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Appellate Court Case No: 78637-7-1
Superior Court Case No: 17-2-02238-37

IN THE APPELLATE COURT OF THE STATE OF WASHINGTON DIVISION 1

CATHERINE MICHELE NAGY,

Appellant,

vs.

EMPRES HOME HEALTH OF BELLINGHAM, LLC, *et. al.,*

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR WHATCOM COUNTY THE HONORABLE CHARLES R. SYNDER

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW RAP 13.4

THOMAS DUNN
Attorney at law
510 East Holly Street
Bellingham, WA 98225
WSBA# 35279
(360) 733-1529

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IDENTITY OF PETITIONER

Appellant Catherine Michele Nagy [hereinafter "Petitioner" makes this petition for discretionary review.

CITATION TO COURT OF APPEALS DECISIONS

Petitioner seeks review of the Court of Appeals Unpublished Opinion filed on December 2, 2019, striking her Reply Brief and affirming the trial court's summary judgment order dismissing her complaint. No motion for reconsideration was filed; however, on December 11, 2019, non-party Igor Lukashin (pro se) filed a motion to publish the Court of Appeal's opinion. This motion was denied per the Court of Appeals order filed on January 10, 2020.

ISSUES PRESENTED

Should the Court of Appeals have stricken Petitioner's Reply Brief because Petitioner raised the "context rule" for the first time in her reply brief?

If this Court finds that the Court of Appeals erred in striking Petitioner's Reply Brief, Petitioner's asks this Court to remand the matter to the Court of Appeals with instructions to consider her reply brief in determining whether the summary judgment dismissing her complaint below should be reversed.

STATEMENT OF THE CASE

An injury to Appellant [hereinafter "Plaintiff" or "Ms. Nagy"] occurred on November 17, 2014 at approximately 12:25 p.m. on Railroad Avenue at the intersection with E. Chestnut Street in Bellingham, Whatcom County, Washington. It was sunny and the sky was clear. Plaintiff Catherine Michele Nagy, a pedestrian, was crossing E. Chestnut St. in a marked crosswalk at the traffic signal controlled intersection with Railroad Ave. She was heading north. The pedestrian "walk" light was on. Employee George Miller, who was employed by Respondent [hereinafter "Defendant" or "Employer"] Eden Home Health, and who was working within the scope of his employment at the time, was driving his 2006 Cadillac CTS, and was heading south on Railroad Ave. Employee Miller made a left turn onto E. Chestnut St. and violently struck Ms. Nagy on the left knee, as she was in the middle of the crosswalk. She was thrown backward, striking the back of her head on the pavement. Medics and the Bellingham Police Department were summoned to the accident scene. Defendant Miller was cited for "Failure to Yield to Pedestrian in Crosswalk" [See Plaintiff's Declaration, Sub No: 12, PP 2]

Ms. Nagy incurred significant injuries as a direct result of the accident and ensuing surgery was necessary to treat her injuries. Ms. Nagy's special damages exceed $60,000.00, and ongoing. [See Plaintiff's Declaration, Sub No: 12, PP 3]

On October 27, 2017, Plaintiff entered into a settlement agreement, which was prior to the filing of this suit. The settlement agreement, [hereinafter the "Miller Agreement"] according to Ms. Nagy's understanding, released only the driver/employee/agent, George Miller [hereinafter "Employee"] and others covered under his insurance policy. A letter from AAA Insurance was sent to Plaintiff's Attorney's Office on October 11, 2017, which offered the full policy limits at the time of the loss, $50,000.00 of Employee's personal insurance policy. [See Plaintiff's Declaration, Sub No: 12, PP 5]

Plaintiff understood the policy limits to be only Employee's contribution and that the release was effective as to only the Employee personally under **his** insurance policy because the amount tendered to Plaintiff by Employee's insurance company did not fully compensate her for the loss she sustained in the subject accident. It was her intention to obtain further compensation from Employer. Employer was not privy to the Miller Agreement and no consideration was provided to Plaintiff for the release of Employer. [See Plaintiff's Declaration, Sub No: 12, PP 6 & 7]

Plaintiff attempted to settle with Employer, but Employer failed and refused to make any offer to settle the matter whatsoever. This law suit ensued.

The Summons and Complaint were filed on November 17, 2017, in Whatcom County Superior Court [Designation of Clerk's Papers, Sub No. 2 and 3 respectively, hereinafter "DCP"]. Attorney Michael John Estok appeared for Defendants on February 7, 2018 [DCP Sub No. 4]. Defendants' Motion for Summary Judgment was filed on May 2, 2018 [DCP Sub No. 7]. Plaintiff's Response was filed on May 31, 2018 [DCP Sub No. 11]. The Summary Judgment Hearing was heard on June 15, 2018, before Honorable Charles R. Snyder, and an Order Granting Summary Judgment was entered on that same day. [DCP sub Nos. 15 and 16 respectively]. Plaintiff's Notice of Appeal was timely filed on July 6, 2018. [DCP Sub No 17], appealing the Order Granting Summary Judgment.

On December 2, 2019, the Court of Appeals, Division One, entered an unpublished opinion striking Appellant Nagy's Reply Brief and affirming the trial court's order of summary judgment dismissing Nagy's claims.

On December 11, 2019, non-party Igor Lukashin (pro se) filed a motion to publish the Court of Appeal's opinion.

On January 10, 2020, the Court of Appeals issued an order denying the motion to publish.

On February 10, 2020, Appellant Nagy timely filed this petition for discretionary review.

ARGUMENT

Grounds

Petitioner submits that the issue as to whether a reviewing court should consider issues raised for the first time in a reply brief is an issue that should be determined by the Supreme Court as it involves an issue of substantial public interest. Petitioner ask this Court to consider the facts regarding this issue herein and determine first whether the issue regarding the "context rule" was, indeed, raised for the first time in her reply brief. If the Court finds that it was, Petition seeks review to determine clear criteria for determining when issues raised for the first time in a reply brief should be stricken and when a matter should proceed on the merits notwithstanding.

I. Petitioner did not Raise the Issue Regarding the "Context Rule" for the First Time in her Reply Brief.

A. Appellant May Reply to Issues Raised in Respondents' Response

RAP 10.3(c) states: Reply Brief. A reply brief should conform with subsections (1), (2), (6), (7), and (8) of section (a) and be **limited to a response to the issues in the brief to which the reply brief is directed.** [My emphasis] Respondents state in their brief: "In this case, as the superior court properly concluded, there is no basis to proceed beyond the

text of the settlement agreement to discern the parties' objective intent because its meaning is not ambiguous." [Respondents' Brief, page 8-9] Ms. Nagy is, accordingly, permitted to reply to said contention with argument and authority challenging the same.

Berg and its prodigy hold that the "context rule" should be used to discern the intent of contracting parties. *Berg v. Hudesman*, 115 Wash. 2d 657, 666, 801 P.2d 222 (1990). Further, extrinsic evidence may be admissible to interpret unambiguous contract language. *Id.* at 668. Respondents cannot now complain that they have been prejudiced by Ms. Nagy's Reply Brief as it responds to an averment Respondents have asserted that is clearly contrary to well-established law.

We know that Respondents were aware of this well-established law because they cite to *Berg* in their Response Brief. [Respondents' Brief, page 20] Accordingly, Defendants cannot now claim that they have been prejudiced by Ms. Nagy citing to *Berg*. In fact, it is Ms. Nagy who would be prejudiced if she were precluded from replying to Defendants' citation to *Berg*, especially because Defendants fail to state *Berg's* central holding: the Court will discern the parties' intention pursuant to the Context Rule. Ms. Nagy submits that the foregoing argument dispels the grounds upon which Respondents' base their motion to strike the Reply Brief, and that this Court should deny Respondents' motion to strike Ms. Nagy's Reply

Brief on the foregoing ground alone. However, Ms. Nagy provides further reasons why Respondents' motion should be denied:

B. Ms. Nagy Raised the Issue Undergirding the "Context Rule" Below

The parties appear to agree that the basic purpose of contract interpretation is to ascertain and give effect to the parties' intentions. *Martinez v. Miller Indus.*, 94 Wash. App. 935, 943, 974 P.2d 1261 (1999).

In her Declaration in Opposition to Defendants' Motion for Summary judgment Ms. Nagy states: "I feel that it would be fundamentally unfair to grant Employer summary judgment motion as I proceeded in good faith and it was never **my intention** to release Employer by signing the personal release for Employee." [Emphasis added]

In Plaintiff's Response to Summary Judgment filed below Ms. Nagy states: "The pivotal inquiry is whether the parties to the release **intended** to release both the principal and the agent. If such intent is clear from the language of the release, then both parties are released." [Plaintiff's Response to Summary Judgment, page 9, lines 6-8] [Original emphasis]

Later she states:

> The subject release does not show that Plaintiff **intended** to release the Employer even though, as with the *Vanderpool* release, Plaintiff's Release includes boilerplate language releasing "principals," stating that all claims against any other persons are discharged.

[Page 11, lines 11-14] [Emphasis added]

Then later she states:

> Plaintiff submits that she and Employee clearly **intended** to release only Employee personally as relates to any further additional exposure over and above his policy limits payment of $50,000.00, and this is exactly what the release does. The subject release does not specifically refer to, name, or identify anyone other than the Employee.

[Page 11, lines 18-21] [Emphasis added]

The purpose of the Context Rule is to ascertain the parties' intentions. Ms. Nagy has asserted below that it was not the parties' intentions to release the Defendants. Ms. Nagy did not raise a new issue in her Reply Brief; she merely cited to additional authority in support of her argument below.

C. Ms. Nagy Raised the Issue Undergirding the "Context Rule" in her Opening Brief

Ms. Nagy states in her Opening Brief: "The pivotal inquiry is whether the parties to the release **intended** to release both the principal and the agent. If such intent is clear from the language of the release, then both parties are released." [Opening Brief, page 18]. Later in the brief Ms. Nagy states:

> As in the *Vanderpool* release, the Miller Agreement includes similar boilerplate language purportedly "releasing" unspecified principals. Plaintiff submits that this Court should not automatically conclude therefrom that the Plaintiff **intended** to release Employer.

[Opening Brief page 22] [Emphasis added]

For the reasons stated above Ms. Nagy did not raise a new issue in her Reply Brief; she merely cited to additional authority in support of her argument in the Opening Brief. The Court of Appeals should not have stricken Petitioner's reply brief; it should have considered the merits of her position and reserved the trial court's summary judgment in favor of Respondents.

II. This Court Should Consider Petitioner's Reply Brief Notwithstanding any Procedural defect and proceed to the Merits of Case in Deciding Whether the Trial Court Erred in Granting Respondents' Summary Judgment

A. The Court Should Interpret the RAP liberally to Promote Justice and Facilitate the Decisions on the Merits

RAP 1.2 provides:

> (a) Interpretation. These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b)....
>
> (c) Waiver. The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c).

Ms. Nagy submits that, for all the foregoing reasons, points, and authorities she has compiled with the Rules of Appellate Procedure with

regard to her Reply Brief. However, if the Court finds that there was a technical violation of the rules, Ms. Nagy respectively urges this Court to exercise its discretion, pursuant to RAP 1.2, and decide this case on the merits. The seminal case regarding when the Court should exercise such discretion is *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995), which holds:

> It is clear from the language of RAP 1.2(a), and the cases decided by this court, that an appellate court may exercise its discretion to consider cases and issues on their merits. This is true despite one or more technical flaws in an appellant's compliance with the Rules of Appellate Procedure. This discretion, moreover, should normally be exercised unless there are compelling reasons not to do so. In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.

Id. at 323.

There is no compelling reason why the Court should not exercise its discretion herein:

The nature of the appeal is clear: it is simply a review of the summary judgment order below, which simply regards whether the subject release releases the Defendants. Whether Mr. Miller and Ms. Nagy

intended to release the Defendants is a significant component of this inquiry.

The relevant issues are argued in the body of the Reply and citation is provided such that this Court is not greatly inconvenienced. In large measure the issues and argument regard the Context Rule as a framework for ascertaining whether Mr. Miller's and Ms. Nagy's intended to release Defendants with the subject release.

Defendants are not prejudiced as they opened the door for Ms. Nagy to reply to their averment: "In this case, as the superior court properly concluded, there is no basis to proceed beyond the text of the settlement agreement to discern the parties' objective intent because its meaning is not ambiguous," and then citing to *Berg* with no mention of the Context Rule. As previously stated, it would be Ms. Nagy who is prejudiced if she were precluded from replying to Defendants' contention and then citing to *Berg* without including its central holding favorable to Ms. Nagy.

If, however, the Court finds that the Respondents are prejudiced, the Court can allow Defendants to submit a rebuttal to the Reply, and Ms. Nagy to submit a sur-rebuttal. RAP 10.1(h).

B. The Cases Cited by the Court of Appeals are Distinguishable from the Case Herein

1. *Cowiche Canyon Conservancy V. Bosley*, 118 Wn.2d 802(1992)

Petitioner submits that the issues in *Cowiche* are distinguishable from those herein. The issue in *Cowiche* regarded whether the plaintiffs had standing to bring an action against a landowner for violation of the Shoreline Management Act of 1097 (SMA). The Plaintiff belatedly tried to assert that it had standing pursuant to an alleged assignment of claims from another landowner:

> The trial court found:
>
> > At the time of the removal of the three railroad trestles by [the contractor] and the placement of the gates by defendant Bruce Bosley, neither Cowiche Canyon Conservancy nor Shields Bag and Printing had any right, title or interest to the trestles, the property upon which they were situated, or any adjacent property.
> >
> > Finding of fact 19. This finding is unchallenged. It is therefore a verity on appeal. *Nearing v. Golden State Foods Corp.,* 114 Wash.2d 817, 818, 792 P.2d 500 (1990).
> >
> > The private plaintiffs have belatedly tried to establish their right to bring suit pursuant to an alleged assignment of claims.
> >
> > The trial court found that Burlington Northern Railroad owned the right of way from which the trestles were removed. A third party, the Clarks, owned the adjacent property. Finding of fact 24. The private plaintiffs challenge this finding, evidently to lend support to a claim that a valid assignment of claims was made to them by the Clarks. If the Clarks did not own the property, of course, such an assignment would obviously be of no import.
> >
> > The trial court found that [n]o assignment of a claim for

> damages to the trestles or any real property was ever made to Shields Bag and Printing Co. or to Cowiche Canyon Conservancy or to the State of Washington from Burlington Northern, Clarks, or any other potentially interested party.
>
> Finding of fact 22. The private plaintiffs assign error to this finding. However, the private plaintiffs present no argument in their opening brief on any claimed assignment. (Indeed, the only mention of the alleged assignment in the opening brief is a statement of an issue relating to a claim of trespass, not an SMA action; the trespass issue is not addressed in the brief, either.) Accordingly, the assignment of error is waived. *Smith v. King,* 106 Wash.2d 443, 451–52, 722 P.2d 796 (1986).
>
> No assignment of claims from any property owners, Burlington Northern Railroad or the Clarks was introduced at trial. Private plaintiffs claim, for the first time in their reply brief, that an assignment from the Clarks is in the Clerk's Papers and defendant should be estopped to deny its existence.
>
> An issue raised and argued for the first time in a reply brief is too late to warrant consideration. *In re Marriage of Sacco,* 114 Wash.2d 1, 5, 784 P.2d 1266 (1990). That the issue existed earlier is obvious from finding of fact 22.

Cowiche Canyon Conservancy V. Bosley, 118 Wn.2d at 808-809(1992)

As previously stated, Petitioner raised the issues as to whether she intended to release Respondents from the "Miller Release" at the trial level and in her opening brief although she did not cite *Berg* and its progeny there. In other words, Petitioner raised a **factual** issue as to why she did not release Respondents and followed up the **law** regarding the same in her reply brief. In *Cowiche* the plaintiff raised a factual issue at the eleven hour.

2. *Roberson v. Perez*, 156 Wn.2d 33 (2005)

In *Roberson* Church members sued their county and city for negligent investigation for negligently investigating members of sexual abuse of children who attended the church.

This Court found that pursuant to RAP 2.5(a) the Respondent could raise the issue of failure to raise facts upon which relief can be granted for the first time on appeal:

> Given the discretionary nature of RAP 2.5(a) and its express exception for raising failure to establish facts upon which relief can be granted, we conclude that the Court of Appeals did not err in reaching the County's argument regarding the scope and availability of Petitioners' cause of action.

Id. at 40-41.

The *Roberson* Court stressed that whether a reviewing court can consider an issue for the first time on appeal is discretionary:

> In general, issues not raised in the trial court may not be raised on appeal. *See* RAP 2.5(a) (an "appellate court may refuse to review any claim of error which was not raised in the trial court"). However, by using the term "may," RAP 2.5(a) is written in discretionary, rather than mandatory, terms.

Id at 39 (Citing *State v. Ford,* 137 Wash.2d 472, 477, 484–85, 973 P.2d 452 (1999).

CONCLUSION

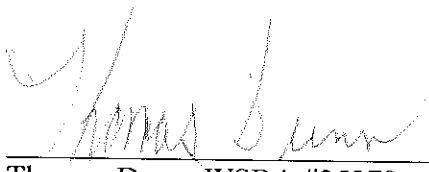
By reason of the foregoing points and authorities, Petitioner respectfully requests that this Court grant her petition and review this matter, reverse the Court of Appeals decision regarding striking her reply brief. She further requests that the matter be remanded to the Court of Appeals with instruction to consider her argument regarding the "Context Rule."

APPENDIX

The Court of Appeals Unpublished Opinion herein filed December 2, 2019.

Dated this 10th day of February 2020

Respectfully Submitted,



Thomas Dunn; WSBA #35279
Attorney for Petitioner Nagy

FILED
12/2/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CATHERINE MICHELE NAGY, an individual, Appellant, v. EMPRES HOME HEALTH OF BELLINGHAM, LLC, a Washington limited liability company, d/b/a EDEN HOME HEALTH, and GEORGE MILLER in his capacity as its employee; and/or EMPRES HOME CARE OF BELLINGHAM, LLC, a Washington limited liability company, d/b/a EDEN HOME HEALTH, and GEORGE MILLER in his capacity as its employee; and/or EMPRES HEALTH CARE MANAGEMENT, LLC, a Washington limited liability company, d/b/a EDEN HOME HEALTH, and GEORGE MILLER in his capacity as its employee; and/or EMPRES WASHINGTON HEALTH CARE, LLC, a Washington limited liability company, d/b/a EDEN HOME HEALTH, and GEORGE MILLER in his capacity as its employee; and/or EMPRES FINANCIAL SERVICES, LLC, a Washington limited liability company, d/b/a EDEN HOME HEALTH, and GEORGE MILLER in his capacity as its employee; and/or EMPRES HEALTHCARE GROUP, LLC, a Washington limited liability company, d/b/a EDEN HOME HEALTH, and GEORGE MILLER in his capacity as its employee. Respondents.	No. 78637-7-I DIVISION ONE UNPUBLISHED OPINION FILED: December 2, 2019

HAZELRIGG-HERNANDEZ, J. — Catherine Nagy appeals the trial court's order on summary judgment dismissing her claims against Empres Home Health of Bellingham and related Empres businesses (Eden).[1] Nagy previously settled her personal injury claim against the Eden employee who injured her and signed a release of all bodily injury claims discharging and releasing the primarily responsible employee, but also any other liable person, principal, corporation or business entity. The trial court granted Eden's motion for summary judgment on the basis that Nagy had not preserved any claims against Eden. Nagy contends there are genuine issues of material fact in her claims of vicarious liability against Eden. We affirm the order dismissing Nagy's claims.

FACTS

Nagy was walking in a marked crosswalk with a lit "walk" signal when she was struck and injured by a car driven by George Miller, an Eden employee. Medics at the scene noted Nagy's head was lacerated and her knee was injured. She claimed that her medical expenses exceed $60,000, as of May, 2018.

Nagy retained counsel and on October 27, 2017, she settled her claim against Miller for $50,000, which was the policy limit of Miller's insurance. Nagy and her attorney both signed the release agreement sent by Miller's insurance company. Nagy states that she did not intend to release Miller's employer. However, neither she nor her counsel added any terms to reserve her rights

[1] Because the parties refer to Empres Home Health of Bellingham, LLC and its related business entities as Eden Home Health or simply Eden, we use the same term.

against Eden or any other principal of Miller's, or any corporation or business entity from the scope of the settlement.

On November 17, 2017, Nagy sued Eden, alleging that Eden employed Miller and he was working within the scope of his employment at the time he struck Nagy. Eden moved for summary judgment dismissing Nagy's claims on May 2, 2018. Nagy responded and the court granted Eden's motion after oral argument. In the order granting summary judgment, the court indicated, as required by RAP 9.12, that it relied on the motion, response, reply, and the declarations and exhibits filed by the parties. The court did not enter findings of fact or conclusions of law. Judgment was entered on June 15, 2018. Nagy timely appealed. Eden moved to strike Nagy's reply brief, arguing that it raised new arguments not presented in the trial court and as exceeding the scope of its response brief.

DISCUSSION

I. Motion to Strike Nagy's Reply Brief

Eden's motion to strike the reply brief filed by Nagy is a threshold matter in this case. We consider whether the reply brief violates RAP 10.3(c) and 2.5. Under RAP 10.3(c) a reply brief is limited to a response to the issues in the brief to which the reply brief is directed. Washington courts have repeatedly held that an issue raised and argued for the first time in a reply brief is too late to warrant consideration. See, e.g., Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Addressing issues argued for the first time in a reply brief is unfair to Eden and inconsistent with the rules on appeal. Ainsworth v. Progressive Cas. Ins. Co., 180 Wn. App. 52, 78 n.20, 322 P.3d 6 (2014).

In general, issues not raised in the trial court may not be raised on appeal. RAP 2.5(a); Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844 (2005). During the proceedings in the trial court, Nagy made three arguments in response to Eden's motion for summary judgment: (1) the release does not cover Eden because, under Glover v. Tacoma General Hospital, the principal is not released from liability unless the agent was solvent and the settlement with the agent is was reasonable, (2) the release does not specifically identify Eden by name, and (3) it would be inequitable to release Eden from liability. 98 Wn.2d 708, 720-23, 658 P.2d 1230 (1983) (abrogated on other grounds by Crown Controls, Inc. v. Smiley, 110 Wn.2d 695, 756 P.2d 717 (1998). On appeal, Nagy has made the same three arguments in her opening brief and Eden's response brief presents the same argument it did in the trial court.

However, in her reply brief, Nagy argues for the first time that the language of the release, standing alone, does not dispose of the issue of whether Eden was released. Nagy asks this court to apply the context rule of Berg v. Hudesman, and look to extrinsic evidence to determine the parties' intent. 115 Wn.2d 657, 801 P.2d 222 (1990). Nagy claims there is a genuine issue of material fact concerning what the parties intended and that the interpretation of a contract is a matter of law when only one reasonable inference may be drawn from the extrinsic evidence.

Nagy's reply argument relies heavily on two cases, neither of which she cited in the trial court briefing or in her opening brief; Stephens v. Gillespie and Terence Butler v. Randal T. Thomsen, an unpublished decision. Stephens v. Gillespie, 126 Wn. App. 375, 108 P.3d 1230 (2005); Terence Butler v. Randal T.

Thomsen, No. 76536-1-I, slip op. (Wash. Ct. App. Dec. 31, 2018) (unpublished), www.courts.wa.gov/opinions/pdf/765361/pdf. None of the analysis or argument based on these cases was included in Nagy's briefing in the trial court or in her opening brief in this court. There was no discussion in the trial court of whether or how Berg's context rule might apply here. Nagy argues that Eden is not prejudiced by her new argument, because Eden cited to the Berg decision in its own brief. But Eden cited the Berg case solely for the well-established proposition that the role of the court is to determine "the meaning of what is written, and not what was intended to be written." Berg, 115 Wn.2d at 669 (quoting J.W. Seavey Hop Corp. of Portland, Or. v. Pollock, 20 Wn.2d 337, 349, 147 P.2d 310 (1944)). Eden did not cite Berg to inject the issue of context into the case, and its reference to Berg did not open the door for Nagy to raise entirely new arguments in support of reversing the trial court.

Nagy also asserts that she raised the context rule in the trial court and here because she repeatedly made references to her own intent in her briefing. This is simply insufficient to put Eden on notice that Nagy was arguing that the court needed to consider extrinsic evidence of the context in which she signed the release to determine what the release means. Moreover, as Eden notes, evidence of Nagy's unilateral or subjective intent about the meaning of the release is not admissible for purposes of the context rule. Hollis v. Garwall, 137 Wn.2d 683, 698, 974 P.2d 836 (1999). Eden's motion to strike Nagy's reply brief is granted under RAP 2.5(a) and 10.3(c).

II. Dismissal Based on the Release of All Claims

On appeal from an order granting summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Summary judgment is appropriate when the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Id.; CR 56(c). A "material fact" is one on which the outcome of the litigation depends in whole or in part. Boguch v. Landover Corp., 153 Wn. App. 595, 608, 224 P.3d 795 (2009).

In determining whether a genuine issue of material fact exists, we view all facts and reasonable inferences in the light most favorable to the nonmoving party. Modumetal, Inc., v. Xtalic Corp., 4 Wn. App. 2d 810, 822, 425 P.3d 871 (2018). To be sufficient to defeat summary judgment, a party's affidavit must present more than ultimate facts, conclusory allegations, speculative statements, opinions, or argumentative assertions. Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (abrogated on other grounds by Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty., 189 Wn.2d 516, 404 P.3d 464 (2017)).

A. The Release is a Contract

A release is a contract and its construction is governed by contract principles subject to judicial interpretation in light of the language used. Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178, 187, 840 P.2d 851 (1992) (citing Vanderpool v. Grange Ins. Ass'n, 110 Wn.2d 483, 488, 756 P.2d 111 (1988)). The purpose of contract interpretation is to ascertain the intent of the parties. Dwelley

v. Chesterfield, 88 Wn.2d 331, 335, 560 P.2d 353 (1977). We ascertain the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Clear and unambiguous contracts are enforced as written. Grey v. Leach, 158 Wn. App. 837, 850, 244 P.3d 970 (2010) (citing McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 733–34, 837 P.2d 1000 (1992)). Words used in a contract are given their ordinary, usual, and popular meaning unless the agreement clearly demonstrates a contrary intent. Hearst, 154 Wn.2d at 504.

A contract provision is ambiguous when its terms are uncertain or may be understood as having more than one meaning. Shafer v. Bd. of Tr. of Sandy Hook Yacht Club Estates, Inc., 76 Wn. App. 267, 275, 883 P.2d 1387 (1994), review denied, 127 Wn.2d 1003, 898 P.2d 308 (1995). We will not read ambiguity into a contract where we can reasonably avoid it. Grey, 158 Wn. App. at 850 (citing McGary v. Westlake Investors, 99 Wn.2d 280, 285, 661 P.2d 971 (1983)).

The release of claims Nagy and her attorney signed in this case provides, in relevant part:

> In signing the following Release of All Claims for Bodily Injury Only, you are giving up all your rights and claims for bodily injury and damages resulting from the accident or incident referred to in the Release, which you may not even know or suspect to exist and which if known by you would have materially affected your settlement.
>
> . . .
>
> The Releasor does hereby acknowledge receipt of payment in the amount of: Fifty Thousand dollars and 00 cents ($50,000:00) made payable to: Catherine Nagy & Michael K Tasker, attorney [sic], which payment is accepted in full compromise, settlement, and satisfaction of, and as sole consideration for the final release and discharge of all bodily injury or personal injury actions, claims, damages,

> demands, causes of action, or suits of every kind and nature whatsoever, at law or in equity, known or unknown, suspected or unsuspected, disclosed and undisclosed, that now exist, or may hereafter accrue against Sherri Miller, Nicole Miller, George Miller (hereinafter "the Releasee") and any other person, insurer, principals, agents, employees, assigns, representatives, subsidiaries, corporation, or other business entity responsible in any manner or degree for injuries to the person of the Releasor, and the treatment thereof, and the consequences flowing therefrom, as a result of the accident or incident which occurred on or about 11/17/2014, at or near East Chestnut St @ Railroad Ave, Bellingham, WA , and for which the Releasor claims the Releasee and the above mentioned persons or entities are legally liable in damages which legal liability and damages are disputed and denied.
> . . .
> I do declare that I understand that this release is a final release for all bodily injury claims I may be entitled to because of the accident or incident described above.

The terms of this full and final release of claims are not ambiguous or unclear, nor are they subject to multiple reasonable interpretations. The sole reasonable interpretation is that the release discharges the liability of Miller's principals for any of Nagy's injuries resulting from the accident on November 17, 2014. The Eden business entities are Miller's principals. Moreover, Nagy does not claim or present any evidence to suggest that she did not know that Eden employed Miller at the time of the accident.

Nagy argues that Eden cannot rely on the release because it does not identify Eden by name as a released entity. We reject this argument. In Perkins v. Children's Orthopedic Hosp., 72 Wn. App. 149, 864 P.2d 398 (1993), an infant was severely and permanently injured during a surgical procedure at Children's Hospital. The defendants in the case included the State, University Hospital (now University of Washington Medical Center), the lead surgeon, two University-related physician's groups, and Children's. Id. at 152. Four other doctors involved in

treating the child were not named in the suit. The plaintiffs reached a settlement with all parties other than Children's, and executed a release discharging the settling parties and "any related organizations or entities, and their representatives, agents, and assigns." Id. Children's then moved for partial summary judgment, which the trial court denied. We reversed, holding that a "straightforward literal reading of the document which releases the 'agents' of the University defendants includes all who, like the unnamed doctors, are in fact agents of the University defendants." This, in turn, released any claims against Children's that were based on a theory of vicarious liability for the negligence of the physicians. Id. at 161-62. We emphasized that there was "no merit" to the argument that the word "agents" did not include the unnamed doctors; including agents had the same legal effect as the language that included the lead surgeon by name. Id. at 161, 164.

The same analysis applies here. The release Nagy and her attorney signed included unnamed principals of Miller and the Eden entities are Miller's principals. The release need not identify the Eden business entities by name to effectively discharge them from vicarious liability for Miller's negligence. And here, as in Perkins, the subjective intent of the plaintiffs "cannot control the legal consequences of the executed release." Id. at 162.

B. Glover's Reasonableness Test Does Not Apply

Nagy further argues that Eden cannot be released from liability unless there is a determination that her settlement with Eden's agent, Miller, was reasonable. Nagy bases this argument on Glover and asserts that the court there adopted the rationale of an earlier case, Ralph C. Finney et al. v. Farmers Insurance Company

of Washington et al., Aetna Casualty & Surety Company. 92 Wn.2d 748, 600 P.2d 1272 (1979). However, Nagy misreads both cases and, contrary to her argument, Glover did not adopt the reasoning of Finney. Rather, the Glover court specifically noted its ruling conflicted with Finney. 98 Wn.2d at 723-24. To resolve the conflict, the Court limited Finney's holding to cases where the plaintiff settles with an agent who is financially unable to fully compensate the plaintiff. Id. That limitation brings Finney into line with Glover, where the release of the agent may operate to release the principal, because the settlement was reasonable. Additionally, both of these cases are factually distinct from the present matter: Glover involved a medical malpractice case wherein the proposed settlement expressly excluded a defendant hospital and Finney was a wrongful death action that examined uninsured motorist coverage where the operator of the vehicle had liability coverage, but the registered owner did not.

Factual dissimilarity aside, Nagy further misreads these cases as standing for the proposition that a principal may only be released from liability if the plaintiff's settlement with the agent was "reasonable," as that term is used in RCW 4.22.060. As the statute recognizes, a release may discharge a person who is liable, but it "does not discharge any other persons liable upon the same claim unless it so provides." RCW 4.22.060(2) (emphasis added). Here, the release Nagy and her attorney executed included among the persons released not only Miller, but his principals. This fact further distinguishes Nagy's situation from that of either Glover or Finney. There is simply no support for Nagy's argument that a release that

expressly discharges the liability of a vicariously liable principal can be construed to mean that it does not do so.

C. Eden's Release from Liability is not Inequitable

Nagy argues that it would be inequitable and contrary to public policy to release Eden. The crux of her argument is that because there is an employer, an entity separate and distinct from Miller, who may be able to ensure Nagy is fully compensated for her injuries, it is unfair to allow that party to be released. Nagy does not cite to a single case holding that a plaintiff may avoid the effect of a release that plainly discharges both the agent and the principal from liability for all of her injury claims on the basis that it is inequitable. This is not a situation involving fraud, overreaching, or misrepresentation. Nagy was represented by counsel who approved and executed the release along with her. Under these circumstances, the language of the contract should be honored.

Eden's motion to strike Nagy's reply brief is granted. We affirm the trial court's order of summary judgment dismissing Nagy's claims.

Affirmed

WE CONCUR:

LAW OFFICE OF MICHAEL TASKER

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