Supreme Court No. 98721-1

Court of Appeals No. 36735-5-III

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SUPREME COURT
OF THE STATE OF WASHINGTON

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LEANNE LEVNO,

Petitioner,

v.

ADDUS HEALTHCARE, INC.,

Respondent.

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# ANSWER TO PETITION FOR REVIEW

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## I. INTRODUCTION

Respondent Addus HealthCare, Inc. ("Addus") respectfully requests that this Court deny the Petition for Review filed by Petitioner Leanne Levno ("Levno"). The Court of Appeals correctly determined that no reasonable factfinder could conclude that Addus illegally terminated Levno. The Court of Appeals' decision does not conflict with a decision of this Court. *See* RAP 13.4(b)(1). Rather, Levno simply failed to present admissible evidence that her claims warranted a trial.

## II. STATEMENT OF THE CASE

### A. Substantive Facts

Levno started working for Addus in Spokane, Washington, in 2007 as a home health caregiver. Clerk's Papers ("CP") at 10 (¶¶ 2.1-2.2), 87 (24-25), 88 (1-11). Levno cared for vulnerable, ill adults. CP at 56 (4-10). Levno was a mandated reporter to the Department of Social and Health Services ("DSHS") if a reasonable belief of abuse/neglect existed. RCW 74.34.020(14), 74.34.035(1).

From 2007 until 2012, Levno cared for several clients. CP at 26. From 2012 until 2016, Levno cared for one client, "L.J.D." CP at 57 (15-25), 58 (1-3), 409 (¶ 6).[1]

[1] In order to comply with the requirements of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Addus has chosen to refer to the client by her initials ("L.J.D.") and to the client's daughter by her initials ("H.D.").

### 1. Levno's Reports of Neglect of Her Patient

In 2013, Levno believed that L.J.D. had been neglected. CP at 59 (12-21). Levno called Sandra Kester, who was located in the corporate office of Addus. CP at 59 (12-21), 60 (1-25), 61 (1-10), and 62 (8-14). Levno shared her concerns that the client was being left without care on the weekends. CP at 61 (17-22).

Addus took no adverse action against Levno after she reported the alleged neglect. CP at 63 (19-25), 64 (1-7). Levno continued caring for L.J.D. CP at 63 (11-15). Levno was not reassigned, written-up, demoted, or suspended. CP at 63 (19-25), 64 (1-7). Levno's pay and hours were not changed. CP at 64 (3-7).

In 2015, Levno again believed that her client had been neglected. CP at 10 (¶ 2.6), 64 (8-15). This time, Levno contacted Adult Protective Services (APS) at DSHS. CP at 64 (8-25), 65 (1-7). Levno did not inform her supervisor or anyone at Addus about her report to APS and she was not aware of DSHS's investigation or conclusions. CP at 65 (19-25), 66 (1-25), 67 (1-2), 75 (7-18). Levno did not know if Addus was notified of her 2015 report to APS, and no evidence shows that it was. CP at 66 (20-25), 67 (1-12).

According to Levno, Kelly Crawford, another caregiver for L.J.D., also made a report to APS in 2015 about burns L.J.D. apparently experienced. CP at 76 (7-13). The burns apparently resulted from a faulty heating pad that *Levno* used with L.J.D. CP at 77 (1-25), 78 (1). According to Levno, she and L.J.D.'s nurse handled that situation properly and L.J.D. was safe and well cared for. CP at 78 (12-21). Levno admitted that it was appropriate for Crawford to make the report. CP at 78 (2-21).

APS investigated Crawford's report, and in May 2015, APS determined that the allegation of neglect was unsubstantiated. CP at 98. Even after these 2015 reports, Levno continued to provide care for L.J.D. CP at 68 (4-16). Addus did not reassign Levno, demote her, suspend her, or reduce her hours or pay. CP at 68 (4-16).

In 2016, Levno again believed that L.J.D. had been neglected. CP at 10 (¶ 2.11), 69 (5-25). She filed a report with Addus on August 30, 2016. CP at 10 (¶ 2.11), 70 (8-13). Addus did not suspend Levno, reduce her hours, or reduce her pay after this report. CP at 71 (1-16). But Addus was concerned about Levno's relationship with L.J.D. because Addus became aware that Levno was providing caregiving services to L.J.D.'s family, which violated Addus's rules about maintaining professional boundaries with clients and their families. CP at 47.

On September 1, 2016, Dawn Taylor, one of Levno's supervisors, called Levno and told her that she could no longer provide care for L.J.D. "until [she] came into the office to discuss this issue." CP at 11 (¶ 2.13), 72 (6-20). On September 2, 2016, Addus notified L.J.D. and L.J.D.'s husband by letter that Levno would no longer be providing care for L.J.D. CP at 11 (¶ 2.12), 73 (17-25), 74 (1-7), 413. Addus suggested that L.J.D. and her husband work with their case manager to select another home care provider. CP at 413. Levno received a copy of this letter on September 6, 2016. CP at 82 (4-24), 83 (1-2).

Addus scheduled a meeting for September 8, 2016, with Levno, to discuss the situation, and Addus informed Levno she could have union representation present if she liked. CP at 11 (¶¶ 2.14-15), 79 (6-21). During the meeting, Addus gave Levno a written warning for insubordination and violating well-established

company rules. CP at 47.

### 2. Levno's Written Warning

The written warning noted that Levno was:

- Not following the plan of care for her client;
- Not reporting changes in the client's condition and needs to her supervisor;
- Having other health care assistants report to Levno instead of their own supervisors with questions or concerns about the client;
- Crossing professional boundaries with her client;
- Providing care for people other than her client; and
- Performing nursing tasks without delegation.

CP at 47, 80 (12-25), 81 (8-25).

The warning does not refer to Levno's employment ending. CP at 47, 350. Levno admits this fact, as she must, and admits that she never received any discharge notice from Addus. CP at 82 (25), 83 (1-2), 84 (1-3). Levno could not identify any document purporting to terminate her employment. CP at 84 (4-25), 85 (1-25), 86 (1-9). And as the Court of Appeals noted in its opinion, "[T]he parties now agree that none of the paperwork generated by Addus at the time of the September 8 meeting specified termination." *Levno v. Addus Healthcare, Inc.*, No. 36735-5-III (June 2, 2020) at 7.

Rather than terminating Levno on September 8, 2016, Addus immediately sought to assign Levno to another client. CP at 44 (¶ 3). But Levno refused to respond to Addus's efforts to contact her for assignment. CP at 44 (¶¶ 3-7).

Ultimately, 90 days later, Addus administratively ended Levno's employment in January 2017 for job abandonment. CP at 44 (¶ 7).

### B. Procedural Facts

Levno filed her Complaint on August 11, 2017. CP at 3-8. Given that Levno did not specify an amount in controversy and that Addus is a foreign corporation, Addus sought to remove the case to the United States District Court for the Eastern District of Washington. CP at 445, 469. In response, Levno filed an Amended Complaint on September 22, 2017, (CP at 9-16), and alleged that "the amount in controversy in this matter does not exceed seventy-five thousand dollars ($75,000)." CP at 10 (¶ 4). Addus filed its Answer on October 23, 2017. CP at 18-27.

Based on Levno's representations, Addus ceased its removal efforts and instead provided Levno with a proposed stipulation regarding the amount in controversy in this case. CP at 445, 456-57, 469. Levno did not return the proposed stipulation. CP at 445, 469.

Addus then served Levno with several requests for admission. CP at 461-65. Specifically, the requests for admission asked Levno: (1) to "[a]dmit that your damages, inclusive of any attorney fees and costs, and interest, do not exceed $75,000" and (2) to [a]dmit that you seek less than $75,000.00 in this lawsuit, including attorney fees, costs, interest, tax offsets, and any other form of monetary relief." CP at 463. Levno did not respond to the requests for admission. CP at 446, 451.

Addus filed a motion for an order deeming these requests for admission

admitted. CP at 444-49, 468-72. On February 2, 2018, the trial court entered an order deeming these requests for admission admitted. CP at 473-74.

On December 20, 2018, Addus filed its summary judgment motion (with a hearing date of January 18, 2019). CP at 29-40. Under CR 56(c) and Spokane County Superior Court Local Rule 56, Levno's response was due *no later than* January 7, 2019. But Levno did not file a timely brief opposing the summary judgment motion. Instead, on January 7, 2019, she simply filed her declaration and H.D.'s declaration. CP at 287-91, 293-94. Addus was not served, however, with H.D.'s declaration until January 14, 2019, and only *after* Addus already had filed its reply in support of the summary judgment motion. CP at 475-76.

In fact, Levno did not file her response until January 14, 2019—seven days *later* than her response was due and only *after* Addus already had filed and served its reply. CP at 296-98,[2] 300-07, 494. Levno provided no reason for her inexcusable neglect of the filing deadline, but the trial court nevertheless considered Levno's submissions. CP at 379.

On January 18, 2019, the trial court heard the parties' argument and took the matter under advisement. CP at 376. On February 4, 2019, the trial court issued its letter ruling, dismissing Levno's claims. CP at 376-82. The trial court instructed Addus's counsel to prepare an order consistent with its letter ruling for presentment on February 22, 2019. CP at 382.

[2] In her response, Levno tried to seek "CR 56(f) relief." CP at 297. But the trial court denied the request, noting, that she "has not filed a declaration providing any reasons why she cannot present facts essential for her opposition or what further discovery needs to be completed in order to properly respond to the motion." CP at 379.

On February 21, 2019, Levno filed her motion for reconsideration. CP at 383-89. As requested by the trial court, Addus filed its response. CP at 391-99. Levno then filed a reply. CP at 402-06.

On March 8, 2019, the trial court denied Levno's motion for reconsideration. CP at 416-17. Among other things, the trial court stated, "The arguments now advanced by the Plaintiff could have been made in her untimely response to the Defendant's motion for summary judgment that was considered by the Court. There has been no showing as to why these arguments were not previously presented." CP at 417. On March 29, 2019, the trial court entered its order summarily dismissing Levno's claims. CP at 418-24.

Levno timely appealed, (CP at 426-443), and on June 2, 2020, the Court of Appeals, without oral argument, affirmed the trial court's order on summary judgment in an unpublished opinion. *Levno*, No. 36735-5-III (June 2, 2020).

## III. ARGUMENT

In her Amended Complaint, Levno claimed that she "was terminated in retaliation of her reporting the abuse/neglect of her client in violation of RCW 74.34. *et seq*." CP at 13 (¶ 3.10). In response to the summary judgment motion, however, Levno failed to provide sufficient facts to make a *prima facie* case that Addus terminated her. CP at 381. The Court of Appeals—like the trial court before it—correctly determined that no reasonable finder of fact could conclude that Addus illegally terminated Levno.

### A. The Court of Appeals Decision Does Not Conflict With This Court's Decision in Rose v. Anderson Hay & Grain Company

In *Rose v. Anderson Hay & Grain Company*, 184 Wn.2d 268, 286, 358 P.3d 1139 (2015), this Court simply repeated the well-known rule that "summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law" and that courts "consider all the facts in the light most favorable to … the nonmoving party."

But it also is a well-known rule that the nonmoving party may not simply rely on bare allegations to carry her to trial. *Reed v. Streib*, 65 Wn.2d 700, 706-07, 399 P.2d 338 (1965). "The purpose of the summary judgment rule is to permit the court to pierce such formal allegations of facts in pleadings when it appears that there are no genuine issues." *Reed*, 65 Wn.2d at 707; *Lundgren v. Kieren*, 64 Wn.2d 672, 677, 393 P.2d 625 (1964) (the court pierces the formal allegations pleaded).

Each party must furnish the factual evidence upon which he or she relies. *Lundgren*, 64 Wn.2d at 677; *see also* CR 56(e). The non-moving party may not rest upon her mere allegations. *Young v. Key Phams., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Reed*, 65 Wn.2d at 707. Otherwise, "the whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence." *Reed*, 65 Wn.2d at 707.

As this Court has stated, "A fact is an event, an occurrence, or something that exists in reality." *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 813 (1976)). "It is what took place, an act, an incident, a reality as

*distinguished from supposition or opinion*." *Grimwood*, 110 Wn.2d at 359 (citing 35 C.J.C. *Fact* 489 (1960)) (emphasis added). Ultimate facts and conclusory statements of fact are insufficient and will not suffice. *Grimwood*, 110 Wn.2d at 359-60; *see also Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) ("A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.").

In short, "[t]he object of a motion for summary judgment is to separate the wheat from the chaff in evidentiary pleadings," *Almy v. Kvamme*, 63 Wn.2d 326, 329, 387 P.2d 372 (1963), just as the Court of Appeals—like the trial court before it—correctly did in accordance with the decisions of this Court.

### B. Levno Failed to Bring Forth Any Admissible Evidence to Make a Prima Facie Case that Addus Discharged Her in Violation of Chapter 74.34 RCW

Here, contrary to what Levno implies, (Petition for Review at 11), the only adverse employment action she pleaded in her Amended Complaint was *actual* discharge. CP at 12-13 (¶¶ 2.24, 2.25, 2.26, 3.8, 3.10).[3] While she could have chosen to plead other adverse employment actions, she did not. Instead, in her Amended Complaint, Levno alleged that she was "terminated in retaliation" for her reporting abuse of her client in violation of chapter 74.34 RCW. CP at 12, 13 (¶¶ 2.25, 3.8, 3.10).

[3] Levno only raised a claim of constructive discharge for the first time in her motion for reconsideration, and the trial court properly refused to consider it. CP at 417. The Court of Appeals affirmed, ruling that the trial court did not abuse its discretion in refusing to consider the argument. CP at 417. Levno does not seek review of this issue. (Petition for Review at 3).

Once Addus demonstrated that it had not terminated Levno, and that no material issues of fact existed about this essential element, (CP at 35-36), the burden shifted to Levno to show otherwise. *Young*, 112 Wn.2d at 225. But Levno failed to respond to the summary judgment motion "with some showing that related evidence was available that would justify a trial on the issue." *Reed*, 65 Wn.2d at 707. And the lower courts correctly ruled that no reasonable factfinder could conclude that Addus illegally terminated Levno.

Importantly, Levno admitted in her deposition that she never received any sort of written termination notice from Addus. CP at 82 (25), 83 (1-2). The September 8, 2016 warning letter to Levno makes no reference to termination. CP at 47, 84 (4-25), 85 (1-25), 86 (1-9). Levno admitted that the September 8, 2016 warning letter contained no reference anywhere to termination. CP at 84 (1-9). And Levno could not identify any document purporting to terminate her employment. CP at 84 (4-25), 85 (1-25), 86 (1-9). As the Court of Appeals noted, "[T]he parties now agree that none of the paperwork generated by Addus at the time of the September 8 meeting specified termination." *Levno v. Addus Healthcare, Inc.*, No. 36735-5-III (June 2, 2020) at 7.

To the extent Levno now relies on a single, uncorroborated hearsay statement allegedly made by Taylor—and recounted solely by Levno in her deposition testimony—to argue that the Court of Appeals erred in affirming the trial court's summary judgment order, (Petition for Review at 12), this argument must fail. Levno cannot successfully oppose the summary judgment motion by nakedly asserting that unresolved questions of fact remain about whether her employment was orally terminated; such bare allegations are insufficient to carry

Levno to trial. *See Reed*, 65 Wn.2d at 706-07; *see also Seven Gables Corp.*, 106 Wn.2d at 13 (a nonmoving party may not rely on argumentative assertions that unresolved factual issues remain). After all, it is incumbent upon Levno to furnish the factual evidence upon which she relies. *Lundgren*, 64 Wn.2d at 777; *see also* CR 56(e).

If a factual basis for Levno's allegation existed, then she could have—and would have—developed it during discovery. But in opposing the summary judgment motion, Levno:

- Did not furnish any factual evidence from any interrogatories propounded to Addus;
- Did not furnish any factual evidence from any requests for production propounded to Addus;
- Did not furnish any factual evidence from any requests for admission propounded to Addus; and
- Did not furnish any deposition testimony from Taylor, let alone any witnesses.

CP at 287-91, 293-94, 296-98, 383-89, 402-06. Furthermore, Levno made no showing that any additional evidence would be introduced by her in the event that she would be afforded a trial. *See, e.g., Plaisted v. Tangen*, 72 Wn.2d 259, 263, 432 P.2d 647 (1967) (summary judgment was affirmed where there was no showing that additional evidence would be introduced by the plaintiff in the event he would be afforded a trial and where plaintiff rested upon his mere allegations).

Rather, as the Court of Appeals noted, Levno opposed the summary judgment motion with her unsupported, subjective belief and opinion about what

happened to her. *Levno*, No. 36735-5-III (June 2, 2020) at 9. But, as this Court has stated, supposition and opinion are not "facts" that will defeat a summary judgment motion. *Grimwood*, 110 Wn.2d at 359. Levno also opposed the summary judgment with her supposition and unreasonable inferences that Addus referred to her termination in: (1) the September 2, 2016 letter to L.J.D. and L.J.D.'s husband and (2) the September 8, 2016 warning letter to her. *Levno*, No. 36735-5-III (June 2, 2020) at 8-9. But Levno has supplied no evidence corroborating her opinion that Addus terminated her employment. CP at 84 (4-25), 85 (1-25), 86 (1-9). Feigned issues will not preclude summary judgment. 4 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE, CR 56 § 18, at 414 (6th ed. 2012). And as this Court has stated, ultimate facts, conclusory statements of facts, and argumentative assertions that unresolved factual issues remain are insufficient and will not suffice to defeat a summary judgment motion. *Grimwood*, 110 Wn.2d at 359-60; *Seven Gables Corp.*, 106 Wn.2d at 13.

Contrary to what Levno argues, (Petition for Review at 13-14), the Court of Appeals did not weigh credibility in deciding the summary judgment motion. Instead, consistently with this Court's pronouncements about the purpose of the summary judgment rule, the Court of Appeals—like the trial court before it—pierced Levno's allegations and "separate[d] the wheat from the chaff." *See Almy*, 63 Wn.2d at 329; *see also Reed*, 65 Wn.2d at 707; *Lundgren*, 64 Wn.2d at 677. While Addus furnished the courts with the factual evidence upon which it relied ("the wheat"), Levno furnished the courts with her subjective beliefs, opinions, supposition, unreasonable inferences, ultimate facts, conclusory statements of fact, and argumentative assertions upon which she relied ("the chaff").

Thus, the Court of Appeals correctly determined that Levno failed to set forth specific facts showing a genuine issue of material fact for trial. *Levno*, No. 36735-5-III (June 2, 2020) at 7-9. As such, Levno failed to meet her burden in opposing the summary judgment motion. *See Young*, 112 Wn.2d at 225 ("If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion.") (citation omitted); *Reed*, 65 Wn.2d at 707 (if a nonmoving party does not set forth specific facts showing that there is a genuine issue for trial, then summary judgment, if appropriate, shall be entered against it); *Lundgren*, 64 Wn.2d at 677 ("if no genuine issue of material fact is presented when the motion for summary judgment is heard, the issue may be summarily resolved"); *see also* CR 56(e).

Furthermore, to the extent that Levno relies on chapter 74.34 RCW and chapter 49.60 RCW (the Washington Law Against Discrimination) to somehow argue that the Court of Appeals should have applied a liberal standard in deciding the summary judgment motion, (Petition for Review at 11, 12-13), this argument must fail. The liberal construction of a statute does not mean that a court may read into a statute—or a court rule,[4] in this instance—language that is not there. *See Klossner v. San Juan County*, 93 Wn.2d 42, 47, 605 P.2d 330 (1980) ("this court's several decisions that the wrongful death statute is to be liberally construed do not mean we may read into the statute matters which are not there"); *King County v.*

[4] "[C]ourt rules are subject to the same principles of construction as are statutes." *In re Disciplinary Proceeding Against McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983).

*City of Seattle*, 70 Wn.2d 968, 991, 425 P.2d 887 (1967); *Lowry v. Dep't of Labor & Indus.*, 21 Wn.2d 538, 542, 151 P.2d 822 (1944) ("We are not unmindful of the rule that the workmen's compensation act shall be liberally construed in favor of its beneficiaries, but, where the language of the act is not ambiguous and exhibits a clear and reasonable meaning, there is no room for construction.").

In fact, this Court has cautioned, "[T]he WLAD's liberal construction clause is not without limitation." *Pham v. Seattle City Light*, 159 Wn.2d 527, 537, 151 P.3d 976 (2007); *see also Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 572, 575, 919 P.2d 589 (1996) (concluding that the WLAD's reference to any other remedy authorized by the federal civil rights act did not extend to punitive damages); *Allison v. Hous. Auth.*, 118 Wn.2d 79, 85-86, 95, 821 P.2d 34 (1991) (acknowledging the WLAD's requirement of liberal construction but adopting an intermediate "substantial factor" standard of proof, rather than the more plaintiff-friendly "to any degree" standard). Moreover, if this Court were to adopt Levno's arguments, it would amount to a sweeping change to CR 56, one which this Court should decline to impose absent compliance with the rulemaking procedure in GR 9.

Here, Levno completely failed to prove an essential element of her case—namely, that Addus terminated her—and any other disputed facts raised by Levno are therefore immaterial. *See Young*, 112 Wn.2d at 225 ("In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.") (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)); *see also Howell v. Spokane & Inland*

*Empire Blood Bank*, 117 Wn.2d 619, 818 P.2d 1056 (1991) ("A party may not preclude summary judgment by merely raising argument and inference on collateral matters."). Therefore, absent a presentation of factual evidence on a material issue by Levno, the Court of Appeals—like the trial court before it—would have erred in allowing this case to go to trial. *See, e.g., Wash. Osteopathic Med. Assn. v. King County Med. Serv. Corp.*, 78 Wn.2d 577, 582, 478 P.2d 228 (1970).

## IV. CONCLUSION

For the foregoing reasons, the Court of Appeals correctly affirmed summary judgment. That decision is consistent with this Court's decisions, and no basis exists for this Court to grant review. Therefore, Addus respectfully requests that this Court deny Levno's Petition for Review.

Respectfully submitted this 31st day of July, 2020.

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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the Response to Petition for Review was sent via e-mail, addressed to:

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Nani Vo

**JACKSON LEWIS P.C.**

**July 31, 2020 - 1:18 PM**

**Transmittal Information**

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