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NO. 37510-2

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

TIMOTHY REEVES

Appellant/Defendant,

v.

COMPUTER SOLUTIONS, et. al.

Respondent.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

Assignment of Error No. 1

A. The court erred by resolving issues of fact in a summary judgment motion.

Issues pertaining to Assignment of Error No.1

1. An Unfair Business Practices claim does not require a finding of damages.

Assignment of Error No. 2

B. Damages were alleged sufficient for denial of a summary judgment motion

1. The Interference with Business Practices Claim should survive.
2. The Negligence claim should survive

INTRODUCTION

Mr. Reeves had an industrial injury for which he was retrained by Computer Solutions, Inc. Mr. Reeves asserts that Computer Solutions, Inc misrepresented the facts to the Department of Labor & industries as to his employability. In addition, Mr. Reeves asserts that Computer Solutions, Inc.'s practices harmed his ability to work in the future or alternatively receive a pension under the Department of Labor & Indus.

Judge Raymond Clary denied Mr. Reeves's claims on summary judgment. Judge Clary determined that Mr. Reeves did not prove damages or causation for purposes of summary judgment. We appeal Judge Clary's ruling as to the Unfair Business Practices Claim, the Tortious Interference of a Business Expectancy claim and the Negligence claim.

PROCEDURAL STATEMENT OF THE CASE

This case was denied on Summary Judgment Motion before Judge Clary in the Spokane County Superior Court. Claimant filed a timely appeal and seeks review of the granting of the summary judgment motion.

STANDARD OF REVIEW

This Court reviews orders of summary judgment de novo, and engages in the same inquiry as the Trial Court: Heath v. Uruga, 106 Wn. App. 506, 512-513 (2001)

"This court will affirm summary judgment if no genuine issue of any material fact exists and the moving party is entitled to judgment as a matter of law." Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337,341, 883 P.2d 1383 (1994). "All facts and reasonable inferences are considered in the light most favorable to the non-moving party, and all questions of law are reviewed de novo." Id. However, "a question of fact may be determined as a matter of law when reasonable minds can reach only one conclusion." Miller v. Likins, 109 Wn. App. 140, 144,34 P.3d 835 (2001)

"[A] but for causation test directs us to change one thing and a time and see if the outcome changes." Bostock v. Claton County Georgia, ___ US ___, 140 S.Ct. 1731, 1739 (June 15, 2020). We apply the "but for" test to cause in fact, and this is generally left to the jury. Hartley v. State, 103 Wn.2d 768, 778 (1985). As a determination of what actually occurred, cause in fact is generally left to the jury

and generally is not resolved on summary judgment. *Id*

FACTUAL BACKGROUND OF THE CASE

On May 5, 2011, Mr. Reeves was hurt while working for Standard Plumbing and Heating. He filed a claim with the Department of Labor and Industries under claim no. AM 34279. As a result of the claim he was found not able to return to work at the job of injury under RCW 51.32.090.

Mr. Reeves was then found eligible for a vocational retraining program on April 8, 2015. The plan was to start May 18, 2015 with New Horizons Computer Learning Center. The plan was to end in January of 2016 but in fact allegedly ended in March 2016.

According to criteria provided by NEW HORIZONS COMPUTER LEARNING CENTER, Mr. Reeves needed to attend 80% of class time and complete 80% of the homework or he would not successfully complete the program. (Guidelines were printable & available during all online classes). (See clerks papers declaration of Marilyn Korostoff and complaint.)

Mr. Reeves attended the Certified Medical and Coding Billing program. Mr. Reeves did not attend all of the classes and lectures. Mr. Reeves did not attend do to pain and discomfort related to his injuries. Mr. Reeves on multiple

occasions told Sue Imholt, vocational counselor, Kassandra Rocha, a school employee and others that he was not getting the material.

The facts will show that Mr. Reeves attempted to go to class but could not on a regular basis. The facts will show that Computer solutions and Ms. Rocha signed certificates signifying completion of courses, for days that Mr. Reeves could not have nor were they scheduled to attend. During Mr. Reeves training, Mr. Spirit Doris said that he did not believe Mr. Reeves would be successful in the retraining. See Declaration of Timothy Reeves. CP 22-26

Ms. Rocha testified that she did not know if they got graded for points. *Id.* She testified they were not required to complete lab exercises. She testified that they have a database that keeps track of students' attendance and professors' comments. *Id.* at pg 20. It is called LMS. *Id.* She testified the only thing the individuals are graded on is attendance in the LMS database.

Q. So what's in the database that tells you that it's completed?

A. One that he's attended.

Q. What else?

A. That's about it. *Id.*

Ms. Korostoff, educational expert will testify that there are no criteria or metrics present by which to determine if Mr.

Reeves actually learned what was taught. Declaration of Marilyn Korostoff. To this Ms. Rocha said the students are adults and they don't check to see if they did the homework. Rocha at. Ms. Korostoff will testify that there has to be something other than attendance by which to judge comprehension in any retraining program.

Ms. Rocha gave the completion certificates to Sue Imholt and told her Tim successfully completed the program. Ms. Imholt conveyed this to the Department of Labor and Industries. Mr. Reeves told both Ms. Imholt and Ms. Rocha he had not learned it. Ms. Imholt relied on Ms. Rocha's assurances he had and found him employable.

Mr. Reeves did not even have scheduled all the classes days that they said he passed on the certificate. Ms. Korostoff, a educational expert provided a declaration that Mr. Reeves was not retrained based on the way Computer Solutions did its program and tested said knowledge. CP 22-26.

I. ARGUMENT

On review the court looks to see if based on the facts proposed by Mr. Reeves if the outcome would change. If the outcome would have changed then there is an issue of fact that the court must send to the jury. The lower court focused on the decision by the Department of Labor & Industries and by so doing overlooked the cause of action in this case. The cause of action against Computer Solutions is because the provided the wrong information to the Department.

The lower court only addressed causation under the claims. Report of Proceedings (RP) pg. 26 ln 3-5. As the court only passed on proximate cause that is the only issue before the court. See Robbins v. Mason Co. Title Ins., 195 Wn.2d 618, 637 (2020). All other elements for purposes of this appeal are presumed not in dispute.

Assignment of Error 1: Computer Solutions actions were the “but for” cause of Mr. Reeves harm.

“[A] but for causation test directs us to change one thing and a time and see if the outcome changes.” Bostock v. Claton County Georgia, __ US ____, 140 S.Ct. 1731, 1739 (June 15, 2020). We apply the “but for” test to cause in fact, and this is

generally let to the jury. Hartley v. State, 103 Wn.2d 768, 778 (1985). As a determination of what actually occurred, cause in fact is generally left to the jury and generally is not resolved on summary judgment. Id.

The question in this case is did Computer Solutions misrepresent or lie as to Mr. Reeves status when they told the vocational counselor he completed school. If the answer is yes, then summary judgment should be denied. As outlined below they breached their duty and caused harm.

Mr. Reeves provided substantial evidence to show the Computer Solutions was a proximate cause of his harm. The lower court's focus on the medical testimony was wrong. It appears from review of the proceedings the lower court did not understand the allegations or framework in which the claims are proceeding. Specifically, the application of RCW 51.32.095 and Computer Solutions responsibilities.

In an L&I claim there is a process for getting an injure worked back to work. That is outlined in RCW 51.32.095. RCW 51.32.095(2) lays out the priorities for returning to work.¹ Mr. Reeves vocational counselor went through the return to work priorities under RCW 51.32.090 and found that he was not employable unless retrained. Under RCW 51.32.095(2)(i),

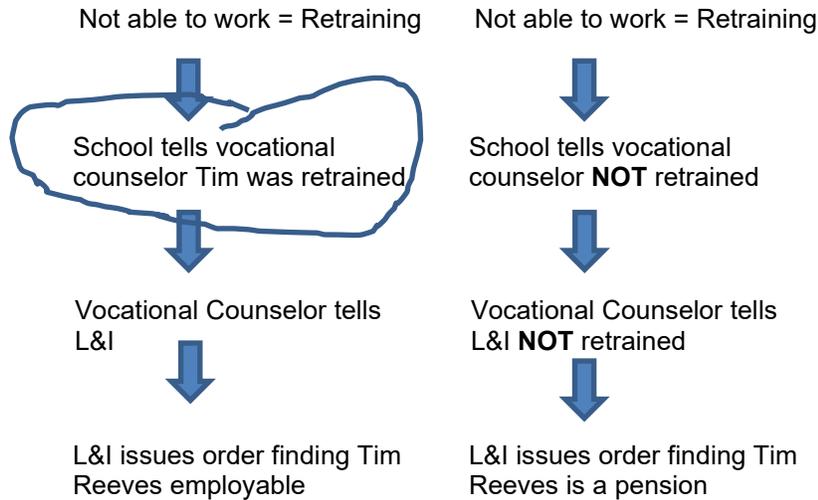
¹ Known as the "return to work priorities."

short term retraining was authorized. Retraining is not an option until all the previous priorities can be eliminated. In other words, the injured worker must be unemployable to qualify for retraining based on his transferable skills and other abilities before going into a retraining program. Then the director can authorize retraining if it is likely to make the injured worker employable. RCW 51.32.095.

To understand the process the following chart is provided. This chart starts after a retraining program is started and what happened to cause Mr. Reeves harm at the end of his claim. The first column is what happened, and the second column is what should have happened. The circle portion is what Computer Solutions did wrong.

L&I Order Process

What should have happened



Computer Solutions harmed Mr. Reeves when the misrepresented his abilities to the vocational counselor and the department. When they told the vocational counselor, he had learned skills they eliminated his ability to get a pension. Regardless of whether Mr. Reeves could physically do the retraining, or the job they told L&I he had skills that he did not have.

The lower court got enamored with the lack of medical evidence to see the actual harm to Mr. Reeves. The issue is whether or not Computer Solutions Inc.'s breach caused

damage to Mr. Reeves. As the diagram shows above, if you remove the breached step of stating Mr. Reeves was retrained, when he was not trained, then Mr. Reeves would not have been harmed as he would have received a pension.

Factually, we have the expert testimony of Marilyn Korostof that states Mr. Reeves was not retrained. Mr. Reeves provided expert testimony that Computer Solutions Inc. misrepresented facts to the vocational counselors and L&I that lead to his finding of employability. Declaration of Marilyn Korostoff., CP 22-26. Mr. Reeves provided enough evidence to show at a minimum he sustained an injury in that Computer Solutions Inc. stated they would retrain him, and they did not. This prevented him from obtaining substantial employment in the field he sought to be retrained in or obtaining an L&I pension.

That there are no supporting documents to show that he was retrained. A reasonable person could find based on this testimony that Computer Solutions injured Mr. Reeves. Therefore, summary judgment was not proper.

Assignment of Error 2: Mr. Reeves proved harm and damages sufficient to survive summary judgment under his CPA Claim, Negligence claim, and Business Interference claim.

Mr. Reeves provided sufficient evidence to show that he sustained injury and damages under the CPA, negligence and

business interference claims. The lower court in its reasoning focused primarily on the lack of causation. This reasoning was not supported by the facts provided to the court.

a. Facts in favor of the non-moving party

"All facts and reasonable inferences are considered in the light most favorable to the non-moving party, and all questions of law are reviewed de novo." Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337,341 (1994). "[O]nce the [plaintiff] establishes the fact of loss with certainty (by a preponderance of the evidence), uncertainty regarding the amount of loss will not prevent recovery." Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc., 178 Wn. App. 702, 715, (2013). For the purposes of summary judgment only harm must be proven.

The lower court failed to take the facts in a light most favorable to the non-moving party. The lower court thought because a pension was denied there was no damages. The lower court's focus on the medical testimony is not relevant at this stage. the failure to address the actual harm and damages was overlooked by the summary judgment decision.

Plaintiff proved, through declarations, that he could establish financial damages through the declaration of Lenore Romney. Ms. Romney did a financial calculation based both on the

theory of lost pension and lost wages. Ms. Romney stated that she reviewed his earnings history, social security and L&I history. He also reviewed data with regards to his possible employment had he been retrained. See Declaration of Lenore Romney, CP 22-26. Based on a review of all this data she estimated losses of \$208,393.89.

The damages numbers were supported by Ms. Korostoff's declaration. Ms. Korostoff, and educational expert stated that she would testify that Mr. Reeves was not trained nor received any proper training by Computer Solutions Inc. If Mr. Reeves was not trained either by the negligence, misrepresentation, or intent of Computer Solutions, then Mr. Reeves was injured. The question becomes what damages are recoverable. To survive summary judgment Mr. Reeves need only prove that he has damages and an injury. He has done that.

This evidence shows that there is an issue of fact as to damages that supports both the negligence claim and the business interference claim.

1. CPA CLAIM

Mr. Reeves alleged a violation under the Unfair Business Practices Act. RCW 19.86. RCW 28C.10.110 provides for

actions against a private vocational school. If a private vocational school fails to follow RCW 28C.10.110 that leads to an automatic violation of the RCW 19.86.20. In deciding this case the lower court opined that Mr. Reeves did not prove causation of damages under this claim. Report of Proceedings pg. 30 ln1-14. As the judge did not find damages, he denied his claim. Id.

In Washington state the law regarding Unfair Business Practices claims/ CPA claims provide two ways to proceed with a claim. Either a finding of damages or a finding of injury. See RCW 19.86. Under the CPA a finding of injury and/or damages is not the same. An injury can be separate from damages. Frias v. Asset Foreclosure Servs., Inc. 181 Wn.2d 412 (2014) (see also WPI 310.06). Under the CPA the plaintiff does not have to prove damages as in a standard negligence claim. All the plaintiff must prove is evidence of an injury to proceed with the claim.

The courts have found that “nonquantifiable injuries such as good will are sufficient to establish a claim. Torres v. Mercer Canyons Inc., 835 F.3d 1125,1135-36 (9th Cir. 2016). An example of an injury includes failure to disclose certain job opportunities. Mason v. Mortgage Am., Inc., 114.2d 842 (1990).

In this case Mr. Reeves alleges they did not retrain him and that they falsely represented this information to the Department of Labor and Industries. If that is correct, then they harmed Mr. Reeves and the summary judgment motion should be denied.

2. Negligence

The court wrongly found that medical causation is the only way to prove damages. That is wrong. As stated above if Computer Solutions misrepresented his abilities, they harmed him and that is sufficient to find proximate cause. Medical testimony is not needed at this stage.

Further, Mr. Reeves provided testimony actual damages. He provided testimony of an economist to show that he would have damages if he had not been retrained. She stated that either under a theory he could not get the job or under a theory he would have been given a pension if not retrained. Either theory allows for damages in a negligence case, and means this case is not ripe for summary judgment.

The lower court focused on proximate cause of Mr. Reeves damages. By focusing on the medical evidence, it did not address the injury to Mr. Reeves nor the damages he may have sustained. The lower court focused on the fact that Mr. Reeves was found employable by the medical experts and L&I. That did not address the issue. Mr. Reeves alleges that the

employability finding was based on the misrepresentation of Computer Solutions. Meaning, if Computer Solutions had told L&I he did not complete the program, he could not have been found employable.

By relying solely on the non-issue of the medical evidence, the lower court did not address the unique circumstances of this case. Under the L&I procedures the doctor signs off on a job analysis for retraining. The injured worker is then retrained. We do not dispute that was the process here. Mr. Reeves is alleging that the retraining never completed and as a result he could not work. That is the harm. It can be quantified as lack of pension or lack of future income. Both were asserted by the expert.

3. Business Interference

The lower court denied this claim as well based on the failure to prove medical damages. For the same reasons as the negligence claim the lower court was wrong. The court only passed on the damages prong and did not address the first four. So as the first four prongs are not at issue Mr. Reeves need show only that his damages were related to the conduct of Computer Solutions Inc.

Mr. Reeves provided the declaration of Ms. Korostoff to show that Computer Solutions at a minimum had no proof that

he learned the skills they allegedly retrained him with. Her declaration shows that he had not gained the ability to do the medical coding and billing job.

Ms. Romney's declaration states that she looked at past and future wage lost based on employment if he had been trained. She came up with a damage number of \$208,393.89. Plaintiff has proved causation and proved damages. With regards to these claims the lower court's decision should be reversed.

II. CONCLUSION

The lower court erred when it relied on medical causation when the damages were not physical harm. Mr. Reeves was harmed financially and vocationally for the rest of his life by the actions of Computer Solutions. This is sufficient harm to proceed with the case. We request the lower court order be overturned and the three claims be allowed to proceed..

DATED: August 24, 2020

Drew Dalton

Drew D. Dalton, WSBA 39306

1 **CERTIFICATE OF SERVICE**

2 I hereby certify under penalty of perjury that I faxed the document to the
3 Court of Appeals and mailed the document referenced below on October
4 12, 2018.

5 Document : **Appellant brief**

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12 **DATED: August 24, 2020**

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