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SUPREME COURT
OF THE STATE OF WASHINGTON

Brian Rundquist, Appellant,

v.

Michael Fox, Respondent,

REPLY OF APPELLANT

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I. TABLE OF AUTHORITIES

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II. ARGUMENT IN REPLY

The Trial Court improperly applied disputed and inadmissible facts in dismissing Defendant Fox.

The respondent is correct. The law is straightforward in this case. The basic question is, whether the undisputed service upon Fischer Trucking, LLC, whom the Plaintiff believed to be Defendant Fox's employer (and to which Defendant Fox has provided no evidence to contradict this belief), was sufficient to toll the statute of limitations for all parties, including, Defendant Fox. It was.

In his reply, the Defendant's analysis ignores the specific wording within RCW 4.16.170 that outlines two options available to the Plaintiff that tolls the statute of limitation. Initially, an action is tolled when a complaint is filed or summons is served. *See*, RCW 4.16.170. Second, if service is not completed prior to filing, as in the present case, the Plaintiff shall **either** serve one or more of the defendants, or commence service by publication. *Id.* There is no dispute that Fischer Trucking, LLC, was personally served with a copy of the summons and complaint prior to the expiration of the 90-day window, thereby tolling the statute for Defendant Fox. CP 10.

However, the Defendant raises two red herrings to distract the court's attention away from that straightforward analysis. The first red herring Defendant Fox raises is his allegation that the Plaintiff did not serve

any proper defendants because Fischer Trucking, LLC is not a proper defendant. The second red herring is Defendant Fox's dispute with the validity of the service on Fischer Trucking, LLC because Fischer Trucking was captioned incorrectly.

With respect to the first red herring, Defendant Fox essentially asks that the court take constructive notice that that everyone knew the identity of his employer. *Brief of Respondent*, 13. While the defendant has the benefit of knowing who his own employer is, he has yet to submit any admissible evidence of that fact. The only information contained in the record are inadmissible hearsay declarations by Fox's own attorneys during oral argument. RP 9, 15-17; CP 136.

The Defendant attempts to leverage this inadmissible information to overcome the high bar both CR12(b)(6) and CR 56. CR12(b)(6) requires the court to presume that all the plaintiff's allegations, including hypothetical facts, are true. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216, (1994). No information besides what is presented in the pleadings may be considered. *Id.*

The Plaintiff possessed the name Fischer Trucking from the one correspondence Plaintiff received from the insurance company representing Defendant Fox. CP 78-79. With this limited information, Plaintiff conducted a search on the Washington Secretary of State's website which

revealed an entity operating with the same name in Washington State. CP 78. Plaintiff also conducted an internet search which also revealed the same entity. *Id.* Thus, it was only logical to conclude that the Plaintiff had identified the correct company, as the accident occurred in Washington State, and Fischer Trucking, LLC, operated within the state. *Id.*

Yet still unsure of exact name of the Washington LLC, the Plaintiff identified the company as “Fischer Trucking, *Inc.*, a Washington limited liability company;” in a sense, akin to naming a defendant “John Doe” not knowing whether his first name is spelled “Jon” or “John,” but knowing that his last name is “Doe.” Considering the defendant’s motion, the court had to assume as fact, that Fischer Trucking, LLC was a proper party under 12(b)(6). As a proper party, the statute of limitation was tolled when they were personally served, thereby tolling the statute of limitation for Defendant Fox.

Although the Defendant contends that his CR 12(b)(6) motion was converted into a CR 56 motion the moment that the trial court considered the Plaintiff’s declaration, thereby allowing the trial court to consider things outside of the pleadings, he still does not meet the evidentiary bar set for a CR 56 motion. The moving party must furthermore prove that there is no genuine issue of material fact viewing the facts in a light most favorable to the non-moving party. CR 56.

The record is clear. Defendant Fox presented no admissible evidence of his true employer. In a summary judgment motion, “supporting and opposing affidavits shall be made on personal knowledge, **shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.**” *See*, CR 56(e), emphasis added. The defendant failed to submit any admissible evidence refuting the Plaintiff’s allegations. Defendant’s counsel’s arguments during oral arguments were not admissible evidence. As a result, the trial court erred when it dismissed Defendant Fox.

Defendant Fox’s second red herring challenges the validity of service on Fischer Trucking, LLC, because Fischer Trucking was captioned incorrectly. However, that issue was already rendered moot by the trial court when the trial court granted the Plaintiff’s request for leave to amend the complaint to correctly identify Fischer Trucking, Inc. as Fischer Trucking, LLC, with the amendment relating back to the date of the original filing. CP 115-116.

In Plaintiff’s second amended complaint, the Plaintiff corrected Fischer Trucking’s name by removing “*Inc.*” from its name, and still alleged that “Fischer Trucking, LLC” was Defendant Fox’s employer. Again, no evidence disputing that allegation was presented before the court. CP 45-

50. With the correction and proper service of process on Fischer Trucking, LLC, the statute of limitations was tolled as to all defendants, including Defendant Fox, under RCW RCW 4.16.170. The trial court's dismissal of Defendant Fox was error because Defendant Fox was properly served through the Secretary of State in accordance with RCW 46.64.040.

III. CONCLUSION

The law and analysis is clear. Defendant Fox was improperly dismissed by the trial court. A properly named and identified defendant (Fischer Trucking, LLC) was personally served within the 90-day tolling window. Upon proper service, the statute of limitations was tolled as to all defendants, including Defendant Fox. Defendant Fox was properly served in accordance with the non-resident motorist statute. Defendant Fox has presented no admissible evidence that the named defendants are improper. Without admissible evidence, arguments to the contrary are merely red herrings. The dismissal of Defendant Fox was error and should be overturned with the case remanded back to the trial court for further proceedings.

Respectfully submitted this 27th day of December, 2016.

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