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STATE OF WASHINGTON
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NO. 92368-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BESSIE WILLIAMS,
Plaintiff/Appellant,

v.

JOHN DOE, FIRST TRANSIT, INC.; CITY OF TACOMA; CENTRAL
BIBLE EVANGELICAL CHURCH,
Defendants/Respondents.

**RESPONDENT FIRST TRANSIT'S
RESPONSE TO APPELLANT'S MOTION
TO FILE AMENDED PETITION**

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 ORIGINAL

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I. INTRODUCTION AND FACTS

A. Background Facts

Ms. Williams filed her Complaint on October 25, 2011 against First Transit and Central Bible Church. (Clerk's Papers ("CP") at 1 – 4). With respect to First Transit, Ms. Williams alleges that she was driven to the Central Bible Church in a shuttle bus on or about October 26, 2008. (*Id.* at 2, ¶ 9). Ms. Williams alleges that the shuttle driver, Mr. Halsten, was running while pushing her wheelchair on the sidewalk and that she was injured when the wheel of the wheelchair hit a raised crack in the sidewalk, causing the wheelchair to stop abruptly and her to fall forward out of the wheelchair. (*Id.*). Ms. Williams alleges that her injuries were caused by First Transit's breach of their duties. (*Id.* at ¶ 12 – 13).

B. Procedural Posture

The procedural history of this litigation has been tortuous. On June 18, 2013, local counsel for Ms. Williams (David Britton), who was the attorney that submitted a *pro hac vice* application for Ms. Williams' Michigan counsel, Ms. Coleman, filed a notice of intent to withdraw. This notice indicated that Mr. Britton no longer was going to represent Ms. Williams or associate with Ms. Coleman. (CP at 377 – 378). Despite the lack of counsel of record for Ms. Williams, First Transit timely served Ms. Coleman and Ms. Williams with a copy of their Motion for Summary

Judgment on August 2, 2013. (CP at 517 – 529, 633 – 650). No response was filed to First Transit’s motion by the original deadline of August 19, 2013. (CP at 586 – 599, 602 – 608).

Ms. Williams’ new local counsel, Michael Ewetuga, filed a Notice of Appearance on August 21, 2013. (CP at 560, 561). This Notice was not served on First Transit. (CP at 653, ¶ 11). Mr. Ewetuga contacted First Transit’s counsel on August 22, 2013 to request an extension of time to respond to its Motion for Summary Judgment. (*Id.*). First Transit refused, noting that counsel needed to formally move the court for an extension. However, Ms. Williams failed to file any such request with the trial court prior to the August 30, 2013 summary judgment hearing date. (*Id.*). Instead, Mr. Ewetuga presented himself at the hearing and argued that he had insufficient time to move for an extension because he had other motions on his calendar and had not been feeling well. (Verbatim Transcript of Proceedings (“TP”) at 4). Mr. Ewetuga also stated at the hearing that he was new to the matter and additional time should be granted for him to evaluate the claim and assess whether an opposition should be filed. (TP at 8).

The trial court granted Mr. Ewetuga’s oral request to extend the deadline by which to respond to First Transit’s and Central Bible’s respective motions for summary judgment. (TP at 8 – 9). At that time, the

trial court directed Mr. Ewetuga to file and serve a response, or to provide a letter to counsel and the trial court stating that no response would be filed, no later than close of business on September 9, 2013. (*Id.*). As First Transit's Second Reply reflects, no response was received by the end of the day on September 9, 2013. (CP at 586 – 587). Ms. Williams did not file her response and supporting declarations until September 11, 2013 – two days after the deadline set by the trial court. (*Id.*; CP at 654, ¶ 13). Moreover, notwithstanding Mr. Ewetuga's request to the trial court and argument that he needed additional time to evaluate the claim, Ms. Williams' opposition to First Transit's Motion for Summary Judgment was filed by Ms. Coleman. (CP at 653 – 654, ¶ 12).

At the second summary judgment hearing on September 20, 2013, Mr. Ewetuga appeared with an e-mail from Ms. Coleman, sent the night before, telling him that she would not be attending the hearing. (TP at 16). The trial court noted that it had not received working copies of the documents filed by Ms. Coleman and that although Ms. Coleman filed the documents, "her admission as *pro hac vice* has not been reaffirmed because Mr. Britton had withdrawn from the case." (TP at 12 – 13).

The trial court held that Ms. Williams' opposition materials were untimely, not in compliance with Pierce County Local Rules as no working copies were provided, and that the trial court could not consider

the filed documents because Ms. Coleman was not licensed in Washington. (TP at 17). The trial court considered the summary judgment motions unopposed and granted both Central Bible's and First Transit's motions for summary judgment. (TP at 18). The trial court also denied Ms. Coleman's e-mail request for a second postponement as moot. (TP at 19). Ms. Williams filed a Motion for Reconsideration on October 1, 2013. (CP at 697 – 715). This motion was untimely as it was filed more than ten days after the trial court entered its Orders on summary judgment, in violation of the Civil Rules. Ms. Williams also failed to serve her Motion for Reconsideration on First Transit or Central Bible. Her motion was denied.

C. Decision of Court of Appeals Division II

Clerk's Papers were prepared on December 5, 2013 pursuant to Ms. Williams' request for review to the Court of Appeals, Division II. (CP at 716 – 719). Ms. Williams failed to timely file her Opening Brief and instead requested an extension of 45 days. Although the appellate court noted that the reasons provided did not support granting an extension, an extension was given until June 9, 2014 in the interest of justice. In her Brief, Ms. Williams alleged that the trial court erred in (1) granting First Transit's Motion for Summary Judgment; (2) granting Central Bible's Motion for Summary Judgment; (3) not granting a short continuance

pursuant to CR 56(f) and CR 6(b); (4) striking the affidavits of Carol Williams and Alkenneth Gurley; and (5) not allowing Ms. Coleman to appear pursuant to APR 8(b).

The Court of Appeals filed its Opinion on August 11, 2015. The court held that: (1) the superior court did not abuse its discretion in striking untimely opposition documents and denying a second continuance because Ms. Williams failed to demonstrate a good reason for delay or delineate evidence that would be established through another continuance that would raise a genuine issue of material fact; (2) under a de novo standard of review, Ms. Williams' *pro hac vice* counsel automatically lost her association with local counsel and her ability to appear in Washington when local counsel withdrew and, therefore, the superior court properly struck opposition materials signed and filed by her; (3) under a de novo standard of review, and considering all evidence available to the superior court including the stricken opposition materials, summary judgment in favor of First Transit was proper because Ms. Williams failed to offer any evidence creating a genuine issue of material fact; and (4) under a de novo standard of review, and considering all evidence available to the superior court including the stricken opposition materials, summary judgment in favor of Central Bible was proper because Ms. Williams failed to raise a genuine issue of material fact related to duty, breach and causation.

D. Motion to File Amended Petition Should be Denied

Ms. Williams filed a Petition for Review by the Washington State Supreme Court on September 10, 2015.¹ Therein, she alleged the Court of Appeals erred when it did not review de novo whether First Transit and Central Bible met their initial burden of proof on summary judgment, erred when it incorrectly interpreted APR 8(b) and cancelled her counsel's *pro hac vice* status, and erred when it applied an abuse of discretion standard to the superior court's rejection of untimely opposition materials.

By letter dated December 4, 2015, the Supreme Court ordered First Transit and Central Bible to serve any responses to such Petition by January 4, 2016. On December 31, 2015 at 4:27 p.m., **on a holiday weekend and not even one business day before responses were due**, an individual from the e-mail account "youngelizabeth4019@yahoo.com," whom we assume was operating on behalf of Ms. Williams, improperly served an "Amended Petition for Review by the Washington State Supreme Court."

By letter dated January 4, 2016, the Supreme Court rejected Ms. Williams's Amended Petition for Review as she failed to seek permission from the Court to file the same. On January 15, 2016, Ms. Williams filed

¹ Ms. Williams improperly served an "Amended Petition for Review by the Washington State Supreme Court on December 31, 2015. For the reasons stated below, this "Amended Petition" should be stricken.

a Motion to File Amended Petition. By letter dated January 19, 2016, the Supreme Court Ordered all responses to be filed by February 16, 2016.

II. RESPONSE

For the reasons set forth below, Ms. Williams' Motion to File Amended Petition should be denied:

A. Ms. Williams' Motion is an Untimely Filed Petition for Review

RAP 13.4(a) requires that a petition for review to the Washington Supreme Court be filed within 30 days of the decision of the Court of Appeals. RAP 18.8 allows the Court to waive or alter the provisions of the Rules of Appellate Procedure, including enlarging or shortening the time in which to file a petition for review, "only in extraordinary circumstances and to prevent a miscarriage of justice." Rule 18.8(b) further states that the Court "will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section." Thus, although RAP 1.2(a) states the desire that the rules of appellate procedure be interpreted liberally enough so that the outcome of a case is not determined on the basis of compliance or noncompliance with the rules, such a liberal interpretation is subject to the restrictions of RAP 18.8.

Extraordinary circumstances are those wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control. *Reichelt v. Raymark Indus.*, 52 Wash. App. 763, 765–766, 764 P.2d 653 (1988). The lost opportunity to appeal would constitute a gross miscarriage of justice because of the appellant's reasonably diligent conduct. *Id.* The burden is on the petitioner to provide "sufficient excuse" and to demonstrate "sound reason" to abandon the Court's preference for finality. *State v. Moon*, 130 Wash. App. 256, 260, 122 P.3d 192 (2005).

Ms. Williams has failed (and, in fact, did not even attempt) to meet her burden of showing extraordinary circumstances sufficient to justify departure from RAP 13.4(a). Ms. Williams claims that she is entitled to amend her original Petition for Review because the Supreme Court decision in *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015), was issued after her original Petition was filed and because she filed a rough draft of the Petition instead of the final draft. Regarding the former, Defendant admits that the issuance of the *Keck* decision after the filing of Ms. Williams' original petition is beyond her control. However, as further detailed below, the appellate court's failure to follow the standard set out in the new *Keck* decision when striking summary judgment opposition materials as untimely would not have affected the outcome of its decision.

Not only were there other independent bases on which it struck the materials, but it ended up reviewing the stricken materials when deciding (de novo) whether summary judgment was appropriate.

Moreover, it is clear that at no point has Ms. Williams exercised reasonable diligence in either the filing of her original Petition or in seeking amendment thereof. Ms. Williams' original Petition for Review was filed on September 10, 2015 (after several extensions) and the new *Keck* decision was issued on September 24, 2015. Yet, Ms. Williams waited more than three (3) months – and less than one business day before the response deadline – to file a motion to amend her petition. That alone demonstrates that Ms. Williams has not exercised due diligence. Rather, and considering her past actions of refusing to file materials on time or follow the civil rules, the only interpretation of Ms. Williams' current motion to amend is that it is for the purpose of delay or that she seeks an unfair advantage by taking yet another (unwarranted) an extension of three (3) months to prepare her Petition.

In contrast to what Ms. Williams' would have this Court believe, there are appellate rules governing the amendment of a petition for review and such rules do not permit her to file an amended petition for review at any time prior to an answer being filed. RAP 13.4(a) requires that a Petition for Review be filed within 30 days. Again, this provision only

may be waived or altered if extraordinary circumstances are shown. As noted above, such a showing has not been (and cannot be) made.

Based on the foregoing, the Court's interest in finality of decisions should outweigh Ms. Williams' request for what amounts to an extension of time to file a petition for review. Almost two years have elapsed since the granting of Defendants' Motions for Summary Judgment. Finality is warranted and will prevent further delay and the waste of resources. Ms. Williams will not lose her opportunity to appeal if her Motion to File Amended Petition is denied, as her original Petition already is on file with this Court. Also, the outcome of Ms. Williams' case will not be determined based on "compliance or noncompliance" with the rules. Ms. Williams' amended Petition raises many of the same issues as those outlined in her original Petition and, as noted above, the fact that the Court of Appeals may not have decided the issue of striking untimely materials in accord with *Keck*, doing so would not have altered or changed the outcome of the court's decision.

Finally, Defendants dispute Ms. Williams' claim that granting her Motion to Amend will result in no prejudice to Defendants. Moreover, the lack of prejudice to a respondent is not the inquiry or even a determining factor in whether a motion to amend a petition for review should be granted. *Reichelt*, 52 Wash. App. at 765--766. The inquiry is whether the

petitioner has shown extraordinary circumstances justifying departure from the Rules of Appellate Procedure. There are no such extraordinary circumstances here. The current request for amendment of Ms. Williams' Petition for Review has no justification other than the fact that Ms. Williams desired an additional three (3) months to prepare her Petition and that she was ineffective and lacked diligence for failing to discover the alleged error in the version of the document she filed.

B. The New *Keck* Decision Would Not Have Altered the Court of Appeal's Decision and Will Have No Effect on the Outcome of this Matter

The Supreme Court's issuance of a decision in *Keck v. Collins* after the filing of Ms. Williams' original Petition for Review would not have changed the Court of Appeal's decision and will have no effect on the outcome of this matter. Therefore, it should not serve as a basis for granting her Motion to File Amended Petition.

First, even if the appellate court's decision was not in accordance with *Keck v. Collins*, there were other independent bases for the appellate court to uphold the striking of the evidence submitted in opposition to summary judgment. In *Keck*, the Washington Supreme Court held that the decision to exclude untimely disclosed evidence is a severe sanction requiring the court to consider the three *Burnet* factors on the record. *Id.* at 368 – 369. Such rulings are subject to an abuse of discretion standard. *Id.*

(citing *Blair v. Ta-Seattle E. No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011)). Here, the appellate court properly applied an abuse of discretion standard.

While neither the trial court or the Court of Appeals analyzed the *Burnet* factors, at most this resulted in harmless error and did not prejudice Ms. Williams or affect the final outcome of the case. *State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977), *superseded by statute on other grounds*. Error without prejudice is not grounds for reversal. *Thomas v. French*, 99 Wash.2d 95, 104, 659 P.2d 1097 (1983). Both the trial and appellate courts upheld striking Ms. Williams' opposition materials on two independent bases. Thus, even though they did not apply the *Burnet* factors with regard to the fact that the materials were untimely, such materials would have been stricken anyway based on the fact that they were filed by an attorney who is not licensed in Washington. A decision based upon erroneous ground will be sustained if correct on any ground. *Rockwood Blvd., In re*, 170 Wash. 64, 15 P.2d 652 (1932). Given that the trial and appellate courts' error related to striking untimely documents would not have changed the outcome of their decision (as those documents would have been stricken on another, independent basis), the error was not prejudicial to Ms. Williams. As a harmless error cannot serve as the basis for reversal (even if this Court were to accept review of

this case), it is futile and unnecessary to allow Ms. Williams to amend her petition to include arguments based on *Keck*.

Second, even after upholding the striking of the untimely evidence on two independent bases, the appellate court reviewed and considered the stricken evidence and found that it would not have been sufficient to overcome Defendants' motions for summary judgment. Simply, there can be no prejudice to Ms. Williams where the Court of Appeals considered the stricken evidence in determining whether summary judgment was appropriate.

In reviewing the granting of summary judgment, the Court of Appeals reviewed the entire record, including stricken portions, under a de novo standard of review. *See Goodwin v. Wright*, 100 Wash. App. 631, 6 P.3d 1 (2000) (holding evidence called to the attention of the trial court is properly before appellate court, whether or not it was considered by the trial court). Hence, the Court of Appeals properly engaged in the same inquiry as the trial court. *Hodge v. Raab*, 151 Wash.2d 351, 88 P.3d 959 (2004). By reviewing the evidence that Ms. Williams' claims was erroneously stricken, the Court of Appeals eliminated any potential prejudice associated with its decision to uphold the striking of her opposition materials. Thus, again, it would be futile and unnecessary to allow Ms. Williams to amend her Petition for Review on the basis of the

new *Keck v. Collins* decision if such a decision (or error related to application of such decision) would not affect the outcome of this matter and cannot serve as a basis for reversal by this Court.

III. CONCLUSION

Based on the foregoing, First Transit respectfully requests that this Court deny Ms. Williams Motion to File Amended Petition.

RESPECTFULLY SUBMITTED this 16th day of February, 2016.

BETTS, PATTERSON & MINES, P.S.

By *s/ Laura E. Kruse*
Laura E. Kruse, WSBA #32947
Attorneys for Respondent First Transit, Inc.

CERTIFICATE OF SERVICE

I, Susan Ferrell, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on February 16, 2016, I caused to be served upon counsel of record at the addresses and in the manner described below, the following document:

- **Respondent First Transit's Response to Appellant's Motion to File Amended Petition**

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of February, 2016.



Susan Ferrell

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To: Susan Ferrell
Cc: Laura Kruse; Crystal Ellis
Subject: RE: Supreme Court No. 92368-0; Bessie Williams v. First Transit, et al.

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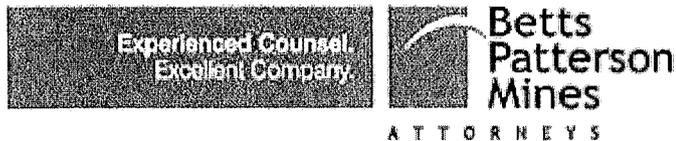
Good Afternoon,

Attached for filing with the Washington State Supreme Court is Respondent First Transit's Response to Appellant's Motion to File Amended Petition.

If I may be of further assistance, please give me a call at my direct number below (highlighted).

Thank you for your kind assistance.

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