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Division III
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No. 36630-8

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MOHAMMED NADEEM, an individual,

Appellant,

v.

MICHAEL MAURER and KENDRA MAUER, as individuals and as the
marital community thereof,

Respondents.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

For purposes of summary judgment, all reasonable inferences from the evidence must be construed in favor of the non-moving party. Accordingly, for purposes of the case at bar, all reasonable inferences from the evidence set forth below, must be construed in favor of Appellant Mohammed Nadeem (“Nadeem”):

- Nadeem does not speak fluent English. (CP 65-66; CP 53-55);
- Nadeem has no grasp of complex legal or medical terminology. (CP 54);
- Ordinarily, for such conversations Nadeem requires an interpreter. (CP 54);
- The State Farm adjuster omitted key context prior to the recorded portion of the phone call. (CP 53-55; CP 65-66);
- Nadeem did not understand the legal term “release” to mean relinquishing legal rights to payment for injury. (*Id.*);
- Nadeem did not intend to settle his personal injury claim with the State Farm adjuster. (*Id.*);
- Being unfamiliar with the legal term “release,” Nadeem agreed to the release of his claim understanding the word “release” to only mean that State Farm was “releasing” a check to him. (*Id.*);

- Due to his lack of comprehension of the English language, Nadeem was unaware that his agreement would limit his right to seek damages from his tortfeasor. (*Id.*);
- State Farm sent a check in the amount of \$3,986.46 to Nadeem, for property damage, which was cashed. (CP 30);
- State Farm’s adjuster sent a check in the amount of \$3,785.51 to Nadeem, which was cashed. (CP 36-37);
- State Farm’s adjuster sent another check in the amount of \$1,200 to Nadeem. (CP 38-39; CP 41-42); and
- The \$1,200 check was rejected in writing and returned (via counsel). (CP 43)

Demonstrating a question of fact, which must be resolved by the trier of fact, the premise of Respondents’ Brief is “Mr. Nadeem speaks English[.]” (Resp. Br. at p. 2)

The record supplied by Respondents concerning the purported State Farm-Nadeem oral contract, evidences only that Nadeem speaks one word of English, “yes”, and one vocalization, “um hum”. (CP 32) Nadeem’s declaration, drafted with language help, further provides that there was a conversation prior to the recorded conversation where the non-party State Farm’s adjuster promised that if Nadeem said yes to her questions on the

audio recording, she would ‘release’ the money to him. (CP 53-55; 65-66) Sensing something amiss, Nadeem consulted with (English-speaking) counsel, and returned State Farm’s settlement offer, rejecting it. (CP 43)

“Disputes over the existence of an oral contract are generally not appropriate on summary judgment because it depends on an understanding surrounding circumstances, intent of the parties, and credibility of witnesses.” *Plese-Graham, LLC v. Loshbaugh*, 164 Wn. App. 530, 541, 269 P.3d 1038 (2011).

From this record, the trial erred in determining there was no question of fact as to whether a meeting of minds occurred sufficient to form an oral contract between a sophisticated insurance adjuster and non-English-speaking immigrant. The trial court should be reversed, and this case remanded for determination by the trier of fact as to whether a meeting of the minds occurred.

ARGUMENT

A. Respondents’ Argument That ‘Oral Settlements Are Binding’ Misidentifies The Legal Issue: Lack Of A Common Language Precludes A Meeting Of Minds And Creates A Question Of Fact As To Whether Acceptance Exists.

Predicated upon the assertion that “Mr. Nadeem speaks English”, Respondents argue that oral settlements are binding. The issue in the present case is not whether oral settlements are binding. Rather, the issue in the

present case is whether a non-English speaking immigrant formed an oral release of all personal injury claims with a sophisticated English-speaking insurance adjuster when he subsequently testified he did not understand what was happening, and he returned the settlement check without cashing it.

Respondents cite *Stottlemire v. Reed*, 35 Wn. App. 169, 665 P.2d 1383 (1983) for the proposition that oral settlement agreements are binding. In fact, *Stottlemire* stands for the fact that “settlement agreements are considered to be contracts, their construction is governed by the legal principles applicable to contracts and they are subject to judicial interpretation in light of the language used and the circumstances surrounding their making.” *Id.* at 171.

B. Nadeem’s Acts Demonstrate Objectively That No Contract Was Formed.

Respondents argue that the evidence demonstrates undisputed objective manifestation of a contract between Nadeem and non-party State Farm, on behalf of Respondents. As described *supra*, given the language barrier precluding oral contract formation, the acts of Nadeem, viewed objectively, do not support the trial court’s finding that no question of fact exists.

Respondents cite *Hearst Communications v. Seattle Times*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005), which concerns the “meaning of a writing” and “the context surrounding an instruments execution.” The *Hearst* court explains that the “objective manifestation theory of contracts” concerns the court “not interpret[ing] what was intended to be written but [rather] what was written.” *Id.* at 504 *citation omitted*. The concept is inapplicable to the present case which concerns a question of fact over a meeting of minds on an oral contract between an English speaker and a non-English speaker.

Nadeem referred the Court to *In re Marriage of Obaidi*, in which it was held no contract was formed because one of the parties did not speak the language in which the contract was drafted. *In re Marriage of Obaidi*, 154 Wn. App. 609, 617, 226 P.3d 787 (2010). Respondents contend *Obaidi* is distinguishable because “Mr. Nadeem speaks English.” Through help with language, Nadeem declared before the trial court that he does not speak English fluently, does not understand legal or medical English, generally gets a translator’s help, and was not intending to enter into a full and final settlement and release in that phone call with the State Farm adjuster. (CP 53-55; 65-66) At best, Respondents’ assertion that Nadeem nonetheless speaks English creates a question of fact for the trier of fact, and the trial court erred in granting summary judgment.

Respondents cite page 224 of *City of Union Gap v. Printing Press Properties, LLC*, 2 Wn. App. 2d. 201, 409 P. 3d 239 (2018), which concerns a written contract drafted by and between English-speaking principals of domestic corporations. *Union Gap* has no bearing on the question of whether a non-English-speaking immigrant understood the oral terms of a personal injury full and final settlement and release, in a 45-second phone call, with a sophisticated, English-speaking insurance adjuster.

Arguing that Nadeem's explanation that he did not understand English and that he was forming a contract with the State Farm adjuster and did not understand that the word 'release' meant other than release the money to him constitutes a 'contradiction without explanation of prior testimony', Respondents cite *Schonauer v. DCR Entertainment, Inc.*, 79 Wn. App. 808, 817-18, 905 P.2d 392 (1995), the pin cited section of which holds that a non-moving party's affidavit submitted in response to a summary judgment motion was admissible. Respondents ask the Court to presume (1) that Nadeem fully speaks and understands English, (2) that the clip of the audio recording constitutes 'testimony' or 'admission' and, (3) that Nadeem's declaration in opposition to summary judgment constitutes a contradiction. To reach this outcome, the Court must first resolve disputed facts against Nadeem, the non-moving party, namely his level of

understanding spoken English which is not permitted under settled summary judgment pages.

C. The Return Of A Settlement Check Without Cashing It Is Objective Evidence That No Contract Was Formed.

The cases cited in the opening brief were not to demonstrate accord and satisfaction, as argued by the Respondent, but to demonstrate that a question of fact exists concerning formation of a contract when a settlement check is returned and rejected. *Katich v. Evich*, and *Bottorhoff v. A.E. Page Machinery Co.*, were cited for the proposition that an oral contract is formed only after the acceptance and cashing a check. *Katich v. Evich*, 161 Wn. 581, 583-584, 297 P. 762 (1931); *Bottorhoff v. A.E. Page Machinery Co.*, 174 Wn. 438, 442, 24 P.2d 1059 (1933).

Moreover, whether or not a check is accepted as payment and fulfillment of a contract depends upon the circumstances and the intentions of the parties, and the court should consider the actions of the parties in connection with the transaction. *Maryatt v. Hubbard*, 33 Wn.2d 325, 331, 205 P.2d 623 (1949). The facts in the *Maryatt* case are distinguishable because the trier of fact found a contract had been formed as the check had been endorsed and satisfied. *Id.* at 333. In contrast, Nadeem was not afforded the opportunity to present to the trier of fact, did not endorse the check, nor testify that the contract had been settled. Nadeem's rejection and

return of the check, at minimum creates a question of fact concerning whether a valid acceptance occurred and a contract was formed.

D. A Non-English Speaker's Lack Of Understanding Of Terms Spoken To Him Creates A Question Of Fact As To Contract Formation As A Matter Of Washington Law.

Respondents refer to the court to *Del Rosario v. Del Rosario*, 116 Wn. App. 886, 68 P.3d 1130 (2003), which resolves the issue in Appellant's favor. In *Del Rosario*, an injured party with limited English signed a release, whose terms had been translated and described for her orally. *Id.* at 889-90. The Court held that "given the evidence presented at trial, a reasonable juror could find that [appellant], who does not understand English, reasonably relied on [translator's] erroneous explanation of the release. Accordingly, [moving parties] are not entitled to judgment as a matter of law under traditional contract principles." *Id.* The *Del Rosario* Court held that even with a signed written settlement agreement, lack of English understanding on the part of the signator creates a question of fact for the trier of fact to determine whether there was a meeting of the minds. *Id.* at 899-900.

E. A Casualty Insurer's Promise To Compensate A Third Party Who Was Injured By Acts Of The Insured Is A Collateral Promise, And Falls Within The Statute Of Frauds.

In Washington, an oral contract assuming and agreeing to pay the debt of another is unenforceable under the Statute of Frauds...In determining whether a promise

falls within the statute, the Washington courts distinguish between original and collateral promises. Original promises do not fall within the Statute of Frauds whereas collateral promises must be in writing, or a violation of the statute has occurred. The distinction is determined based on the factual situation surrounding the transaction.

25 Wash. Prac., Contract Law and Practice § 3:10 (3d ed.).

In order for the promise to be original, the promisor must have benefit immediately accrue to himself as a direct consequence of the promise. *Id.* Here, the promisor, State Farm, accrues no direct benefit and rather is promising to make the payment by virtue of its relationship to the tortfeasor as casualty insurer. It seems clear on its face that casualty indemnification is inherently a collateral promise.

The only Washington case of record concerning this section of the statute in the context of a casualty insurer is *Ford v. Aetna*, 70 Wn. 29, 126 P. 69 (1912), and the *Ford* Court offers very little analysis. The applicable Washington Practice Section has thirty-three citations, none of which are to a case involving an insurer.

Concerning the original promise/collateral promise distinction, an oral promise is collateral for purpose of the statute if the promisee could not sue the promisor directly if the oral promise is not fulfilled (*i.e.* no payment

is made). *Sposari v. Matt Malaspina & Co.*, 63 Wn. 2d 679, 684-85, 388 P.2d 970 (1964).

Here, Respondents are the tortfeasors. State Farm is Respondents' casualty insurer. State Farm's adjuster, and the counsel retained by State Farm for Respondents' benefit, are acting in their capacity as agents for Respondents, rather than for their own benefit. Promises made by State Farm adjusters and retained counsel on Respondents' behalf are collateral promises. *See Id.* As a consequence, the oral contract falls within the Statute of Frauds, and Respondents may not use this oral collateral promise to avoid their underlying tort responsibility.

CONCLUSION

For the foregoing reasons, Appellant requests that the Court reverse the trial court's summary dismissal of his claims, and remand for trial on the merits.

Dated this 8th day of July, 2019

KSB LITIGATION, P.S.

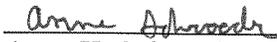


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