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SUPREME COURT NO. 92368-0
COURT OF APPEALS NO. 45504-8-II

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SUPREME COURT
OF THE STATE OF WASHINGTON

BESSIE WILLIAMS,

Appellant,

v.

FIRST TRANSIT, INC., *et al.*,

Respondents.

**RESPONDENT CENTRAL BIBLE EVANGELICAL CHURCH'S
ANSWER TO PETITION FOR REVIEW**

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ORIGINAL

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I. IDENTIFICATION OF RESPONDENT

Respondent Central Bible Evangelical Church (Central Bible), requests that the Supreme Court deny Petitioner Bessie Williams' Petition for Review. Ms. Williams' Petition fails to identify a sufficient basis for Supreme Court review as required by RAP 13.4.

II. COURT OF APPEALS DECISION

Ms. Williams requests review of the August 11, 2015, Court of Appeals, Division II, unpublished decision in *Williams v. First Transit, Inc., et al.*, No. 45504 -8 -II (Wn.App. Div II August 11, 2015).

The unanimous opinion of the Court of Appeals correctly ruled that summary judgment in favor of Central Bible (and First Transit) was warranted. The Court of Appeals also properly ruled that the trial court did not abuse its discretion in declining to grant the plaintiff a second continuance of the summary judgment motions and declined to consider unauthorized filings by Ms. Williams' formerly admitted pro hac vice counsel.

For the reasons set forth below, Ms. William's Petition for Review is not supported by Washington law and fails to meet the criteria set forth in RAP 13.4, and review should be denied.

III. ISSUES PRESENTED

1. Did the Court of Appeals apply the proper standard of review when it reviewed the summary judgment in favor of Central Bible on a de novo basis?

2. Did the Court of Appeals properly review the trial court's denial of a second continuance of the summary judgment hearing on an abuse of discretion standard?

3. Did the Court of Appeals properly review the trial court's decision to exclude late opposition papers on an abuse of discretion standard?

4. Did the Court of Appeals properly review the trial court's decision that withdrawal of local associated counsel voided Williams' attorney's limited admission to practice in Washington as a matter of law?

IV. COUNTERSTATEMENT OF FACTS

Ms. Williams' Statement of Facts attempts to minimize her failure to comply with the applicable rules for both the Superior Court and the Court of Appeals. However, the facts demonstrate that the trial court gave Ms. Williams ample opportunity to prosecute her personal injury action before granting summary judgment in favor of Central Bible (and First Transit) in September 2013.

A. Williams' Complaint

Ms. Williams filed a complaint for negligence against Central Bible for personal injuries she suffered after falling from her wheelchair onto a sidewalk adjacent to property owned by the church. Clerk's Papers (CP) at 1-4. Williams alleged that in 2008, an employee of First Transit drove her on a shuttle bus to property owned by Central Bible in Tacoma and that the employee assisted her in reaching the building on the property by pushing her in her wheelchair. CP at 2. Williams claimed that as the employee pushed her along the sidewalk, he began to run despite her requests that he stop. CP at 2. She alleged that as he pushed her, one of the wheels of her wheelchair hit a raised crack in the sidewalk, stopping the wheelchair abruptly and causing her to be thrust from the wheelchair, causing personal injuries. CP at 2. Williams claimed that Central Bible negligently failed to maintain the sidewalk in a safe condition. CP at 3.

B. Williams' Representation

On October 24, 2011, Plaintiff initiated this lawsuit on her own accord as a pro se plaintiff. CP at 1-4. On May 25, 2012, an attorney licensed in Washington, David Britton, moved for limited "pro hac vice" admission on behalf of Katrina Coleman, an attorney licensed in Michigan, under Admission to Practice Rule (APR) 8(b). CP at 53-58. The trial court granted the motion. CP at 56. Britton and Coleman then

filed a joint notice of appearance on Ms. Williams' behalf. On June 18, 2013, after the Court awarded discovery sanctions against Plaintiff, CP at 475-76, Britton withdrew. CP at 377-78.

On August 21, 2013, another attorney licensed in Washington, Michael Ewetuga, filed a notice of appearance on Ms. Williams' behalf. CP at 560-61. However, no motion for pro hac vice/APR 8(b) admission was filed to re-admit Ms. Coleman, Ms. Williams' Michigan counsel. Mr. Ewetuga subsequently withdrew from representation on October 8, 2013.

C. Central Bible's Summary Judgment Motion

On August 2, 2013, Central Bible moved for summary judgment, arguing that (1) it owed no duty to Williams as an adjacent property owner, (2) Williams failed to present any evidence of negligence because she could not identify the alleged crack in the sidewalk or where the accident occurred, and (3) Central Bible was not negligent as a matter of law because the crack was an open and obvious danger of which Central Bible had no prior knowledge. CP at 491-94.

The hearing on Central Bible's summary judgment motion was set for August 30, 2013. CP at 488. Ms. Williams failed to file an opposition to the motion by that date. When Central Bible appeared to argue the unopposed motion, Mr. Ewetuga, Williams' Washington attorney who had filed a notice of appearance the previous week, orally moved for a

continuance to give him time to review Williams' file. Report of Proceedings (RP) at 3-4; CP at 602. Central Bible opposed the motion to continue, noting that the case already had been delayed significantly at multiple intervals. RP at 4-5. The trial court granted the continuance and gave Ms. Williams' new counsel three additional weeks to prepare, noting the new hearing date for September 20. RP at 8-9. The trial court ordered that Ms. Williams' response to the summary judgment motion was due by September 9, consistent with Civil Rule (CR) 56(c)'s requirement that materials in opposition to summary judgment motions be submitted no later than 11 days before the hearing. RP at 8-9. In the alternative, new counsel was to notify the parties in writing that he did not intend to oppose the pending motions for summary judgment. RP at 9.

Central Bible did not receive a response to its summary judgment motion by September 9 or notice that its motion would be unopposed. Consequently, Central Bible asked the trial court to grant its unopposed motion and to award fees for having to appear on August 30. CP at 627-28. On September 11, Central Bible received an untimely response to its motion and four supporting declarations. CP at 612-14, 617, 620, 623, 628. However, the response was not submitted by Mr. Ewetuga, Ms. Williams' new local counsel, but rather by Katrina Coleman, Williams' formerly-admitted pro hac vice counsel in Michigan. CP at 614. Central

Bible asked that the trial court refuse to consider the untimely opposition brief and corresponding declarations and additionally urged the trial court to reject the brief because it was signed by Ms. Coleman, who was no longer authorized to participate in the case because Britton, the attorney with whom she had associated under APR 8(b), withdrew months before. RP at 13-14; CP at 628. At the hearing, the trial court denied a vague request to postpone the hearing a second time to allow Ms. Coleman to travel to Pierce County to participate in the summary judgment hearing or to participate telephonically. RP at 19.

The trial court acknowledged the untimeliness of Ms. Williams' opposition and noted that it failed to comply with the court rules. RP at 17. The court further concluded that Britton's withdrawal from the case "canceled" Coleman's admission to practice in Washington. RP at 17.

The trial court reasoned that Britton:

had sponsored the pro hac vice application, which the Court granted because of his assurances to the Court the compliance with the rules, the Washington State Bar Association and the required Rules of Professional Conduct, in essence, an unlicensed lawyer in Washington. ... So with that, her materials were not applicable to the case because the Court can't consider them.

RP at 17. Because the trial court was left "in a position with basically unopposed Summary Judgment motions," it granted Central Bible's motion. RP at 18. The trial court also granted Central Bible's request for

attorney fees. RP at 18. On October 21, 2013, Ms. Williams filed a pro se notice of appeal with the Court of Appeals.

At the Court of Appeals, Ms. Williams was dilatory in perfecting her appeal and submitting briefs, necessitating repeated action by the Court of Appeals Clerk. In addition, she engaged in unnecessary motion practice that further delayed the resolution of this appeal. On August 11, 2015, the Court of Appeals affirmed the trial court's dismissal of Ms. Williams' claims against Central Bible and First Transit.

V. ARGUMENT AND AUTHORITIES

Although Ms. Williams presents three issues in her petition, her two-paragraph argument focuses solely on the standard of review followed by the Court of Appeals with respect to the Respondents' respective motions for summary judgment. Contrary to Ms. Williams' assertion, the Court of Appeals applied the proper standard of review when affirming summary judgment in favor of Central Bible (and First Transit).

A. This Court should deny review as Ms. Williams has not shown a basis for review under RAP 13.4(b), as the Court of Appeals properly applied the de novo standard when reviewing the summary judgment in favor of Central Bible.

Ms. Williams argues that review is appropriate under RAP 13.4(b)(1), (2) and (4) because the Court of Appeals decision is in conflict with the Supreme Court's prior decisions on the proper standard of review

for a summary judgment motion. However, the Court of Appeals properly applied the de novo standard when reviewing the trial court's order granting summary judgment in favor of Central Bible. There simply is no conflict between the Court of Appeals' decision in this case and a decision of the Supreme Court or another division of the Court of Appeals.

The Court of Appeals properly stated that summary judgment motions are reviewed on a de novo basis:

We review a summary judgment ruling de novo, engaging in the same inquiry as the superior court. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012). Summary judgment is warranted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Wilkinson v. Chiwawa Cmty. Ass'n*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014). The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact, *Ruvalcaba*, 175 Wn.2d at 6, and the moving party is entitled to summary judgment only when there is a "complete failure of proof concerning an essential element of the nonmoving party's case [which] necessarily renders all other facts immaterial." *Cho v. City of Seattle*, 185 Wn. App. 10, 15, 341 P.3d 309 (2014) *review denied*, 183 Wn.2d 1007 (2015) (quoting *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)).

We take the facts and make reasonable inferences in the light most favorable to the nonmoving party. *Ruvalcaba*, 175 Wn.2d at 6. But under CR 56(e), a party opposing summary judgment cannot simply rely upon the mere allegations of its pleadings to overcome summary judgment; rather, the party opposing summary judgment must present declarations, affidavits or other evidence as provided in CR 56 to set forth specific facts showing that there is a genuine issue of material fact for

trial. CR 56(e); *Keck v. Collins*, 181 Wn. App. 67, 91 n.9, 325 P.3d 306 (2014), review granted, 181 Wn.2d 1007 (2014). If reasonable minds can reach only one conclusion, summary judgment is appropriate. *Old City Hall*, 181 Wn. App. at 10.

Appendix A (August 11, 2015 Decision) at pp. 9-10.

Applying the foregoing standards, the Court of Appeals proceeded to review the two summary judgment motions on a de novo basis. Significantly, the Court of Appeals considered the entire summary judgment record, including the declarations stricken by the trial court. With respect to the Central Bible motion for summary judgment, the Court of Appeals addressed the Declaration of Alkenneth Gurley, which was stricken by the trial court:

But the superior court properly struck Gurley's declaration as untimely, speculative, inadmissible lay testimony under ER 701, and submitted by an attorney who was no longer authorized to practice before the court; and even if the court had considered his declaration on summary judgment, Gurley's statements were inadmissible under CR 56. *Grant County Port Dist.*, 349 P.3d at 893; *Fallentine*, 149 Wn. App. at 624; *Sisley*, 171 Wn. App. at 233. Nor did Williams provide adequate foundation to admit Gurley's declaration as expert opinion under ER 702-704. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 357, 333 P.3d 388 (2014) (expert opinions lacking proper foundation should be excluded). And Williams presented no other evidence that the tree caused the crack in the sidewalk or that Central Bible's use of the sidewalk created an artificial condition.

Appendix A (August 11, 2015 Decision) at p. 14.

Citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), Petitioner seems to be arguing that the Court of Appeals improperly applied an abuse of discretion standard to trial court rulings made in conjunction with the summary judgment motions. Petitioner misstates the rule from *Folsom*. Recently, this Court clarified its holding in *Folsom*, indicating that it was limited to the trial court's evidentiary rulings on admissibility:

Relying on a statement in *Folsom* that says the de novo standard applies to “all trial court rulings made in conjunction with a summary judgment motion, “the Court of Appeals reviewed de novo the trial court's ruling striking the third affidavit as untimely. *Keck*, 181 Wn. App. at 79 (quoting *Folsom*, 135 Wn.2d at 663). The quoted phrase from *Folsom*, however, referred to the trial court's evidentiary rulings on admissibility. See 135 Wn.2d at 662-63. It did not address rulings on timeliness under our civil rules. See *id.*

Keck v. Collins, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015). To the extent Petitioner is arguing that, under *Folsom*, other rulings by the trial court made in conjunction with the summary judgment motions should have been reviewed on a de novo basis, *Keck* makes it clear that certain rulings will be addressed on an abuse of discretion basis. This would include denial of the Petitioner's motion for a second continuance of the summary judgment hearing.

B. The Court of Appeals properly determined that the trial court did not abuse its discretion when denying the Petitioner's request for a second continuance of the summary judgment hearing.

Without formal argument, Ms. Williams is apparently taking the position that the Court of Appeals applied the improper standard of review with respect to the second request for a continuance of the summary judgment hearing. Under Washington law, a decision to deny a motion for a continuance is reviewed for manifest abuse of discretion. *Doyle v. Lee*, 166 Wn. App. 397,403-04, 272 P.3d 256 (2012). A trial court abuses its discretion if its decision is manifestly unreasonable, is based on untenable grounds, or was made for untenable reasons. *In re Marriage of Chandola*, 180 Wash.2d 632, 642, 327 P.3d 644 (2014).

The Court of Appeals properly applied the abuse of discretion standard when reviewing the trial court's denial of the Petitioner's request for a second continuance. See Appendix A at pp. 6-7. Furthermore, the facts bear out the Court of Appeals' conclusion that there was no abuse of discretion.

Central Bible's summary judgment motion was originally scheduled to be heard on August 30, 2013. At that hearing, Ms. Williams' new local attorney, Mr. Ewetuga, appeared and requested additional time to respond to the motion. Over the objections of the defendants, the trial court continued the motion to September 20, 2013, provided the plaintiff

submit her opposition papers no later than September 9, 2013 or give written notice to the moving parties of their decision not to oppose the motions. Despite the trial court's clear directive, plaintiff did not submit her opposition on September 9th. Rather, two days later her former counsel, Ms. Coleman submitted four declarations and an opposition to the pending dispositive motions. It is noteworthy that in the belated opposition materials, there was no request for a continuance of the September 20th hearing.

On September 20th, Central Bible (and First Transit) appeared for the summary judgment hearing. At that time, Mr. Ewetuga requested a second continuance of the hearing to permit Katrina Coleman to travel from Michigan to participate on behalf of Ms. Williams. Once again, Central Bible opposed the request for a continuance, as there was no justifiable basis offered for further delay. Noting the plaintiff's repeated noncompliance with the court's orders, the trial court denied the motion for a second continuance.

Under these circumstances, the Court of Appeals appropriately determined that the trial court did not abuse its discretion in refusing to grant a request for a second continuance. See Appendix A at p. 7-8.

C. The decision to strike untimely opposition papers was properly reviewed by the Court of Appeals under an abuse of discretion standard.

Once again, the Petitioner has not presented any argument regarding the trial court decision to strike untimely opposition papers. As with the denial of the petitioner's request for a second continuance of the summary judgment hearing, it appears that Petitioner is incorrectly arguing that under *Folsom*, the Court of Appeals should have reviewed the decision to strike untimely opposition papers on a de novo basis. However, under *Keck*, a decision to strike untimely opposition papers is reviewed on an abuse of discretion standard. *Keck*, 184 Wn.2d at 368.

In the present case, the Court of Appeals specifically reviewed the trial court's decision to exclude the untimely opposition papers on an abuse of discretion standard. See Appendix A at p. 10. Pursuant to *Keck*, this was proper and there was no error justifying review by the Washington Supreme Court.

Ms. Williams has only alleged error with respect to the standard of review followed by the Court of Appeals. However, even if one were to go one step further and evaluate the trial court's conclusion on the untimely opposition papers, that issue would have no bearing on the outcome of this case. Although the trial court declined to consider the untimely opposition pleadings, the Court of Appeals considered those

documents on its de novo review of the summary judgment motions and concluded that they would not have changed the outcome. Thus, any error associated with trial court decision to exclude the untimely opposition papers was rendered moot by the Court of Appeals.

D. The Court of Appeals correctly interpreted the rule regarding admission of out-of-state counsel pursuant to APR 8(b).

Without any argument, Petitioner also alleges that the Court of Appeals incorrectly interpreted the Admission to Practice Rules and improperly cancelled pro hac vice attorney's status without proper notice and an opportunity to be heard. In presenting this issue, Petitioner does not address either the procedure or authority addressing the admission of counsel pro hac vice.

Washington court rules clearly prohibit the unauthorized practice of law in Washington State. APR 8(b) provides:

A member in good standing of, and permitted to practice law in, the Bar of any other state ... may appear as a lawyer in any action or proceeding *only* (i) with the permission of the court or tribunal in which the action or proceeding is pending, *and* (ii) in association with an active member of the Washington State Bar Association, who shall be the lawyer of record therein, responsible for the conduct thereof, and present at proceedings unless excused by the court or tribunal.

(Emphasis added.). The attorney seeking admission must make a written motion to the court before which the action is pending, certifying

compliance with the rule's requirements. APR 8(b)(1). The associated lawyer must join in the motion and certification. APR 8(b)(1). After the application is made, whether to grant the application for admission is within the trial court's discretion. *Hahn v. Boeing Co.*, 95 Wash.2d 28, 33, 621 P.2d 1263 (1980).

The instant case requires interpretation of the plain language of APR 8(b) to determine whether withdrawal of associated counsel voids foreign counsel's limited admission, a question of law this court reviews de novo. See *Biomed Comm, Inc. v. Dep't of Health Bd. of Pharmacy*, 146 Wn.App. 929, 934, 193 P.3d 1093 (2008) (interpretation of court rules reviewed de novo).

The trial court considered Central Bible's summary judgment motion to be unopposed, in part, because the opposition was submitted by Katrina Coleman, a Michigan attorney who had been admitted to limited practice in Washington but whose sponsoring attorney, Britton, had withdrawn from the case three months before the summary judgment hearing.¹ RP at 17-18. Accordingly, the trial court granted the motion. RP at 18. Because the plain language of APR 8(b) clearly requires a

¹ Central Bible objected to the continued participation of Ms. Coleman after she submitted an untimely response to its motion for summary judgment. CP at 628. Prior to her filing an untimely response, there was no basis to raise the issue of her status in the case. However, it should be noted that in prior briefing, Central Bible had characterized Ms. Coleman as "plaintiff's former counsel of record." CP at 627-28.

Washington attorney's participation in a case for which foreign counsel is admitted pro hac vice, the trial court properly determined that Ms. Coleman was no longer admitted to practice in the case.

Ms. Coleman successfully applied for limited admission under APR 8(b) with Britton as associated Washington counsel. CP at 53-58. The attorneys then filed a joint notice of appearance, but Britton subsequently withdrew from the case. CP at 377-78. In August 2013, Williams ultimately retained Mr. Ewetuga as Washington counsel. However, Ms. Coleman never moved for limited admission with Mr. Ewetuga as associated local counsel. CP at 560. Mr. Ewetuga was involved with the case less than two months before he withdrew.

Under the plain language of APR 8(b), in order for Coleman to validly be admitted to practice in Washington State as Williams' counsel in this matter, she was required to be associated with an active member of the Washington Bar. Under the rule, the associated Washington counsel in the matter will be "the lawyer of record therein, responsible for the conduct thereof, and present at proceedings unless excused by the court or tribunal." APR 8(b). When Britton withdrew, Ms. Coleman was no longer associated with an attorney who was a lawyer of record in the case. And because Britton was no longer the attorney of record, he could not be responsible for the conduct of proceedings and certainly would not be

present at those proceedings. Therefore, Coleman's pro hac vice admission was no longer valid under APR 8(b) at the time she filed Ms. Williams' opposition to summary judgment, and, therefore, that submission was in contravention of the Washington court rules. Accordingly, the trial court did not err when it determined that Britton's withdrawal voided Coleman's admission to practice under APR 8(b) and, therefore, the trial court did not err when it treated Central Bible's summary judgment motion as unopposed.

Additional sources highlighting the local counsel association rule's purpose further confirm this result. The purpose of the local counsel association requirement is to provide a "reasonable assurance that local rules of practice and procedure will be followed." *Hahn*, 95 Wash.2d at 34. Here, Coleman repeatedly failed to comply with the local rules. After Central Bible's repeated attempts to obtain answers to its interrogatories and requests for production from Coleman, Central Bible was required to file a motion to compel. CP at 242-45. On the evening before the motion to compel was set to be heard, Ms. Coleman emailed the responses to Central Bible. CP at 397. To avoid wasting the court's resources, Central Bible agreed to strike the pending discovery motion. CP at 398. However, because the responses were inadequate, Central Bible asked Coleman to properly respond to and to supplement the requests. CP at

398. After Coleman failed to participate in a discovery conference and failed to properly respond, Central Bible filed another motion to compel. CP at 398.

Moreover, Coleman repeatedly failed to timely submit a response to Central Bible's summary judgment motion and ultimately submitted the response two days after the already-extended filing deadline. CP at 602-03, 628. Further, the trial court noted that when Coleman ultimately did submit untimely responsive documents, she failed to comply with the local rules because she failed to provide the trial court with working copies. RP at 17. Coleman's unresponsiveness and complete failure to comply with the court rules highlights the importance of local counsel and is the type of conduct the local association rule was intended to prevent. *See Hahn*, 95 Wash.2d at 34.

In addition, APR 8(b)(3) provides that "No member of the Bar Association shall lend his or her name for the purpose of, or in any way assist in, avoiding the effect of this rule." To allow foreign counsel limited admission to practice in Washington by associating with local counsel and to allow foreign counsel's continued admission notwithstanding local counsel's immediate withdrawal clearly would amount to local counsel's assistance in avoiding the rule's purpose and would defeat the purpose of local counsel's important supervisory role.

Pursuant to APR 8(b), the trial court was required to strike the materials as they were submitted by counsel unauthorized to practice in Washington. Accordingly, the trial court did not abuse its discretion when it concluded that Ms. Coleman was no longer admitted to appear on behalf of Ms. Williams in this case and declined to accept pleadings filed by Ms. Coleman.

VI. CONCLUSION

Ms. Williams' Petition for Review should be denied. The Court of Appeals applied the proper standard of review to the issues before it. Most importantly, the Court of Appeals conducted a de novo review of Central Bible's motion for summary judgment and properly concluded that summary judgment was warranted, even when considering the expanded record, including the pleadings stricken by the trial court. Since the Court of Appeals conducted this de novo review, the other issues referenced, but not discussed, in Ms. Williams' Petition are moot. In the absence of a valid conflict with a prior decision of this Court or with another appellate court division, there is no basis for discretionary review under RAP 13.4.

DATED this 4th day of January, 2016.

ANDREWS • SKINNER, P.S.

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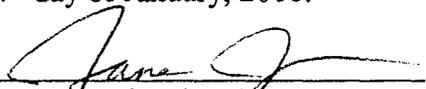
DECLARATION OF SERVICE

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

That on January 4, 2016, I arranged for service of the foregoing Respondent Central Bible Evangelical Church's Answer to Petition for Review, to the court and to the parties to this action as follows:

Supreme Court of the State of Washington	Via email for filing
Bessie Williams 13023 Greenwood Ave. N. Seattle, WA 98133 hyprnike@comcast.net	Via Email and US Mail
Laura E. Kruse Betts Patterson & Mines, PS 701 Pike Street, Suite 1400 Seattle, WA 98101-3927 lkruse@bpmlaw.com	Via Email and US Mail

Dated at Seattle, Washington this 4th day of January, 2016.


Jane Johnson, legal assistant

APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
STATE OF WASHINGTON

DIVISION II

BY: lp
DEPUTY

No. 45504-8-II

BESSIE WILLIAMS,

Appellant,

v.

JOHN DOE, FIRST TRANSIT, INC.;
CITY OF TACOMA; and CENTRAL BIBLE
EVANGELICAL CHURCH,

Respondents.

UNPUBLISHED OPINION

SUTTON, J. — Bessie Williams appeals the superior court's summary judgment orders dismissing her negligence claims against First Transit, Inc. and Central Bible Evangelical Church. Williams argues that the superior court (1) abused its discretion in refusing to grant a second continuance of the summary judgment motions filed by First Transit and Central Bible, (2) abused its discretion in striking filings by her formerly admitted pro hac vice counsel, and (3) erred in granting summary judgment in favor of First Transit and Central Bible.

We hold that the superior court did not abuse its discretion in refusing to grant a second continuance of the summary judgment motions and that it properly struck the unauthorized filings by Williams's formerly admitted pro hac vice counsel. Because Williams failed to raise a genuine issue of material fact, we affirm the superior court's summary judgment orders dismissing Williams's negligence claims against First Transit and Central Bible.

FACTS

I. BACKGROUND FACTS

On or about October 26, 2008, a shuttle van operated by First Transit drove Williams to Central Bible. The driver of the shuttle van and employee of First Transit, Philip Halsten, pulled into the Central Bible parking lot, unloaded Williams from the van, and, at her request, assisted her into the church. Halsten pushed Williams in her wheelchair uphill along the paved public sidewalk to the main entrance of the church. As Halsten was pushing the wheelchair up the sidewalk, the wheel of the wheelchair hit a raised crack in the pavement, abruptly stopping the wheelchair, and causing Williams to fall forward out of the wheelchair.

Williams filed a complaint for negligence against First Transit, Central Bible, the City of Tacoma, and "John Doe"¹ for personal injuries she suffered after falling from her wheelchair on a public sidewalk adjacent to property owned by Central Bible. Williams alleged that First Transit breached its duty of care to her. Williams also alleged that Central Bible and the City of Tacoma negligently failed to maintain the public sidewalk abutting Central Bible's property in a safe condition and failed to warn and protect her from unreasonably dangerous conditions.

II. WILLIAMS'S COUNSEL

After Williams filed her lawsuit pro se, David Britton, a Washington licensed attorney, moved for limited pro hac vice admission of Katrina Coleman, a Michigan licensed attorney under

¹ The "John Doe" here is Philip Halsten, driver of the First Transit shuttle van. Halsten and First Transit, represented by the same counsel, joined in their answer to the complaint and in their summary judgment motion. Clerk's Papers (CP) at 5. We refer collectively to Halsten and First Transit as First Transit.

Admission to Practice Rule (APR) 8(b).² The superior court granted the motion. Britton and Coleman filed a joint notice of appearance on Williams's behalf. After the court awarded discovery sanctions against Williams for failing to provide discovery responses, Britton withdrew. Michael Ewetuga, a Washington licensed attorney, then filed a notice of appearance on Williams's behalf. But Ewetuga did not file a motion for pro hac vice re-admission of Coleman, Williams's Michigan counsel. Ewetuga later withdrew from representing Williams.

III. FIRST TRANSIT'S AND CENTRAL BIBLE'S SUMMARY JUDGMENT MOTIONS

On August 2, 2013, First Transit and Central Bible filed separate motions for summary judgment. The court set a hearing for both summary judgment motions on August 30, 2013. Williams failed to file an opposition to the motions by that date and, when First Transit and Central Bible appeared to argue the unopposed motions, Ewetuga orally moved to continue the hearing. The court granted the continuance, set a new hearing date for September 20, and ordered that, by September 9, Williams must respond or give notice that she will not oppose the summary judgment motions.

Neither First Transit nor Central Bible received a response to their summary judgment motions by the September 9 deadline; they asked the superior court to grant their unopposed

² APR 8(b) provides, in pertinent part:

A member in good standing of, and permitted to practice law in, the Bar of any other state . . . may appear as a lawyer in any action or proceeding only (i) with the permission of the court or tribunal in which the action or proceeding is pending, and (ii) in association with an active member of the Washington State Bar Association, who shall be the lawyer of record therein, responsible for the conduct thereof, and present at proceedings unless excused by the court or tribunal.

No. 455048-II

motions and to award fees for having to appear on August 30. Two days later, after the court's deadline to file opposition materials, First Transit and Central Bible received Williams's two untimely responsive briefs and three supporting declarations. But these filings were submitted by Williams's formerly-admitted pro hac vice counsel in Michigan, not by Ewetuga, her new Washington counsel.

First Transit and Central Bible moved to strike Williams's opposition materials as untimely; and strike the briefs because they were signed by Williams's formerly-admitted pro hac vice counsel, Coleman. They argued that Coleman was no longer authorized to participate in the case because Britton, the attorney with whom she had associated with under APR 8(b), had withdrawn. At the hearing on the motion to strike, Williams's new Washington counsel, Ewetuga, informally requested a second continuance, and indicated that Coleman had a conflict and could not appear at the hearing, but the superior court denied the request for a second continuance.

The superior court ruled that Williams's two opposition briefs and three declarations were untimely and failed to comply with the court rules. The superior court also concluded that Britton's withdrawal from the case canceled Coleman's pro hac vice admission to practice in Washington. Because Williams failed to timely file her opposition materials under CR 56, the superior court

considered only First Transit's and Central Bible's submissions³ and ruled that their summary judgment motions were unopposed. The superior court granted First Transit's and Central Bible's

³ The order granting summary judgment in favor of First Transit shows that the superior court considered the following materials:

1. Defendants First Transit, Inc.'s and Phil Halsten's Motion for Summary Judgment;
2. Declaration of Kelly A. Croll in Support of the Motion for Summary Judgment, with exhibits;
3. Declaration of Philip Halsten in Support of the Motion for Summary Judgment;
4. Defendants First Transit, Inc.'s and Phil Halsten's Reply Motion for Summary Judgment;
5. Defendants First Transit, Inc.'s and Phil Halsten's Second Reply in Support of Motion for Summary Judgment;
-
12. Defendants First Transit, Inc.'s and Phil Halsten's Third Reply in Support of Motion for Summary Judgment; and
13. Declaration of Laura E. Kruse in Support of the Third Reply of Defendants' Motion for Summary Judgment, with exhibits.

CP at 694-96.

The order granting summary judgment in favor of Central Bible shows that the superior court considered:

1. Defendant Central Bible Evangelical Church's Motion for Summary Judgment;
2. Declaration of Stephen Skinner in support of the Motion for Summary Judgment;
3. Declaration of Louis Diana in support of the Motion for Summary Judgment;
4. Defendant Central Bible Evangelical Church's Reply on Motion for Summary Judgment;
5. Defendant Central Bible Evangelical Church's Second Reply in Support of Motion for Summary Judgment;
-
11. Defendant Central Bible Evangelical Church's Third Reply in Support of Motion for Summary Judgment.

CP at 691-93.

In both of its orders granting summary judgment to First Transit and Central Bible, the superior court crossed out Williams's submissions because it previously struck them from the record as noncompliant with the rules.

summary judgment motions. The superior court also granted First Transit's and Central Bible's requests for attorney fees, awarding Central Bible \$500 in fees and costs, and awarding First Transit \$4,200 in fees and costs. Williams moved for reconsideration, but the superior court denied that motion. On October 21, 2013, Williams filed a pro se notice of appeal.

ANALYSIS

Williams argues that the superior court (1) abused its discretion in not granting her a second continuance and in striking the opposition materials filed and signed by her formerly-admitted pro hac vice counsel and (2) erred in granting summary judgment in favor of First Transit and Central Bible.

First Transit and Central Bible respond that the superior court did not abuse its discretion in denying the second continuance under CR 56(f) and in striking the unauthorized opposition materials signed by Coleman. They also argued that they owed no duty to Williams, did not breach any duty to her, and that their actions were not a proximate cause of injury or damages to Williams. We agree with First Transit and Central Bible.

I. CONTINUANCE OF SUMMARY JUDGMENT MOTIONS

CR 56(c) requires that a party opposing a summary judgment motion file a response no later than 11 days before the motion hearing. If the party opposing a summary judgment motion submits an affidavit stating that she is unable to present facts essential to her opposition, then the court may order a continuance "if the nonmoving party shows a need for additional time to obtain additional affidavits, take depositions, or conduct discovery." *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 742, 218 P.3d 196 (2009); CR 56(f). We review a superior court's

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decision to deny a motion for a continuance for a manifest abuse of discretion. *Doyle v. Lee*, 166 Wn. App. 397, 403-04, 272 P.3d 256 (2012).

A superior court does not abuse its discretion if it denies a motion for a continuance because “(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence, (2) the requesting party does not state what evidence would be established through the additional discovery, or (3) the desired evidence will not raise a genuine issue of material fact.” *Old City Hall LLC v. Pierce County AIDS Found.*, 181 Wn. App. 1, 16, 329 P.3d 83 (2014) (quoting *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989)). “A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Garcia*, 179 Wn.2d 828, 846, 318 P.3d 266 (2014) (quoting *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012)).

Williams argues that neither party suffered any prejudice from her late filed opposition materials. Williams failed to timely oppose the summary judgment motions by the first deadline of August 30th or the second extended deadline of September 9th, and the responses she did file on September 11 were untimely and signed by her formerly admitted pro hac vice counsel, who no longer had authority to appear in Washington because local counsel had withdrawn.

We hold that under CR 56(f), the superior court did not abuse its discretion in refusing to grant a request for a second continuance because Williams fails to demonstrate (1) a good reason for her requested delay and (2) what evidence would be established through another continuance that would raise a genuine issue of material fact. *Old City Hall*, 181 Wn. App. at 16.

II. PRO HAC VICE COUNSEL

Williams also argues that the superior court abused its discretion in ruling that her formerly admitted pro hac vice counsel lost her ability to represent Williams when Williams's associated local counsel withdrew, and in striking her opposition materials, including her two briefs and three declarations. Williams argues that there is nothing in APR 8(b) that requires a court to terminate counsel's pro hac vice status once associated local counsel withdraws from the case. First Transit and Central Bible respond that APR 8(b) allows pro hac vice counsel to appear only in association with local counsel and that, once local counsel withdrew, pro hac vice counsel lost her association and her ability to appear in Washington. We agree with First Transit and Central Bible.

We review de novo the interpretation of APR 8(b) to determine whether pro hac vice counsel's representation terminates when associated local counsel withdraws. *See State v. McEnroe*, 174 Wn.2d 795, 800, 279 P.3d 861 (2012) (we interpret court rules de novo). In Washington, an out-of-state lawyer:

[M]ay appear as a lawyer in any action or proceeding only (i) with the permission of the court or tribunal in which the action or proceeding is pending, and (ii) in association with an active member of the Washington State Bar Association, who shall be the lawyer of record therein, responsible for the conduct thereof, and present at proceedings unless excused by the court or tribunal.

APR 8(b). APR 8(b) permits an attorney to appear in an action or proceeding only with the court's permission and in association with local counsel; failure to meet either requirement precludes out-of-state counsel's representation. The purpose of the rule is to reasonably assure the court that the out-of-state attorney is competent, will follow the local rules of practice and procedure, and will act in an ethical and respectful manner. *Hahn v. Boeing Co.*, 95 Wn.2d 28, 34, 621 P.2d 1263 (1980).

On June 18, 2013, Williams's local counsel, Britton, filed a notice of intent to withdraw and terminate Williams's representation. Up to that point, every appearance or filing performed by Coleman was done in association with Britton; once Britton withdrew, Coleman was no longer in association with an active member of the Washington State Bar, as required by APR 8(b), and thus Coleman could no longer appear pro hac vice. The superior court ruled,

[W]hen Mr. Britton withdrew, it left Ms. Coleman's actual participation in this case -- I don't know what else to say -- it canceled it. He had sponsored the pro hac vice application, which the Court granted because of his assurances to the Court the compliance with the rules, the Washington State Bar Association and the required Rules of Professional Conduct for, in essence, an unlicensed lawyer in Washington, which is what Ms. Coleman is, although she has a license in another state.

Verbatim Transcript of Proceedings (VRP) at 17.

APR 8(b) permits pro hac vice counsel to appear only in association with local counsel; there is no requirement for a court to affirmatively terminate out-of-state counsel's pro hac vice status. Under APR 8(b), Coleman automatically lost her pro hac vice association with local counsel when Williams's local counsel withdrew, the superior court properly precluded Coleman's representation and properly struck Williams's opposition materials signed and submitted by Coleman.⁴

Williams argues that the superior court erred in striking all five of her filings and in refusing to consider them at summary judgment. The superior court struck these filings as untimely and

⁴ In her Clerk's Papers, Williams designated five filings struck by the superior court: Williams's Response to First Transit's Motion for Summary Judgment; Williams's Response to Central Bible's Motion for Summary Judgment; and the declarations of Carol Williams, Alkenneth Gurley, and Katrina Coleman.

submitted by out-of-state counsel, who was not admitted to practice in Washington, and thus the court could not accept the documents. The superior court did not abuse its discretion.

III. SUMMARY JUDGMENT MOTIONS

We review a summary judgment ruling de novo, engaging in the same inquiry as the superior court. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012). Summary judgment is warranted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Wilkinson v. Chiwawa Cmty. Ass'n*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014). The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact, *Ruvalcaba*, 175 Wn.2d at 6, and the moving party is entitled to summary judgment only when there is a “complete failure of proof concerning an essential element of the nonmoving party’s case [which] necessarily renders all other facts immaterial.” *Cho v. City of Seattle*, 185 Wn. App. 10, 15, 341 P.3d 309 (2014) review denied, 183 Wn.2d 1007 (2015) (quoting *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)).

We take the facts and make reasonable inferences in the light most favorable to the nonmoving party. *Ruvalcaba*, 175 Wn.2d at 6. But under CR 56(e),⁵ a party opposing summary judgment cannot simply rely upon the mere allegations of its pleadings to overcome summary

⁵ CR 56(e) provides, in part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

judgment; rather, the party opposing summary judgment must present declarations, affidavits or other evidence as provided in CR 56 to set forth specific facts showing that there is a genuine issue of material fact for trial. CR 56(e); *Keck v. Collins*, 181 Wn. App. 67, 91 n.9, 325 P.3d 306 (2014), *review granted*, 181 Wn.2d 1007 (2014). If reasonable minds can reach only one conclusion, summary judgment is appropriate. *Old City Hall*, 181 Wn. App. at 10.

In Williams's negligence actions against First Transit and Central Bible, she has the burden of proving "(1) the existence of a duty owed to the complaining party, (2) a breach of that duty, (3) a resulting injury, and (4) that the claimed breach was a proximate cause of the injury." *Jackson v. City of Seattle*, 158 Wn. App. 647, 651, 244 P.3d 425 (2010) (quoting *Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 804, 43 P.3d 526 (2002)). We review de novo whether a duty exists. *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 661, 240 P.3d 162 (2010).

A. WILLIAMS'S CLAIMS RELATED TO FIRST TRANSIT

Williams alleged in her complaint that First Transit failed in its duty "to properly and adequately train and supervise" Halsten, whose negligence caused her injuries, and consequently whose "negligence [was] imputed to First Transit." Clerk's Papers (CP) at 3. But in her deposition, Williams did not know how fast Halsten was pushing her; she only recalled that he was running. Instead, Williams relies upon her daughter Carol Williams's declaration to speculate about the speed that Halsten was running and the speed at which Williams could have been traveling when the accident occurred. But a non-moving party may not rely upon speculation and argumentative assertions. *Grant County Port Dist. No. 9 v. Wash. Tire Corp.*, ___ Wn. App. ___, 349 P.3d 889, 893 (2015). And in order to be admissible under ER 701, a lay person's opinion must be "rationally based." *State v. Fallentine*, 149 Wn. App. 614, 624, 215 P.3d 945 (2009).

Carol Williams was not present at the time of the accident, her statements lack foundation, are speculative, are not rationally based under ER 701, and are not admissible. We agree that the superior court properly struck her declaration as untimely. But even if the superior court had considered her declaration on summary judgment, this court can only consider evidence that is admissible under CR 56. *See Sisley v. Seattle School Dist. No. 1*, 171 Wn. App. 227, 233, 286 P.3d 974 (2012). Williams did not offer any other evidence that would create a genuine issue of material fact as to duty, breach, or causation by First Transit. Thus, the superior court did not err in granting summary judgment dismissal in favor of First Transit.

B. WILLIAMS'S CLAIMS RELATED TO CENTRAL BIBLE

Williams also argues that the superior court erred in granting summary judgment in favor of Central Bible. She alleges that Central Bible "failed in its duty to maintain the sidewalk in a safe condition," thereby proximately causing her injuries. CP at 3. Central Bible argued that it did not owe a duty to Williams because (1) it was an adjacent property owner, (2) it did not use its sidewalks for any "special purpose" or insert an artificial condition on the land, and (3) the crack was an open and obvious danger of which Central Bible had no prior knowledge. Br. of Resp't (Central Bible) at 15. We hold that Williams failed to raise a genuine issue of material fact demonstrating a duty, breach, or causation by Central Bible. Thus, the superior court did not err in granting summary judgment dismissal in favor of Central Bible.

1. No duty of care: no special use of the sidewalk

Whether a duty exists is a question of law that we review de novo. *Arnold*, 157 Wn. App. at 661. Generally, an owner or occupant of land abutting a public sidewalk is not an insurer of the safety of pedestrians using the sidewalk, and maintenance of public sidewalks is the city's responsibility. *Rosengren v. City of Seattle*, 149 Wn. App. 565, 575, 205 P.3d 909 (2009). But a duty can arise when an abutting property owner makes special use of a public sidewalk; the property owner must then exercise reasonable care so that the owner's special use does not create unsafe conditions for pedestrians using the sidewalk. *Rosengren*, 149 Wn. App. at 571; *Groves v. City of Tacoma*, 55 Wn. App. 330, 332, 777 P.2d 566 (1989). A duty can also arise if the property owner "causes or contributes to the condition" on the public sidewalk. *Rivett v. City of Tacoma*, 123 Wn.2d 573, 579, 870 P.2d 299 (1994). The plaintiff has the burden of establishing the existence of a duty. *Jackson*, 158 Wn. App. at 651.

Williams does not argue or present evidence that Central Bible made special use of the sidewalk; rather, she argues that the tree on Central Bible's property caused the defect to the public sidewalk. Williams relies on the declaration from Alkenneth Gurley, a church attendee present that day. Gurley stated,

There is a tree planted 8-10 feet from the raised cracks in the sidewalk where the incident took place.

□ I have a background in horticulture. I can state that based on my experience, it is possible that the roots of a tree in such close proximity to the raised cracks in the sidewalk could have caused damage to the sidewalk.

CP at 618.

But the superior court properly struck Gurley's declaration as untimely, speculative, inadmissible lay testimony under ER 701, and submitted by an attorney who was no longer authorized to practice before the court; and even if the court had considered his declaration on summary judgment, Gurley's statements were inadmissible under CR 56. *Grant County Port Dist.*, 349 P.3d at 893; *Fallentine*, 149 Wn. App. at 624; *Sisley*, 171 Wn. App. at 233. Nor did Williams provide adequate foundation to admit Gurley's declaration as expert opinion under ER 702-704. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 357, 333 P.3d 388 (2014) (expert opinions lacking proper foundation should be excluded). And Williams presented no other evidence that the tree caused the crack in the sidewalk or that Central Bible's use of the sidewalk created an artificial condition.

2. No duty of care: "known or obvious" condition

Central Bible also argues that it owed no duty to Williams because the crack in the sidewalk was a "known or obvious" condition and that, even if Williams were an invitee, Central Bible would not be liable for her injuries. Br. of Resp't (Central Bible) at 21. Central Bible presented un rebutted evidence that Williams could see the crack as she approached, based on her own admissions in her deposition. When she was asked if, "on the day of the incident, did [she] observe[d] anything on the sidewalk that caused [her] concern prior to" the incident, she responded, "[w]ell, I remember seeing . . . I saw a -- it was a hole or crack." CP at 505. We agree with Central Bible that Williams presented no evidence to demonstrate a genuine issue of material fact on this issue.

A landowner's liability to invitees "is limited by the RESTATEMENT (SECOND) OF TORTS § 343A(1), which provides: "A possessor of land is not liable to . . . invitees for physical harm

caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.” *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 50, 914 P.2d 728 (1996) (quoting *Tincani*, 124 Wn.2d at 139; RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965)). Even if the condition was open and obvious, in limited circumstances, a possessor of land may be liable if he or she “should anticipate the harm despite such knowledge or obviousness.” RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965). “Distraction, forgetfulness, or foreseeable, reasonable advantages from encountering the danger are factors which trigger the landowner’s responsibility to warn of, or make safe, a known or obvious danger.” *Tincani*, 124 Wn.2d at 140.

Williams did not argue that the crack was concealed, nor did she present evidence to the superior court that the condition was not known or obvious. *Degel*, 129 Wn.2d at 50. She failed to present a genuine issue of material fact showing that even if she were an invitee, the crack was not known or obvious to her. *See Jackson*, 158 Wn. App. at 651-52.

CONCLUSION

We hold that the superior court did not abuse its discretion in refusing to grant a second continuance of the summary judgment motions and that it properly struck the unauthorized filings by Williams’s formerly admitted pro hac vice counsel. Because Williams failed to raise a genuine

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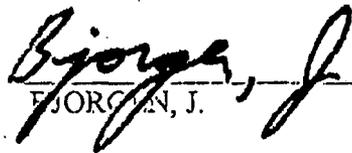
issue of material fact, we affirm the superior court's summary judgment orders dismissing Williams's negligence claims against First Transit and Central Bible.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


SUTTON, J.

We concur:


JOHANSON, C.J.


BJORGE, J.

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Subject: Bessie Williams v. First Transit; Supreme Court No. 92368-0

Re: Case Name: Bessie Williams v. First Transit;
Case No: Supreme Court No. 92368-0
Attorney filing: Stephen G. Skinner, WSBA #17317
206-223-9248
Stephen.skinner@andrews-skinner.com
Counsel for Respondent Central Bible Evangelical Church

Attached for filing in the above matter please find:

1. Respondent Central Bible Evangelical Church's Answer to Petition for Review and Appendix A 1-16

Counsel and parties are copied on this email. Thank you.

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