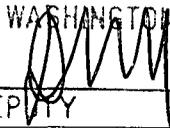


FILED
COURT OF APPEALS
DIVISION II

2015 JUL -1 PM 3:49

No. 46782-8-II

STATE OF WASHINGTON

BY 
DEPUTY

**COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON**

AHSSON and KARI SPRY, a married couple, individually
and on behalf of K.A.S., M.A.S. and G.J.S., minors

Appellants,

PENINSULA SCHOOL DISTRICT, and "JOHN AND
JANE DOES" 1-25, BELLEVUE POLICE DEPARTMENT,
JAY JOHNSON, BRENDA JOHNSON, JOHN KIVLIN,
MICHELLE KIVLIN and DOES 1-25

Respondents.

APPELLANT'S OPENING BRIEF

AHSSON SPRY, PRO SE
KARI SPRY, PRO SE

4810 Point Fosdick Drive NW, Suite 269
Gig Harbor, Washington 98335

TABLE OF CONTENTS

I.	INTRODUCTION	2
II.	ASSIGNMENTS OF ERROR	2
III.	ISSUES RELATING TO ASSIGNMENTS OF ERROR	3
IV.	STATEMENT OF CASE	3
V.	ARGUMENT	5
VI.	CONCLUSION	11

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (White, J.) 8

Anderson v. Wachovia Mortg. Corp., 621 F.3d 261, 273 (3d Cir. 2010) (Rendell, J.)
(quoting Pivrotto v. Innovative Sys., Inc., 191 F.3d 344, 357 (3d Cir. 1999)
(Becker, C.J.)) 10

Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 330-31 (3d Cir. 1995) 9

Brouillet v. Cowles Publ'g Co., 114 Wn.2d 788, 791 P.2d 526 (1990) 6

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) 7

Chelan County Deputy Sheriffs' Ass'n v. Chelan County,
109 Wn.2d 282, 295, 745 P.2d 1 (1987) 7

Commonwealth of Pa. v. Flaherty, 983 F.2d 1267, 1273 (3d Cir. 1993) 8

Cowlitz Stud Co. v. Clevenger, 157 Wn.2d 569, 573, 141 P.3d 1 (2006)
(quoting Dep't o/Labor & Indus. v. Fankhauser, 121 Wn.2d , 304,
308, 849 P.2d 1209 (1993)) 6

Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 523 (3d Cir. 1992)
(Hutchinson, J.), cert. denied, 510 U.S. 826 (1993) 8

Doe 1 v. Lower Merion School Dist., 689 F. Supp. 2d 742, 755 (E.D. Pa. 2010) 9

Giles v. Kearney, 571 F.3d 318, 322 (3d Cir. 2009) 7

Hisle v. Todd Pacific Shipyards Corp., 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004) 6

Lexington Ins. Co., 423 F.3d at 329; McQueeney, 779 F.2d at 92. 10

Marquis v. City of Spokane, 130 Wn.2d 97, 112, 922 P.2d 43 (1996) 6

Marquis v. City of Spokane, 76 Wn.App. 853, 857, 888 P.2d 753 (1995) 6

Marzano v. Computer Sci. Corp., 91 F.3d 497, 509 (3d Cir. 1996) 9

McQueeney v. Wilmington Trust Co., 779 F.2d 916, 928 (3d Cir. 1985) 10

Rouse v. II-VI, Inc., 2008 WL 398788, at *1 (W.D. Pa. Feb. 11, 2008) (McVerry, J.), aff'd, 2009
WL 1337144, at *6 (3d Cir. May 14, 2009 (per curiam)) 10

TABLE OF AUTHORITIES cont.

Sedwick v. Gwinn, 73 Wn. App. 879, 885, 873 P.2d 58 (1994)
(quoting Adams v. Allen, 56 Wn. App. 383, 393, 783 P.2d 635 (1989)) 7

Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1071 (3d Cir. 1996)
(Sloviter, J.) (internal citation omitted), cert. denied, 521 U.S. 1129 (1997) 8

U.S. v. Haut, 107 F.3d 213, 220 (3d Cir. 1997) 9

RCW

RCW 49.60 2, 3, 6

RCW 49.60.010 5

RCW 49.60.210 2

RCW 49.60.030(1) 6

FED R. CIV. P.

FED. R. CIV. P. 56(a) 7

I. INTRODUCTION

The trial Court overstepped its bounds by dismissing a meritorious discrimination case brought pursuant to RCW 49.60 et. seq. and common law, despite the fact that the Appellate Courts for this State have repeatedly commanded that such cases generally are not susceptible to summary resolution and almost always involve questions of fact for a jury to decide.

This is a case that should have played out before a jury or Judge, and it was error for the trial Court to dismiss it based on summary judgment standards. Appellants respectfully suggest that had summary judgment standards been appropriately applied to the facts of this case, it never would have been dismissed.

II. ASSIGNMENTS OF ERROR

1. Whether the Trial Court erred in denying Appellants motion for a trial continuance and discovery cut-off date, when Appellants had not requested any trial continuance or discovery cut-off before (CP 21-23 and CP 270-272).

2. The Trial Court erred by misapplying summary judgment standards applicable to discrimination cases (CP 24-39, CP 40-106, CP 237-269, CP 203-218, CP 107-186, CP 187-190, CP 191-198 and CP 199-202).

3. The Trial Court erred by dismissing Plaintiff's case based on disparate treatment discrimination, due to race, when, at a minimum, there are unresolved questions of fact as to whether or not Plaintiff's race played a role in the adverse actions taken against them (CP 24-39, CP 40-106, CP 237-269, CP 203-218, CP 107-186, CP 187-190, CP 191-198 and CP 199-202).

4. The Trial Court erred by dismissing Plaintiff's claim for opposing discriminatory practices, which is protected on the terms of RCW 49.60.210, when, based on the record which was before it, there was at a minimum a question of fact as to whether or not a retaliatory animus

was a substantial factor in the actions taken against these Plaintiffs (CP 24-39, CP 40-106, CP 237-269, CP 203-218, CP 107-186, CP 187-190, CP 191-198 and CP 199-202).

5. Did the trial Court error in dismissing the negligent infliction of emotional distress as well as negligence? (CP 270-272).

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the trial Court misapply the rules of summary judgment, when it dismissed on summary judgment grounds Plaintiff's racial discrimination claims for disparate treatment all of which violate of the provisions of Washington's Law Against Discrimination (WLAD), RCW 49.60. et. seq.? (CP 273-275).

2. Did the trial Court unfairly deny a motion to extend discovery cut-off and extension of the trial date? (CP 270-272)

3. Did the trial court unfairly dismiss the negligent infliction of emotional distress as well as negligence? (Verbatim Transcript, pp. 22, ll. 20-25 and p. 23, ll. 1-9).

IV. STATEMENT OF CASE

In this case, a trial court failed three (3) young African American children and their parents by failing to allow them their day in court to seek justice for the injustices that occurred to their family from the Peninsula School District (hereinafter "PSD") and the culture of racism that exists within the school district. As stated in the Complaint, there were multiple acts of racial discrimination that precipitated Appellants to bring this action (CP 3-14). Even though these acts against Appellants took place many years ago, PSD again attempts to defame this family by stating to their counsel recently that they view our actions (i.e., bringing this lawsuit) as "opportunistic." The Spry family, on the other hand, views their actions as courageous. Racism is something nobody wants to confront, yet still exists despite the fact it is 2015 (CP 3-

14). Appellants Ahsson and Kari Spry simply wanted their children and themselves treated equal to their peers, this was not the case. Despite being well aware of racism and its effects, they would have never imagined it would befall their young children and forever damage what should have been happy elementary school memories (CP 3-14). This racially pervasive atmosphere occurred to KAS and MAS in Kindergarten, 1st grade, 2nd grade, 3rd grade, 4th grade and 5th grade. GJS was less affected directly by the discrimination, but indirectly felt the effects it had on her family. One occasion of racist behavior would have been bad enough, but the Spry family endured six (6) painful years of it (CP 3-14, CP 191-198, CP 107-186, CP 187-190, CP 199-202).

The trial Court erred in granting the PSD's motion for summary judgment. Despite precedent in this Court instructing that the burden on a plaintiff in a discrimination case at the summary judgment stage must be relaxed, the District Court imposed a heightened burden on the Appellants. The trial court granted summary judgment against Appellants, finding that Appellants lacked evidence establishing that they had been discriminated against. In doing so, the trial Court erred by ignoring or dismissing as inadmissible key evidence of discrimination presented by Appellants during the summary judgment proceedings. PSD harbors racial animus toward African American students generally. The District Court erroneously discarded each piece of evidence in support of Appellants' case in piecemeal fashion, never looking at the evidence as a whole. By doing so, the District Court ignored this Court's instructions to review such evidence in the aggregate and be hesitant to grant a motion for summary judgment when inherently factual issues like racial intent are involved. For these reasons and the reasons set forth below, the judgment of the District Court should be reversed and this case should be remanded for trial before a jury (CP 3-14, CP 191-198, CP 107-186, CP 187-190, CP 199-202).

As to the negligent infliction of emotional distress and negligence claim, in the summary judgment hearing, although multiple documents were submitted in opposition, an extremely disparaging and hostile e-mail was read into the record, written by another parent about the Spry family to principal Weymiller of Artondale Elementary (Verbatim transcript, p. 11, ll. 13-25, p. 12, ll.1-19). This type of hatred which was unwarranted, truly could have put our kids in danger, PSD did nothing to make the Spry family aware of this danger, instead went along with the request of the Kivlin family and request we be transferred to another school (Verbatim transcript, p. 12, ll. 20-25, p. 13, ll. 1-7). One can simply look to events happening in society today (i.e., Charleston church shooting) that people act on their hate in despicable ways.

V. ARGUMENT

PSD could have taken this opportunity to discuss solutions to fix the problem that racism and racial discrimination exists in the school district by their staff and administrators. Instead they hired high power attorneys to fight these pro se litigants to attempt to “sweep the issues under the rug.” As more and more families move into the Peninsula School District with varying racial and ethnic backgrounds PSD could have collaborated with the Spry’s family concerns and worked together towards creating racial harmony for what will be in the future a more diverse student population. Additionally, in a recent visit to Gig Harbor High School, Appellant Kari Spry counted 136 staff pictures located on the wall, with no African American staff whatsoever. Appellant found similar results from the Peninsula High School website of their staff pictures of approximately 95-100 more staff, now finding only two (2) African American staff as janitors. Between both schools, there are over 3000 students. Again, the year is 2015. Year after year the school district becomes a little more diverse, shouldn’t the teaching staff reflect this too?

The Washington Law Against Discrimination affords broad protections against racial discrimination. The Washington Law Against Discrimination (WLAD) was enacted with the goals of protecting civil rights, creating a strong and clear public policy against discrimination, and declaring discrimination against Washington's inhabitants illegal. RCW 49.60.010. "[The law] is broadly stated, is to be liberally construed and, as part of the law against discrimination, is meant to prevent and eliminate discrimination in the State of Washington." *Marquis v. City of Spokane*, 130 Wn.2d 97, 112, 922 P.2d 43 (1996). The elimination and eradication of discrimination has been recognized as a "policy of the highest priority." *Id.* at 109. The law declares the "right to be free from discrimination because of race [and] national origin ... a civil right." RCW 49.60.030(1). RCW 49.60.030(1)(a). The statutory list of protections afforded under RCW 49.60, et seq. "by its own terms, is not exclusive, and can reasonably be interpreted to incorporate other rights recognized by federal law, including the contract rights protected by 42 U.S.C. § 1981." *Marquis v. City of Spokane*, 76 Wn.App. 853, 857, 888 P.2d 753 (1995).

The standard of review for a motion for summary judgment is *de novo*. An appellate court reviewing an order on summary judgment engages in the same inquiry as the trial court, considering all matters *de novo*. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004). Both the law and the facts will be reconsidered by the appellate court. *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990). Summary judgment is appropriate only "if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 573, 141 P.3d 1 (2006) (quoting *Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d , 304, 308, 849 P.2d 1209 (1993)). Even if the facts are undisputed, if reasonable minds could draw different conclusions,

summary judgment is improper. *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 295, 745 P.2d 1 (1987).

A party moving for summary judgment must argue and prove 1) that no genuine issues of material fact exist and 2) that it is entitled to judgment as a matter of law. CR 56(c). In considering whether the moving party is entitled to judgment as a matter of law, the court must "view the evidence presented through the prism of the substantive evidentiary burden." *Sedwick v. Gwinn*, 73 Wn. App. 879, 885, 873 P.2d 58 (1994) (quoting *Adams v. Allen*, 56 Wn. App. 383, 393, 783 P.2d 635 (1989)). In other words, the court must ask itself whether the moving party has met the burden of satisfying the substantive requirements of its claim.

Appellant Kari Spry indicated to the Court at the September 15, 2014 summary judgment hearing that there were still issues of material fact still in existence (Verbatim Transcript, p. 15, ll. 11-17). No discovery had been propounded on Respondents which most likely would have added to the breadth of evidence in Appellant's possession. Counsel for Respondents indicated in that hearing that no witnesses had been disclosed, yet in our interrogatories, we had disclosed what we believed at the time were all witnesses (Verbatim transcript, p. 5, ll. 14-20).

The trial Court erred in Granting the PSD's Motion for Summary Judgment. This court applies a plenary standard of review when evaluating a court's entry of summary judgment. *Giles v. Kearney*, 571 F.3d 318, 322 (3d Cir. 2009) (Aldisert, J.). Summary judgment is properly granted if there are no disputes of material fact and the movant has shown it is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (Rehnquist, J.). The "party seeking summary judgment ... bears the initial responsibility of informing the district court of the basis for its motion." *Id.* Once the moving party meets that burden, the court must credit all evidence offered by the non-movant, and all justifiable

inferences must be drawn in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (White, J.). The court may enter summary judgment only if it concludes that no reasonable juror could return a verdict for the non-movant based on the evidence presented. *Id.* at 249; *Giles*, 571 F.3d at 322. This case ultimately rests upon a single question: What quantum of evidence must a plaintiff produce to support an inference of intentional racial discrimination in order to overcome a summary judgment motion? Appellants produced ample evidence for purposes of summary judgment to show that the District did precisely that. From these facts, among others, reasonable jurors could have legitimately inferred that the PSD with the requisite racial intent. This Court has instructed that a discrimination plaintiff's burden on summary judgment must be relaxed because such a plaintiff must typically rely on circumstantial evidence. In this case, the only issue is whether plaintiffs have produced evidence to support an inference of discrimination for purposes of summary judgment, as necessary to satisfy the second and fourth elements of the prima facie case. This Court has recognized the reality that “[d]iscrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered. Cases charging discrimination are uniquely difficult to prove and often depend upon circumstantial evidence.” *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1071 (3d Cir. 1996) (Sloviter, J.) (internal citation omitted), cert. denied, 521 U.S. 1129 (1997). Accordingly, the plaintiff need not produce a “smoking gun” that irrefutably establishes discriminatory intent. *Commonwealth of Pa. v. Flaherty*, 983 F.2d 1267, 1273 (3d Cir. 1993) (Mansmann, J.) (“It is now well established that a prima facie showing of discriminatory intent may be proven indirectly ... on the totality of the relevant facts....” (internal quotation omitted)). This means that a district court may not insist, as the District Court effectively did here, on “[e]xplicit evidence of discrimination—i.e., the ‘smoking gun,’” *Ezold v.*

Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 523 (3d Cir. 1992) (Hutchinson, J.), cert. denied, 510 U.S. 826 (1993). Once the plaintiff presents admissible evidence of discrimination, the court must view the facts in the light most favorable to the plaintiff, and may not reject them based on credibility determinations or a balancing of competing evidence that is properly the function of the fact-finder. See Sheridan, 100 F.3d at 1072 (where the evidence meets the threshold requirement of admissibility, the court “may not pretermitt the jury’s ability to draw inference from testimony, including the inference of intentional discrimination drawn....”); see also U.S. v. Haut, 107 F.3d 213, 220 (3d Cir. 1997) (“evaluation of witness credibility is the exclusive function of the jury”) (quoting Sheridan, 100 F.3d at 1072)). Moreover, as this Court has observed, the existence of racial intent “is clearly a factual question, [and] summary judgment is [therefore] rarely appropriate” in discrimination cases. See Marzano v. Computer Sci. Corp., 91 F.3d 497, 509 (3d Cir. 1996) (Sarokin, J.) (stating that because discrimination cases center on discriminatory intent, which is “clearly a factual question, summary judgment is in fact rarely appropriate”). See also Doe 1 v. Lower Merion School Dist., 689 F. Supp. 2d 742, 755 (E.D. Pa. 2010) (Bayleson, J.) (“Not only would live testimony by the various Board members, district administrators, and outside consultants enable the Court to evaluate their credibility, thereby conducting its “sensitive inquiry” into whether the Board purposefully discriminated against Plaintiffs on the basis of race, but also, the Court is particularly reluctant to grant summary judgment and to deny Plaintiffs the right to trial in this case, which involves issues of public policy and great concern to the community.”). Instead, the sole question is whether a reasonable juror could draw an inference of discrimination from the direct and circumstantial evidence presented. Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 330-31 (3d Cir. 1995). The District Court’s decision in this matter deviates from this standard in two

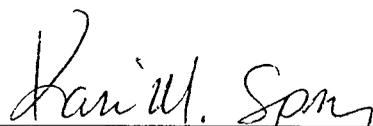
crucial respects. First, the Court erred by ignoring or dismissing as inadmissible several key pieces of evidence during summary judgment proceedings. That evidence, considered alongside the balance of the facts, properly supports an inference of racial intent. Second, in ruling on the District's summary judgment motion, the District Court viewed Appellants' evidence in piecemeal fashion, improperly weighed the credibility of witnesses, and failed to look at the aggregate body of evidence in the light most favorable to Appellants. By conducting such an analysis, the District Court effectively placed a heightened burden on Appellants to produce a gun smoking with the fumes of racial bias. That approach is contrary to this Court's repeated admonition that the prima facie burden should be "relaxed in certain circumstances," including in discrimination cases. *Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 273 (3d Cir. 2010) (Rendell, J.) (quoting *Pivrotto v. Innovative Sys., Inc.*, 191 F.3d 344, 357 (3d Cir. 1999) (Becker, C.J.)). The District Court erred by ignoring or dismissing as inadmissible key evidence of discrimination during summary judgment proceedings. Once that showing is made, the "the evidence goes to the jury ... [to] ultimately determine the authenticity of the evidence, not the court." *Id.* Moreover, circumstantial evidence, in principle, may suffice to authenticate a document. *Link*, 788 F.2d at 927; *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 928 (3d Cir. 1985) (Becker, J.) (same). This Court has held that when, as here, documents are produced by a party in response to an explicit discovery request, that production is highly probative of the document's authenticity. *Lexington Ins. Co.*, 423 F.3d at 329; *McQueeney*, 779 F.2d at 929. This Court affirmed a district court opinion stating that "[a] party to litigation that produces documents during discovery in that litigation thereby authenticates the documents it has produced." *Rouse v. II-VI, Inc.*, 2008 WL 398788, at *1 (W.D. Pa. Feb. 11, 2008) (McVerry, J.), *aff'd*, 2009 WL 1337144, at *6 (3d Cir. May 14, 2009 (per curiam)). Thus, in *Lexington*

Insurance Co., the plaintiff sought to introduce a form containing handwritten notes, even though the author of those notes, like here, was unknown. Nonetheless, the form had been produced by the defendant, and it was undisputed that the document was created in the defendant's usual course of business, as here. This Court found, at the summary judgment stage, that plaintiff had satisfied the foundation requirement, even though there was no evidence regarding authorship of the handwritten notes. *Lexington Ins. Co.*, 423 F.3d at 328-29.

VI. CONCLUSION

Summary Judgment was improper because there are material questions of fact to support plaintiffs. No discovery had been propounded on PSD which most likely would provide more facts to support what was already in the record damning evidence. Additionally, denial of the motion to continue the trial date should be reversed. This was the first instance of a request to extend discovery cut-off and continue the trial date. Appellant Kari Spry had been employed with Pierce County Superior Court from 2008 to 2014, and was very familiar with how frequent and with ease trial dates were granted continuances. In addition, prior to working for Superior Court, Appellant Kari Spry was employed in the legal field from 1988 to 2004. In this regard she was familiar with the workings between counsel and extending discovery cut-off was also something that could occur with a simple phone call between counsel, yet when requested directly to counsel for Respondents, it was denied. Having to waste the court's time for such a motion seemed absurd. This was the first request to continue both of these dates. This too should be reversed. Established federal court precedent and the priority of eliminating racism should have guided the trial court to reconsider its ruling on summary judgment.

DATE: July 1, 2015



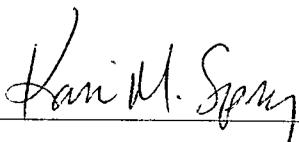
Kari Spry, Appellant Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on July 1, I caused to be served upon Defendant, Peninsula School District, at the address and manner described below a copy of the document to which this certificate is attached for delivery to the following:

VIA PRIORITY MAIL

Jessie Harris, Esq.
Williams Kastner
Two Union Square
601 Union Street, Suite 4100
Seattle, Washington 98101



Kari Spry
Pro Se

FILED
COURT OF APPEALS
DIVISION II
2015 JUL - 1 PM 3:50
STATE OF WASHINGTON
BY  CREDITY