COA No. 303551

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LISA BUHR,

Appellant,

v.

STEWART TITLE OF SPOKANE, LLC, and STEWART TITLE COMPANY,

Respondents.

APPELLANT'S REPLY BRIEF

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I. REPLY

1) Stewart confirms that both parties had just initiated discovery when the Court terminated Plaintiff's access to the rules.

In responding to error assigned to the trial court's premature termination of all discovery, Stewart confirms that it had itself just initiated its own discovery as of "late 2010 and January 2011." *Response Brief at p. 15.* In blaming Buhr's counsel for Stewart's own first setting of depositions after the discovery cutoff, Stewart fails to explain why, in the preceding "fourteen-plus months" also available to Stewart, it also failed to initiate depositions. Stewart thus confirms that discovery was globally delayed. The only reason cited in the record for this is Stewart's own jockeying of its defense counsel.

Stewart also confirms that, as of the January 10, 2011 cut-off date, neither side had received anything more than incomplete answers to one set of interrogatories and requests for production from the other, and not a single deposition had yet been taken. *See Stewart Memo, pp. 15-16.*

Stewart cites law related to, e.g. "denial of a continuance." The issue here is much more fundamental than a continuance—it is a trial court's denial of a party's ability to use discovery rules to develop the claim at all. Stewart refers only to the trial court's refusing to grant "additional discovery," and focuses only on Buhr's later futile request to *at least* obtain three categories of

certain specific documents. It misses the point—there was no discovery to begin with. The trial court prematurely terminated *all* discovery; its subsequent refusal to grant even limited specific discovery was only more egregious.

Stewart asserts a veritable barrage of other reasons why Buhr *should* have been denied discovery.[1] None of the reasons given were used by the trial court. *CP 101; CP 260-63 (orders terminating discovery)*. Buhr did not "fail to move to compel answers" nor "delay initiating discovery," nor seek irrelevant information, nor argue her counsel's "heavy workload." *Id.* By advocating other reasons as an alternative basis for cutting off necessary discovery, Stewart concedes the egregiously flimsy rationale used by the trial court. It concedes that two parties disputing the meaning of the word "closed" is an insufficient reason for a trial court to revoke a party's CR 26 discovery rights, and essentially argues that there must have been more to it. There wasn't. *CP 101; CP 260-263*.

Stewart also tries to justify the trial court's ruling by a footnote argument claiming that Buhr was required to file a CR 56(f) affidavit stating

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[1] The phrase "veritable barrage" lifted from *ARVCO Container Corp. v. Weirhauser Co.*, 2009 WL 311125 (W.D. Mich. Feb. 9, 2009)), which also addressed similar defense arguments against discovery in an instructive fashion.

that Buhr needed additional evidence to controvert summary judgment. *Response Brief at 39.* This is not about insufficient information to defend a summary judgment—this is a complete judicial blocking of *all* discovery for any purpose at the outset of discovery. Buhr's claims in part survived summary judgment—she remained with no discovery for trial.

Stewart argues that it produced certain discovery requested. *Memo at pp. 41-42.* This is an ironic claim, given that it elsewhere confirms that its responses to Buhr's interrogatories were "proper objections." *Response Brief at p. 15.* The propriety of Stewart's objections is irrelevant. The point is that Stewart provided none of the information sought, and the trial court then cut off all discovery.

The right to discovery is the right to justice. This trial court did not shepherd that right; it terminated it altogether, and it did so when both parties had just initiated discovery processes. The damage cannot be known with any certainty, because terminating all discovery at the outset prevents insight even into what exists which may lead to relevant information. *ER 401.* The trial court's denial of this right to Lisa Buhr is cause for reversal, remand for proper discovery, and retrial thereafter.

2) **Stewart concedes that it failed in its burden of production at summary judgment to show lack of feasibility or undue hardship, and argue its case on the merits instead.**

Lisa Buhr laid out the burden-shifting requirements for both parties at summary judgment in her disability employment discrimination case. *See, e.g., Wilson v. Wenatchee School District*, 110 Wn.App. 265, 270, 40 P.3d 686 (2002). Stewart does not contest that Buhr showed that she could perform the essential functions of her job with reasonable accommodation, or that reasonable accommodation by flexible time was available to Stewart. *Id.* Stewart instead diverges entirely from the burden-shifting requirements, and argues that its actions were reasonable. That is the decision for the jury, not a basis on which to enter summary judgment in Stewart's favor. *Wilson, supra* at 271; *Frisino v. Seattle School Dist. No. 1*, 160 Wn.App. 765, 776, 240 P.3d 1044 (2011).

Stewart's burden was to produce evidence showing that Buhr's proposed solution (or any other solution) was not feasible, or was an undue hardship. *Wilson, supra.* Stewart is unable to point to any evidence in the record establishing either. Stewart's evidence was Anthony Carollo's testimony that he had no intention of accommodating Ms. Buhr. *See CP 458: 11-21, citing Pl. Ex. 55 at p. 40: 2 – p. 41: 22.* Per Mr. Carollo, Buhr was to

work 8-5, she had her sick leave, and that was that. Stewart failed to satisfy its burden of showing lack of feasibility or undue hardship, and it was not entitled to summary judgment on Buhr's failure-to-accommodate claim.

Stewart argues that it "satisfied its duty to accommodate Buhr" by letting Buhr take her sick leave, that it was not "required" to allow Buhr to work outside of normal business hours, and that "even if flex time was required, Buhr's flex time remained constant during her employment." *See Response Brief, p. 28.* This was the ultimate issue for the jury. While an employer need not necessarily grant an employee's specific request for accommodation, Stewart's burden of production at summary judgment was to show lack of feasibility or undue hardship of the proposed solution. The arguments made here are not that showing. Nor does Stewart evidence any effort at the requisite interactive process to find any alternative solution. *See, e.g., Wilson, supra; Frisino v. Seattle School Dist. No. 1*, 160 Wn.App. at 777, 781; *and see MacSuga v. Spokane County*, 97 Wn.App. 435, 443, 983 P.2d 1167 (1999).

Stewart argues that Buhr did not *require* any accommodation, because her absences did not affect her job performance. Running out of sick leave affects an employee's ability to perform their job because they get fired for the

next absence. Running out of sick leave affects Buhr's job performance because she stops being paid for her work (ditto).

In sum, whether Stewart's single proposed solution of letting an employee use her finite leave time like everyone else was a "reasonable" solution to accommodate this unique disability was the issue for the jury. *See Wilson, supra* at 271; *Frisino*, 160 Wn.App. at 776.

The trial court's entering summary judgment in favor of Stewart ignores the burden shifting requirement at summary judgment, ignored Buhr's production of evidence sufficient to defeat summary judgment, and improperly decided the claim on its merits. This is error requiring reversal, and remand of this claim for trial.

3) Because reasonable accommodation is a necessary part of disparate treatment, the jury's verdict is actually one finding that Stewart failed to accommodate Ms. Buhr.

Buhr argues that the trial court's removal of the concept of reasonable accommodation in her disability discrimination trial undercuts the very protections of Washington's Law Against Discrimination, RCW 49.60. She argues that the trial court improperly restricted her from discussing or evidencing her accommodation needs, and instead instructed the jury that any accommodation given her would have been illegal disparate treatment.

Stewart responds by agreeing that this is precisely what the trial court did. Stewart argues that this is the law. The very passage cited by Stewart holds the exact opposite.

In *Doe v. Boeing,* 121 Wn.2d. 8, 20, 846 P.2d 531 (1993), cited at the Response Brief's page 34, our Supreme Court confirms that an employer must first adequately accommodate the disabled employee. Absent this accommodation, identical treatment may be a source of discrimination itself. This is Buhr's point. *Accommodation* is not violation of the disability law. It is not disparate treatment. It is an affirmative threshold entitlement in a disability case of any kind. Stewart's argument that because it did *not* accommodate Ms. Buhr, it cannot be found to have committed disparate treatment, is anathema to the WLAD and its purpose.

Ironically, what the jury actually concluded by their verdict that no disparate treatment existed is that Ms. Buhr was not accommodated. Because she was treated just as was everyone else, i.e., without any accommodation, then no disparate treatment existed. This is plain error. Reasonable accommodation plays a necessary role in assessing disability discrimination in any form.

This court's cutting away that necessary concept of accommodation in a disparate treatment disability trial, and its instructing the jury that accommodation would be disparate treatment, is obvious error requiring reversal.

4) Stewart implicitly concedes that sanctions against Buhr's counsel were improperly based on an alleged violation of the supplementation rule, because it is unable to apply CR 26(e) to what occurred.

Buhr does not dispute that a trial court has the discretion to fashion sanctions for discovery violation; what she disputes is whether a trial court may fashion and impose sanctions against a lawyer who hasn't violated anything.

Stewart argues, without support by rule or record, that Buhr's counsel was properly sanctioned for "agree(ing) to supplement," then not doing so. But it fails to show how any of the information sought or referenced was supplementation. *CR 26(e)(1)(A).*

Stewart argues that Buhr's counsel "withheld documents reviewed by that expert which he brought with him to trial." At trial, Stewart referred to a "four-and-a-half or five-inch stack of documents that have been accumulated over the time since Mr. West was hired..." in the expert' briefcase as the missing supplementation. *RP 696: 1-6.* A generic stack of documents in an

expert's briefcase is not supplementation. CR 26(e)(1)(A) is specific as to what must be supplemented. Stewart makes no showing that *anything* in this stack obtained after rummaging through the expert's briefcase could be properly classified as CR 26(e)(1)(A) supplementation as defined.

Stewart also fails to respond to how any such pre-Jan. 10, 2011 interrogatory "agreement" to supplement survived the court's order terminating all CR 26 discovery on January 10, 2011. Stewart was the party asking to terminate all discovery *after* Buhr's answers were received. "Supplementation" is CR 26 discovery, and all discovery was terminated expressly by order after Buhr's offer. *See CR 26 and CR 26(e).*

Stewart fails to show even how a broad active agreement to supplement did not encompass exactly what Buhr did, i.e., to provide Stewart with two separate comprehensive written reports. Such reports are not required in state court under CR 26(b)(5). The federal civil rule on expert disclosure is much more comprehensive and requires such reports; but state rules do not, and actively *limit* disclosure. *Compare FRCP 26(a)(2)(B) with CR 26(b)(5).* Moreover, CR 26(e)(1)(A) provides that, even where supplementation applies, the additional information can be "otherwise made known to the other side...in writing." Plaintiff's counsel *did* supplement with the expert's

report—twice. *RP 693: 3-23.* Stewart thus grudgingly acknowledges that Buhr produced "a" final expert report "on the eve of trial." *See Brief,* p. 46. It misrepresents the record. Buhr produced *two* comprehensive reports, she did so *after* the order terminating Stewart's discovery rights, and she did so first, in March 2011, nearly five months before trial, and again, in July 2011, a month before trial. *RP 693: 20-22; Pl. Ex. 70, Pl. Ex. 71.* Stewart concedes that it pursued no further discovery as to either, nor did it move to compel anything under CR 37 if it felt those reports were "incomplete."

Buhr's counsel violated nothing. Sanctioning a lawyer because an expert brings a briefcase to trial is an arbitrary and improper use by a trial court of its sanction authority. The sanction order should be vacated.

II. CONCLUSION.

Ms. Buhr requests the reversal and remand for proper discovery and retrial, along with an order vacating the sanctions imposed on her counsel.

DATED this 26 day of Nov., 2012.

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CERTIFICATE OF SERVICE

The undersigned certifies she is a person of such age and discretion as to be competent to serve papers; and that on the 26 day of Nov, 2012, she served a copy of **Appellant's Reply Brief** to the following individuals, in the manner below:

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