

No. 72115-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CONTRACTORS BONDING AND INSURANCE COMPANY, a
surety insurer,

Respondent,

v.

WAYNE and KIMBERLY BERRY, husband and wife and the marital
community comprised thereof and COMMERCIAL
CONSTRUCTION SERVICES, INC.,

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE PALMER ROBINSON

REPLY BRIEF OF APPELLANTS

SMITH GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542
Ian C. Cairns
WSBA No. 43210

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Appellants

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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I
KIMBERLY BERRY



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I. INTRODUCTION

In April 2014, two months after filing its complaint and more than ten months before the discovery cutoff, respondent Contractors Bonding and Insurance Company (CBIC) sought summary judgment on over \$330,000 in claims it purportedly paid on a bond in favor of appellants Wayne and Kimberly Berry and Commercial Construction Services, Inc. (CCS), whose counsel had withdrawn a month earlier.¹ The trial court granted the motion based only on a cursory declaration that CBIC concedes “lumped together” eleven of twelve claims and that lacked any supporting documentation establishing who CBIC paid, when CBIC paid them, the amounts CBIC paid, or that any payments were actually related to the bond. (Resp. Br. 7) This Court should reverse the trial court’s hasty summary judgment order and remand with instructions to allow the Berrys sufficient time to obtain counsel and conduct discovery before ruling on any summary judgment motion.

¹ The appellants are collectively referred to as “the Berrys” unless otherwise stated.

II. REPLY ARGUMENT

A. The trial court erred in denying the Berrys a short continuance to obtain new counsel who could oppose CBIC's motion following the death of Mr. Berry's mother.

Mr. Berry was focused on caring for his dying mother in Texas, not finding an attorney in Washington to oppose CBIC's motion, inexplicably filed before any discovery had been conducted. CBIC ignores this undisputed fact in alleging that the Berrys were dilatory, that they were represented by counsel, and that they already had any needed evidence. CBIC's demonstrably false allegations underscore that its arguments depend on the courts ignoring the principle that justice must be the "primary consideration in ruling on a motion for continuance." *Keck v. Collins*, 181 Wn. App. 67, 88, ¶ 38, 325 P.3d 306, *rev. granted*, 181 Wn.2d 1007 (2014) (App. Br. 7). This Court should reverse the trial court's summary judgment order entered despite the Berrys' demonstrated need for a continuance.

As CBIC acknowledges (Resp. Br. 7), Mr. Berry was caring for his dying mother and tending to her estate in the month between when the Berrys' local counsel withdrew and CBIC filed its summary judgment motion. (CP 44; RP 8) The Berrys had no

reason to know that they needed to immediately obtain substitute counsel to respond to a summary judgment motion filed ten months before the discovery cutoff and nearly a year before the dispositive motions deadline. (CP 92) The passing of Mr. Berry's mother and the Berrys' reasonable difficulty in obtaining new counsel in Washington more than justified a continuance. *Coggle v. Snow*, 56 Wn. App. 499, 508, 784 P.2d 554 (1990) (App. Br. 8).

These same difficulties also explain the Berrys' technical violations of local rules regarding the timing of filings that CBIC relies upon in justification of the court's summary judgment. (Resp. Br. 10) Without counsel, the Berrys were ill-equipped to obtain the evidence necessary to respond to CBIC's summary judgment motion. *Bonneville v. Pierce Cnty.*, 148 Wn. App. 500, 202 P.3d 309 (2008), *rev. denied*, 166 Wn.2d 1020 (2009) (Resp. Br. 12-14), is not to the contrary. *Bonneville* in fact underscores that the trial court should have granted a continuance based on Mr. Berry's mother's final illness, as the appellate court in that case affirmed the trial court's denial of a *second* continuance after granting an initial continuance based on a family member's illness. 148 Wn. App. at 507, ¶ 9.

Mr. Berry's statement as a pro se litigant that he wanted his day in court establishes only his adamant belief that the trial court was ruling prematurely, entirely consistent with his written request for a continuance. CBIC rips Mr. Berry's answer to the trial court's query regarding a continuance at the summary judgment hearing out of context. (Resp. Br. 10, 12) The trial court asked Mr. Berry "are you asking me to continue this?" to which Mr. Berry responded "No, ma'am. . . . I'm asking you to deny the summary judgment and let us have our day in court with these people." (RP 25-26) Mr. Berry at the same time told the court that they needed to conduct discovery to "get to the bottom of this." (RP 26)

The Berrys fully complied with CR 56(f) when they explained "by affidavit" the "facts essential to justify [their] opposition" that they could not present because of CBIC's inexplicable truncation of the case schedule. (*Compare* Resp. Br. 13 *with* CP 57-60) Mr. Berry explained that CBIC's declaration "states an amount owed of \$169,312.12 for claims paid by CBIC to various subcontractors" but that "[n]one of the amounts are broken down by contractor, scope or amount for each contractor." (CP 57) The Berrys were thus "unable to justify this opposition without complete particularity on

each alleged claim by each alleged subcontractor” or “respond to blanket claims of \$169,312.12.” (CP 57)

Documents identifying how much was paid to each claimant, when the payments were made, or the basis for the claim is “probative evidence,” not “just questions in general.” (Resp. Br. 12) Mr. Berry also noted that CBIC’s allegations regarding the general contractor Hensel Phelps’ demands for correction were “hearsay without anything attached to support the statement” and that discovery would clarify the \$331,380.12 in “corrections” CBIC alleged that Hensel Phelps had demanded a hundred times more than the \$3,150 in work Hensel Phelps demanded directly from CCS on June 6, 2011. (CP 59)

The record also soundly refutes CBIC’s assertion that the Berrys did not need a continuance to obtain local counsel because they were “represented by at least two lawyers in this matter.” (Resp. Br. 9) The only counsel to appear on the Berrys’ behalf “in this matter” were Joel Watkins and Mark Walters. (CP 100-01) They withdrew on March 21, 2014, a month before CBIC filed its summary judgment. (CP 95-97) The Berrys’ New Mexico counsel, Ilyse Hahs-Brooks, had not yet been admitted pro hac vice, and thus could not defend against CBIC’s motion. (RP 5) A third

attorney from New Mexico, Mr. Lawless, never appeared in this action nor made any effort to do so.² Thus, the Berrys had no counsel “*in this matter.*” And CBIC concedes that CCS, which could not appear pro se, had no counsel. (Resp. Br. 8)

Ms. Hahs-Brooks did not testify that she was “unable to find a Washington attorney” to sponsor her pro hac vice application, as CBIC claims. (Resp. Br. 10) To the contrary, she stated she had found a Washington attorney to sponsor her and she needed only a short continuance to finalize the application. (RP 5) It was manifestly unjust of the trial court to deny a continuance when the Berrys had arranged for Ms. Hahs-Brooks, an attorney already familiar with the case, to appear in short order.

CBIC likewise misstates the record when it asserts that Mr. Berry stated “he had local counsel working on the case for ‘six or seven months prior to the case being filed.’” (Resp. Br. 13 (quoting RP 8)) In fact, Mr. Berry said that *CBIC* “sat on [its complaint] for six or seven months,” and that he had only conferred with local counsel “over some jurisdictional issues.” (RP 8) Nor does CBIC

² CBIC contradicts itself regarding Mr. Lawless’s involvement in this case, alleging that he both still represented the Berrys at the time of the summary judgment hearing (Resp. Br. 7, 9) and that he withdrew from representing the Berrys. (Resp. Br. 17)

explain how the Berrys' "various attorneys had *this case* from June 2011" when it was not even filed until February 2014. (Resp. Br. 13 (emphasis added))

CBIC also wrongly claims that the Berrys did not need to conduct discovery because they had "600 pages of documents regarding these claims." (Resp. Br. 17) Those documents concern the dispute with "CBIC and Hensel Phelps" (RP 19), and do not provide any support for CBIC's payment of claims to eleven subcontractors that CBIC admits it simply "lump[ed] together" when asking the trial court to grant it a six-figure judgment. (Resp. Br. 7) That is precisely why the Berrys served CBIC with discovery requests for documents concerning its alleged payments to subcontractors. (CP 73-80) These payments, which CBIC concedes it has never documented or broken down by subcontractor, were not "well known" to the Berrys. (*Compare* Resp. Br. 7 with CP 57)

Had CBIC actually produced any documentation supporting its payments, the Berrys could have compared it to their own files, which they believed did not justify payment of the claims. Likewise, the Berrys might have uncovered the evidence of fraud by CBIC they believe exists, in which case they would not be bound by CBIC's decision to pay claims. (*Compare* Resp. Br. 15 with RP 18,

20, 25; CP 34) That the Berrys did not have evidence of fraud *before conducting discovery* does not mean it does not exist. (Resp. Br. 14)

Rather than make justice its “primary consideration,” the trial court denied a continuance despite the diligent efforts of the Berrys to obtain new counsel and the evidence needed to oppose CBIC’s premature summary judgment motion. *Keck*, 181 Wn. App. at 89, ¶ 40. This Court must reverse.

B. Summary judgment was not warranted on the sparse record submitted by CBIC.

The trial court granted CBIC summary judgment based on nothing more than the assertion of its employee – without any supporting documentation – regarding the amounts it purportedly paid to eleven different subcontractors and the general contractor. The trial court erred in holding the Berrys liable for \$411,241.12 based on this unsupported assertion, which conflicted with the only documentary evidence in the record.

CBIC’s affidavit fails to meet even the minimal bar it set for itself in the indemnity agreement, which required it to produce “an itemized statement of the aforesaid loss and expense” or “the vouchers or other evidence of disbursement” before it could

recover. (CP 34) *See also* Resp. Br. 18 citing *Safeco Ins. Co. of Am. v. Gaubert*, 829 S.W.2d 274, 282-83 (Tex. App. 1992), *writ denied* (Sept. 23, 1992) (involving similar clause). A statement “lumping together” eleven of twelve claims is not an “itemized statement,” and it is undisputed CBIC provided no “vouchers” or other documentation to support the payments it purportedly made. CBIC’s own surety contract confirms that it was not entitled to summary judgment. *McKasson v. Johnson*, 178 Wn. App. 422, 429, ¶ 15, 315 P.3d 1138 (2013) (“we construe written contracts against their drafters”). Indeed, CBIC’s affidavit is little more than the “robo-signed” affidavits Washington courts have previously condemned. *See, e.g. Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 792 n.14, ¶ 41, 295 P.3d 1179 (2013) (criticizing “assembly-line signing and notarizing of affidavits for foreclosure cases, mortgage assignments, note allonges and related documents”).

Moreover, CBIC concedes it produced *no* documentation supporting the amounts it allegedly paid to eleven subcontractors and the general contractor, and instead relied on the declaration of its employee that “lump[ed] together” all the payments made to subcontractors, failing to specify when payments were made to the subcontractors, how much was paid to each subcontractor, or the

basis of any of the payments to subcontractors. (Resp. Br. 7) CBIC fails to cite any evidence supporting its assertion that these payments were made on “disclosed dates.” (Resp. Br. 7) Nor does CBIC provide any documentation to explain the discrepancy between the \$3,150 in “corrections” demanded by the general contractor directly to CCS in a June 2011 letter and the over \$162,000 CBIC alleges it paid to the general contractor, again relying solely on the declaration of its employee that CBIC paid the general contractor to complete unspecified “work” and “provide as built drawings and warranties.” (Resp. Br. 17 (citing CP 29); see also App. Br. 13-14; CP 59, 69) Far from establishing that there are no genuine issues of material fact, CBIC’s sole piece of “evidence” – its self-serving employee affidavit – raises far more questions than it answers. (App. Br. 13-16)

In order to recover damages, a plaintiff must prove them. That is why the Berrys cited *Modern Builders, Inc. of Tacoma v. Manke*, 27 Wn. App. 86, 95, 615 P.2d 1332 (holding that plaintiff could not recover extra costs because it “presented no documentation of such extra costs” and thus “failed to present sufficient evidence to prove these costs”), *rev. denied*, 94 Wn.2d 1023 (1980) (see Resp. Br. 18). The trial court erred in holding to

the contrary and allowing CBIC to recover six-figure payments it allegedly made on its bond without any supporting documentation required by the indemnification agreement on which it sued.

III. CONCLUSION

This Court should reverse the trial court's summary judgment order and remand with instructions to allow the Berrys sufficient time to obtain local trial counsel and conduct discovery before ruling on any summary judgment motion.

Dated this 12th day of January, 2015.

SMITH GOODFRIEND, P.S.

By: 
Catherine W. Smith
WSBA No. 9542
Ian C. Cairns
WSBA No. 43210

Attorneys for Appellants

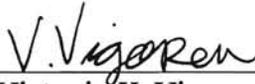
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 12, 2015, I arranged for service of the foregoing Reply Brief of Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-File
Ilyse Hahs-Brooks IDH Attorney at Law, LLC 2014 Central Avenue S.W. Albuquerque, NM 87104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
John S. York Yusen & Friedrich 215 N.E. 40th Street, Suite C-3 Seattle, WA 98105	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 12th day of January, 2015.



Victoria K. Vigoren