

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

HARRY WILLIAMS,

Appellant,

v.

DUSTON ANDERSON AND JANE DOE ANDERSON, individually and
the marital community thereof; T.E. WALRATH TRUCKING, INC., a
Washington State Corporation; KEISHA McDEW and JOHN DOE
McDEW and the marital community composed thereof,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OR OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Garold E. Johnson

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This case involves a multi-vehicle freeway accident in which heavy traffic caused a series of cars to rapidly decelerate leading to multiple vehicle collisions in which Appellant Harry Williams was rear-ended with great force.

Two drivers involved in the accident were named as defendants in this suit. Both moved for summary judgment, and both motions were granted by the trial court. Respondent Keisha McDew, admitted to rear-ending another vehicle and offered a declaration from that vehicle's driver corroborating her story. Appellant's counsel, having reviewed the court record and not having been counsel in the trial court, does not seek to overturn the order dismissing Mr. Williams' case against Ms. McDew.

The other defendant, Duston Anderson, denied hitting Mr. Williams from behind but offered no testimony but his own to corroborate his story. Mr. Williams' counsel entirely failed to respond to the McDew motion and he did not appear for the hearing. However, Mr. Williams' counsel did file an untimely response to the Anderson motion and appear at that hearing. Mr. Williams' response contained declarations from two disinterested witnesses stating that Duston Anderson rear-ended Mr. Williams. Although the trial court reviewed the declarations and ruled

them admissable, it refused to consider either the declarations or the Response because they were filed late.

This Court should overturn the order dismissing Mr. Williams' claims against Respondents Anderson and T.E. Walrath Trucking, Inc. and give Mr. Williams his day in court.

II. ASSIGNMENT OF ERROR

- A. The Superior Court of Pierce County, State of Washington, erred in granting defendant's motion to strike the declarations of Appellant's witnesses which had been offered in opposition to Respondants Anderson and T.E. Walrath Trucking Inc.'s motion for summary judgment.
- B. The Superior Court of Pierce County, State of Washington, further erred in granting defendant's motion to strike Appellant's responsive memorandum in opposition to Respondents Anderson and T.E. Walrath Trucking Inc.'s motion for summary judgment.
- C. The Superior Court of Pierce County, State of Washington, likewise erred in granting Respondents Anderson and T.E. Walrath Trucking Inc.'s motion for summary judgment motion for summary judgment.
- D. In turn, the Superior Court of Pierce County, State of Washington, erred in entering its "order" on defendants Anderson and T.E. Walrath Trucking Inc.'s motion for summary judgment.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. Whether the superior court failed to properly follow the legal requirements mandated under Rule 56 the Washington Civil Rules for Superior Court (CR) when granting Respondents' motion for summary judgment and dismissing the Appellant's complaint for damages?

B. Whether the superior court also abused its discretion when striking Appellant's responsive motion and memorandum, and witness declarations and exhibits attached thereto, in opposition to summary judgment?

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

On March 14, 2008, Harry Williams (Williams) was traveling southbound on Interstate 5 within the Tacoma city limits. CP 1-2. It was raining heavily and the roadway was slick. CP 63; CP 72. A multiple car accident involving a semi-truck caused a number of vehicles to abruptly slow ahead of Williams. CP 28. As he approached the oncoming traffic, he noticed an SUV ahead of him and began to slow down to avoid hitting it. CP 62. As Williams decelerated, another vehicle struck him from behind with great force causing him to “blackout.” CP 20. The rear of Williams’ car was crushed by the impact. CP 13. When Williams regained consciousness, he was spinning out of control and the first image he saw was a semi truck driven by Duston Anderson within the course and scope of his employment at T.E. Walrath Trucking, Inc (collectively referred to as Anderson). CP 62; CP 2. After the initial impact, Williams’ vehicle may have been struck and dragged by Anderson’s semi truck. CP 2; CP 74. Anderson’s semi truck’s then struck another vehicle. CP 25. As a result of the multiple impacts, Williams suffered severe injuries. CP 2-3.

B. PROCEDURAL FACTS

On March 10, 2010, Williams filed a Complaint for Personal Injuries and Damages against defendants Duston Anderson and his employer, T.E.

Walrath Trucking, Inc. CP 1. The Complaint alleged Anderson was employed by T.E. Walrath Trucking, Inc., and Anderson's negligent act was committed within the scope and course of that employment.

On November 1, 2010, Williams filed his First Amended Complaint For Personal Injuries and Damages. CP 4. The amended complaint named Keisha McDew (McDew) as a third defendant and alleged she was responsible for rear-ending Mr. Williams' vehicle and propelling him into the lane on his right where he struck and dragged by Anderson. CP 5:8-14.

On May 25, 2011, McDew moved for summary judgment. CP 7. The motion's supporting documents included a declaration of McDew stating that she was involved in the accident, that she rear ended a vehicle driven by Eric Reed, and in turn, her vehicle was struck on its side by an unknown vehicle. CP 31. Eric Reed also filed a declaration stating he was involved in the accident and his vehicle was rear-ended by McDew. Williams' attorney filed no response to McDew's motion. 1RP 2.¹

On June 24, 2011, Anderson moved for summary judgment, arguing Williams could not a make prima facie case of negligence against him

¹ This brief refers to two volumes of verbatim report of proceedings as follows: 1RP-July 15, 2011 (Hearing for Respondent McDew's summary judgment motion); and 2RP- July 22, 2011(Hearing for Respondent Anderson's summary judgment motion).

because Williams could not show that Anderson rear-ended his vehicle.²

CP 32. Anderson asserted the following facts were uncontested: 1) Williams and Anderson were operating vehicles in lanes adjacent to each other prior to the accident, 2) Williams' was rear-ended by a third party, 3) the collision propelled Williams' vehicle into the side of Anderson's tractor trailer, and 4) Anderson did not make an improper lane change, follow too closely, or breach any other rule of the road. CP 34-35.

Williams' attorney failed to attend the July 15, 2011, summary judgment hearing for McDew's motion. 1RP 2. The trial court granted the motion, ruling that without a response from Williams, there was no material issue of fact sufficient to preclude summary judgment and that McDew was entitled to judgment as a matter of law. 1RP 2.

On July 20, 2011, two days prior to the hearing, Williams' attorney filed Plaintiff's Response To Motion For Summary Judgment By Defendants Anderson And T.E. Walraith." CP 95.

Included in the Response was the Declaration of Shaun Collins, which adopted the tape-recorded statement he provided his insurance adjuster about the accident and a handwritten statement he made to the police at

² It is noteworthy that Anderson made reference to the Washington State Patrol Accident report at his October 27, 2010, deposition, nearly 8 months before moving for summary judgment. CP 25. An excerpt from this report was attached to Williams' response and contains Collin's statement that Anderson rear-ended Williams car. CP 100-01.

the scene of the accident. CP 82. In the declaration, Collins stated he witnessed Anderson's semi truck rear end Williams' car, lifting the end off the ground and swinging the vehicle into the third lane. CP 96. Collins also stated that the semi truck pushed Williams' car into the side of a red car. *Id.*

The Declaration of Paul Richmond was also included in the Response. CP 98. Richmond also stated he witnessed Anderson's semi truck collide with several cars and then come to a sudden stop. CP 99. He further stated Williams' car was one of the vehicles struck by Anderson and he saw the underside of Williams' car, indicating that the rear end was lifted up when Anderson struck the vehicle in the rear. CP 99.

After Williams responded to Anderson's summary judgment motion, Anderson replied, moving the court to strike the Collins and Richmond declarations and Response, arguing: 1) the Collins and Richmond statements were inadmissible hearsay and not properly authenticated, 2) the statements contradicted Williams' testimony thus he should be estopped from presenting them, and 3) they were filed untimely. CP 102.

At the July 22, 2011, Anderson summary judgment hearing, the court rejected the hearsay and authentication arguments. 2RP 2-3. Similarly, the court rejected Anderson's judicial estoppel argument stating that the

inconsistencies in witness testimony were questions of fact for the jury.

2RP 4.

The court then ruled it would not consider Williams' responsive documents because they were filed 2 days prior to the hearing, violating the filing requirements of CR 56(c). 2RP 9. The court stated: "I just can't accept documents that are that late. It's just too late... I'm simply not going to consider it. Therefore, the summary judgment will be granted." *Id.* The court then entered its order granting summary judgment and dismissing the case against Anderson and T.E. Walrath Trucking, Inc. with prejudice. CP 113-14.

Harry Anderson appeals from the trial court's ruling granting summary judgment and dismissing his claim against Anderson and T.E. Walrath Trucking, Inc.

IV. ARGUMENT AND AUTHORITY

A. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE MATERIAL ISSUES OF FACT EXISTED.

The essential elements of a negligence action are (1) the existence of a duty to plaintiff; (2) breach of that duty; (3) resulting injury; and (4) proximate cause between the breach and the injury. *Hutchins v. 1001 Fourth Ave. Associates*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991), *citing*

Christen v. Lee, 113 Wn.2d 479, 780 P.2d 1307 (1989); *Pedroza v. Bryant*, 101 Wn.2d 226, 677 P.2d 166 (1984).

Standard of Review for Summary Judgment

An appellate court reviews summary judgment de novo and engages in the same inquiry as the trial court. *Heath v. Uraga*, 106 Wn.App. 506, 512, 24 P.3d 413 (2001). Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the burden of proving there are no genuine issues of material fact. CR 56(c); *Smith v. Preston Gates Ellis, LLP*, 135 Wn.App. 859, 863, 147 P.3d 600 (2006). In ruling on motion for summary judgment, court must consider all evidence and all reasonable inferences therefrom most favorable to nonmoving party, and if there is genuine issue as to any material fact, summary judgment cannot be granted. *Maki v. Aluminum Bldg. Products*, 73 Wn.2d 23, 26, 436 P.2d 186 (1968). Even where the evidentiary facts are undisputed, if reasonable minds could draw different conclusions from those facts, then summary judgment is not proper. Summary judgment is not well suited to actions where the central issues of fact focus on the negligence of a party or the reasonableness of

his or her actions. *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975).

Standard of Review for a motion to strike made in conjunction with a motion for summary judgment.

A court's ruling on a motion to strike is reviewed for an abuse of discretion. However, when a motion to strike is made in conjunction with a motion for summary judgment, an appellate court reviews de novo. *Southwick v. Seattle Police Officer John Doe No. 1*, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008). An appellate court would not be properly accomplishing its charge if the appellate court did not examine *all* the evidence presented to the trial court, including evidence that had been redacted. The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)(citing *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979)). The standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court. *Id.* (citing *Mountain Park Homeowners Ass'n*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994)).

1. Williams' stricken declarations establish material issues of fact and should be considered by this Court.

This Court should examine all the evidence presented to the trial court, including the content of Collins and Richmond declarations, when it evaluates the existence of material issues of fact and the appropriateness of the trial court granting summary judgment.

The contents of the Collins and Richmond declarations and exhibits establish that Anderson's semi truck was the vehicle responsible for the first impact to the rear-end of Williams car. This was **the** central fact Anderson claimed was uncontested in his motion for summary judgment. If the trial court had considered the statements, it could not have granted summary judgment.

Shaun Collins stated the following:

I watched the black car hit the SUV which moved him forward and actually missed me and I was like oh I better, you know, get over to this Gore Point and uh, as I'm watching it, and uh, I see the C- another car hit the black car and I want to say it was Harry's car the silver one hit that car **and then the semi hit him which brought up the, the rear end of the vehicle and swung him into the red car.**

CP 87 (emphasis added).

Collins further stated:

A: And then uh, **yeah so the, the semi rear ended** Harry's car and uh, ya know the rear end of that came up

and it moved so the uh, the rear end of Harry's car swung to the right into the third lane.

Q: Okay.

A: And that hit a red car that was slowing down. I, it mighta hit somebody in front. I couldn't tell but I saw it hit that red car on the side.

Q: Harry's car hit the red car on the side?

A: Yeah. The rear end of Harry's car struck the side of the red car.

Q: Okay.

A: From the semi pushing it yeah.

CP 89 (emphasis added).

Q: okay and how did Harry and the semi get tangled up? Did, I mean after the impact did Harry's car move? Did the semi truck move?

A: Oh yeah, the semi truck hit Harry's car.

CP 88.

Paul Richmond also witnessed the accident and gave the following statement:

I was following a semi tractor trailer when it collided with several cars and then came to a sudden stop. One of the cars it collided with was a gray car. The driver of the gray car got out and lay on the pavement. I later learned that the driver of the gray car was identified as Harry Williams.

I remember seeing the underside of the Harry Williams car, which means that the rear end of his car must have come up in the collision.

CP 99.

The Collins and Richmond declarations clearly raise issues of material fact regarding whether Anderson rear-ended Williams' vehicle.

Because this Court can and should consider the Collins and Richmond declarations, it must find issues of material fact are present and reverse the trial court's ruling granting summary judgment.

2. The record contains material issues of fact even if the Collins and Richmond declarations are not considered.

CR 56(e) provides that, when the adverse party does not properly respond to a motion for summary judgment, “summary judgment, *if appropriate*, shall be entered against him” (Italics ours.). CR 56(e). Even if the adverse party fails to contest the motion the court still must determine if the grant of summary judgment is legally “appropriate” before entering an order. *Gerrard v. Craig*, 67 Wn.App 394, 399, 836 P.2d 837 (1992) (over returned on other grounds).

Even if this Court were not to consider the Collins and Richmond declarations, close examination of Anderson's summary judgment motion and the court file clearly show the existence of material issues of fact and under CR 56(e), Williams was not required to submit a response to avoid summary judgment.

As previously addressed, Anderson asserted the following facts were uncontested: 1) Williams and Anderson were operating vehicles in lanes adjacent to each other prior to the accident, 2) Williams was rear-ended by an unknown third party, 3) that collision propelled Williams'

vehicle into the side of Anderson's tractor trailer, 4) Anderson did not make an improper lane change, follow too closely, or breach any other rule of the road. CP 34-35. The record shows clear issues of material fact with each of these assertions.

- a. Williams' testimony is used out of context to assert his vehicle was in a lane adjacent to Anderson prior to the accident.

Williams' testimony was taken out of temporal context to show that his and Anderson's vehicles were traveling in adjacent lanes prior to the accident, and establish that Anderson could not have rear-ended him. Anderson misuses Williams statements. When read in context, Williams was describing the location of his and Anderson's vehicles after the collision occurred and all vehicles had come to a "complete stop." Thus, his testimony does not establish the vehicles were in adjacent lanes prior to the accident and preclude Anderson from being the driver responsible for the initial collision to the rear of his car.

Williams stated the following:

Q: All right. When you saw the 18 wheeler, do you recall what lane of traffic it was in.

A: I was lucky to be coherent. When I opened my eyes, when I saw the 18 wheeler, it was so traumatic for me, **I was just thinking get out of my car. Get out of your car. I wasn't too concerned on what was going on because I saw my life flash right in front of me, and I was not concerned about anything else**

except for when that car came to a complete stop was to get out of it.

Q: So is that a no then, you don't know what lane the 18 wheeler was in?

A: Yeah. Oh yeah, he was in the third lane. Third lane, the lane on the right of me.

Q: Okay. And how many lanes of traffic were there total?

A: Five.

Q: So if he was in the third lane, and you were to the left of him

A: Uh-huh.

Q: Would you say that you were in the fourth lane, is that fair?

A: Yes.

CP 67:6-25 (emphasis added).

In this testimony, Williams is describing the location of the 18-wheeler after the accident. In his response, he first discusses his state of mind immediately following the accident and after the vehicles had come to a "complete stop." He then proceeds to describe the locations of those vehicles. Clearly, he would not have been thinking to himself "get out of your car" before the accident occurred. Williams' statement does not establish the vehicles' locations were in adjacent lanes prior to the accident, thus a material issue of fact exists.

b. Anderson failed to establish he did not rear-end Williams.

Similarly, Anderson mischaracterized Williams' testimony to establish it was uncontested that Anderson did not rear end Williams. There is nothing in Williams' testimony that precludes Anderson's semi

truck from being the vehicle that first struck Williams. In fact, Williams testimony supports Anderson being responsible for that collision. The first thing that Williams saw after being struck from behind and spun around was Anderson's semi truck, which is consistent with Anderson rear-ending Williams.

“[a]nd when I was in the process of slowing down I felt something strike me from the rear. It was very horrific, and it was very loud. And I tried to keep my hands on the steering wheel as firmly as possible. And after I was struck from the rear, I blacked out.

When I came back—when I regained my consciousness I was being “spinned” out of control. And **the first image I recall was an 18 wheeler truck**, and I saw my whole life flash in front of me.

CP 20; CP 62 (emphasis added).

Williams further described the impact stating:

Yeah, I can remember seeing the 18 wheeler when I opened my eyes. And that was very loud and sounded like a crate had been dropped from the sky. And when I was spinning around, I was looking at the 18 wheeler.

CP 22.

Moreover, Williams own testimony about what he heard during the accident can be construed as evidence he was rear-ended by Anderson. Williams describes two occurrences of sounds that “sounded like a crate had been dropped from the sky.” The

first occurrence happened when he was rear-ended. Williams associated the second occurrence of the sound with the semi truck driven by Anderson, describing it as follows:

BALDWIN: I'm going to follow up on that because I'm not sure when you heard the sound in relationship to everything that was happening to you. So the sound that sounded like a crate that's been dropped from the sky, was that during the first contact, after the first contact, while you were spinning, or some other time?

THE WITNESS: It was like twice. The initial strike from the rear, I heard that crash into me from the rear. And then I blacked out after I was struck from the rear. And then when I opened my eyes, it was like a real loud sound from the 18-wheeler. It was like I was spinning around, and I can hear this real loud sound like the car was being crushed.

CP 66.

Williams testimony must be viewed in the light most favorable to him, therefore, based on his testimony, there is a question of material fact as to whether Anderson rear-ended Williams.

Further, it does not follow that because Williams did not see who struck him from behind, that he cannot offer evidence demonstrating Anderson was responsible for the collision. The court did not consider any of Williams' responsive pleadings because they were untimely filed. As fact witnesses disclosed prior to any disclosure deadline, there was nothing preventing Colins or Richmond from testifying at trial.

It is also noteworthy that the trial court summarily disregarded Anderson's argument that photographs of his truck's bumper showed no physical damage indicating a rear-end collision. 2RP 6-7.

Because Anderson failed to establish that no material fact exists as to whether Anderson rear-ended Williams' vehicle, summary judgment was improper.

- c. Anderson failed to establish an unknown third-party rear-ended Williams and propelled his vehicle into Anderson's trailer.

The fact that Williams cannot identify who struck his vehicle from the rear does not preclude it from being Anderson's vehicle. It is uncontested that Williams' car was struck from behind with great force. However, there is no support in the record that a vehicle collided with Williams and left the scene. Unlike McDew, Anderson has no corroborating witness supporting his version of the events.

Further, it is a reasonable explanation that Anderson first rear-ended Williams with his cab and then struck him a second time with his trailer. As previously addressed, Williams repeatedly testified that the first vehicle he remembered seeing while still in a spin was Anderson's truck and that the sound of the initial impact was the same as the sound of the second impact, which Williams did associate with Anderson's truck.

Lastly, although Anderson asserts that a third-party vehicle rear-ended Williams and propelled him into the trailer, Anderson did not witness this and presents no evidence supporting such a claim. CP 77. The existence of an unknown third-party vehicle is pure conjecture.

When the evidence is viewed in the light most favorable to Williams, there remains a question of material fact as to whether he was first struck by Anderson's cab and the existence of a third party vehicle responsible for rearending Williams and propelling him into Anderson's trailer is pure conjecture.

- d. Anderson's testimony must be heard by jury because he is an interested party.

“That a witness is interested in result of suit is sufficient to require the credibility of his testimony to be submitted to jury as a question of fact. *Sartor v. Arkansas Natural Gas Corp.*, 64 S.Ct. 724, 729, 321 U.S. 620, 64 S.Ct. 724 U.S. (1944). It is a question for the jury whether the testimony of a party or person interested is to be believed. *Scott v. Wilmeroth Service & Cold Storage Co.*, 292 P. 99 (1930).

Williams' testimony does not support Anderson's assertion that he and Williams were in adjacent lanes prior to the accident, that he did not rear-end Williams, that Williams was rear-ended by an unknown third party, or that the impact propelled his car into Anderson.

Further, the only testimony supporting the assertions that Anderson made no improper lane change, did not follow too closely, and broke no other rules of the road came from Anderson himself. The credibility of Anderson's testimony must be submitted to jury because he has an interest in the outcome of this suit.

Anderson's credibility should also be submitted to a jury because it contains inconsistencies. For instance, although Anderson has characterized the accident as Williams' vehicle striking his, he also testified that he was responsible for striking Williams' vehicle, stating "I hit it with the front axle of my trailer." CP 74. In addition, he claims there is no evidence that he violated any rule of the road yet he contradicts this assertion by acknowledging he rear-ended another car in the accident. CP 25.

CR 56(c) only allows summary judgment where it is "appropriate" even when no responsive documents have been filed or considered by the court. It was wholly inappropriate to grant summary judgment in this case where so many material issues of fact existed.

**B. THE TRIAL COURT ABUSED ITS DISCRETION BY
STRIKING WILLIAMS RESPONSIVE PLEADINGS**

CR 56(c) sets the filing requirements for summary judgment motions and provides as follows:

The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing.

The trial court has discretion regarding the acceptance of an untimely filed affidavit in connection with motion or summary judgment. *Security State Bank v. Burk*, 100 Wn.App. 94, 103, 995 P.2d 1272 (2000). Plaintiff's untimely filing of affidavit in opposition to defendant's motion for summary judgment did not provide basis for affirmance of grant of summary judgment, which was substantively incorrect, where no showing was made that trial court abused its discretion in accepting untimely affidavit, and no prejudice to defendant resulted, since it prevailed in trial court. *Id.* at 995. Failure of the trial court to grant a lengthy continuance upon the filing of an untimely affidavit before ruling on a motion for summary judgment is not an abuse of discretion when adequate steps are available to an opposing party to counter such an affidavit. *Jewett-Gorrie Ins. Agency, Inc. v. Visser*, 12 Wn.App. 707, 714, 531 P.2d 817 (1975).

Although it is within the trial court's discretion under CR 56 to reject untimely filed documents, it was an abuse of discretion to strike Williams' response because: 1) the trial court raised its own issues of material fact, 2) the substance of the documents established undeniable issues of material fact that would preclude summary judgment, 3) the trial court determined that the Collins and Richmond declarations were admissible, 4) the court's consideration of the documents would have created no prejudice because Anderson had been in possession of the statements long before Williams' response was filed, and 5) lesser sanctions were available to the court, including a continuance and monetary sanctions against Williams' counsel.

1. The Trial Court Raised Issues Of Material Fact Prior To Granting Summary Judgment.

a. The Trial Court Described Anderson's Evidence For Summary Judgment as "Borderline."

During the hearing the trial court raised its own issues of fact about Anderson's assertions. Prior to making its ruling, the court acknowledged that without the documents Anderson filed with his motion for summary judgment, he "wouldn't be entitled to judgment as a matter of law." 2CP 9. The court further stated, "[t]here are material issues of fact without those documents. They're borderline even with them, frankly." 2CP 9.

Thus the trial court acknowledged Anderson's arguments were weak and should have denied summary judgment.

b. The Trial Court Raised Issues Of Fact With Anderson's Photographic Evidence.

The trial court rejected Anderson's photographs of Anderson's semi truck's front bumper as proof that Anderson did not rear-end Williams, and in doing so, it raised its own issue of material fact. Stating the following:

I did look at that, and I was concerned about that. You've got a bump the size of about 12 inches wide, and it's chrome. It's just very difficult. I don't think it would be proper for me to pretend to be able to look at that picture and decide whether or not something happened. That bumper is awful thick, and it's a photograph, even I don't know whether from the impact or not.

2RP 6-7.

Presumably, prior to making this statement, the court had viewed the photo of Williams' mangled vehicle taken after the accident that was contained in the record. CP 13. The trial court, when considering all the photographic evidence before it, pointed out damage to Anderson's bumper and stated that he could not determine if it was caused by the accident, thus raising an issue of fact and demonstrating its awareness that the case was inappropriate for summary judgment.

c. The Trial Court Described Williams' Recollection Of The Accident As "Not Entirely 100 Percent."

During the hearing, the trial court recognized that Williams' recollection of the accident was not entirely clear, describing it as "not entirely 100 percent. 2RP 4.

The Court went on to state:

Other witnesses saw it differently, apparently. And seems to me at that point you have a question of fact for a jury, those inconsistencies. Even though it's the plaintiff who remembers something one way doesn't mean that's the way it happened. He's just a witness when it comes to trial like any other witness.

2RP 4.

If this was the court's view, as to the weight Williams' testimony should receive, it was improper to conclude that his testimony corroborated Anderson's assertions and grant summary judgment. Further, the court clearly states that there is a question of fact for the jury, yet granted summary anyway.

2. The stricken declarations of Collins and Richmond would have barred summary judgment.

As previously discussed at length, the contents of the Collins and Richmond declarations and exhibits establish that Anderson's semi truck was the vehicle responsible for the first impact to the rear-end Williams car prior to it being struck a second time by Anderson's trailer. If the court

had considered the statements, it could not have granted summary judgment.

At the onset of the July 22, 2011 hearing, the court stated it had read the entire case file “very carefully.” 2RP 2. The court also made it clear that it was not considering the responsive pleadings solely because they were filed late, stating: “I just can't accept documents that are that late. It's just too late... I'm simply not going to consider it. Therefore, the summary judgment will be granted.” 2RP 9. The court rested its decision granting summary judgment entirely on its decision to strike the untimely-filed documents, with full knowledge Williams had compelling evidence establishing Anderson caused both collisions injuring Williams. Thus, the court imposed the ultimate sanction, preventing Williams’ case against Anderson from being tried on its merits with full knowledge serious issues of material fact existed.

The court’s ruling is also in conflict with CR 1, which “promotes a policy to decide cases on their merits. Indeed, ‘[m]odern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties.’” *Sheldon v. Fettig*, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996)(citing *Carle v. Earth Stove, Inc.*, 35 Wn. App. 904, 670 P.2d 1086 (1983)).

3. The trial court determined the Collins and Richmond statements were admissible.

During the hearing, the court discussed the admissibility and authentication of Collins' and Richmond's statements, finding them admissible. 2RP3.³ Thus the court was aware admissible evidence of Anderson's fault existed that would bar summary judgment, and not only chose to strike it, but used the decision to strike as a means to pave the way for granting summary judgment and dismissing the case against Anderson.

4. The trial court was aware that Anderson had long been in possession of the Collins and Richmond declarations and would suffer no prejudice if the declarations were considered.

At the time it made its ruling, the court was aware Anderson possessed the Collins and Richmond statements long before Williams filed his response, and the only new documents were the declarations authenticating and adopting their previous statements. 2RP 8.

Thus the court was aware Anderson would suffer no last minute surprise or other prejudice if the court had considered the declarations. In contrast, Williams suffered great prejudice by the documents being stricken.

³ There is no reason Collins or Richmond's testimony could be stricken at trial as both were fact witnesses and Disclosure of Plaintiff's Primary Witnesses deadline was August 30, 2010, more than a month after the Anderson summary judgment hearing.

5. The trial court failed to consider any lesser sanction.

The trial court made it clear that it was sanctioning Williams' counsel for violating a Court Rule. 2RP 9. Striking the responsive filings and granting summary judgment was the ultimate sanction. Because CR 56(c) gives little guidance to the court as to how to exercise its discretion in accepting or rejecting untimely filings, it is appropriate to look to CR 37 case law for guidance in determining abuse of discretion, as it governs discovery sanctions.

A review of sanctions for noncompliance with a discovery order is governed by the abuse of discretion standard. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002). When a trial court imposes dismissal or default in a proceeding as a sanction for violation of a discovery order, it must be apparent from the record that: (1) the party's refusal to obey the discovery order was willful or deliberate; (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial; and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed. *Id.* at 686. Before resorting to the sanction of dismissal, the trial court must clearly indicate on the record that it has considered less harsh discovery sanctions, and its failure to do so constitutes an abuse of discretion. CR 37(b). *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 590, 220 P.3d 191 (2009).

Under the *Rivers* test, the trial court's decision to strike Williams' response and grant summary judgment would be an abuse of discretion. Arguably, Williams' late filings could be construed as willful or deliberate, thus satisfying the first prong of the test. However, the record does not make apparent any substantial prejudice to Anderson. In fact, the opposite is the case as Anderson was in possession of the statements Williams relied on in his response, thus he would have suffered no prejudice. The record makes it absolutely clear that the court completely failed to address any lesser sanction.

However, the court had numerous lesser sanctions available to punish Williams or his attorney for the untimely filing other than striking the response and granting summary judgment. The most obvious lesser sanction would be ordering the hearing continued and imposing monetary sanctions for wasting the court and opposing counsel's time and resources.

Because the substance of the Collins and Richmond statements were admissible and precluded summary judgment if admitted, the court was aware that striking of the documents would result in dismissal, Anderson would have suffered no prejudice if statements were considered, and lesser sanctions were available to the court, the court abused its discretion by striking the statements and granting summary judgment.

V. CONCLUSION

For the foregoing reasons, Mr. Williams respectfully requests this Court reverse the trial court's order granting summary judgment and remand for trial.

Respectfully submitted this 24th day of February, 2012.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

Harry Williams,)	
)	
Appellant,)	Cause No. 42473-8-II
)	
v.)	CERTIFICATE OF SERVICE
)	
Duston Anderson and Jane Doe)	
Anderson, individually and the marital)	
community composed thereof; T.E.)	
Walrath Trucking, Inc., a Washington)	
State Corporation; Keisha McDew and)	
John Doe McDew and the marital)	
community composed thereof,)	
)	
_____ Respondents.)	

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2012, I served true and correct copies of Appellant's Opening Brief by Email and US Mail on the following parties:

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