COURT OF APPEALS
DIVISION II
12 DEC 26 PM 4:11
STATE OF WASHINGTON
BY Cm
DEPUTY

NO. 42473-8

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

HARRY WILLIAMS,

Appellant.

v.

DUSTON ANDERSON and JANE DOE ANDERSON, individually and the marital community composed thereof; T.E. WALRATH TRUCKING, INC., a Washington State corporation; KEISHA McDEW and JOHN DOE McDEW, and the marital community composed thereof,

Respondents.

BRIEF OF RESPONDENTS ANDERSON AND T.E. WALRATH, INC.

Steven G. Wraith, WSBA No.17364
Jonathan M. Minear, WSBA No. 41377
Attorneys for Respondents Anderson and T.E. Walrath Trucking, Inc.

LEE SMART, P.S., INC.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929
(206) 624-7990

5404420.doc

ORIGINAL

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 3

III. STATEMENT OF THE CASE 5

A. Although Mr. Williams initially alleged that Mr. Anderson's vehicle rear-ended him, he amended his complaint to allege that Ms. McDew rear-ended him and propelled him into Mr. Anderson's lane. 5

B. According to Mr. Williams, his vehicle struck Mr. Anderson's semi-truck *after* crossing into Mr. Anderson's southbound lane on Interstate 5. 6

C. Mr. Anderson largely confirmed Mr. Williams's testimony about the accident, including that his car entered Mr. Anderson's lane. 9

D. Mr. Williams failed to submit any briefing or evidence in opposition to Ms. McDew's summary judgment motion. .. 9

E. Mr. Williams also failed to oppose Anderson's summary judgment motion by his deadline of July 11, 2011; he finally filed his materials on July 20. 10

F. Mr. Williams sent his response brief and declarations to Anderson's counsel by facsimile without first obtaining an electronic service agreement. 11

G. Mr. Williams's counsel offered no reasonable justification for the late opposition or improper service, and the trial court appropriately exercised its discretion to strike the brief and supporting declarations. 11

IV. SUMMARY OF ARGUMENT 14

V. ARGUMENT 15

A. The trial court did not abuse its discretion in striking Mr. Williams's untimely-filed and improperly-served opposition motion and declarations. 15

1. The court should review this issue for an abuse of discretion. 15

2. Counsel for Mr. Williams failed to file his client's opposition or supporting evidence by the deadline in CR 56(c). 16

3. Mr. Williams's attorney also failed to properly serve his untimely pleadings on Anderson's counsel, rendering them invalid. 23

B. If this court affirms the decision to strike Mr. Williams's untimely response brief and declarations, then RAP 2.5(a) and RAP 9.12 preclude him from arguing his opposition to summary judgment on appeal. 25

C. The trial court properly granted summary judgment in favor of Anderson. 27

1. The standard of review here is de novo, and the record supports summary judgment of dismissal as a matter of law. 28

2. Mr. Williams should be judicially estopped on appeal from arguing that Mr. Anderson initially rear-ended him. 29

3. The trial court's findings and rationale for granting summary judgment carry no weight on appeal. 32

4. If this court affirms the ruling to strike the opposition brief and evidence, then there is zero evidence that Anderson breached the standard of care or proximately caused this accident. 32

5. The declarations of Mr. Collins and Mr. Richmond do not create a genuine issue that Mr. Anderson was negligent or proximately caused this accident. 38

VI. CONCLUSION 41

TABLE OF AUTHORITIES
Table of Cases

Cases **Page(s)**

Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir., 2011) 30

Sartor v. Ark. Natural Gas Corp., 321 U.S. 620, 628, 64 S. Ct. 724, 88 L. Ed. 967 (1944) 37, 38

State Cases

Allen v. Asbestos Corp., Ltd., 138 Wn. App. 564, 157 P.3d 406 (2007), *rev. denied*, 162 Wn.2d 1022, 178 P.3d 1033 (2008) 16

Arkinson v. Ethan Allen, Inc., 160 Wn.2d 535, 160 P.3d 13 (2007) 30

Bellevue Sch. Dist. No. 405 v. Lee, 70 Wn.2d 947, 425 P.2d 902 (1967) 25

Brown v. Peoples Mortgage Co., 48 Wn. App. 554, 739 P.2d 1188 (1987) 16

Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997) 24, 31

Capitol Hill Methodist Church of Seattle v. City of Seattle, 52 Wn.2d 359, 324 P.2d 113 (1958) 38

CHD, Inc. v. Taggart, 153 Wn. App. 94, 220 P.3d 229 (2009) 30

City of Kennwick v. Vandergriff, 109 Wn.2d 99, 743 P.2d 811 (1987) 23

Clapp v. Olympic View Pub. Co., L.L.C., 137 Wn. App. 470, 154 P.3d 230 (2007), *rev. denied*, 162 Wn.2d 1013 (2008) 25

Coppernoll v. Reed, 155 Wn.2d 290, 119 P.3d 318 (2005) 24, 31

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992) 24

Davies v. Holy Family Hosp., 144 Wn. App. 483, 183 P.3d 283 (2008) 16, 18, 20, 22

Demlash v. Ross Stores, Inc., 105 Wn. App. 508, 20 P.3d 447, *rev. denied*, 145 Wn.2d 1004, 35 P.3d 380 (2001) 25

Dickinson v. Edwards, 105 Wn.2d 457, 716 P.2d 814 (1986) 38

Duckworth v. City of Bonney Lake, 91 Wn.2d 19586 P.2d 860 (1978) 32

Espinoza v. City of Everett, 87 Wn. App. 857, 943 P.2d 387 (1997), *rev. denied,* 134 Wn.2d 1016, 958 P.2d 315 (1998) 26

Halverson v. Anderson, 7 Wn. App. 706, 502 P.2d 466 (1972), *rev'd on other grounds*, 82 Wn.2d 746, 513 P.2d 827 (1973) 27

Haslett v. Planck, 140 Wn. App. 660, 166 P.3d 866 (2007) 30

Hawkins v. Diel, __ Wn. App. __, 269 P.3d 1049, 1055 n.2 (2011) 24

Idahosa v. King County, 113 Wn. App. 930. 55 P.3d 657 (2002), *rev. denied,* 149 Wn.2d 1011, 69 P.3d 874 (2003) 16, 17, 20, 21, 22

In re Det. of McGary, 155 Wn. App. 771, 231 P.3d 205 (2010) 24

In re Recall of Reed, 156 Wn.2d 53, 124 P.3d 279 (2005) 16
James v. Niebuhr, 63 Wn.2d 800, 389 P.2d 287 (1964) 27
Johnson v. Si-Cor, Inc., 107 Wn. App. 902, 28 P.3d 832 (2001) 30
King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County, 123 Wn.2d 819, 872 P.2d 516 (1994) 16
King v. Clodfelter, 10 Wn. App. 514, 518 P.2d 206 (2004) 30
Marshall v. AC & S, Inc., 56 Wn. App. 181, 782 P.2d 1107 (1989) 30
Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 972 P.2d 475 (1999) 29
McCormick v. Lake Wash. Sch. Dist., 99 Wn. App. 107, 992 P.2d 511 (1999) 29
Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus., 136 Wn. App. 1, 146 P.3d 1212 (2006) 25
Miller v. Campbell, 164 Wn.2d 529, 192 P.3d 352 (2008) 30
Morgan v. Kingen, 166 Wn.2d 526, 210 P.3d 995 (2009) 28
O'Neill v. Farmers Ins. Co. of Wash., 124 Wn. App. 516, 125 P.3d 134 (2004) 16
Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 144 P.3d 276 (2006) 28, 29, 35, 38
Peluso v. Barton Auto Dealerships, Inc., 138 Wn. App. 65, 155 P.3d 978 (2007) 16
Riojas v. Grant County Pub. Util Dist., 117 Wn. App. 694, 72 P.3d 1093 (2003), *rev. denied*, 151 Wn.2d 1006, 87 P.3d 1184 (2004) 25, 27
Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 41 P.3d 1175 (2002) 22
Robinson v. Avis Rent A Car Sys., Inc., 106 Wn. App. 104, 22 P.3d 818, *rev. denied*, 145 Wn.2d 1004, 35 P.3d 381 (2001) 29
Sec. State Bank v. Burk, 100 Wn. App. 94, 995 P.2d 1272 (2000) 16
Selvig v. Caryl, 97 Wn. App. 220, 983 P.2d 1141 (1999), *rev. denied*, 140 Wn.2d 1003, 999 P.2d 1262 (2000) 29
Seto v. Am. Elevator, Inc., 159 Wn.2d 767, 154 P.3d 189 (2007) 23
State v. WWJ Corp., 138 Wn.2d 595, 980 P.2d 1257 26
Thoma v. C.J. Montag & Sons, Inc., 54 Wn.2d 26, 337 P.2d 1052 (1959) 38
Thongchoom v. Graco Children's Prods., Inc., 117 Wn. App. 299, 71 P.3d 214 (2003), *rev. denied*, 15 Wn.2d 1002, 87 P.3d 1185 (2004) ... 32
Vanderhoff v. Fitzgerald, 72 Wn.2d 103, 431 P.2d 969 (1967) 27
Wash. Fed'n of State Employees v. Office of Fin. Mgmt., 121 Wn.2d 152, 849 P.2d 1201 (1993) 25
Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 840 P.2d 860 (1992) 25

Will v. Frontier Contractors, Inc., 121 Wn. App. 119, 89 P.3d 242 (2004), *rev. denied*, 153 Wn.2d 1008, 111 P.3d 856 (2005) 23
Wilson & Son Ranch, LLC, Hintz, 162 Wn. App. 297, 253 P.3d 470 (2011) 25
Woodhead v. Disc. Waterbeds, Inc., 78 Wn. App. 125, 896 P.2d 66 (1995), *rev. denied,* 128 Wn.2d 1008, 910 P.2d 482 (1996) 16

Rules and Regulations

CR 5 15
CR 5(b)(7) 23
CR 37 22
CR 56 ..... 18, 20
CR 6(b)(2) 20
CR 56(c) 15, 16, 17, 20, 22, 28, 34, 38
CR 56(h) 13

RAP 2.5(a) 25
RAP 9.12 25
RAP 10.3(c) 24

Other Authority

15A Tegland & Ende, *Wash. Prac.: Handbook on Civ. Pro.* § 60, at 504 (2011-12 ed.) 23

15A Tegland & Ende, *Wash. Prac.: Handbook on Civ. Pro.* § 60.4, at 508 (2011-12 ed.) 23

I. INTRODUCTION

On March 14, 2008, a multi-vehicle collision occurred on Interstate 5 near Federal Way, Washington, involving, among other drivers, Appellant Harry Williams, Keisha McDew, and Respondent Duston Anderson, who was operating his semi-truck for his employer Respondent T.E. Walwrath Trucking, Inc. (collectively "Anderson"). Mr. Williams sued Anderson and Ms. McDew in Pierce County Superior Court, alleging that she rear-ended Mr. Williams and "propelled" him into Mr. Anderson's lane, where Mr. Williams and Mr. Anderson's vehicles struck each other.

Following discovery, Ms. McDew moved for summary judgment, arguing that she did not proximately cause Mr. Williams's accident or injuries. His attorney failed to submit any briefing or evidence in opposition. The Honorable Garold E. Johnson granted Ms. McDew's motion and dismissed her from the case.

Anderson then moved for summary judgment, arguing that there was no factual dispute that his semi-truck was traveling in a different lane than Mr. Williams at the time of the accident. Accordingly, Mr. Anderson did not breach any standard of care or proximately cause their vehicles to strike each other. Again, Mr. Williams's attorney did not file any opposition by the deadline. However, **nearly 10 full days later and less**

than 48 hours before the hearing, he finally filed a response and two supporting declarations, which he improperly transmitted to Anderson's counsel by facsimile. Despite the severe time limitations, Anderson was able to file a reply and a supporting declaration.

At oral argument, the trial court asked Mr. Williams's counsel why his response was "so doggone late." Counsel's only explanation was that he was dealing with stressful circumstances at his job and that he had difficulty reaching one of the witnesses. After considering the issue at length, the trial court struck and would not consider Mr. Williams's opposition materials and granted summary judgment of dismissal for Anderson.

On appeal, Mr. Williams has abandoned his claims against Ms. McDew and seeks for this court to reverse the trial court's rulings as to Anderson. First, Mr. Williams argues that that the court abused its discretion in failing to consider his untimely opposition filings. Second, he claims that, with or without that evidence, the court erred as a matter of law in granting summary judgment for Anderson.

Mr. Williams is wrong on both issues for the reasons set forth below. Further, if this court affirms the trial court's decision not to consider his untimely opposition, then he cannot argue — and this court should not reach — the merits of his opposition on appeal.

Anderson respectfully asks this court to affirm the trial court's reasoned decisions below.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Anderson assigns no error to the trial court's July 22, 2011, rulings (1) to strike and not consider Mr. Williams's untimely responsive brief and declarations and (2) to grant summary judgment, which properly dismissed his claims against Anderson.

Issues Pertaining to Assignments of Error

Anderson disagrees with Mr. Williams's statement of issues. This appeal presents four issues, which are more properly stated as follows:

The first issue is whether the trial court properly exercised its discretion to strike Mr. Williams's untimely responsive brief and supporting declarations, where:

1. Mr. Williams completely failed to respond to Ms. McDew's summary judgment motion or appear at the hearing;

2. Anderson moved for summary judgment on June 24, 2011, and Mr. Williams's opposition was due by July 11;

3. Mr. Williams failed to file any response by July 11, instead waiting nearly another 10 full days before filing an

untimely response and declarations on July 20 at about 4:00 p.m., less than 48 hours before the scheduled hearing on July 22; and

4. Mr. Williams failed to serve his response and declarations on counsel, choosing instead to send them by facsimile without obtaining an electronic service agreement.

The second issue is whether this court can reach the merits of Mr. Williams's summary judgment arguments, where if this court holds that the trial court did not abuse its discretion in striking his opposition materials, then he failed to preserve for appeal any arguments as to summary judgment.

The third issue is whether Mr. Williams should be judicially estopped from arguing in response to summary judgment that Mr. Anderson rear-ended him, where Mr. Williams's own first amended complaint alleges that Ms. McDew rear-ended him and propelled him into Mr. Anderson's lane.

In the event the court finds that the trial court manifestly used its discretion in striking Mr. Williams' untimely response and declarations, the fourth issue is whether Mr. Anderson is entitled to summary judgment of dismissal as a matter of law, where:

1. Mr. Williams averred in his first amended complaint and later testified under oath that he was rear-ended by Ms. McDew and not Mr. Anderson;

2. Mr. Williams and Mr. Anderson both testified that their respective vehicles were in adjacent lanes at the time Ms. McDew rear-ended Mr. Williams;

3. The subsequent impact between Mr. Williams and Mr. Anderson occurred in Mr. Anderson's lane;

4. There is no basis to adopt the "following car doctrine" when it is undisputed that Mr. Williams and Mr. Anderson were in adjacent lanes; and

5. There is no evidence that Mr. Anderson violated any statutory duty or otherwise failed to exercise ordinary care to avoid the collision with Mr. Williams.

III. STATEMENT OF THE CASE

A. Although Mr. Williams initially alleged that Mr. Anderson's vehicle rear-ended him, he amended his complaint to allege that Ms. McDew rear-ended him and propelled him into Mr. Anderson's lane.

On March 14, 2008, a multi-vehicle collision that occurred on Interstate 5 near Federal Way, Washington. Clerk's Papers (CP) 5. Based on that accident, Mr. Williams filed a Complaint for Personal Injuries and Damages on March 8, 2010, alleging that he was "rear ended by defendant

Anderson" and that "[a]fter the initial impact, defendant Anderson attempted to change lanes but in doing so, his vehicle trailer caught the side of plaintiff Williams' vehicle." CP 2.

After discovery, Mr. Williams amended his complaint on November 1, 2012. He added Ms. McDew as a defendant and alleged that it was she, and not Mr. Anderson, that rear-ended him:

> 2.2. Williams stopped for traffic when he was rear-ended by defendant Keisha McDew, **and was propelled into the lane where he was struck by Defendant Duston Anderson**.
>
> 2.3 Defendant Anderson's trailer caught the side of plaintiff Williams' vehicle and dragged it.

CP 5 (emphasis added).

B. According to Mr. Williams, his vehicle struck Mr. Anderson's semi-truck *after* crossing into Mr. Anderson's southbound lane on Interstate 5.

At approximately 2:00 p.m. on March 14, 2008, CP 5, 72, Mr. Anderson, an employee of T.E. Walrath Trucking, Inc., was operating a semi-truck and trailer in the middle of five southbound lanes. CP 71. To his immediate left, in lane number four,[1] Mr. Williams was also traveling southbound. CP 63-64.

---

[1] Like Mr. Williams's brief, this brief will describe "Lane 1" as the that lane to the far right of the highway and assign a sequentially higher number to each lane on the left, ending with "Lane 5" as the high-occupancy-vehicle (or "HOV") lane. CP 71. However, witness Shaun Collins describes these lanes in the reverse order, with the leftmost lane as "Lane 1." CP 85.

At his deposition, Mr. Williams repeatedly confirmed the averments in his amended complaint that he was driving in the adjacent lane to the left of Mr. Anderson's semi-truck at the time of the accident, and that Mr. Williams was initially rear-ended:

> Q. So you're traveling southbound on Interstate 5 about a mile north of the Fife exit, you see an accident ahead of you about 100 to 200 feet, and you're traveling at about 55 miles per hour?
>
> A. Yes.
>
> Q. What do you do?
>
> A. I began to start looking at my options as far as trying to avoid the traffic ahead of me, so I began to slow down.
>
> Q. . . . . [W]hat other vehicles were around you, in front of you, beside, or behind that you recall?
>
> A. I saw an SUV directly in front of me, directly ahead of me. It was massive traffic. **The 18 wheeler truck was on the right of me.**
>
> . . . .
>
> Q. And to your knowledge, **where did that first contact come from?** The side? The front?
>
> A. **The rear.**
>
> Q. Other than the one contact from the rear, do you have any recollection of your car encountering any other contacts?
>
> A. No, I don't. I was knocked out.

CP 63-65 (emphasis added).

He explained, "[W]hen I was in the process of slowing down, I felt something strike me from the rear. . . . And after I was struck from the rear, I blacked out." CP 20, 62. Though Mr. Williams was unclear exactly how many contacts he made with fellow motorists, he was certain that "[t]he initial strike [came] from the rear." CP 66.

When his vehicle was rear-ended, it began to spin "out of control." CP 20, 31. While spinning, he regained consciousness and saw an 18-wheeler truck. CP 20-21.

> Q. . . . . Where was the 18 wheeler when you opened your eyes?
>
> A. I was spinning around in circles, and it was like the 18 wheeler was **right there on the side of me**.

CP 21 (emphasis added).

Mr. Williams also described hearing at some point during these events a "real loud sound like the car was being crushed," comparing it to the sound of "a crate that's been dropped from the sky." CP 66. He continued, "And when I was spinning around, I was looking at the 18 wheeler. **And as far as exactly where it was and position, I couldn't tell you that.**" CP 22 (emphasis added).

At no point in Mr. Williams's deposition does he testify that Mr. Anderson's semi-truck was traveling behind him or that it was first to strike him.

C. Mr. Anderson largely confirmed Mr. Williams's testimony about the accident, including that his car entered Mr. Anderson's lane.

Immediately before the accident, Mr. Anderson was traveling southbound in the center lane of Interstate 5. CP 71. All of the sudden, he saw traffic was stopped on the highway in front of him, so he applied his brake to slow down. CP 72.

> And as I came upon the traffic that was stopped, I noticed the front end of a car coming into my lane. So I moved to the far right of my lane to try to avoid the car, but I couldn't move over far enough.

CP 72-73.

Though Mr. Anderson was able to avoid hitting that vehicle with his tractor, it nevertheless connected with the driver's side front axle of his first trailer. CP 74, 76-77. This impact occurred in Mr. Anderson's lane:

> Q. The car that entered your lane, did you strike any part of it?
>
> A. **I didn't. I didn't strike it. It struck me.**
>
> Q. And where did it strike you?
>
> A. At the front axle of the semi-trailer.

CP 75 (emphasis added).

D. Mr. Williams failed to submit any briefing or evidence in opposition to Ms. McDew's summary judgment motion.

Following discovery, Ms. McDew moved for summary judgment

on May 25, 2011, arguing that she did not proximately cause Mr. Williams's accident or injuries, CP 7-14, and submitted declarations and exhibits in support of her motion. CP 16-31. Mr. Williams failed to file any opposition to her motion. CP 79. In fact, his counsel even failed to attend the July 15 hearing on this motion, and the trial court granted summary judgment in her favor, dismissing her from the case with prejudice. CP 78-80; RP (July 15, 2011) at 2-3.

E. Mr. Williams also failed to oppose Anderson's summary judgment motion by his deadline of July 11, 2011; he finally filed his materials on July 20.

On June 24, 2011, Anderson moved for summary judgment, arguing that Mr. Anderson's truck did not breach the standard of care or proximately cause Mr. Williams's accident. CP 35-37. Anderson supported this motion with declarations from defense counsel and T.E. Walwrath Trucking dispatcher Bill Conrad. CP 40, 58. Mr. Conrad submitted photographs showing that the only damage to Mr. Anderson's vehicle from the accident was a dented trailer fender, with no damage to the semi-truck or double-trailer. CP 40-55.

Under CR 56(c), any responsive briefing by Mr. Williams was required to be filed with the trial court and served on opposing counsel by July 11. CP 34. Mr. Williams did not file his response until approximately 4:00 p.m. on July 20, almost 10 full days past the deadline

and less than 48 hours before the hearing on July 22. CP 95, 110, 113.

F. Mr. Williams sent his response brief and declarations to Anderson's counsel by facsimile without first obtaining an electronic service agreement.

Mr. Williams's counsel had no electronic service agreement with Anderson's counsel. CP 110. Nonetheless, Mr. Williams's counsel improperly transmitted his client's response materials to opposing counsel by facsimile at approximately 4:00 p.m. on July 20. CP 110-12. Counsel did not attempt to serve his briefing or declarations by any method permitted under the civil rules. CP 110.

G. Mr. Williams's counsel offered no reasonable justification for the late opposition or improper service, and the trial court appropriately exercised its discretion to strike the brief and supporting declarations.

The trial court began the July 22, 2011, hearing by lecturing Mr. Williams' counsel about his untimely opposition filings:

> THE COURT: Again, gentlemen, I've read this file all the way through very carefully. Maybe to take this in a little bit of a reverse order of priorities, there clearly is a problem with this is a case of late filing of the response.
>
> MR. MAXWELL: Yes, Your Honor.
>
> THE COURT: Two days before the hearing as opposed to eleven. It causes great consternation.

RP (July 22, 2011) at 2.

After addressing some of the evidentiary and estoppel arguments that Anderson raised regarding the declarations of Mr. Collins and

Mr. Richmond, the trial court returned to his core concerns about the lateness of the response materials:

> THE COURT: . . . . But I tell you what really concerns me about this case, kind of address the issues that maybe without even looking at it all, and that is the rule is clear; responsive documents have to be – rebuttal documents have to be filed eleven days before the hearing. And I don't want to stand on procedure as being the touch-all of every case, but at some point to wait until two days before the hearing – frankly, I didn't even get a chance to see these until last night because they were filed at about 4 o'clock, it appears to me, on Wednesday, and I was over in CD1, which is a criminal docket, in any event.
>
> And I looked at these things, and I had expected not to receive anything **it was so doggone late**. And then to get your reply, which was marked without anything in it at all in that timeframe.
>
> But nevertheless, at some point – I don't mean to lecture, but I'm looking at some point to go from using some equity and sliding off the rule a little bit just because of the nature of what we do, to a point we're just simply ignoring it. And it seems to me when you're two days before the hearing and you're saying Oh, go ahead and submit them anyway, at that point, without justification, unless there is one, I'm just ignoring the rule. And it's not my rule. It's the Supreme Court's rule.
>
> MR. MAXWELL: Your Honor, two responses to that. One is that yes, it was late, yes. Getting ahold of a witness in Alaska on the North Slope wasn't easy; that's where Shawn Collins lives.
>
> In addition to that, I've had some – I've had some very stressful times at my workplace, and I take responsibility for that as well. That's all I have to say.

Id. at 7-8 (emphasis added).

After considering argument by both counsel, the trial court ended the hearing with the following ruling:

> MR. MAXWELL: I am taking responsibility for this.
>
> THE COURT: Well, the number of times I filed something late in my career, it happens, I don't deny that. **But I just can't accept documents that are that late. It's just too late.**
>
> There was no motion to continue. There was nothing to go with that, so I will not consider those documents. But I have to tell you – well, I'll leave it at that. **I'm simply not going to consider it. Therefore, the summary judgment will be granted.**

Id. at 9 (emphasis added). The trial court clearly articulated on the record his final rulings to grant summary judgment and not to consider the opposition briefing or evidence. *Id.* at 7-9.

Off the record, counsel disputed the form of order. *Id.* at 10. In accordance with the court's oral rulings, Anderson's counsel crossed out Mr. Williams's response and the declarations of Mr. Collins and Mr. Richmond from the list of records and files that the court reviewed in making his decision on summary judgment, pursuant to CR 56(h). CP 122. Anderson's counsel also added the following language to the order: "These documents were not considered, having been filed untimely on July 20, 2011." CP 122.

After going back on the record, Mr. Williams's attorney argued that the trial court should sign the original proposed order without these changes, an argument which the court quickly rejected:

> MR. MAXWELL: What I have, Your Honor, is the original order that was proposed by the defense counsel.
>
> Judge, from my point of view, far better for the Court to consider the plaintiff's materials and grant the motion, particularly in light of the fact that the Court – here is my proposed order, Your Honor.
>
> THE COURT: Hand it up. I'll take a look at it.
>
> MR. MAXWELL: Particularly in light of the fact that the Court described the plaintiff's materials as borderline at best.
>
> THE COURT: I've signed the order.

RP (July 22, 2011) at 10. The trial court signed the version of the order that Anderson's counsel proposed, which reflected the court's decision not to consider Mr. Williams's opposition materials. CP 121-23.

IV. SUMMARY OF ARGUMENT

The trial court did not abuse its discretion by striking Mr. Williams's briefing and declarations and not considering them on summary judgment because his counsel failed to file them timely and failed to serve them properly on Anderson's counsel. Given Mr. Williams's attorney's pattern of dilatory behavior in this case, the trial court had ample reason to strike these opposition materials.

With or without those materials, Mr. Williams cannot show a genuine issue of material fact requiring a trial. There is no evidence on the record that would permit a fact-finder to reasonably infer that Mr. Anderson (1) hit Mr. Williams's car while following it in the same lane, (2) breached a standard of care, or (3) proximately caused any alleged injuries. Without properly filing or serving his opposition materials, he failed to preserve his arguments or evidence for review on appeal. If this court affirms the trial court's discretionary ruling to strike, this court should also affirm the trial court's ruling on summary judgment, without considering Mr. Williams's unpreserved arguments on appeal. This court should affirm the rulings of the trial court.

V. ARGUMENT

A. The trial court did not abuse its discretion in striking Mr. Williams's untimely-filed and improperly-served opposition motion and declarations.

There are two independent bases for affirming the trial court's discretionary decision to strike Mr. Williams's opposition brief and evidence below. First, he failed to file these documents timely under CR 56(c). Second, he failed to serve them properly on Anderson's counsel under CR 5.

1. The court should review this issue for an abuse of discretion.

Anderson agrees with Mr. Williams that the trial court's decision

to strike his untimely opposition and supporting evidence should be reviewed for an abuse of discretion. App. Brief at 4, 21-23; *see, e.g.*, *In re Recall of Reed*, 156 Wn.2d 53, 61, 124 P.3d 279 (2005); *King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994); *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 499, 183 P.3d 283 (2008); *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 570, 157 P.3d 406 (2007), *rev. denied*, 162 Wn.2d 1022, 178 P.3d 1033 (2008); *O'Neill v. Farmers Ins. Co. of Wash.*, 124 Wn. App. 516, 522, 125 P.3d 134 (2004); *Idahosa v. King County*, 113 Wn. App. 930, 937, 55 P.3d 657 (2002), *rev. denied*, 149 Wn.2d 1011, 69 P.3d 874 (2003); *Sec. State Bank v. Burk*, 100 Wn. App. 94, 103, 995 P.2d 1272 (2000); *Brown v. Peoples Mortgage Co.*, 48 Wn. App. 554, 559-60, 739 P.2d 1188 (1987). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds or reasons. *See, e.g.*, *Allen*, 138 Wn. App. at 570.

2. Counsel for Mr. Williams failed to file his client's opposition or supporting evidence by the deadline in CR 56(c).

"The trial court has considerable latitude in managing its court schedule to insure the orderly and expeditious disposition of cases." *Idahosa*, 113 Wn. App. at 937; *see Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 71, 155 P.3d 978 (2007); *Woodhead v. Disc.*

Waterbeds, Inc., 78 Wn. App. 125, 129, 896 P.2d 66 (1995), *rev. denied*, 128 Wn.2d 1008, 910 P.2d 482 (1996). For summary judgment motions, the nonmoving party "may file and serve opposing affidavits, memoranda of law or other documentation **not later than 11 calendar days before the hearing**." CR 56(c) (emphasis added).

Washington courts have repeatedly upheld trial courts' discretionary decisions to strike and not consider untimely oppositions to summary judgment. *See Idahosa*, 113 Wn. App. at 936-37; *Davies*, 144 Wn. App. at 500-01. In *Idahosa*, a corrections officer filed a complaint against King County in Pierce County Superior Court, alleging various discrimination claims. 113 Wn. App. at 932-34. After discovery had begun, the trial court granted the County's motion to compel discovery from plaintiff and then granted the County's motion for sanctions based on her failure to comply with that order. *Id.* at 934. The County also filed a summary judgment motion. *Id.* The parties agreed that plaintiff would file her response by March 19, 2001, and for a hearing on March 23. *Id.* at 934-35. However, plaintiff did not file her response until March 21, two days after the agreed deadline and two days before the hearing. *Id.* at 935. The trial court granted the County's motion to strike her untimely response and to grant summary judgment. *Id.*

On appeal, Division Two affirmed the trial court's decisions to grant summary judgment and to strike plaintiff's opposition. *Id.* at 935. Plaintiff argued that (1) the trial court granted summary judgment because of her earlier discovery violations and (2) dismissal was improper under CR 56 and then-Pierce County Local Civil Rule 56. *Id.* at 935-36. The *Idahosa* court disagreed, ruling that the summary judgment order resulted not from discovery violations, but from plaintiff's untimely response. *Id.* at 936. But for the parties' stipulation, CR 56 would have required her response 11 days before the hearing. *Id.* The court determined that she missed the parties' stipulated deadline and "filed her response **only two days before the summary judgment hearing**." *Id.* at 936 (emphasis added). Division Two confirmed that a trial court may make a discretionary decision to strike untimely briefing within the context of other events in the proceedings:

> [G]iven the trial court's observations of Idahosa's **dilatory pattern, the lateness and size of her response**, and a pending trial date less than two months away, we cannot say that it was an abuse of discretion to refuse to accept the untimely response or to strike it as untimely.

Id. at 937 (emphasis added). Division Two did not require that any or all of these factors be present before a trial court strike an opposition to summary judgment. *See id.*

Similarly, in *Davies*, the plaintiff-husband and personal

representative of his deceased wife's estate brought suit against the hospital and its employees for medical negligence when she died after kidney surgery. 144 Wn. App. at 488. The hospital moved for partial summary judgment on the grounds that plaintiff lacked competent expert testimony to make a prima facie case. *Id.* at 489-90. Plaintiff moved for a continuance. *Id.* at 489. The trial court denied his motion but nevertheless continued the hearing for several weeks. *Id.* at 489-90. Plaintiff timely responded with a legal memorandum in opposition to summary judgment, an affidavit of his counsel, and a declaration of a practicing radiologist offering opinions of the nursing staff's standard of care. *Id.* at 490.

Plaintiff's counsel resigned shortly before the hearing, so plaintiff was unrepresented at oral argument. *Id.* The trial court considered the parties' briefing and granted the hospital's motion, scheduling presentment three weeks later. *Id.* Two weeks later, however, new counsel appeared for plaintiff and moved (1) for reconsideration and (2) to submit an untimely response, attaching a declaration from a previously undisclosed registered nurse. *Id.* At the presentment hearing, the trial court signed the hospital's order granting summary judgment. *Id.* The trial court struck that nurse's declaration as untimely and inadmissible and denied plaintiff's motion to submit an untimely response. *Id.* at 491. The trial court also denied reconsideration. *Id.*

On appeal, plaintiff argued, among other things, that the trial court improperly denied his motion to submit an untimely response to summary judgment and an untimely witness declaration. *Id.* at 499-500. Division Three affirmed, repeatedly emphasizing that CR 56 required any responding documents at least 11 days before the hearing. *Id.* at 498, 500. Citing *Idahosa* and other Washington case law, the *Davies* court also confirmed that the decision to reject untimely documents was one within the trial court's discretion. *Id.* at 499. According to the court, absent a motion for continuance, the trial court was under no obligation to consider untimely materials, and once a party missed the deadline, CR 6(b)(2) required a showing of excusable neglect. *Id.* at 499-500.

Here, the facts are remarkably similar to those in *Idahosa* and *Davies*. Like *Idahosa*, Mr. Williams failed to file a timely response brief or supporting declarations. CP 95, 110, 113. Whereas the plaintiff in *Davies* filed a responsive memorandum before the deadline, he then moved for leave to file another response after that deadline, which Division Three held was properly denied based on CR 56(c). 144 Wn. App. at 490. Mr. Williams did not move for leave to file a late response. Nor did he move for a continuance in order to obtain a declaration from Mr. Collins, whose location in Alaska Mr. Williams's counsel cited as a reason for the untimely opposition. RP (July 22, 2011) at 8. Like the

plaintiff in *Idahosa*, Mr. Williams's lawyer filed this opposition "only two days before the summary judgment hearing," which Division Two considered much too late. 113 Wn. App. at 936. But unlike *Idahosa*, where counsel's response was two days late, *id.*, Mr. Williams's response was **almost 10 full days past the deadline**. CP 95, 110, 113.

The trial court clearly articulated on the record its rationale for striking Mr. Williams's opposition briefing and declarations. The trial court could not consider them because they were filed not just late, but "so doggone late" that the court barely had time to see the briefing before the hearing. RP (July 22, 2011) at 7. Though the court expressed some sympathy for missing deadlines, it drew the line at filing "documents that are that late." *Id.* at 9. To permit such tardiness would be to "ignor[e] the rules," which the trial court would not do. *Id.* at 8.

Importantly, the trial court made this ruling in the unmistakable context of this same attorney also failing to file an opposition to Ms. McDew's summary judgment motion. CP 79. The *Idahosa* court singled out a party's pattern of dilatory behavior as one of several factors that a trial court may consider when exercising its discretion to accept or strike untimely opposition materials. 113 Wn. App. at 937. Though the trial court here did not explicitly reference Ms. McDew's earlier motion, the court's oral ruling clearly reflected its concern for counsel's dilatory

conduct by repeatedly emphasizing the importance of filing timely materials and specifically how these omissions caused the court "great consternation." RP (July 22, 2011) at 2.

Surprisingly, Mr. Williams neglects to address or distinguish controlling case law such as *Idahosa* and *Davies*, which specifically discuss the repercussions of missing opposition deadlines under CR 56(c). App. Br. at 28-29. Instead, he draws a questionable analogy to CR 37, which deals with discovery sanctions, "[b]ecause CR 56(c) gives little guidance to the court as to how to exercise its discretion in accepting or rejecting untimely filings. . . ." App. Br. at 28. He cites no authority for analyzing the facts at bar under CR 37, or applying a three-part test for ordering dismissal as a discovery sanction from *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002) — primarily because no Washington authority permits this type of comparison.

The court should analyze the facts of this case under *Idahosa*, *Davies*, and other Washington case law that have considered the appropriate means of dealing with a party's failure to oppose a dispositive motion for summary judgment. Under those authorities, the court will find a solid basis for affirming the trial court's discretionary ruling below.

3. Mr. Williams's attorney also failed to properly serve his untimely pleadings on Anderson's counsel, rendering them invalid.

CR 5(b)(7) allows for "[s]ervice by other means," allowing for service by facsimile and electronic mail service. For this form of delivery to be valid, it must be "consented to in writing by the person served." CR 5(b)(7). Without such a written agreement, service by email or facsimile is ineffective. *See, e.g.*, *Seto v. Am. Elevator, Inc.*, 159 Wn.2d 767, 775, 154 P.3d 189 (2007); *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 127, 89 P.3d 242 (2004), *rev. denied*, 153 Wn.2d 1008, 111 P.3d 856 (2005); 15A Tegland & Ende, *Wash. Prac.: Handbook on Civ. Pro.* § 60.4, at 508 (2011-12 ed.). Other than motions for default under CR 55, a motion and supporting papers that have not been served on opposing counsel are invalid. *See City of Kennwick v. Vandergriff*, 109 Wn.2d 99, 102, 743 P.2d 811 (1987); 15A Tegland & Ende, *Wash. Prac.: Handbook on Civ. Pro.* § 60.1, at 504 (2011-12 ed.).

Here, there was no electronic service agreement between the parties. CP 110. As such, Mr. Williams's service of his opposition briefing and declarations on Anderson's counsel was ineffective and therefore invalid. *See Seto*, 159 Wn.2d at 775; *Vandergriff*, 109 Wn.2d at 102. Though the trial court did not explicitly discuss this argument by Anderson at the hearing, Washington courts may affirm a trial court's

ruling on any theory or basis that the record supports. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 (1997).

Mr. Williams provides no argument on appeal for why these materials were properly served on opposing counsel, even though Anderson made this argument in their reply in support of summary judgment below. CP 103 n.2, 110. It is now too late for Mr. Williams to shore up this serious shortcoming by making such arguments for the first time in his reply brief. *See* RAP 10.3(c); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Hawkins v. Diel*, __ Wn. App. __, 269 P.3d 1049, 1055 n.2 (2011); *In re Det. of McGary*, 155 Wn. App. 771, 784 n.8, 231 P.3d 205 (2010).

Under the circumstances where Mr. Williams's attorney demonstrated a clear pattern of dilatory behavior in missing deadlines for responses to dispositive motions, and where he also failed to serve his responsive brief or declarations on opposing counsel, this court should affirm the trial court's decision to strike and not consider Mr. Williams's opposition brief or declarations on summary judgment.

B. If this court affirms the decision to strike Mr. Williams's untimely response brief and declarations, then RAP 2.5(a) and RAP 9.12 preclude him from arguing his opposition to summary judgment on appeal.

Washington appellate courts only consider evidence and issues called to the attention of the trial court on summary judgment. RAP 9.12; *Wash. Fed'n of State Employees v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993); *Riojas v. Grant County Pub. Util Dist.*, 117 Wn. App. 694, 696 n.1, 72 P.3d 1093 (2003), *rev. denied*, 151 Wn.2d 1006, 87 P.3d 1184 (2004). Otherwise, the court would not truly engage in the same inquiry as the trial court. *Wash. Fed'n of State Employees*, 121 Wn.2d at 157.

Similarly, appellate courts generally do not consider arguments that a party makes for the first time on appeal. RAP 2.5(a); *see, e.g.*, *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992); *Bellevue Sch. Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967); *Wilson & Son Ranch, LLC, Hintz*, 162 Wn. App. 297, 303, 253 P.3d 470 (2011); *Clapp v. Olympic View Pub. Co., L.L.C.*, 137 Wn. App. 470, 476, 154 P.3d 230 (2007), *rev. denied*, 162 Wn.2d 1013 (2008); *Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus.*, 136 Wn. App. 1, 8, 146 P.3d 1212 (2006); *Demlash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447, *rev. denied*, 145 Wn.2d 1004, 35 P.3d 380 (2001). This

rule is grounded in basic notions of fairness to both the trial court and the opposing party. *Espinoza v. City of Everett*, 87 Wn. App. 857, 873-74, 943 P.2d 387 (1997), *rev. denied*, 134 Wn.2d 1016, 958 P.2d 315 (1998).

RAP 2.5(a) provides narrow exceptions for arguments and claims regarding (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. *See State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (199). Mr. Williams cannot meet any of these exceptions and has not argued any of them in his opening brief.

Here, there is no reason to allow Mr. Williams to make new arguments for the first time on appeal. This is a simple case involving an automobile accident, not a criminal conviction or a civil rights matter, so making an exception here would not serve the ends of substantial justice, prevent a denial of anyone's fundamental rights, or affect the public interest. In fact, permitting new argument on appeal would unfairly prejudice Anderson's rights to their expectation of a full and fair hearing below and for an appellate review of the trial court's ruling considering only those arguments and evidence before the court on summary judgment.

Put simply, in waiving his opportunity to file a timely opposition to summary judgment below, Mr. Williams also waived his chance to

preserve arguments for his present appeal. In the event that this court affirms the trial court's decision to strike, this court should affirm the court's order granting summary judgment without reaching the merits of his new arguments.

C. The trial court properly granted summary judgment in favor of Anderson.

The following driver in an accident is not negligent per se for all injuries sustained. *Vanderhoff v. Fitzgerald*, 72 Wn.2d 103, 105, 431 P.2d 969 (1967); *James v. Niebuhr*, 63 Wn.2d 800, 802, 389 P.2d 287 (1964); *Halverson v. Anderson*, 7 Wn. App. 706, 710, 502 P.2d 466 (1972), *rev'd on other grounds*, 82 Wn.2d 746, 513 P.2d 827 (1973). The plaintiff must still establish the elements of negligence, that is, duty, breach, cause, proximate cause, and injuries attributable to the defendant. *Riojas*, 117 Wn. App. at 697. The elements of breach and proximate cause may be determined on summary judgment where reasonable minds could reach but one conclusion. *Id.*

Mr. Williams has yet to articulate his specific theory of Anderson's liability, having failed to do so in his complaint, in his amended complaint, on summary judgment, and now on appeal. CP 1-6, 95-97; App. Br. at 9-30. He suggests this is a case of negligence, relying apparently on the "following car" doctrine. But he has failed to show that

Mr. Anderson made an improper lane change, followed too closely, or otherwise breached any other rule of the road. Nor has there been any showing that Mr. Anderson proximately caused Mr. Williams's alleged injuries.

1. The standard of review here is de novo, and the record supports summary judgment of dismissal as a matter of law.

This court reviews de novo a trial court's order granting summary judgment. *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 350-51, 144 P.3d 276 (2006). Summary judgment is proper if the pleadings, depositions, and other documents show that "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c). Factual disputes must be material to survive summary judgment, and a "material fact" is one on which the outcome of the litigation depends. *Morgan v. Kingen*, 166 Wn.2d 526, 533, 210 P.3d 995 (2009). This court construes evidence in the light most favorable to the nonmoving party. *See Pac. Nw. Shooting Park Ass'n*, 158 Wn.2d at 350.

If the moving party shows the absence of a genuine issue of material fact, then the burden shifts to the nonmoving party to set forth specific facts that would raise a genuine issue of material fact for trial. *Id.* at 350-51. If the nonmoving party fails to show an issue of material fact

as to any element of a claim, then summary judgment on that claim is appropriate. *Id.* at 351.

2. Mr. Williams should be judicially estopped on appeal from arguing that Mr. Anderson initially rear-ended him.

As a threshold matter, this court should not permit Mr. Williams to argue that Mr. Anderson initially rear-ended him where his first amended complaint avers that Ms. McDew initially rear-ended him and propelled him into Mr. Anderson's lane. The deposition testimony of both parties confirms that the two were traveling in adjacent lanes immediately before the accident.

Generally, a party cannot create an issue of fact and prevent summary judgment simply by offering two different versions of a story by the same person. *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 111-12, 992 P.2d 511 (1999); *Selvig v. Caryl*, 97 Wn. App. 220, 225, 983 P.2d 1141 (1999), *rev. denied*, 140 Wn.2d 1003, 999 P.2d 1262 (2000). For example, if a party has given a deposition and his opponent moves for summary judgment, the deponent-party cannot manufacture a factual issue by submitting an affidavit contradicting his or her own deposition. *Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wn. App. 104, 121, 22 P.3d 818, *rev. denied*, 145 Wn.2d 1004, 35 P.3d 381 (2001); *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999);

Marshall v. AC & S, Inc., 56 Wn. App. 181, 185, 782 P.2d 1107 (1989).

"'[J]udicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.'" *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008) (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007)). In short, this doctrine prevents a party from "'playing fast and loose with the courts.'" *Haslett v. Planck*, 140 Wn. App. 660, 665, 166 P.3d 866 (2007) (internal quotation marks omitted) (quoting *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001)).

This doctrine also applies to a litigant's inconsistent statements of fact. *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 102, 220 P.3d 229 (2009); *King v. Clodfelter*, 10 Wn. App. 514, 519, 518 P.2d 206 (2004). A court does not need to issue an order or final judgment accepting the prior assertion; rather, it is sufficient if the court "implicitly accepted" the party's earlier position. *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 909, 28 P.3d 832 (2001). Nor does a party seeking to estop the other need to have actually relied on the prior position or suffer damage from that reliance. *Id.*

Here, Mr. Williams has alleged facts below and on appeal that are directly contrary to his most recent amended complaint and his own

deposition testimony. Though his pleading alleged that he "was **rear-ended by defendant Keisha McDew**, and was propelled **into the lane where he was struck by Defendant Duston Anderson**," CP 5 (emphasis added), and his deposition testimony bears this out, CP 63-64, 66, the crux of his appeal and opposition to summary judgment is that Mr. Anderson instead rear-ended him. App. Br. at 13; CP 95. This glaring inconsistency appears to be an effort to manufacture a factual issue at the eleventh hour by submitting declarations vaguely suggesting that Mr. Anderson initially rear-ended him. Anderson preserved this argument below, CP 105-08, and Washington courts may affirm a trial court's ruling on any theory or basis that the record supports. *Coppernoll*, 155 Wn.2d at 296; *Burnet*, 131 Wn.2d at 493.

Had Mr. Williams actually believed in this new case theory, he would have amended his complaint a second time. He did not. He should not be allowed to mislead this court by submitting and relying on evidence that rebuts his own case theory. Because Mr. Williams's positions are completely contradictory, he should be judicially estopped from arguing on appeal that Mr. Anderson negligently rear-ended him and proximately caused his injuries.

3. The trial court's findings and rationale for granting summary judgment carry no weight on appeal.

In his opening brief, Mr. Williams repeatedly points to statements by the trial court that he believes support his arguments for reversing summary judgment. *See, e.g.*, App. Br. at 19, 23-26. He relies primarily on the trial court's confusing, gratuitous statements following its order granting the motion about there being some "borderline" issues of fact. CP 23; RP (July 22, 2011) at 9. He also argues that the trial court raised factual issues with Anderson's photographs. App. Br. at 24. He even goes so far as to claim that "the trial court acknowledged that Anderson's arguments were weak. . . ." App. Br. at 24.

But this court engages in de novo review on summary judgment, and the trial court's findings or explanation in this regard carry no weight on appeal. *See, e.g.*, *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978); *Thongchoom v. Graco Children's Prods., Inc.*, 117 Wn. App. 299, 309, 71 P.3d 214 (2003), *rev. denied*, 15 Wn.2d 1002, 87 P.3d 1185 (2004). Arguments along these lines have no merit.

4. If this court affirms the ruling to strike the opposition brief and evidence, then there is zero evidence that Anderson breached the standard of care or proximately caused this accident.

A review of the evidence before the trial court leaves no doubt that another vehicle rear-ended Mr. Williams and propelled him into

Mr. Anderson's lane, just as Mr. Williams alleged in his first amended complaint. CP 5. In his deposition, he repeatedly and unequivocally confirmed that he was driving in the lane to the left of Mr. Anderson's semi-truck at the time of the accident, and that Mr. Williams was initially rear-ended. CP 20-21, 62-66.

> Q. . . . . [W]hat other vehicles were around you, in front of you, beside, or behind that you recall?
>
> A. I saw an SUV directly in front of me, directly ahead of me. It was massive traffic. **The 18 wheeler truck was on the right of me.**
>
> . . . .
>
> Q. And to your knowledge, **where did that first contact come from?** The side? The front?
>
> A. **The rear.**
>
> Q. Other than the one contact from the rear, do you have any recollection of your car encountering any other contacts?
>
> A. No, I don't. I was knocked out.

CP 63-65 (emphasis added). He continued, "[W]hen I was in the process of slowing down, I felt something strike me from the rear. . . . And after I was struck from the rear, I blacked out." CP 20, 62. Though Mr. Williams was unclear exactly how many contacts he made with fellow motorists, he was certain that "[t]he initial strike [came] from the rear." CP 66.

When his vehicle was rear-ended, it began to spin "out of control." CP 20, 31. While spinning, he regained consciousness and saw Mr. Anderson's vehicle. CP 20-21.

> Q. . . . . Where was the 18 wheeler when you opened your eyes?
>
> A. I was spinning around in circles, and it was like the 18 wheeler was **right there on the side of me**.

CP 21 (emphasis added). At no point did he suggest that Mr. Anderson's semi-truck was traveling behind him or that it was first to strike him. This testimony aligns with photographs of the front bumper of the semi-truck, which do not show any impact damage, let alone damage to be expected from a 50+ mph collision. CP 40-55.

Rather than address his own admissions head-on, Mr. Williams instead argues that Anderson failed to establish sufficiently (1) that his semi-truck did was not the first to Mr. Williams's vehicle, (2) who else actually hit Mr. Williams's vehicle, or (3) whether any driver left the scene of the accident. App. Br. at 16-20. It is not Anderson's burden to unravel what actually happened on March 14, 2008, but rather to demonstrate that there is no genuine issue of material fact supporting Mr. Williams's claim that Anderson's negligence proximately caused his alleged injuries. CR 56(c). Anderson has met that initial burden, so the burden now shifts to Mr. Williams to set forth specific facts in the record

that would raise a genuine issue of material fact for trial. *See Pac. Nw. Shooting Park Ass'n*, 158 Wn.2d at 351.

Mr. Williams argues that Anderson's summary judgment motion quoted him out of context at one point to suggest that he was in the lane to the left of Mr. Anderson's semi-truck. App. Br. at 15-16. Even if that were true, Mr. Williams still testified that he was in that very lane before and during the accident. CP 63 ("It was massive traffic. The 18 wheeler truck was on the right of me."); CP 21 ("I was spinning around in circles, and it was like the 18 wheeler was right there on the side of me."). He surprisingly fails to bring his own testimony to this court's attention.

Importantly, he also admitted that he did not know the precise location of Mr. Anderson's semi-truck during the accident because he lost consciousness after being rear-ended. CP 20, 62, 66. He testified that he regained consciousness while his car was spinning: "And when I was spinning around, I was looking at the 18 wheeler. **And as far as exactly where it was and position, I couldn't tell you that**." CP 22 (emphasis added). Here, as below, he cannot escape that critical gap in his knowledge.

Despite these admissions, Mr. Williams claims that this court should nevertheless draw inferences in his favor from his testimony about the sounds he recalled from the accident. App. Br. at 17-18. During the

accident he heard the sound of "a crate ha[ving] been dropped from the sky," CP 22, 66, and apparently argues that that a sound like that could only come from a semi-truck impacting his car. App. Br. at 17-18. But there is no expert testimony in the record that such a sound could only be generated by striking a semi-truck rather than any other model vehicle. And even if that were the sound of hitting a semi-truck, there is nothing to suggest that it is **the sound of being rear-ended by a semi-truck**, as Mr. Williams claims. App. Br. at 17 ("Williams['s] own testimony about what he heard during the accident can be construed as evidence he was rear-ended by Anderson."). The fact that Mr. Williams described his collision as the sound of "a crate ha[ving] been dropped from the sky" does not raise a reasonable inference that Mr. Anderson negligently rear-ended Mr. Williams or proximately caused his alleged injuries.

According to Mr. Williams, the fact that he first saw the semi-truck when he regained consciousness while his car was spinning means that Mr. Anderson must have rear-ended him. App. Br. at 17. This argument is untenable for two simple reasons. First, his car was spinning, so he could have seen Mr. Anderson's vehicle in lane 3, rather than behind him. Second, Mr. Williams specifically testified that he "couldn't tell" "exactly where it was and [its] position," CP 22, so this court cannot reasonably infer that Mr. Anderson rear-ended Mr. Williams based on this testimony.

Finally, Mr. Williams argues that a trial court cannot grant summary judgment based on testimony of an interested party because his or her credibility must be determined by a jury. App. Br. at 20-21. For support, he roughly quotes the following passage from a 1944 case from the United States Supreme Court: "'That a witness is interested in result of suit is sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.'" App. Br. at 20 (internal quotation marks omitted) (quoting *Sartor v. Ark. Natural Gas Corp.*, 321 U.S. 620, 628, 64 S. Ct. 724, 88 L. Ed. 967 (1944)).

But Mr. Williams's reliance on *Sartor* is misplaced. In *Sartor*, the Court reversed summary judgment in favor of the defendant, who had introduced affidavits from eight interested or biased expert witnesses whose testimony was rejected in an underlying trial. 321 U.S. at 624, 626. The Court reasoned that where the only witnesses were interested or biased, and there was "some, although far from conclusive, evidence" contradicting their statements, the case should be submitted to a fact-finder to weigh the witnesses' credibility. *Id.* at 627-28. Here, unlike *Sartor*, the parties' testimony is that of percipient fact witnesses, not experts. *Id.* at 627. Nor have fact-finders in an earlier trial already rejected the witnesses' testimony. *Id.* at 628. Accordingly, *Sartor* is easily distinguishable from this case. Although Washington courts have

cited *Sartor* on three occasions, none have adopted the rule that Mr. Williams argues *Sartor* established. *See Dickinson v. Edwards*, 105 Wn.2d 457, 461-62, 716 P.2d 814 (1986); *Thoma v. C.J. Montag & Sons, Inc.*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959); *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 363, 324 P.2d 113 (1958).

This case is controlled not by *Sartor*, but by the principle that to overcome a summary judgment motion supported by proper affidavits, the nonmoving party must submit evidence setting forth specific facts showing that there is a genuine issue for trial. CR 56(c); *see, e.g.*, *Pac. Nw. Shooting Park Ass'n*, 158 Wn.2d at 351. Because Mr. Williams failed to timely file any evidence to refute Anderson's motion demonstrating no factual issues, this court should determine that the trial court properly granted summary judgment.

5. The declarations of Mr. Collins and Mr. Richmond do not create a genuine issue that Mr. Anderson was negligent or proximately caused this accident.

In the event that this court reverses the trial court's decision to strike Mr. Williams's opposition brief and declarations, he still has not shown a genuine issue of material fact that Anderson was negligent or proximately caused this accident.

Mr. Collins claims to have witnessed the relevant events while "glancing back and forth" in his rear-view mirror, CP 90, and described the freeway lane numbers in the reverse order of how Mr. Anderson described them. CP 71, 85. Mr. Collins called the leftmost lane "Lane 1." CP 85. According to him, at the time of the accident, Mr. Williams was driving in "the one lane" and Mr. Anderson's semi-truck in "that number two lane," both generally behind and to the right of Mr. Collins's vehicle. CP 88. Though he said that "the semi rear-ended Harry's car," CP 89, they were not in the same lane at the time, CP 99, so the court cannot reasonably infer the parties' relative positions from his use of the term "rear-ended." Even in the light most favorable to Mr. Williams, it is clear that, when coupled with Mr. Collins's other testimony, he uses the term "rear-end" to mean simply "strike," not "hit from behind in the same lane." *See* CP 89, 99.

Further, Mr. Collins saw Mr. Anderson's vehicle hit Mr. Williams's only after a chain reaction of other collisions:

> Uhm, so ya know looking I could see the black car behind him which was right on his tail ya know and so as I'm starting to roll again I watch the **black car hit the SUV** which moved him forward and actually missed me and I was like oh I better ya know get over to this gore point and uh, as I'm watching it and us, I see the C- **another car hit the black car** and I wanna say **it was Harry [Williams]'s**

> **car the silver one hit that car** and **then the semi hit him** which brought up the, the uh rear end of the vehicle and **swung him into the red car**.

CP 87 (emphasis added). Although Mr. Collins saw the semi-truck ultimately hit Mr. Williams's grey car after a multi-vehicle accident had already begun, his tangled narrative does not provide grounds to reasonably infer that Mr. Williams and Mr. Anderson were actually in the same lane, or that Mr. Anderson was negligent or proximately caused any injuries. Neither the insurance adjuster's questions nor Mr. Collins's answers provide temporal or sequential clues for just how and why Mr. Anderson's vehicle ultimately struck Mr. Williams's. CP 83-92. Mr. Collins's short witness statement to the state patrol reflects the version of events he gave to the insurance adjuster. CP 94.

Turning to Mr. Richmond's declaration, he gives the following equivocal recollection:

> I was following a semi tractor trailer when it collided with several cars and then came to a sudden stop. One of the cars it collided with was a gray car. . . . I later learned that the driver of the gray car was identified as Harry Williams.

CP 99. Mr. Richmond was positioned behind Mr. Anderson's vehicle and could see only that it ultimately struck several cars. *Id.* There is no indication from this testimony which vehicle initially rear-ended Mr. Williams's gray car, or how the semi-truck came to connect with these other cars. *Id.* Also, he gives no information about the relative positions

of their vehicles on the highway — side by side in adjacent lanes, or following in the same lane. *Id.* This court cannot reasonably infer that Mr. Anderson's truck initially rear-ended Mr. Williams's car and thus proximately caused his alleged injuries, only that the two vehicles ultimately connected and came to a sudden stop. *Id.*

Accordingly, even when considering the stricken evidence, this court should still affirm the trial court's order granting summary judgment. There is no factual issue that Mr. Anderson was negligent or proximately caused Mr. Williams's accident or alleged injuries.

VI. CONCLUSION

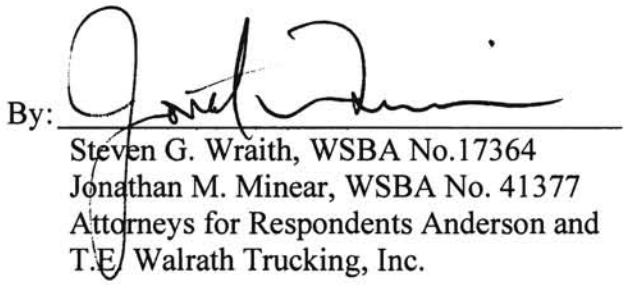
The trial court did not abuse its discretion by striking Mr. Williams's briefing and declarations and not considering them on summary judgment because his counsel failed to file them timely and failed to serve them properly on Anderson's counsel. Given Mr. Williams's attorney's pattern of dilatory behavior in this case and failure to serve his response on opposing counsel, the trial court had ample reason to strike these opposition materials.

With or without those documents, Mr. Williams cannot show a genuine issue of material fact requiring a trial. There is no evidence on the record that would permit a fact-finder to conclude that Mr. Anderson negligently rear-ended Mr. Williams's car or proximately caused his

accident or alleged injuries. Without properly filing or serving his opposition materials, he failed to preserve his arguments or evidence for review on appeal. If this court affirms the trial court's discretionary ruling to strike, this court should also affirm the trial court's ruling on summary judgment, without considering Mr. Williams's unpreserved arguments on appeal. Anderson respectfully asks that this court affirm the trial court's reasoned decisions below.

Respectfully submitted this 26th day of March, 2012.

LEE SMART, P.S., INC.



By: _____
Steven G. Wraith, WSBA No.17364
Jonathan M. Minear, WSBA No. 41377
Attorneys for Respondents Anderson and T.E. Walrath Trucking, Inc.

5404420.doc

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on March 26, 2012, I caused service of the foregoing pleading on each and every attorney of record herein:

VIA LEGAL MESSENGER

Mr. Bardi Martin
Boyle Martin, PLLC
1823 Tenth Avenue West
Seattle, WA 98119

Mr. Dan Johnson
Law Offices of Shahin Karim
USAA General Counsel Department
520 Pike Street, Ste. 1300
Seattle, WA 98101

DATED this 26th day of March, 2012 at Seattle, Washington.

Taniya T. Chai

Taniya T. Chai, Legal Assistant

5404420.doc

No. 42473-8

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

HARRY WILLIAMS, Appellant, vs. DUSTON ANDERSON and JANE DOE ANDERSON, individually and the marital community composed thereof; T.E. WALRATH TRUCKING, INC., a Washington State corporation; KEISHA McDEW and JOHN DOE McDEW, and the marital community composed thereof, Respondents.	RESPONDENTS ANDERSON AND T.E. WALWRATH, INC.'S NOTICE OF ERRATA

Brief of Respondents Anderson and T.E. Walwrath, Inc. contained the following typographical error on page 4: "In the event the court finds that the trial court manifestly <u>used</u> its discretion . . . ." That word should be replaced with the following word: "In the event the court finds that the trial court manifestly <u>abused</u> its discretion . . . ."

5416777.doc

ORIGINAL

Respectfully submitted this 30th day of March, 2012.

LEE SMART, P.S., INC.

By: _____

Steven G. Wraith, WSBA No.17364
Jonathan M. Minear, WSBA No. 41377
Attorneys for Respondents Anderson
and T.E. Walrath Trucking, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on March 30, 2012, I caused service of Respondents Anderson and T.E. Walrath Trucking, Inc.'s Notice of Errata on each and every attorney of record herein:

VIA LEGAL MESSENGER

Mr. Bardi Martin
Boyle Martin, PLLC
1823 Tenth Avenue West
Seattle, WA 98119

Mr. Dan Johnson
Law Offices of Shahin Karim
USAA General Counsel Department
520 Pike Street, Ste. 1300
Seattle, WA 98101

DATED this 30th day of March, 2012 at Seattle, Washington.

Taniya T. Chai

Taniya T. Chai, Legal Assistant

5416777.doc