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STATE OF WASHINGTON
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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 REPLY BRIEF

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I. ARGUMENT IN REPLY

A. STRIKING THE OPPOSITION AND GRANTING SUMMARY JUDGMENT WAS IMPROPER

1. The Proper Standard Of Review For A Motion To Strike Made In Conjunction With A Motion For Summary Judgment Is De Novo.

Contrary to the assertion made in the Brief of Respondents (Resp. Brief) at page 15, de novo is the proper standard for this Court to review a motion to strike when made in conjunction with a motion for summary judgment. *See Appellant's Opening Brief* (App. Brief) at 11; *see also Southwick v. Seattle Police Officer John Doe No. 1*, 145 Wn.App. 292, 297, 186 P.3d 1089 (2008). Although Anderson claims Williams agrees that an abuse of discretion review is proper, this is simply a misrepresentation of William's position. *Resp. Brief* at 15-16. Anderson cites to Williams' argument, made in the alternative, that even if this court reviews for an abuse of discretion, the trial court's ruling should be reversed. *Id.* It is William's position that *Southwick* controls and arguments addressing an abuse of discretion standard are made solely in the event the Court disagrees and reviews the motion to strike for an abuse of discretion.

Further, William's counsel has reviewed the cases cited by Anderson to support his position that motions to strike made in conjunction with

motions for summary judgment are reviewed for an abuse of discretion. These cases either predate or cite to cases predating the 1998 ruling in *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998), or they do not involve motions to strike in conjunction with motions for summary judgment. Thus, we would request the Court adopt the de novo standard of review as set forth in Appellant's Opening Brief. App. Brief at 11.

2. Even Though Williams's Opposition Was Untimely Filed, Summary Judgment Was Improper.

At issue in this case is whether a single late filing warranted striking the Collins and Richmond declarations and granting summary judgment, where the declarations and court record clearly established the existence of material issues of fact. It is uncontested that trial counsel for Williams failed to file Plaintiff's Response To Motion For Summary Judgment (Opposition) 11 days prior to the hearing as required under CR 56(c). However, striking the responsive pleadings and granting summary judgment where at least two witnesses observed Anderson rear-end Williams was clear error under either a de novo or abuse of discretion standard.

Anderson's Cases are Inopposite to the Facts in this Matter.¹

¹ Another case not cited by Williams but worth citing and distinguishing in candor to this Court is *Lane v. Brown & Haley, Inc.*, 81 Wn.App. 102 (Div. 2 1996), where the court reversed, as an abuse of discretion, a trial court's vacation of its prior summary judgment of dismissal of plaintiff's claim with prejudice on the ground that new counsel produced

To support his contention that striking the Opposition was required under CR 56(c), Anderson relies heavily on *Idahosa v. King County*, 113 Wn.App 930, 55P.3d 657 (2002). This reliance is misplaced because that decision was made pursuant to local Pierce County Court Rule (PCLR) 56 which is no longer in effect, and the facts in *Idahosa* are easily distinguishable from the case at hand. Moreover, *Idahosa* relies on pre-*Folsom* authority to justify applying an abuse of discretion standard while reviewing a motion to strike made in conjunction with the motion for summary judgment. *Id.* at 937 (citing *King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994); *Analytical Methods, Inc. v. Dep't of Revenue*, 84 Wn.App. 236, 244, 928 P.2d 1123 (1996)).

At the time the *Idahosa* court granted summary judgment, PCLR 56(c)(4) was in effect and required the court to make a discretionary ruling before it could even consider an untimely response. 113 Wn.App. at 936. Thus there was a presumption under the Rule that any late response was to be stricken. However, PCLR 56 has since been eliminated, and CR 56,

five witness affidavits raising a question of fact as to Brown & Haley's knowledge of the defect. "We hold that attorney negligence does not provide grounds for vacation of the [summary] judgment." There the trial court set aside the summary judgment it had granted under CR 60 (2 subparts), so the exercise of discretion had to be considered in light of certain factors listed in the rule. The facts for setting aside were quite compelling, but the court found they did not fulfill any subpart of the rule. In our case the alleged abuse of discretion may arise out of any factor, not just those specified in CR 60.

which has no similar discretionary ruling requirement, now governs summary judgment in Pierce County. Consequently, *Idahosa* is irrelevant to this Court's standard of review.

Moreover, unlike this case, the appellant in *Idahosa* showed a clear and pervasive pattern of ignoring the court rules, the court scheduling order, and the stipulations of the parties. The Appellant in *Idahosa* filed an untimely response two days prior to the hearing even after the parties had stipulated to extending the response deadline to four days before to the hearing. *Id.* at 936. Far more egregious than the late filing was the fact the appellant filed seven other pleadings between the agreed due date of the summary judgment response and the hearing, indicating that the appellant had ample time to prepare pleadings, but chose to wait until less than 48 hours before the hearing to file a lengthy summary judgment response. *Id.* at 936. Moreover, this flagrant pattern of disregard for court rules took place after the appellant had been sanctioned for failing to comply with the court's order compelling discovery. *Id.* at 934.

The facts in this case are clearly distinguishable. Williams' trial counsel filed a single late pleading. There was absolutely no discussion by the trial court at the summary judgment hearing of William's trial counsel exhibiting a pattern of dilatory behavior. The single issue cited by

the trial court was the untimely filing. 2RP 9.² In fact, the only factual similarities in the cases were the untimely filed pleadings. Williams did not bombard Anderson with other pleadings prior to filing the Opposition, he did not file a lengthy opposition brief, he had not been previously sanctioned for discovery violations, and the filing of the Opposition was the only instance that William's trial counsel filed a late pleading.

Anderson's reliance on *Davies v. Holy Family Hospital* is also misplaced as the case is easily distinguishable. 144 Wn.App 483, 183 P.3d 283 (2008). *Davies* was a medical negligence case and therefore expert medical testimony was necessary to establish the standard of care and to prove causation. *Id.* at 500-01. In addition, the *Davies* court relied on *Idahosa* and its pre-*Folsom* authority for its application of an abuse of discretion standard to the motion to strike made in conjunction with the motion for summary judgment. 144 Wn.App at 499.

The *Davies* court stated that the most "significant" issue supporting the trial court's decision to strike was the fact the experts' declarations failed to set forth admissible facts and failed to show that they were competent to testify for the purposes of CR 56(e), rather than the untimely filing under CR 56. *Id.* Accordingly, the court properly struck

² This brief and Appellant's Opening brief refer 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).

the declarations as they contained inadmissible evidence. In this case, the trial court determined that the Collins and Richmond declarations were admissible. CP 2-3.

Because the vast majority of issues considered by the *Idahosa* and *Davies* courts were not present in this case, those cases employed the wrong standard of review, and the only factor considered by the trial court in this case was the untimely filing of the Opposition Brief, this Court should not analyze the facts of this case under *Idahosa* and *Davies*.

3. The Record Was Not Sufficiently Developed For This Court To Fairly Consider Whether Williams' Trial Attorney Properly Served The Opposition Brief.

This Court should reject Anderson's argument to affirm the trial court's decision to strike based on improper service. Anderson raised the issue of improper service of the Opposition under CR 5(b)(7) to the trial court as a footnote in his Summary Judgment Reply.³ CP 103.

However the argument was ignored by the trial court and therefore should not be considered for the first time on appeal.

³ Although Anderson addressed the issue of improper service of the Opposition brief to the trial court, he did not comply with the notice requirements laid out in CR 5 (d)(2). Anderson's Reply was filed June 21, 2011, the day before the June 22, 2012 summary judgment hearing thus the trial court could not have considered Anderson's motions for sanctions under CR 5 (d)(2) without first moving the court, in writing, to shorten the time for filing as required by PCLR 7(c)(2)(A). Clearly, William's trial counsel's lack of diligence created the need to shorten time, however, Anderson failed to follow the court rules governing his motion and this is likely why the trial court ignored the argument leaving the record insufficiently developed for this court to fairly consider the issue.

RAP 2.5 only allows a party to present an alternate ground for affirming a trial court if “the record has been sufficiently developed to fairly consider the ground.” RAP 2.5(a); *See also Sorrel v. Eagle Healthcare, Inc.*, 110 Wn.App. 290, 38 P.3d 1024 (2002) (where the trial court had no opportunity to address an issue on summary judgment, appellate court would decline to consider it on appeal of summary judgment). Mr. Williams never had an opportunity to respond to this argument because the argument was first raised the day before the hearing, and the trial court never addressed the issue at the hearing. CP 102. Consequently, the record was not sufficiently developed for this Court to fairly consider the argument.

Moreover, striking for improper facsimile service would have been an extreme sanction where Mr. Anderson suffered no prejudice and there were lesser available sanctions. Clearly Anderson received the Opposition as he filed a reply brief the following day. CP 102. In addition, Anderson had long been aware of the Collins’ and Richmond’s statements indicating Anderson was responsible for the initial rear-end collision with Williams’ car.⁴ Thus Anderson knew about the statements on June 24, 2011, when he filed his motion for summary judgment

⁴ At his October 27, 2010, deposition, Anderson possessed the Washington State Patrol Accident report containing Collin’s and Richmond statements. CP 25; CP 94; CP 100-01.

claiming it was “undisputed that plaintiff cannot produce any evidence that Anderson breached any duty and did not cause the collision.” CP 37.

Even if the court were to consider this as an alternate ground for upholding the trial courts decision to strike, affirming the trial court’s ruling to strike the Opposition on this basis, where CR 5 (d)(2) provides several lesser sanctions, is inappropriate.

B. THIS COURT MAY PROPERLY CONSIDER ALL ARGUMENTS RAISED IN APPELLANT’S OPENING BRIEF EVEN IF THIS COURT AFFIRMS THE DECISION TO STRIKE WILLIAMS’ OPPOSITION.

In general, issues not raised in the trial court may not be raised on appeal... [h]owever, by using the term “may,” RAP 2.5(a) is written in discretionary, rather than mandatory, terms. *Roberson v. Perez*, 156 Wn.2d 33, 40, 123 P.3d 844 (2005) (citing *State v. Ford*, 137 Wn.2d 472, 477, 484–85, 973 P.2d 452 (1999)). In addition to its discretionary nature, RAP 2.5(a) contains several express exceptions from its general prohibition against raising new issues on appeal, including the “failure to establish facts upon which relief can be granted.” This exception is fitting inasmuch as “[a]ppel is the first time sufficiency of evidence may realistically be raised.” *Id.* (citing *State v. Hickman*, 135 Wn.2d 97, 103, n.3, 954 P.2d 900 (1998)). We have consistently stated that a new issue can be raised on appeal “ ‘when the question raised affects the right to

maintain the action.’ ” *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990) (quoting *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 621, 465 P.2d 657 (1970)); *see also Jones v. Stebbins*, 122 Wn.2d 471, 479, 860 P.2d 1009 (1993).

Williams arguments are properly allowed on appeal pursuant to RAP 2.5(a), RAP 9.12, and relevant caselaw. Clearly, the primary focus of the Opening Brief was demonstrating Anderson’s failure to establish facts upon which relief can be granted. Specifically, the trial court record, with or without the Opposition, contained material issues of fact that barred summary judgment. These arguments go to the heart of the exception found in RAP 2.5(a)(2).

Further, the issues raised in the Opening Brief are properly considered by this court as they clearly affect the right to maintain this appeal of summary judgment. Lastly, because RAP 2.5(a) is a discretionary rule, this Court can and should exercise its discretion and address all argument contained in the Opening Brief.

C. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT

1. The Record Does Not Support Dismissal As A Matter Of Law.

Anderson 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). With or without the Collins and Richmond declarations, Anderson has completely failed to meet his burden thus, contrary to his assertion, there is no need for Williams to spell out his particular theory of liability to this Court as Anderson's burden has never shifted. *See* Resp. Brief at 27.

2. Anderson's Filed No Cross-Appeal and Assigned No Error To The Trial Court's Ruling Rejecting His Judicial Estoppel Argument.

Anderson's judicial estoppel argument is not properly before this Court because the trial court rejected it and Anderson neither filed a cross-appeal nor assigned error to the decision.

Anderson made the identical argument to the trial court in his Reply to the Opposition that Williams should be prohibited from asserting factual allegations contained in the Collins and Richmond declarations because they asserted facts contrary to his own Amended Complaint and deposition testimony. CP 105-08. At the summary judgment hearing, the trial court rejected this argument, stating the following:

The judicial estoppel issue, I looked at that as well. There are some problems with that theory I think, and that is because judicial estoppel requires to some extent, you know, submitting something to a Court, and the Court is thereby misled and takes a particular course of action. And later that same party comes back and says, just kidding. We want to take it to another Court. And that's what judicial estoppel is about, you know, truly inconsistencies in deposition.

I don't think the Court ever took any action based upon the deposition you're admitting, so I don't think that's a judicial estoppel matter.

2RP 3

Under the RAP 5.1 (d), a notice of cross appeal is essential if the respondent seeks affirmative relief as distinguished from urging additional grounds for affirmance. *In re Arbitration of Doyle*, 93 Wn.App. 120, 126, 966 P.2d 1279 (1998). Affirmative relief “normally mean[s] a change in the final result at trial.” 2A Karl B. Tegland, *Washington Practice: Rules Of Practice RAP 2.4* author's cmt. 3, at 174 (6th ed. 2004). While RAP 2.4(a) does not limit the scope of argument a respondent may make, it qualifies any relief sought by the respondent beyond affirmation of the lower court. *State v. Sims*, 171 Wn.2d 436, 442, 256 P.3d 285 (2011). When a respondent requests a partial reversal of the trial court's decision, he seeks affirmative relief. *In re Doyle*, 93 Wn.App. at 127.

Anderson seeks partial reversal of the trial court's decision rejecting the judicial estoppel argument, however he failed to file notice of a cross-review as required by RAP 5.1 (d) and 5.2(f), and failed to assign any error to the trial court's ruling in his Response. Because the trial court ruled on the issue, RAP 5.1 precludes Anderson from arguing the trial court erred by rejecting his judicial estoppel argument.

Finally, the judicial estoppel argument fails because Mr. Williams could have amended the complaint to conform with the facts. CR 15 provides “a party may amend the party’s pleading with leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” CR 15(a). The purpose of pleadings is to facilitate proper decision on the merits, and not to erect formal and burdensome impediments to litigation process, and rule providing for amendment was designed to facilitate amendment except where prejudice to opposing party would result. *Caruso v. Local Union No. 690 of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983). *See also Haselwood v. Bremerton Ice Arena, Inc.*, 155 P.3d 952 (2007).

It should be noted that Keisha McDew had yet to file her declaration admitting she rear-ended Scott Reed or Scott Reed’s corroborating declaration at the time that Williams filed his Amended Complaint. CP 31; CP 28. Moreover, counsel for Williams did not obtain the declarations of Shawn Collins or Paul Richmond, which formally adopted their previous statements indicating Anderson rear-ended Williams, until July 19, 2011. CP 82; CP 99. Given the proximity of these filings with the July 22, 2011 hearing it is understandable that Williams had yet to amend his complaint. Moreover, it would have been

premature to seek leave of the court to amend the complaint a second time prior to the McDew summary judgment hearing on July 15, 2011.

3. The Trial Court's Findings And Rationale Demonstrate Knowledge Of The Inappropriateness Of Summary Judgment And Are Relevant To Establishing The Trial Court Abused Its Discretion.

Anderson's argues the trial court's findings and rationale carry no weight on appeal because motions for summary judgment are reviewed de novo. *See* Resp. Brief at 32. Anderson seems to ignore the fact that Williams raised the findings and rationale under an abuse of discretion standard.

In his Opening Brief, Williams addressed the abuse of discretion standard in the event this Court did not follow *Folsom* in its review of the motion to strike. App. Brief at 23-25. It is highly relevant under an abuse of discretion standard that the trial court was aware the Collins and Richmond declarations barred summary judgment yet chose to strike them anyways. Of additional relevance, as addressed in the Opening Brief, is the fact the trial court raised issues of material facts independent of the stricken declarations and still chose to grant summary judgment.

Anderson's position can only be interpreted in two ways: either he is arguing for de novo review in response to Williams' arguments addressing an abuse of discretion standard, or he misrepresents Williams'

argument as being directed solely at “reversing summary judgment,” rather than the trial court’s decision to strike the Opposition. Resp. Brief at 32.

Although it is Williams’ position that the motion to strike should be reviewed de novo, if this court reviews the decision to strike for an abuse of discretion, it should take into consideration the fact that the trial court raised issues of fact.

4. If This Court Affirms The Ruling Striking the Opposition Brief, The Record Contains Sufficient Evidence To Reverse Summary Judgment.

In his Response, Anderson repeatedly presents arguments that are simply not supported by the record. Moreover, he cites facts also cited by Williams in his Opening Brief, but they reach substantially different conclusions indicating material issues of fact exist. For instance, he claims that a “review of the record leaves no doubt that another vehicle rear-ended Williams and propelled him into Anderson’s lane.” Resp. Brief at 33. However, he offers no evidence to support this claim, just the tenuous argument that Anderson was in a different lane. *Id.* This claim is not supported by the record and it is in direct conflict with the statements of Mr. Collins and Mr. Richmond. *See* App. Brief at 15-19.

Anderson also argues that Williams “repeatedly and unequivocally confirmed that he was driving in the lane to the left of Anderson’s semi-truck at the time of the accident. Resp. Brief at 33. However, at no point did Williams ever state that the semi-truck he saw prior to the accident was the same semi-truck driven by Anderson or indicate how far in advance of the accident he saw the semi-truck. It is highly unlikely that Anderson had the only semi-truck present that day on Interstate 5; in fact, the record contains reference to at least one other semi-truck at the scene. CP 28.

As previously addressed, Williams heard two instances of sounds similar to a crate having been dropped out of the sky. App. Brief at 19-18. The first was associated with the initial rear-end impact and the second was associated with Anderson’s semi-truck striking Williams, likely for the second time. *Id.* A reasonable trier of fact could easily conclude this circumstantial evidence demonstrates both impacts involved Anderson’s semi-truck. Although Anderson argues that expert testimony is needed to address this circumstantial evidence, he fails to cite any authority supporting the assertion or offer any reason why expert testimony would assist the trier of fact. Accordingly, the court should reject his argument.

Some of Anderson’s arguments are simply absurd. For instance, Anderson argues that this Court should not employ the plain meaning of

the phrase “rear-end” as used by Collins, but instead interpret that phrase as meaning “strike.” Resp. Brief at 39.

Anderson also attempts to distinguish *Sartor v. Arkansas Natural Gas Corp.*, 64 S.Ct. 724, 321 U.S. 620, 64 S.Ct. 724 U.S. (1944). He asserts *Sartor* is distinguishable because it addressed interested expert witnesses and the interested witness at issues in this case is a fact witness. Resp Brief at 37. However no argument is offered as to why an interested fact witness’ credibility differs from that of expert witness. Interestingly, the passage of *Sartor* quoted in the Response Brief does not use the term “expert” to qualify witness.⁵ Further, Anderson fails to cite any cases, of the myriad that have cited to *Sartor*, that hold *Sartor* only applies to expert witnesses. Consequently, this Court should reject his argument.

5. The Collins and Richmond Declarations Create Clear Issues of Material Fact Barring Summary Judgment.

Both Collins and Richmond provided clear statements implicating Anderson as the driver responsible for the initial impact to Williams’ vehicle and consequently, responsible for the injuries Williams sustained in that collision.

Mr. Collins’ declaration contained the following statements:

⁵ “That a witness is interested in result of suit is sufficient to require the credibility of his testimony be submitted to the jury as a question of fact.” Resp. Brief at 37 quoting 64 S.Ct. at 628.

“[T]he semi hit him (Williams) which brought up the, the rear end of the vehicle and swung him into the red car” CP 87. “[Y]eah 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.” CP 89. “Oh yeah, the semi truck hit Harry’s car” CP 88. “I watched that car’s (Williams) back end come up about five feet into the air as it was hit by the semi-truck.” *Id.* at 94.

Similarly, Mr. Richmond’s declaration contained statements that implicated Anderson as the driver responsible for the first rear-end collision. “I was following a semi tractor trailer when it collided with several other cars and then came to a sudden stop. One of the cars it collided with was a gray car (Williams’).” CP 99. “I remember seeing the underside of the Harry Williams car, which means that the rear end of his car must have come up during the collision.” *Id.*

Not only do Mr. Collins and Mr. Richmond’s statements clearly demonstrate a material issue of fact exists as to whether Anderson drove the vehicle responsible for the first rear-end collision, the statements also clearly demonstrate that an issue of material fact exists as to whether Anderson was behind Mr. Williams and in the same lane at the time of the first collision. These issues of fact make summary judgment wholly inappropriate.

II. CONCLUSION

For the above reasons, as well as those addressed in the Opening Brief, Mr. Williams respectfully requests this Court reverse the trial court's rulings striking the Opposition and granting summary judgment, and remand for trial.

Respectfully submitted this 30th day of April, 2012.

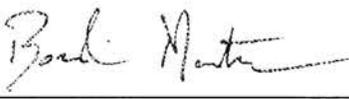
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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2012, I served true and correct copies of Appellant's Reply Brief by Email and US Mail on the following parties:

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