumerated” makes the three year statute of limitations in RCW 4.16.080 inapplicable to causes of action that are identified subsequently in RCW 4.16. Two of these subsequently identified causes of action are assault and battery under RCW 4.16.100.

5. Plaintiff crafted his complaint to avoid alleging intentional torts

Plaintiff Aust carefully crafted his complaint to avoid asserting causes of action for the torts of assault and battery. In their place, he asserted a negligence cause of action in an attempt to circumvent the two year statute of limitations for the torts of assault and battery. Despite this attempt, the Court should recognize the absence of alleged causes of action for the intentional torts of assault and battery as an attempt to avoid the consequences of the shorter statute of limitations-as did the Court of Appeals in *New York Underwriters v. Doty*, 58 Wn. App. 546, 794 P.2d 521 (1990). In *New York Underwriters*, the Court concluded that it was

not persuaded by the Plaintiff's claim that her complaint did not allege any intentional torts. *New York Underwriters*, 58 Wn. App. at 549. The Court further concluded that the carefully crafted complaint for personal injury never used the legal terms of assault, battery, or false imprisonment, but nevertheless asserted only intentional torts. *New York Underwriters*, 58 Wn. App. at 549. This Court should reach a similar conclusion.

Counsel for Plaintiff Aust has styled this case as one of negligence in order to attempt to avoid the running or expiration of the statute of limitations for the true causes of action that underlie the facts in this case, namely, assault and/or battery. Despite this artifice, this Court should rule that the essence of the case controls the applicable statute of limitations, not particular words in the pleadings.

The essence of the case reasoning is illustrated in the following case: Ted Martin was injured when he fell from a scaffold while working for Lockheed Shipyard. *Martin v. Patent Scaffolding*, 37 Wn. App. 37, 38, 678 P.2d 362 (1984). Patent Scaffolding had sold the scaffolding to Lockheed. *Martin*, 37 Wn. App. at 38, 39. A complaint alleging negligence was served on Patent Scaffolding on June 10, 1980, but was never filed. *Martin*, 37 Wn. App. at 39. After some depositions were taken, Martin served an Amended Complaint which was filed on April 15, 1981. *Martin*, 37 Wn. App. at 39. The Amended Complaint alleged a

product liability claim, but also asserted a breach of warranty claim.

Martin, 37 Wn. App. at 39.

The trial court granted summary judgment and dismissed Martin's complaint because the case was not filed within the three year statute of limitations for product liability actions. *Martin*, 37 Wn. App. at 39.

On appeal, Martin argued that the allegations of warranty brought the case under the four year statute of limitations as set forth in RCW 62A.2-725. In response, the Court of Appeals noted that while the Amended Complaint contained an allegation of breach of warranty by the manufacturer, the complaint stated a product liability claim and alleged that the scaffolding was unsafe for use. *Martin*, 37 Wn. App. at 39. The Court of Appeals concluded that the essence of Martin's claim was product liability, and it remained a product liability claim even though the Amended Complaint contained allegations of breach of warranty. *Martin*, 37 Wn. App. at 39. The Court of Appeals ruled that the essence of the case controls, not particular words in the pleadings. *Martin*, 37 Wn. App. at 39.

The essence of the claim in this case is assault and/or battery, despite the attempt to style the underlying claim as one of negligence. The essence of this case, namely assault and/or battery, should control the applicable statute of limitations, which is two years.

In a case that has similarities to this case, the Court of Appeals again used reasoning similar to that used in *Martin. Boyles v. City of Kennewick*, 62 Wn. App. 174, 813 P.2d 178 (1991). A Kennewick police officer arrested Ms. Boyles on December 29, 1985. *Boyles*, 62 Wn. App. at 175. Three years later, Ms. Boyles served the City of Kennewick with a complaint, wherein she alleged that the officer used excessive force in the arrest. *Boyles*, 62 Wn. App. at 176.

On June 1, 1989, the City of Kennewick and the defendant officer moved the court to dismiss the complaint. *Boyles*, 62 Wn. App. at 176. They contended that the action was time barred because the complaint made claims for assault and battery. *Boyles*, 62 Wn. App. at 176. On July 11, 1989, Ms. Boyles moved the court for leave to amend her complaint to add an additional cause of action for negligence. *Boyles*, 62 Wn. App. at 176. The court denied the defendants' motion to dismiss, and thereafter, the defendants obtained discretionary review. *Boyles*, 62 Wn. App. at 176.

During review, the Court of Appeals noted that, generally, a police officer making an arrest is justified in using sufficient force to subdue a prisoner, but he becomes a tortfeasor and is liable as such for assault and battery if unnecessary violence or excessive force is used in accomplishing the arrest. *Boyles*, 62 Wn. App. at 176. The Court stated that whether Ms. Boyles should be allowed to amend her complaint for damages based on

excessive force to one based on negligence would depend upon the factual allegations contained in her original complaint. *Boyles*, 62 Wn. App. at 177. The Court ruled that the factual allegation in the complaint determine the applicable statute of limitations. *Boyles*, 62 Wn. App. at 177. The Court then reasoned that Ms. Boyles had not raised a claim for negligence by the factual allegations in her complaint, and thus, reversed the trial court's order denying dismissal based on the expiration of the statute of limitations. *Boyles*, 62 Wn. App. at 177.

**B. PLAINTIFF UNTIMELY AND ERRONEOUSLY
STYLES HIS CLAIM AS ONE OF EXCESSIVE FORCE**

Plaintiff Aust made no allegations that Defendant Anderson carelessly used excessive or too much force against Plaintiff Aust in his Complaint for Damages. In fact, Plaintiff Aust failed to plead the theory until he first argued his theory of careless use of excessive force in his summary judgment response. At no time did Plaintiff Aust move the court for leave to amend his pleading pursuant to Civil Rule 15. Accordingly, any claim for excessive use of force is untimely asserted.

In addition, Plaintiff Aust erroneously asserts a claim of excessive use of force. A proper claim for excessive use of force arises in the context where an actor is entitled or privileged to use force against another

person. The Restatement (Second) of Torts describes the excessive use of force as follows:

§ 71. Force In Excess Of Privilege.

If the actor applies a force to or imposes a confinement upon another which is in excess of that which is privileged,
(a) the actor is liable for only so much of the force or confinement as is excessive; . . .

Restatement (Second) of Torts § 71 (1965). The comment on clause (a) explains the scope of the liability for excess use of force:

Comment on Clause (a):

a. While the actor is liable to another for any force or confinement which he applies or imposes upon the other which is in excess of that which he is privileged to impose, he is not liable for so much of the force or confinement as he is privileged to apply or impose, and so he does not become a "*trespasser ab initio*" by his abuse of his privilege.

Restatement (Second) of Torts § 71, cmt a (1965).

A *trespasser ab initio* is a trespasser from the beginning. Black's Law Dictionary 1503 (6th ed. 1990). A *trespasser ab initio* is not privileged or entitled to use some force upon another, and thus, is distinguishable from an actor who is privileged to use some amount of force. For example, a police officer who makes an arrest is entitled to use sufficient force to subdue an arrestee. *Boyles*, 62 Wn. App. at 176. Similarly, a nurse, doctor or paramedic is entitled or privileged to use a reasonable amount of force toward a patient in the course of care or

treatment. The force that law enforcement officers or medical personnel use, which exceeds the scope of their privilege, is excessive, and thus, actionable.

In contrast, persons that are the subjects of arrest, whether lawful or unlawful, such as was Defendant Anderson, are not entitled to use any force to resist the arrest, absent an attempt by the arresting officer to injure the arrestee. *State v. Valentine*, 132 Wn.2d 1, 21, 935 P.2d 1294 (1997) (holding that a person who is being unlawfully arrested may not use force against the arresting officers if he or she is faced only with a loss of freedom). Accordingly, absent an attempt by Plaintiff Aust to injure Defendant Anderson, any force used by Defendant Anderson against the Plaintiff Aust was not privileged. The result of a lack of privilege to use force is that the actor, such as Defendant Anderson, is a *trespasser ab initio*—a trespasser from the beginning whose use of force is not excessive, but is simply unjustified at its inception. Thus, Plaintiff Aust’s claim of excessive force lacked merit.

C. CR 56(e) – DEFENSE REQUIRED

Civil Rule 56 governs summary judgment motions. CR 56(e) requires an adverse party to assert a defense to a summary judgment motion:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

CR 56(e).

The facts required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. *Overton v. Consolidated Insurance Company*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002). *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 735 P.2d 517 (1988). Ultimate facts or conclusions of fact are insufficient. *Overton*, 145 Wn.2d at 430. *Grimwood*, 110 Wn.2d at 359. Likewise, conclusory statements of fact will not suffice. *Overton*, 145 Wn.2d at 430. *Grimwood*, 110 Wn.2d at 359. Additionally, broad generalizations and vague conclusions are insufficient to resist a motion for summary judgment. *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993). Furthermore, a nonmoving party in a summary judgment may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Thompson*, 71 Wn. App. at 556.

Under CR 56(e), affidavits must (1) be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to

testify to the matters stated in the affidavit. *Grimwood*, 110 Wn.2d at 359. Beyond the competency requirement, there is a dual inquiry as to whether an affidavit sets forth material facts that create a genuine issue for trial: Does the affidavit state material facts, and, if so, would those facts be admissible in evidence at trial? *Grimwood*, 110 Wn.2d at 359. If the contents of an affidavit do not satisfy both standards, then the affidavit fails to raise a genuine issue for trial, and summary judgment is appropriate. *Grimwood*, 110 Wn.2d at 359.

The application of the rule in CR 56(e) is illustrated in the following cases:

1. *Brame v. St. Regis Paper Company*

A company, General Mechanical, Inc., moved for summary judgment and based its motion on an affidavit of its vice president, a contract between General Mechanical and a general contractor, and a memorandum of authorities. *Brame v. St. Regis Paper Company*, 97 Wn.2d 748, 752, 649 P.2d 836 (1982). These documents established that the general contractor was entitled to indemnity only if some activity of General Mechanical had contributed to an employee's injuries. *Brame*, 97 Wn.2d at 752. The general contractor, Baugh, did not respond to the summary judgment motion as required by CR 56(e). *Brame*, 97 Wn.2d at 752. In fact, Baugh, the general contractor, filed no affidavits or other

response. *Brame*, 97 Wn.2d at 752. The only allegation against General Mechanical in any of the pleadings was a bare assertion of the indemnity clause. *Brame*, 97 Wn.2d at 752. Consequently, the trial court granted the summary judgment motion of General Mechanical against Baugh. *Brame*, 97 Wn.2d at 749.

The case was appealed, and ultimately the Supreme Court of Washington concluded that the bare assertion of the indemnity clause in the pleadings did not rise above the level of mere unsupported allegations as required by CR 56(e). *Brame*, 97 Wn.2d at 752. Thus, the Supreme Court affirmed the trial court's grant of summary judgment. *Brame*, 97 Wn.2d at 752.

2. *Lindsey Credit Company v. Skarperud*

In another case, purchasers of irrigation equipment, the Skarperuds, alleged that Lindsey Credit Corporation was merely the credit and finance company of Lindsey Manufacturing Company. *Lindsey Credit Company v. Skarperud*, 33 Wn. App. 766, 770, 657 P.2d 804 (1983). Lindsey Manufacturing moved for summary judgment and in support of its motion, submitted an affidavit from its executive vice president. *Lindsey*, 33 Wn. App. at 770. In the affidavit, the vice president stated that Lindsey Credit Corporation and Lindsey Manufacturing Company were two independent companies. *Lindsey*, 33

Wn. App. at 770. The Skarperuds failed to respond or contravene this affidavit. *Lindsey*, 33 Wn. App. at 770. Consequently, the trial court granted the motion for summary judgment. *Lindsey*, 33 Wn. App. at 769, 770.

On appeal, the Court of Appeals reasoned that the Skarperuds made a mere allegation, which was nebulous at best, of a connection between Lindsey Manufacturing and Lindsey Credit. *Lindsey*, 33 Wn. App. at 771. The Court of Appeals noted that the Skarperuds failed to present any affidavits or other documents indicating to the trial court that the doctrine of corporate disregard should be applied. *Lindsey*, 33 Wn. App. at 771. Accordingly, the Court of Appeals affirmed the order granting Lindsey Credit's motion for summary judgment. *Lindsey*, 33 Wn. App. at 773.

3. *Thompson v. Everett Clinic*

In another case, a patient brought a lawsuit against a doctor and a clinic stemming from the doctor's sexual assault of the patient during a medical examination. *Thompson v. Everett Clinic*, 71 Wn. App. 548, 860 P.2d 1054 (1993). In response to the clinic's summary judgment motion, the Thompsons failed to offer any substantial evidence to establish the existence of a genuine issue of material fact as to whether the clinic knew or should have known, or failed to exercise reasonable care in failing to

know of the inappropriate sexual conduct of the doctor. *Thompson*, 71 Wn. App. at 555. Thus, the trial court granted the motion for summary judgment. *Thompson*, 71 Wn. App. at 550.

On appeal, the Court of Appeals stated that the Thompsons, as the party opposing the summary judgment motion, were required to submit competent testimony setting forth specific facts, as opposed to general conclusions, to demonstrate a genuine issue of material fact. *Thompson*, 71 Wn. App. at 555. The Court of Appeals noted that there was no competent evidence suggesting the clinic breached a duty to exercise ordinary care in the hiring or supervision of the doctor, and thus affirmed the trial court's grant of summary judgment. *Thompson*, 71 Wn. App. at 556.

In this case, Plaintiff Aust failed to submit any material evidence in opposition to Defendant Anderson's declaration in support of his Motion for Summary Judgment. In fact, Plaintiff Aust, in his summary judgment response, stated that he "[did] not contest the facts alleged by defendant." CP 61. Given these circumstances, there was certainly no genuine issue as to any material fact in this case.

Despite the fact that Plaintiff Aust did not contest the facts alleged by Defendant Anderson, counsel for Plaintiff Aust argued that "Plaintiff asserts in his complaint that Defendant did not intentionally cause the

injuries complained – of.” CP 61. Plaintiff’s reliance on assertions in his Complaint to defeat Defendant Anderson’s Summary Judgment Motion were contrary to the requirements of CR 56(e). As set forth above, the rule specifically states that “an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial.” CR 56(e). Plaintiff’s reliance upon the assertions in his Complaint were further without merit because Plaintiff Aust failed to verify, under penalty of perjury, the assertions or allegations contained in the Complaint. CP 102-105.

Counsel for Plaintiff Aust also argued that “Plaintiff has the right to present evidence that the cause of the injuries was negligent, rather than intentional . . .”. CP 61. Whether or not this contention would have been true for trial purposes, the obligation of Plaintiff Aust in response to Defendant Anderson’s summary judgment motion was to provide “specific facts showing there is a genuine issue for trial.” CR 56(e). In accordance with the rule, Plaintiff Aust was required to present evidence to show or support his theory of negligence in response to Defendant Anderson’s Summary Judgment Motion, rather than wait to present such evidence at a later scheduled trial. In effect, Plaintiff’s obligation to present evidence of negligence at the time of the summary judgment

and binding precedent, which he fails to distinguish. Accordingly, this Court should award Defendant Anderson attorney fees and costs under RAP 18.1 and 18.9(a).

V. CONCLUSION

Based on the foregoing, Respondent Anderson respectfully requests that the Court sustain the trial court's Order Granting Defendant's Supplemental Motion for Summary Judgment.

Dated: October 26, 2006

Kevin J. Yamamoto
Kevin J. Yamamoto 26787
Attorney for Respondent

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COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

STEVE AUST, a married man,

Appellant,

vs.

TERRY CLARK ANDERSON, a
married man,

Respondent.

No. 35068-8-II

DECLARATION OF SERVICE

I HEREBY CERTIFY that I personally served a true and correct copy of the Brief of Respondent on Steve Aust and his attorney, Michael Golden, by leaving a copy of the Brief at Michael Golden's office with his clerk or other person in charge thereof.

Michael Golden
Lewis County Prosecuting Attorney
360 NW North Street
Chehalis, WA 98532

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Chehalis, Washington this 26th day of October, 2006.



Jennifer D. Williams

ORIGINAL