Supreme Court No. 102076-7

SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 83541-6-I

GARRET SCHIREMAN, in his individual capacity, and as executor for THE ESTATE OF LOREN E. SCHIREMAN,

Petitioner,

v.

CHRISTOPHER P. WILLIAMS,

Respondent.

PETITIONER'S ANSWER TO CLERK'S MOTION TO STRIKE REPLY

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I. INTRODUCTION

Petitioner Garret Schiremen respectfully requests the Court deny the Clerk's Motion to Strike his Reply because Respondent Christopher Williams raised a new issue in his Response brief that was never introduced in any of the underlying litigation or the Division One appeal. The 6-page Reply brief strictly addresses that issue and none others.

II. RELEVANT FACTS

In *Daugert v. Pappas*, 104 Wn.2d 254 (1985), this Court held that, in some legal malpractice cases, the trial judge can decide proximate cause instead of the jury. The primary issue in the Petition for Discretionary Review is whether the trial court should decide proximate cause when no party asked it to:

> Should Division One have vacated a unanimous jury verdict on the grounds that *Daugert* required the trial judge to decide proximate cause, where neither party asked the trial judge to decide proximate cause, both parties asked the jury to decide proximate cause, and both parties stipulated to the propriety of the proximate cause jury instruction?

Petition for Review at 1-2.

Prior to the Division One ruling, Respondent Christopher Williams repeatedly admitted that he never asked the trial judge to decide proximate cause:

> Garret argues throughout his response that Williams "never asked Judge Appel to decide proximate cause". BR 21. That is because there was no need for anyone to argue or decide "proximate cause", since the issues were purely legal ones that *had already been decided by Judge Bowden*. Garret was trying to turn the case into one of negligence by Williams, but it should never have survived the first motion to dismiss.

Reply Brief of Appellant ("RBoA") at 6 (italics added). Also:

> …both of Williams' motions in two of his assignments of error sought dismissal of Garret's claims on the basis that a jury should not decide an issue previously decided as a matter of law by a judge. It has nothing to do with 'proximate cause', a central focus of Garret's BR.

RBoA at 6, n. 3 (citations omitted).

On March 27, 2023, Division One issued its opinion. The opinion stated that the trial court erred by allowing the jury to decide proximate cause. *Schireman v. Williams*, 83541-6-I, 2023 WL 2645875, at *7 (Wn. Ct. App., Mar. 27, 2023). After Mr.

Schireman submitted his Petition for Discretionary Review of that opinion, Mr. Williams began to claim, for the first time in his Response, that he *did* ask the trial judge to decide proximate cause:

> What Schireman cannot deny, pet. at 10-12, however, is that Williams argued a CR 12(h) motion before the trial, **arguing that causation was for the court**, not a jury. RP 712-29. The court denied it. RP 724-29. Similarly, Williams argued a CR 50(a) motion **asking the court to decide causation**. RP 231-47. The court denied it as well. RP 244-47.

Answer at 7 (emphasis added).

III. ARGUMENT

Mr. Williams' novel position drastically changes the issue in the case. The issue in the Petition is 'what a trial court should do when neither party asks it to decide proximate cause.' Mr. Williams' Response changes that issue to 'what a trial court should do when the defendant *does* ask the trial court to decide proximate cause.' One is procedural. The other is substantive, requiring an in-depth review of *Daugert* and its progeny. By changing the predicate on which the entire Petition is based, Mr.

Williams changes the proper analysis and introduces a new issue. By deploying that new issue in a Response brief, he deprives the Petitioner of an opportunity to address the new issue.

RAP 13.4(d) does not prohibit Mr. Schireman's reply. RAP 13.4(d) provides:

> A party may file a reply to a petition for review only if the answering party seeks review of an issue not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer.

RAP 13.4(d).

Mr. Schireman's reply does not reargue issues previously raised in the Petition for Review. It does not argue issues previously raised *at any point in this case* because Mr. Williams' new position was raised for the first time after it was too late for Mr. Schireman to respond. The Court has a right to know that Mr. Williams never asked the trial court to decide proximate cause. It has a right to know that Mr. Williams changed his position only once it became necessary to support the Division

One opinion. The Petitioner's six-page Reply brief does no more than inform the Court about that.

IV. CONCLUSION

For the foregoing reasons, Mr. Schireman respectfully requests the denial of the motion to strike and review of his Reply.

This document contains 774 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 20th day of July, 2023.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under the laws of the state of Washington that on the date written below, I filed the foregoing Petitioner's Reply to Respondent's Answer with the Clerk of the Court using the Washington State Appellate Courts' Portal, which will send notification of such filing to the following:

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Dated this 20th day of July, 2023.

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