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NO. 64078-0-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

JON C. REYNOLDS AND KAREN RUTH REYNOLDS, husband and
wife and the marital community composed thereof;

Respondents/Plaintiffs

v.

CHRISTOPHER HAMILTON DEAN AND JANE DOE DEAN, husband
and wife and the marital community composed thereof, and
BELLINGHAM SCHOOL DISTRICT #501,

Appellants/Defendants.

BRIEF OF APPELLANTS DEAN

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2018 MAY 11 PM 2:15
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TABLE OF CONTENTS

Assignments of Error 1

Statement of the Case..... 1

 A. Nature of the Proceeding..... 1

 B. Standard of Review 2

 C. Statement of Facts 2

Argument 8

 1. The Complaint cannot be construed to contain alternative
 Claims..... 8

 2. There are insufficient facts showing Dean to be in
 his personal capacity to deny summary judgment..... 12

 A. This Motion was converted to a CR 56 motion..... 12

 B. No genuine issues of material fact exist..... 13

Conclusion 15

CASES

Berge v. Gorton,.....9
88 Wn.2d 756, 762, 567 P.2d 187 (1977)

Dewey v. Tacoma Sch. Dist. 10, 95 Wn.App. 18, 23-25,
974 P.2d 847 (1999).....9

Estate of Celiz v. PUD 1, 30 Wash.App. 682, 684, 638 P.2d 588 (1981)15

LRS Electric Controls, Inc., v. Hamre Const., Inc., 153 Wash.2d 731,
107 P.3d 721 (2005).....2

Lobak Partitions v. Atlas Const. Co., 50 Wn.App. 493,
498, 749 P.2d 716 (1988).....9

McNew v. Puget Sound Pulp & Timber Co., 37 Wash.2d 495,
497-98, 224 P.2d 627 (1950)11

Miller v. Litkins, 109 Wash.App. 140, 34 P.3d 835 (2001).....2, 15

Poundstone v. Whitney, 189 Wash. 494, 65 P.2d 1261 (1937).....10, 11

Rahman v. State, 150 Wash.App. 345, 208 P.3d 566 (2009).....10, 11, 14

Rathvon v. Columbia Pac. Airlines, 30 Wash.App. 193, 201,
633 P.2d 122 (1981), *review denied* 96 Wash. 2d 1025 (1982).....13

STATUTES

RCW 4.96.0201, 4, 5, 8, 16
RCW 4.96.020(4).....5

RULES

Civil Rule 812
Civil Rule 8(a).....8
Civil Rule 12(c)12
Civil Rule 5612
Civil Rule 56(c).....12, 13

Assignment of Error

The superior court erred in denying defendants Dean's Motion to Dismiss, because defendant Christopher Dean was in the course and scope of public employment with the Bellingham School District at the time of this accident. The Complaint so alleged, and cannot be construed any more broadly (*i.e.*, to contain an alternative claim against Dean personally). As a result, Dean was entitled to the 60-day waiting period before suit was filed, under RCW 4.96.020. Further, there were no *facts* to support a personal claim against Dean. Therefore, because plaintiff failed to comply with the waiting period for her "employment capacity" claims, and has no factual basis for a claim against Dean personally, her claims should have been dismissed.

Statement of the Case

A. Nature of the Proceeding

This is an appeal, on discretionary review, of an order of the Whatcom County Superior Court. The Superior Court denied defendants Dean's Motion to Dismiss. The Motion was based on plaintiff's failure to comply with the 60-day waiting period of RCW 4.96.020 (the Notice of Tort Claim statute). Defendants Dean sought, and were granted, discretionary review on the ground of obvious error. (Decision of

Commissioner William H Ellis, Jr., March 3, 2010). This appeal follows.

B. Standard of review

The Whatcom County Superior Court ruled that (a) the Complaint could be construed as containing alternative pleadings against Christopher Dean, both in his individual capacity *and* in his employment capacity; and (b) there were genuine issues of material fact as to whether Dean was, in fact, in the course and scope of employment at the time of the accident.

Both rulings are legal rulings that are reviewed *de novo* by this court.

Miller v. Likins, 109 Wash.App. 140, 34 P.3d 835 (2001) (summary

judgment); *LRS Electric Controls, Inc. v. Hamre Const., Inc.*, 153

Wash.2d 731, 107 P.3d 721, Wash., (2005) (construction of pleadings).

C. Statement of Facts

The injury in this case occurred in a car accident that happened at 1:20 p.m., on Friday, September 30, 2005. Chris Dean, an employee of the Bellingham School District, was driving a Bellingham School District van. He rear-ended the plaintiffs on the off ramp from I-5 to Guide-Meridian Street, in Bellingham. (CP at 91 (Complaint)).

Around the time of the accident, Dean's job title was Maintenance Supervisor. His work hours were 7:00 to 3:30, Monday through Friday. He drove the school van daily; it was assigned to him. (CP 105). He was

of sufficient rank within the District that he did not need permission from his supervisor to make trips in the van. (CP at 144). In fact, part of his job description involved going from school to school, and from building to building, making sure that each location had the supplies it needed. (See generally CP at 102, 125, 144 (Dean depositions of May 19, 2009, and July 23, 2009)).

At the time of this accident, Dean has testified, he was driving the van from Bellingham High School to “Office Depot,” to shop for an office chair for the maintenance department secretary. Such a task was squarely within the scope of Dean’s job duties. (CP at 102, 125 (Dean Depositions of May 19, 2009, and July 23, 2009)).

In support of that explanation, the record shows that, shortly before the accident, Dean had obtained a used office chair from the District’s warehouse. (CP at 178 (Exhibits to Dean Deposition of June 23, 2009)). The used chair was broken. As a result, Dean testified, he planned to obtain a *new* office chair for the maintenance department’s secretary. (CP at 146-147 (Dean Deposition of May 19, 2009)). On the morning of the day of the accident, the undisputed evidence shows that Dean had been at Bellingham High School, making a professional visit to the head custodian. He then left there, sometime after noon, to go to Office Depot,

to shop for a new office chair. (CP at 111 (Dean Deposition of May 19, 2009)). He did not have a “purchase order” with him. He would not have needed one, to make a purchase. Instead, the School District had an ongoing contract with Office Depot, and could obtain goods there simply by providing them with a “field P.O.,” a number that Dean could obtain simply by calling the District office. (CP at 109-110, 125 (Dean Deposition of May 19, 2009)). After the accident, Dean did not, in fact, purchase a chair. (CP at 149 (Dean Deposition of July 23, 2009)).

Dean was on Guide-Meridian Street, which provides a direct route between Bellingham High School and the Office Depot, when he rear-ended the plaintiffs. (CP at 113-114 (Dean Deposition of May 19, 2009)). The accident occurred at 1:20 p.m., during work hours. (CP at 108 (Dean Deposition of May 19, 2009)). There is no evidence that Dean did anything else on the trip between Bellingham High and Office Depot—there is no evidence that he stopped for lunch, took a personal detour, ran personal errands, or engaged in any other allegedly *ultra vires* act. (CP at 97-126 (Dean Deposition of May 19, 2009)).

When plaintiffs’ attorney filed suit, he was aware of the requirements of RCW 4.96.020--that he was required to file a Notice of Claim before he could bring suit against the District. He did so, filing his

Notice on August 7, 2008. (CP 79). In it, he specifically alleged that Christopher Dean was in the course and scope of employment, and that therefore the School District was liable for the plaintiff's injuries. (CP 79).

However, plaintiff's attorney then ignored the 60-day waiting period, proscribed by RCW 4.96.020(4), and instead, filed suit on September 11, 2008, which was only the 36th day. (CP 90-93). In the Complaint, which is the subject of the controversy here, plaintiff specifically alleged, in several paragraphs, that defendant Dean was acting in the course and scope of employment. (CP 90-93). The School District and Dean answered, and *admitted* that Dean was in the course and scope of employment. (CP 87-89). The District and Dean also raised the issue of RCW 4.96.020, and defective timing, in specific affirmative defenses within their Answer, while there was still time for plaintiff to cure. (CP 87-89).

When plaintiff did not cure the timing problem, the District and defendant Dean moved for dismissal. The Motion to Dismiss was based on the timing flaw. (CP 80).

In response to the motion, plaintiff's attorney *made a complete reversal*. He began to argue that, despite his Notice of Tort Claim, and his

Complaint, both of which alleged *only* vicarious liability, he now intended to show that defendant Dean had *not* been in the course and scope of his job duties (and therefore, had not been entitled to a Notice of Tort Claim and 60-day waiting period). (CP 62). Plaintiff's attorney argued that, if he could show that, in fact, Dean had been acting outside the course and scope of employment, the court could retroactively excuse the failure to have provided the Notice of Claim and 60-day waiting period as to defendant Dean. (CP 62, 24, 9).

Plaintiffs did not attempt to amend the Complaint, to add an "ultra vires" claim. Instead, they conducted extensive discovery, directed toward the issue of Dean's scope of employment. The above facts were developed, regarding the purchase of the office chair. (CP 95-195). And, at most, plaintiffs elicited an inconsistent statement about the name of the person for whom Dean had been shopping. Dean testified consistently that he was shopping for the maintenance department secretary. But he had first testified that the secretary at the time had been Elaine Perkins. He later corrected himself and explained that it was, in fact, Elaine's predecessor, Sharon Thomas, the former secretary. (CP at 108, 155).

The trial court held multiple hearings on the District's and Dean's motion. Throughout those four hearings, although many other issues were

raised, plaintiff never stated that he had intended to plead in the alternative. Plaintiff never asked the court to construe the complaint to include two different theories of liability against defendant Dean. (CP 62, 24, 9).

Then, when the court was prepared to make its oral ruling, at the July 31, 2009, hearing, plaintiff's attorney suddenly proposed that the court should construe the complaint to contain alternative theories—one being based on the claim that Dean was in the course and scope of employment, and one based on the theory that Dean was exceeding the scope of his employment duties at the time of the accident. (Vbt. Rp. Proc. At 11, 15). Plaintiff agreed that the court could dismiss the claim against Dean based on vicarious liability, because of the timing problem, but argued that the theoretical “second claim” against defendant Dean--for ultra vires actions—should be allowed to survive. (Vbt. Rp. Proc. at 11, 15).

The school district argued, in return, that the Complaint did not contain two alternative theories against defendant Dean, nor did it allege that Dean was outside the scope of his employment. (Vbt. Rp. Proc. at 16). It also argued that, even if the Complaint were so construed, there was insufficient evidence of “ultra vires” acts to allow the claim against Dean

to survive. (CP 5-8; and Vbt. Rp. Proc. at 14).

The trial court agreed with plaintiffs. It construed Paragraphs 4.3 through 4.6 of the complaint to contain an ultra vires claim against defendant Dean personally. (Vbt. Rp. Proc. at 17-18). It then held that such a claim would not require a RCW 4.96.020 Notice of Claim. It therefore allowed that claim to survive. It further held that the discrepancies in Dean's testimony about the identity of the person for whom the office chair was being purchased were sufficient "material facts" to prevent summary judgment for defendant Dean. (Vbt. Rp. Proc. at 19).

The Deans moved for discretionary review, which was granted. (See Order of Commissioner William Ellis, March 3, 2010). The Deans now move for reversal and remand, for a dismissal of the claims against them.

Argument

1. The Complaint cannot be construed to contain alternative claims.

Civil Rule 8(a) generally governs pleading requirements and provides that a complaint 'shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled.' Accordingly, a

sufficient pleading provides the opposing party fair notice of the other party's claim and its legal basis.

But, ‘{a} complaint must at least identify the legal theories upon which the plaintiff is seeking recovery’ and ‘{a}lthough inexpert pleading is permitted, insufficient pleading is not.’ *Dewey v. Tacoma Sch. Dist.* 10, 95 Wn.App. 18, 23-25, 974 P.2d 847 (1999); In other words, ‘{e}ven our liberal rules of pleading require a complaint to contain direct allegations sufficient to give notice to the court and the opponent of the nature of the plaintiff's claim.’ *Berge v. Gorton*, 88 Wn.2d 756, 762, 567 P.2d 187 (1977); see also *Lobak Partitions v. Atlas Constr. Co.*, 50 Wn.App. 493, 498, 749 P.2d 716 (1988). “The complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.” *Berge*, 88 Wash.2d at 763.

Here, the Complaint alleges, in at least three places, that defendant Dean was “performing his duties as an employee of the Bellingham School District.” (CP 90-93, Paragraph 4.3, 4.5, and 6.2). *Nowhere does it allege exactly the opposite*—that he had exceeded, or departed from, the scope of

those duties. Nowhere does it even hint of such a theory. Yet, that is exactly what the trial court held. It held that the Complaint contained an alternative allegation: that Dean had so far exceeded the scope of his job duties at the time that he could be personally liable for the injuries. It therefore allowed the suit to proceed on such a theory, despite its complete absence from the controlling pleadings, and a paucity of evidence to support such a theory.

Notably, the trial court made this ruling despite extensive discovery, and despite legal briefing on “personal detours.” (CP at 95-195, CP 7). The plaintiffs had conducted *all* of the depositions that they had requested, on the issue of Dean’s employment. They had not been able to elicit any evidence that Dean was on a “frolic and detour,” or had somehow exceeded the scope of his duties.

Further, the District had specifically argued that Dean would still be in the course and scope of employment, and the District liable for his conduct, unless the evidence showed that “the employee could not have been directly or indirectly serving his employer.” *Rahman v. State*, 150 Wash.App. 345, 208 P.3d 566 (2009); *Poundstone v. Whitney*, 189 Wash. 494, 65 P.2d 1261 (1937), cited in District’s Second Supplemental Reply (CP 7-8). In those cases, and many others, the courts have routinely held

that, “where the employee combines his own business with that of his employer, “the employer will [still] be held responsible” for the employee's negligent conduct “unless it clearly appears that the employee could not have been directly or indirectly serving his employer.” *McNew v. Puget Sound Pulp & Timber Co.*, 37 Wash.2d 495, 497-98, 224 P.2d 627 (1950). In other words, taking CR 8 and the *Rahman/Poundstone* holdings together, there was no “ultra vires” claim against defendant Dean unless the pleadings specifically averred that Dean was engaged in some truly extraneous conduct that did not directly or indirectly serve his employer. And, the District argued, no such pleading existed. (CP 7-8).

The trial court nonetheless ruled that the pleading could be read that broadly. It held, “There is not something that sets out clearly, in the alternative, “thus and such.” But I think it’s clear, so I will and I believe I must dismiss the school district and Mr. Dean as an employee of the school district,” and that “it seems to me it’s the claim against Mr. Dean personally and members of the community that survive[s].” (Vbt. Rp. Proc. at 18-19).

In short, there was no allegation in the Complaint that defendant Dean was engaged in some conduct that exceeded the scope of his employment duties for the District, and was therefore personally liable for

damages he caused. The trial court stretched the Complaint further than CR 8 allows. That was reversible legal error.

2. There are insufficient facts showing Dean to be in his personal capacity, to deny summary judgment

Even assuming for the sake of argument that the Complaint had contained an “ultra vires” allegation against defendant Dean, it was error for the court to allow such a claim to survive the District’s Motion to Dismiss.

A. This Motion was converted into a CR 56 motion.

As plaintiffs themselves argued, this Motion to Dismiss had been converted, by operation of CR 12(c), into a CR 56 type motion, by the plaintiffs’ submission of materials outside the pleadings. (See Vbt. Rp. Proc. at 6 (Plaintiffs’ counsel: “This is now, um, like a summary judgment because what we have got is issues as to fact and then we get in, because we have expended the scope of what is relevant to making this decision[.]”). Defendants Dean agree with applications of the CR 56 standard for purposes of this appeal.

When this Motion was converted to a CR 56-like proceeding, by operation of CR 12(c), then the inquiry became: whether there were genuine issues of material fact, as to defendant Dean’s actions being

outside the scope of his employment? CR 56(c).

B. No genuine issues of material fact

The District's Motion for Dismissal was supported by Dean's testimony that he had been in the service of his employer when the accident happened (and by such allegations in the Complaint, which were admitted in the Answer). Once the School District offered Dean's testimony that he was in the course and scope of employment, in traveling on the Guide-Meridian, on a workday, during work hours, in a district van, to go to Office Depot on district business, the burden shifted to the plaintiffs, to set forth *specific facts* showing there is a genuine issue requiring a trial. *Rathvon v. Columbia Pac. Airlines*, 30 Wash.App. 193, 201, 633 P.2d 122 (1981), *review denied*, 96 Wash.2d 1025 (1982).

Rather than try to meet that burden, plaintiffs argued that minor discrepancies in Dean's own testimony created an issue of "credibility." (CP 11-13). Specifically, plaintiffs sought to create factual issues by offering Dean's testimony to show that (a) Dean originally mis-named that secretary; (b) he did not have a purchase order with him; and (c) he never actually bought a chair. (CP 11-13). From those facts, plaintiffs offered counsel's speculation that Dean must have concocted the "shopping at Office Depot" story after the fact. They argued that Dean's credibility was

at issue, and summary judgment could, therefore, not be granted. (CP 11-13).

The District responded that none of those issues were “material” facts. (CP 5-8). Despite Dean’s mis-recollection of the secretary’s name, no *facts* had been elicited, showing that Dean had exceeded the scope of his authority to use the school district’s van. (CP 5-8). Said differently, even if Dean had been completely mistaken about why he was driving on Guide Meridian on September 30 (which the District does not concede), the burden should still have remained on plaintiff, to show what he *was* doing, and to show, *through specific and articulated facts*, that such conduct was so far outside the scope of his duties that only he, personally, was liable for the injuries. Without such evidence, summary judgment should have been granted. *See, e.g., Rahman v. State*, 150 Wash.App. 345, 208 P.3d 566 (2009) (holding that summary judgment was proper when the evidence showed that the employee was performing a task that benefitted the employer, at the time of accident). Speculation from plaintiffs’ counsel should have been insufficient. *Id.*

The trial court held that “the issues that you mentioned, that being issues of credibility, it seems to me, more likely, it is recollection or faulty recollection. But I think that is sufficient because I am not making a

factual determination right now.” (Vbt. Rp. Proc. at 18-19). In other words, the trial court denied summary judgment based on counsel’s speculation that Dean might not have been buying an office chair that day.

A material fact is one upon which the outcome of the litigation depends. *Estate of Celiz v. PUD 1*, 30 Wash.App. 682, 684, 638 P.2d 588 (1981). None of the evidentiary issues in this record created a genuine issue of *material* fact. Dean’s mis-recollection of the secretary’s name, his lack of a physical “purchase order,” and even his lack of an ultimate chair purchase, do not equate with evidence that he was exceeding the scope of his job duties, in driving the district van on Guide-Meridian.

Summary judgment is proper if the non-movant ““fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”” *Miller v. Likins*, 109 Wash.App. 140, 34 P.3d 835 (2001). Speculation and conjecture are insufficient. *Id.* The plaintiffs should have had to produce *some affirmative evidence* to support their “ultra vires” theory. Absent such evidence, the trial court should have granted the District’s Motion, as to defendant Dean.

Conclusion

Plaintiffs knew that Dean was in his employment capacity when he

caused this accident. Their Complaints states that—and only that. It cannot be construed to contain an “ultra vires,” or “personal liability” claim. Further, even if the Complaint were so construed, there are insufficient facts to support a claim for personal liability against Dean. The only viable claim was the one based on his employment by the Bellingham School District. And, for that claim, plaintiff failed to comply with the 60 day waiting period required by RCW 4.96.020. The order denying defendants Dean’s Motion to Dismiss should be reversed, and remanded for entry of a dismissal of all claims.

DATED this 5th day of May, 2010.

Respectfully submitted,



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CHRISTOPHER HAMILTON DEAN, and JANE DOE DEAN,
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and BELLINGHAM SCHOOL DISTRICT, #501,

Defendants/Petitioners.

DECLARATION OF MAILING

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JEFFREY BROWN, hereby declares:

On March 22, 2010, I mailed via U.S. Postal Service a true and correct copy of the following documents:

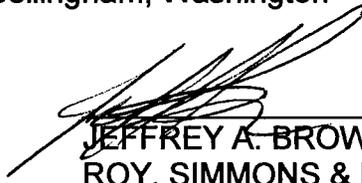
Brief of Appellants Dean and this declaration addressed to:

Pro Se Respondents:

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I declare under penalty of perjury pursuant to the laws of the State of Washington that the foregoing statement is true and correct.

Dated this 6th day of May 2010 at Bellingham, Washington



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