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Court of Appeals No. 69763-3-1

IN THE WASHINGTON COURT OF APPEALS
DIVISION ONE

BERTHA GRIFFITH

Appellant,

v.

EDMONDS SCHOOL DISTRICT,

Respondent,

BRIEF OF APPELLANT

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I. INTRODUCTION

This is an appeal from a Superior Court Order granting Defendant Edmonds School District's Motion for Summary Judgment and dismissing Plaintiff's Complaint for Personal Injury.

II. ASSIGNMENTS OF ERROR

The Superior Court erred in granting the order of summary judgment and dismissing the claims of Plaintiff.

III. ISSUES PRESENTED

Did the Superior Court err when summary judgment was granted to the defendant when there are numerous facts and circumstances that create genuine issues of material fact which preclude such a decision?

IV. STATEMENT OF THE CASE

Appellant was injured on February 16, 2011, while riding on a Community Transit DART bus which was hit by an Edmonds School District bus. CP 286-87. She suffered injuries to her neck, spine, and nervous system as well as a cap tooth injury and emotional and physical distress. CP 285-286.

After initial rounds of discovery had been completed, defendant moved for summary judgment alleging that there was no evidence the district breached a duty to Ms. Griffith. CP 260-61.

Further the district asserted that there was no evidence to show that the any alleged breach proximately caused her to suffer injury. (CP 2, 9-11).

The trial court granted the district's motion for summary judgment dismissing Griffith's claims with prejudice. (CP 9) Griffith now appeals from that decision and seeks to have her claims reinstated. (CP 2)

II. ARGUMENT

A. STANDARD OF REVIEW

Appellate review of an order granting or denying summary judgment is *de novo*. In a hearing on a motion for summary judgment, a summary judgment is only available where there is no genuine issue as to any material facts and where the moving party is entitled to judgment as a matter of law. CR 56(c). The burden is on the party moving for summary judgment to demonstrate that there is no genuine dispute as to any material fact after all reasonable inferences from the evidence have been resolved against him. *Morris v. McNicol*, 83 Wn. 2d 491, 519 P. 2d 7 (1974).

The motion should be granted only if, from all of the evidence, reasonable men could reach but one conclusion. *Id.* at 494. The test to be applied is similar to that upon challenge to

sufficiency of evidence. After considering all material evidence and reasonable inference therefrom most favorably to non-moving party, it may be granted only where but one reasonable conclusion can be drawn therefrom. *Black v. Western Life Ins. Co.*, 1 Wn. App. 927, 464 P. 2d 949 (1970); *Sanders v. Day*, 2 Wn. App. 393, 468 P. 2d 452 (1970).

Moreover, summary judgment should not be granted merely because it appears that the non-moving party is unlikely to prevail at trial, or because the facts which he offers appear less plausible than those tendered by the moving party. Wright & Miller, FEDERAL PRACTICE & PROCEDURE; *Civil* (Vol. 10, 1973) §2725.

Therefore, a party moving for summary judgment is not entitled to a judgment merely because the facts he offers appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial. Therefore, if the evidence presented on the motion is subject to conflicting interpretations, or reasonable men might differ as to its significance, summary judgment is improper. *Id.*, at 514-515.

Thus, summary judgment should not be granted where contradictory inferences and conflicting interpretations may be drawn from undisputed evidentiary facts, or if the credibility of the

movant's witness is challenged by the opposing party and specific bases for possible impeachment are shown. *U.S. v. Perry*, 41 F. 2d 1020 (C.A. 9th, 1970). Wright & Miller, *supra*, §2726 at 521.

Typically, plaintiffs "may establish any fact by circumstantial evidence." *Tabak v. State*, 73 Wash.App. 691, 696, 870 P.2d 1014 (1994). Before juries, circumstantial and direct evidence are viewed as equivalently valuable. See 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL § 1.03, at 22 (2005).

The Respondents have failed to sustain the burden as moving party. First, allowing Appellant, as non-moving party, all reasonable inferences from all the evidence, including circumstantial evidence, considered in a light most favorable to her, reasonable men could conclude from the circumstantial evidence that there was an accident.

1. Consideration in the Light Most Favorable to Appellant.

Under CR 56, the moving party bears the burden of demonstrating that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. CR 56(c); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

The Court must consider all facts and inferences in the light most favorable to the nonmoving party. *Ames v. City of Fircrest*, 71 Wn.App.284, 289, 857 P.2d 1083 (1993). In determining whether the movant has satisfied its burden, the movant's papers must be closely scrutinized, while the non-movant's papers should be treated with indulgence. *Adamski v. Tacoma General Hospital*, 20 Wn.App. 98, 104, 579 P.2d 970 (1978). Summary judgment should be denied if there appears to be any reasonable hypothesis under which the nonmoving party may be entitled to the relief sought. *Fleming v. Smith*, 64 Wn.2d 181, 390 P.2d 990 (1964).

In deciding the motion the trial Court must ignore the testimony favorable to the moving party when conflicting testimony exists. In *Faust v. Albertson*, 166 Wn.2d 653, 663, 211 P.3d 400 (2009), the Supreme Court recently reversed a summary judgment in favor of a defendant on grounds that "credibility determinations lie with the jury", which may choose to disbelieve "self-interested testimony" or testimony that can be impeached "on the grounds of faulty memory and inconsistent statements. *Id.* at 663.

Throughout the entirety of its motion, Respondent presented Appellant's testimony and then explained why it was not credible or "self-serving," or attempted to refute it with the testimony of other

witnesses. Respondent's rhetoric exemplified the many issues of material fact that exist in this case, which must be decided by the jury. A motion for summary judgment is wholly inappropriate for Respondent's he-said/she-said argumentation.

B. RESPONDENT HAS SUBMITTED MEDICAL RECORDS THAT HAVE NOT BEEN QUALIFIED AS BUSINESS RECORDS AND APPELLANT MOVED TO STRIKE THOSE EXHIBITS.

Appellant moved to strike Respondent's exhibits 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 as they were unauthenticated medical records that Respondent had not qualified as business records, and were therefore inadmissible hearsay. RCW 5.45.020; ER 801; ER 802; ER 803. Supporting affidavits must set forth only facts that would be admissible in evidence. CR 56(e). Civil Rule 56(e) requires that, "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Respondent had not served or attached certified copies of Appellant's medical records. Any one of the above-mentioned defects is sufficient for striking the medical records exhibits. Here, Respondent's exhibits 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 contain both defects: they are inadmissible hearsay and are not properly

certified. Therefore, the Court should have stricken them from consideration.

C. AMPLE EVIDENCE OF EDMONDS SCHOOL DISTRICT'S NEGLIGENCE.

Respondent Edmonds School District's Motion for Summary Judgment reads like an outline of arguments Respondent plans to present before the jury. Respondent defeats its own motion with the very facts recited within it. Appellant Griffith had ample evidence to support her case that Edmonds School District breached its duty owed to Appellant, and as a result caused injury and damage to Appellant.

1. Respondent admits collision though documents in evidence and the testimony of Respondent's driver-employee.

The Edmonds School District bus driver Lynette Wilson (District Driver Wilson) admits that she was involved in a collision on February, 22, 2008. CP 172-73. Immediately after the collision she filled out a report entitled Motor Vehicle Accident Report, where she details the specifics of the collision, including which parts of the vehicles made contact. District Driver Wilson admitted that she collided with the DART bus on the day of the collision, and at her deposition admitted that such information was still accurate.

Q. [Johnsen] I'm going to show you the accident report. We can mark this as an exhibit. (Exhibit No. 1 marked.)

Q. Is this your handwriting, Ms. Wilson?

A. [District Driver Wilson] Yes, it is.

Q. In the box that says "Date of Collision," it says 2/22/08, is that information accurate?

A. (Witness reviews document.) Yes, I assume so.

Q. When it says "Time of Collision, 3:25 p.m.," is that still accurate?

A. Yes.

...

Q. And I can't read the next box. It says something about an intersection between 156th Avenue and Highway 99; is that correct for the location of the collision?

A. Yes.

...

Q. For collision involved, number of vehicles, it says "two"; is that still correct?

A. Yes.

Q. For "object struck," it says "mirror on DART bus"; is that still correct?

...

A. There has always been discrepancy. There was discrepancies at the time. That's what we seem to have come up with, so I would probably -- a simple answer, yes.

...

Q. Yes, that information in the box is accurate?

A. Yes.

CP 60.

In the Motor Vehicle Accident Report, District Driver Wilson wrote on the day of the accident:

"I MUST HAVE 'TAPPED' HIS MIRROR WITH MINE."

CP 56

District Driver Wilson admits to not paying attention to where she was driving at the time of the collision:

"I WAS IN MY MIRROR + CORRECTING 3 'ROWDY' BOYS." CP 56. In the box labeled "REASON FOR NOT SEEING DANGER" District Driver Wilson wrote, "DEALING W/ 3 BOYS ON BUS + MISJUDGED DISTANCE." CP 56.

The foregoing evidence and the evidence presented in Respondent's Motion refuted Respondents contention that, "all of the evidence outside of Ms. Griffith's testimony supports the conclusion that this was a non-event." Further, Respondent did not explain why no reasonable juror could possibly be persuaded by Ms. Griffith's testimony. CP 62-63. After this so-called "non-event,"

both drivers called their respective supervisors and police arrived at the scene. CP 62-63.

District Driver Wilson was not allowed to leave the scene of the collision until she received permission from her supervisor and a policeman. CP 63.

Respondent used its motion to attempt explain away District Driver Wilson's written and oral admissions confirming that an accident occurred. This mitigation of bad facts is improper in a motion for summary judgment, and in fact highlights that genuine issues of material fact existed. The jury is the ultimate decision maker who should have been allowed to scrutinize whether District Driver Wilson changed her story from the day of the collision to the present.

2. Respondent Driver Admitted To Breaching Her Duty, And Admitted To Breaking The Law.

Respondent does not dispute it owed a duty to Appellant Griffith. District Driver Wilson admitted that by causing a collision – driving into a parked vehicle—she broke the law and did not do her job properly. She admitted to driving down the center of the road, straddling two lanes, and admitted that such driving is never legal.

Q. [Johnsen] Do you agree that the law requires you not to crash into other vehicles?

A. [District Driver Wilson] I do.

Q. If you were to crash into another vehicle, you wouldn't be doing your job properly, would you?

A. Correct.

Q. You are supposed to avoid collisions, correct?

A. Correct.

Q. And you are supposed to do everything in your power to keep your passengers and the passengers of other vehicles safe, aren't you?

MS. GILLESPIE: Okay, I let the first few go, but I have to object to the form because they're leading questions. So if you can restate the question that's not leading.

Q. [Johnsen] You may answer.

A. [District Driver Wilson] Correct.

Q. And you drove down the center of the street, correct?

A. Correct.

MS. GILLESPIE: Same objection.

Q. When are you allowed to drive down the center of the street?

A. Legally, never. . . .

. . . .

Q. So you chose to drive down the center of the street knowing it's not legal, correct?

MS. GILLESPIE: Object to the norm of the question. Go ahead.

THE WITNESS: Yes, I did.

...

Q. You were reprimanding rowdy passengers, isn't that correct?

A. Correct.

Q. And you chose to reprimand them while the bus was moving, didn't you?

MS. GILLESPIE: Same objection. Still leading question. Go ahead and answer.

THE WITNESS: Correct.

CP 62.

3. Respondent Presented No Evidence That Rebuts Appellant's Injuries or Their Cause.

Respondent lacked any expert opinion to challenge causation and damages. Yet Respondent Edmonds School District asked the Court to rule as a matter of law that no reasonable juror could conclude that a motor vehicle collision caused Ms. Griffith to suffer any injury. The court agreed and dismissed Griffith's case.

Respondent did not have a single expert supporting its assertions. Not a single deposition was taken of Appellant's treating doctors. Respondent did not submit any admissible medical testimony from a doctor or a record supporting its position. Because Appellant suffered from other ailments at different points

in time, Respondent inferred that there could be no injury that occurred on February 22, 2008 as a result of the Edmonds School District bus collision. Respondent's position is illogical and should not have supported its burden on summary judgment. Indeed, Respondent cherry-picked a few pages out of hundreds seemingly only to argue that Appellant had pre-existing injuries. The majority of medical records attached as exhibits did not relate to Appellant's injuries that are at issue, but previous medical appointments. CP 159-62, 169-78, 181-86, 216-18, 219-22, 223-31, 232-37, 238-40, 248-51.

Kin Lui, MD, a treating physician of the Appellant testified that Appellant Griffith suffered injuries caused by the February 22, 2008 Edmonds School District bus collision. CP 52-53. Dr. Lui declared: "My opinion is that the right shoulder and symptomatic pain was likely caused by the February 22, 2008 collision that occurred while Ms. Griffith was riding a DART bus." CP 53. Dr. Lui's testimony establishes causation and damages. Without expert testimony from a medical doctor, Respondent cannot argue against causation or damages, let alone move for judgment as a matter of law.

VI. CONCLUSION

A Motion for Summary Judgment is an inappropriate avenue for arguing one's case factually, casting doubt on the Appellant's truthfulness, and disputing the seriousness of Appellant's injuries. Respondent may present such evidence to the jury. Respondent's own recitation of facts revealed the multiple issues of material fact present in the case that warranted a jury trial. Respondent's driver admitted to the collision in question, thus breaching her duty to the Appellant. Appellant Griffith's treating doctor has testified that she was injured as a result of the collision in question. For these reasons, Appellant respectfully requests that this appeal be granted and she be given her day in court before a jury.

Dated this 30th day of April, 2013.

The Law Office of Michael E. Blue, P.S.

By: 
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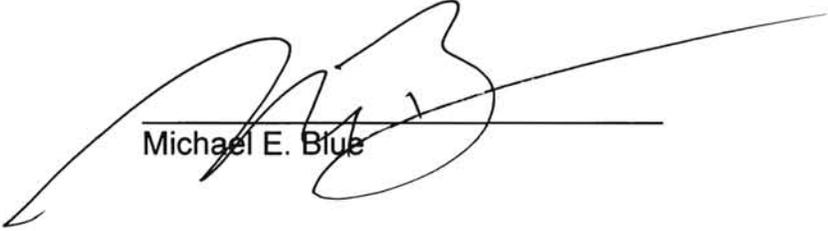
CERTIFICATE OF SERVICE

The undersigned hereby certifies that I am a person of such age and discretion as to be competent to serve papers, and that on today's date, I caused a true and correct copy of Brief of Appellant to be served via legal messenger and via electronic mail to the following:

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