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No. 70761-2-I

King County Superior Court No. 10-2-34403-9 SEA

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CHANNARY HOR,

Appellant,

v.

CITY OF SEATTLE,

Respondent.

CITY OF SEATTLE'S REPLY BRIEF ON CROSS-APPEAL

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I. INTRODUCTION

The City of Seattle provides this Reply Brief addressing only those issues raised in plaintiff's response as it relates to the City's conditional cross-appeal.

II. ISSUES

1. Did the City have standing to raise the issue of the timing and adequacy of service on Tammam below, and does it have standing to raise the issue in this appeal?

2. Did plaintiff's first attorneys act in good faith and proceed "in a timely manner as required by the court rules" in trying to serve Tammam such that they can meet the *Sidis* standard?

3. Are Tammam's in-car statements hearsay and not subject to admission under an exception?

III. ARGUMENT

A. The City Has Standing to Raise the Issue of the Timing and Adequacy of the Service on Tammam.

Standing is a legal concept that derives from the fundamental principle that one whose legal rights may be affected by the ruling on a particular issue has a voice in addressing that issue. Plaintiff's argument is without merit.

The City of Seattle has standing to challenge the issue of whether Tammam was properly served within the statute of limitations such that he is a proper defendant in the case. Under RCW 4.22.070(1)(b), in the event

of a fault-free plaintiff (here, the trial court ruled pre-trial that plaintiff was fault free for purposes of RCW 4.22):

> If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, **the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.** (Emphasis added.)

As such, the City's potential liability exposure to fault assigned to Tammam **only** becomes significant by virtue of him being a defendant, specifically a defendant "against whom judgment is entered . . . ." If Tammam is not a "defendant," then judgment cannot be entered against him. If judgment is not entered against him, then the City cannot be "jointly and severally liable for the sum of their [Tammam and the City] proportionate shares of the claimant's total damages." If Tammam is not a defendant, then the fault assigned to him does nothing to increase the City's liability exposure – no judgment could be entered against him and therefore the City has no joint and several liability exposure for his proportionate share of fault. This legal exposure, that comes only if Tammam is a proper defendant in this suit, gives the City standing – a legally protected interest – to challenge the adequacy of the service of process on Tammam.

RAP 3.1 provides that "[o]nly an aggrieved party may seek review by the appellate court." "To have standing, a party must show a real interest in the subject matter of the lawsuit, that is, a present,

substantial interest, as distinguished from a mere expectancy, or future contingent interest, and the party must show that a benefit will accrue it by the relief granted. *Primark, Inc. v. Burien Gardens Associates*, 63 Wn. App. 900, 907, 823 P.2d 1116 (1992) (*citing State ex rel. Gebhardt v. Superior Court for King Cy.*, 15 Wn.2d 673, 680, 131 P.2d 943 (1942)). Plaintiff mistakenly characterizes the City's "real interest" as it relates to Tamman not being dismissed as a defendant as a "litigation advantage." This dismissive characterization minimizes the substantial impact this decision has on defendant.

The issue – timely and proper service upon Mr. Tammam – directly affects whether the City can be held jointly and severally liable for damages associated with Mr. Tammam's actions. That effect is not "a mere expectancy, or future, contingent interest." In light of the trial court's pre-trial ruling that Ms. Hor was not at fault, had there been a finding of negligence and proximate cause against the City, it would have faced joint and several liability for the percentage of fault assigned to Tammam.[1] As such, the effect the trial court's decision not to dismiss Tammam for lack of jurisdiction vastly increased the City's liability exposure and dramatically altered the landscape of this case. There is no

[1] The trial court, by virtue of Tamman's default, concluded as a matter of law that Tamman was both negligent and that his negligence was a proximate cause of plaintiff's injuries and damages. The only issue left for the jury to decide at trial as to Tammam was the percentage of fault to be allocated to him. In the unlikely event of a retrial, the findings of negligence and proximate cause as to Tammam will stand. That makes it even more vital that this Court, if it reaches the issue on this conditional cross appeal, determine whether Tammam is a proper defendant against whom a judgment can be entered or whether he should be dismissed as a defendant and be simply a non-party entity whose percentage of fault allocation can never be attributed to the City under RCW 4.22.070(1)(b).

doubt that the City has a "real interest" in this issue and is fully entitled to challenge the propriety of the trial court's decision as part of this cross appeal. See *Bunting v. State*, 87 Wn. App. 647, 943 P.342 (1997) (a party has standing to raise an issue if it has a distinct and personal interest in the outcome of the case and can show it would benefit from the relief requested).

The court in *Tinker v. Kent Gypsum Supply, Inc.*, 95 Wn. App. 761, 765-766 (1999), determined that a defendant did not have standing to challenge a ruling regarding another co-defendant. In that case, because the defendant did not assert a cross-claim when it had ample opportunity to do so, the court held that the defendant cannot later argue that is has a cognizable interest in the co-defendant's dismissal. *Id.*, at 765. Implicit in that ruling is that a defendant has standing to challenge a trial court's decision with respect to a co-defendant if that defendant takes action asserting their cognizable interest when they have opportunity to do so before the court make its decision. The defendant in *Tinker* failed to assert their cognizable interest – a cross-claim against co-defendant – until after the court dismissed co-defendant from the case despite having ample opportunity to do so.

The opposite is true here. The City challenged the untimely and improper service of Mr. Tammam well in advance of trial. As discussed in its opening brief, the City moved pre-trial to have Tammam dismissed as a defendant, thus preserving its objection. The City has a cognizable interest in this issue of whether Tammam can be a defendant because his

inclusion brings with it joint and several liability exposure. Unlike *Tinker*, the City has standing here because it raised its objection and sought to protect its cognizable interest.

B. Plaintiff's Attorneys Were Not Diligent and Cannot Meet the *Sidis* Standard.

Tammam was never timely served and should have been dismissed as a defendant for lack of jurisdiction, thus eliminating him as a defendant "against whom judgment is entered" for purposes of joint and several liability under RCW 4.22.070(1)(b). It is patent from the record that plaintiff's first counsel did not use diligence in trying to effect service when they completely ignored all of the alternate means of service that easily could have been effected well before the statute of limitations (already tolled during plaintiff's minority) ran.

The issue in this conditional cross-appeal as it relates to whether the plaintiff timely served Tammam cannot be simply answered with the statement "Mr. Tammam was served." (Reply Brief, p. 23.) The issue is whether plaintiff met her legal obligation under *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991), to both timely serve Tammam after effecting service on the City of Seattle and proceed with her case in the manner contemplated by the scheduling order and the civil rules. "Plaintiffs **must** proceed with their cases in a timely manner as required by court rules, and **must** serve each defendant in order to proceed with the action against that defendant." *Id.* at 329-30 (emphasis added). This holding in *Sidis* is hardly a statement of dicta, as plaintiff would trivialize

it. Rather, it is a clear articulation of the Supreme Court's rule of interpretation of the language of RCW 4.16.170, which read literally, as the Court of Appeals did in *Sidis,* "would permit a plaintiff to extend the state of limitations indefinitely against multiple defendants merely by serving one defendant."[2] This period for service "is not *infinite.*" *Id.* at 329. Neither RCW 4.16.170 nor *Sidis* contemplate the situation where a plaintiff makes no effort until one month before trial to exercise alternate means of service on a known, primary defendant. The *Sidis* Court's admonition that plaintiffs must "proceed with their cases in a timely manner as required by courts rules" clarified the "clumsy" language of RCW 4.16.170 in order to avoid absurd and patently inequitable consequences like those presented here.

This court's inquiry is relatively simple. The procedural record in this case is clear. The court rules, which "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action[,]" are likewise clear. CR 1. Nothing in their letter or spirit can excuse the neglect objectively demonstrated here. Plaintiff cannot show that her neglect was in "good faith."

Bosteder v. City of Renton, 155 Wn.2d 18, 117 P.3d 316 (2005) (superseded by statute), upon which plaintiff relies, does not support her position. In *Bosteder*, where plaintiff delayed eight months before serving a defendant, the Court noted that there is little guidance as to what kind of delay would be considered "excessive," but cited to *Sidis* for the basis

[2] *Sidis v. Brodie/Dohrmann, Inc.,* 58 Wn.App. 665, 672, 794 P.2d 1309 (1990).

underlying the tolling provision – that it is "arguably unfair to require a plaintiff to serve all defendants within a set limitation period, when it may be difficult or impossible to determine the actual location of some defendants before discovery is underway".[3] The Court then identified specific misunderstandings and confusion that may have contributed to the delay in that case. In contrast, plaintiff can cite to no "misunderstandings" or confusion that might have compromised efforts to timely serve Tammam, particularly where, unlike in *Sidis* and *Bosteder*, plaintiff had available to her alternate means of service, including the process under RCW 46.64.040 that she ultimately chose to exercise 15 months after the statute of limitations had run. Unlike in *Sidis* and *Bosteder*, plaintiff had absolute certainty about the factual and legal basis for a claim against Tamman from the day she sustained her injuries. Moreover, neither *Sidis* nor *Bosteder* contemplate the situation here, where a judgment against the late-served defendant is clearly sought only for the potential of obtaining a joint recovery under RCW 4.22.070(1)(b).

The record simply does not bear out plaintiff's argument that the efforts of her first attorneys, Mr. Klein and Mr. Martin, were "significant and extraordinary." (Reply brief at 23.) They were not. Indeed, the actions of these attorneys in trying to serve Tammam don't meet the minimum standards for ethical conduct under RPC 1.3 and 3.2. Notwithstanding the trial court's extraordinary efforts to set aside plaintiff's prior counsel's inaction, as the Supreme Court recently

[3] *Bosteder* at 48, *citing Sidis* at 330.

affirmed, such a procedural record is absolutely anathema to the practice of law in this state and thus cannot be reconciled with the good faith and timeliness standard set forth in *Sidis*.[4] The trial court erred in not dismissing Tammam as a party defendant for lack of jurisdiction. Since he should have been dismissed from the case, the trial court erred by entering judgment against him.

Carras v. Johnson, 77 Wn. App. 588, 892 P.2d 780 (1995), discussed on page 25 of plaintiff's reply brief, does not help her argument. The plaintiff there undertook attempts to effect service before the statute of limitations expired and filed an affidavit with the Secretary of State's office setting forth their efforts at due diligence "in support of his effort to obtain substitute service" under RCW 46.64.040 **before** the expiration of the 90-day period following timely filing of a summons and complaint. Here, the statute of limitations on plaintiff's claims against Tamman expired on October 30, 2010. She did not undertake substitute service on the Secretary of State until 2012. The time limit set forth in RCW 46.64.040 (three years) is the same as the three-year statute of limitations for bringing an action for injury to person or property. *Martin v. Triol,*

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[4] In *In the Matter of the Disciplinary Proceedings Against Matthew Franklin Pfefer,* Supreme Court Cause No. 201,327-9 (Feb. 26, 2015), the Court upheld discipline against an attorney for failing to timely prosecute an action on behalf of his client, from the point of initial filing to the point of suddenly withdrawing. The opinion is instructive because it demonstrates the fundamental ethical obligation of an attorney to proceed in good faith and in a timely fashion in prosecuting an action on behalf of a client. RPC 1.3 requires that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." RPC 3.2 requires that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." Certainly, those requirements inform the *Sidis* requirement that a party demonstrate that her counsel proceeded "in a timely manner as required by the court rules." The record here does not support such a determination as it relates to the non-actions of plaintiff's original counsel.

121 Wn.2d 135, 147-49, 847 P.2d 471, 477-78 (1993). The issue is not whether plaintiff used due diligence in attempting to serve Tammam such that she can avail herself of the substituted service provided by RCW 46.64.040. That statute was lost by virtue of delay. Rather, the issue here is whether plaintiff, through her first lawyers, fulfilled the *Sidis* requirement for attempting service on Tammam. They did not, unless the "timely manner" requirement is an empty vessel and the court rules and scheduling order are meaningless in practice.

C. Tamman's In-Car Statements Constitute Inadmissible Hearsay and the Court Erred by Admitting Them Into Evidence.

Plaintiff's brief makes it clear that the two grounds now provided as a basis for Tammam's "mutterings" are (1) the excited utterance exception under ER 803(a)(2), or (2) the then existing mental or emotional state exception under ER 803(a)(3). Neither of these fit for the reasons set forth in the City's opening brief. Beyond conclusory assertions, plaintiff's brief does not address any of the legal authorities set forth in the City's brief, but instead cites to the case of *Nation Wide Ins. v. Williams,* 71 Wn. App. 336, 858 P.2d 516 (1993). That case does not support the admission of Tammam's alleged statements here.

In *Nation Wide Ins.*, the plaintiff sought uninsured motorist coverage based on a claim that he was run off the road by a phantom vehicle. There were no other witnesses to the accident. He sought to present evidence of his own statements made to a person that came upon his damaged vehicle, say plaintiff moaning in the cab of his truck, and

heard him remark about having been run off the road. Plaintiff later made similar remarks to the emergency room personnel about having been run off the road. The Court of Appeals evaluated the excited utterance exception as it applied to the plaintiff's statements and found them admissible.

As outlined in the City's opening brief, the situation here has none of the indicia of an excited utterance. First, Tammam's alleged statements were not "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." As plaintiff described, Tammam was responding to her question – "[w]hat are you doing?" – posed at a point in time when Tammam was driving at high speed away from having been contacted by a police officer. In response to her question, Tammam allegedly described to her his contingent plan: "I'll stop if they stop." Responding to a question is inapposite to "spontaneous[ly] blurt[ing] out a statement . . ." as *Nation Wide Ins.* discussed. To qualify under this narrow exception, the statement cannot be the "product of premeditation, reflection, or design." *Burmeister v. State Farm Ins. Co.,* 92 Wn. App. 359, 369-371, 966 P.2d 921 (1998). At best, Tammam's highly self serving alleged statements are just that – an indication of his designed and premeditated plan – to continue driving until such time as the officers stop, at which point he will stop because, under the present circumstances he "can't lose them."

These "mutterings," so highly prejudicial and so lacking in circumstantial guarantees of trustworthiness, particularly in light of the City's evidence that such "mutterings" would have been rendered inaudible over the roar of the engine, should never have been admitted at trial. The trial court, which admitted its hesitation but indicated it felt bound to deem the statement de facto admitted by virtue of the first trial court's refusal to address the City's evidentiary challenges on summary judgment, patently abused its discretion in deciding that they were admissible. In the unlikely event of a new trial, this Court should rule that they are inadmissible.

IV. CONCLUSION

The plaintiff's assignments of error are without merit and this Court should affirm the underlying judgment in favor of the City of Seattle. In the unlikely event the Court reaches the issues in this conditional cross-appeal, it should rule that Tammam is not a proper defendant, having never been timely served. As such, the trial court had no jurisdiction over him. He is not a defendant against whom judgment can be entered under RCW 4.22.070.

Further, the trial court should not have admitted Tammam's alleged mutterings. They constitute hearsay, lack all guarantees of trustworthiness, and should not be permitted into evidence in any retrial.

Respectfully submitted this 2nd day of March, 2015

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