No. 98963-0

Court of Appeals No. 52665-4

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

TRUEBLUE, INC., a Washington corporation; and its wholly owned subsidiary, LABOR READY NORTHWEST, INC.,

Respondents,

v.

KELLY MARCHEL a/k/a KELLY LANGLOIS; and ANYTIME LABOR-SEATTLE, d/b/a LABORMAX,

Petitioners.

KELLY MARCHELL a/k/a KELLY LANGLOIS,

Counterclaim Plaintiff,

v.

TRUEBLUE, INC., a Washington corporation; and its wholly owned subsidiary, LABOR READY NORTHWEST, INC.; PAUL SHEVCHENKO, an individual; TATIANA REEVES, an individual; and MARLINDA NEWMYER, an individual,

Counterclaim Defendants.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

As relevant here, the Court of Appeals held:

> [T]he superior court erred by (1) granting Marchel partial summary judgment on her MWA claim because there are genuine issues of material fact regarding her classification, and (2) granting Marchel partial summary judgment on TrueBlue's breach of contract claim because there are genuine issues of material fact regarding whether TrueBlue breached its contract with [Marchel] by changing her compensation structure without adequate compensation.

TrueBlue, Inc. v. Marchel, Wash. Ct. App. No. 52665-4-II at 3 (Unpub., June 2, 2020). Attached as App. A. Despite these straightforward holdings that genuine issues of material fact precluded partial summary judgment, Marchel petitions this Court under several theories that she failed to raise in the trial court and that the appellate court thus never reached. Appellate courts consider only issues called to the trial court's attention. RAP 9.12.

In any event, Marchel fails to raise any proper grounds for this Court's review. The Unpublished Opinion does not conflict with any existing precedent – rather, it simply follows controlling precedent. RAP 13.4(b)(1) & (2). And the existence of genuine issues of material fact is not an issue of substantial public interest that this Court should decide. RAP 13.4(b)(4).

Supreme Court review is unwarranted at this juncture.

STATEMENT OF THE CASE

A. The Unpublished Opinion accurately states the facts, but Marchel does not.

The Unpublished Opinion accurately states the facts of this case. App. A at 4-13. Marchel does not accurately state the facts. TrueBlue discusses specific relevant facts, with record cites, *infra*.

B. The trial court granted partial summary judgment to Marchel while refusing to reach TrueBlue's motion for partial summary judgment.

TrueBlue sought partial summary judgment that Marchel breached her noncompete agreement as a matter of law and that a contractual one-year limitations provision barred her age discrimination and MWA claims. PFR App. 32. Specifically on her noncompete agreement, (a) courts routinely enforce reasonable noncompete agreements as a matter of law; (b) Marchel signed the noncompete at the outset of her employment, so adequate consideration existed as a matter of law; (c) a one-year, 25-mile-radius noncompete is reasonable as a matter of law; and (d) no harm came or could come to the public from this limited, reasonable noncompete agreement, as a matter of law. *Id*. at 38-44.

TrueBlue also argued that the one-year contractual limitation period in the employment contract that Marchel signed barred her age discrimination and wage claims because (1) contracting parties

may agree to shorten the limitations period as a matter of law; (2) Washington courts have found one-year contractual limitations periods reasonable as a matter of law; and (3) no statute or public policy forbids such a limitations period as a matter of law. *Id*. at 45-49. Marchel responded (*id*. at 91-100); and TrueBlue replied (a) that Marchel's responses were largely irrelevant; (b) that the employment contract she signed expressly permitted TrueBlue to modify the terms and conditions of her compensation; (c) that TrueBlue paid Marchel as much or more after it did so than before; (d) that Marchel admitted she breached the noncompete; (e) that Marchel ignored controlling precedent; and (f) that her other arguments are irrelevant. *Id*. at 112-16.

Marchel cross-moved for partial summary judgment (a) that the noncompete is unenforceable; (b) that TrueBlue misclassified her; and (c) that she is entitled to damages. *Id.* at 135-49.[1] TrueBlue responded (a) that noncompete agreements signed at the outset of employment are supported by adequate consideration as a matter of black-letter Washington law; (b) that Marchel's employment agreement expressly permitted TrueBlue to alter the terms and

[1] It is crucial to note here that Marchel did *not* argue on summary judgment that her employment agreement was "illusory." *Id*.

conditions of her compensation (as is commonly necessary for virtually every employer and employee during an employment relationship lasting (as here) for seven years); (c) that Marchel was an exempt employee; and (d) that Marchel was paid appropriately. *Id*. at 159-76.

Marchel raised her "illusory contract" argument for the first time in a paragraph in her reply (CP 1781-82) which is too late. *See, e.g.*, ***Molloy v. City of Bellevue***, 71 Wn. App. 382, 385, 859 P.2d 613 (1993) (moving party on summary judgment must raise all issues in motion); ***White v. Kent Med. Ctr., Inc.***, 61 Wn. App. 163, 168-69, 810 P.2d 4 (1991) (allowing new issues in a reply improperly and unfairly deprives nonmoving party of opportunity to respond).

The trial court ruled that TrueBlue misclassified Marchel as an overtime-exempt employee as matter of law, so she could be entitled damages, if proven. App. A at 7. It also ruled that TrueBlue breached her employment agreement by altering the terms and conditions of her compensation, so TrueBlue could not enforce it. *Id*. The trial court thus dismissed TrueBlue's noncompete-breach claim. *Id.* at 7-8.[2]

[2] The case proceeded, with the trial court ultimately sanctioning TrueBlue for discovery violations by entering a default judgment and awarding Marchel actual damages without a trial. App. A at 8-13. The appellate court affirmed, and neither Marchel nor TrueBlue seeks review of that issue.

C. The Unpublished Opinion reversed and remanded based on genuine issues of material fact that precluded partial summary judgment for Marchel.

The Court of Appeals held that genuine issues of material fact precluded summary judgment, both on Marchel's misclassification claim and on TrueBlue's noncompete claim. *Id*. at 14-19. On misclassification, the appellate court applied the controlling law reflected in RCW Ch. 49.46; WAC 296-128-520; and ***Fiore v. PPG Indus.***, 169 Wn. App. 325, 279 P.3d 972, *rev. denied*, 175 Wn.2d 1027 (2012) (citing, *inter alia*, ***Drinkwitz v. Alliant Techsystems, Inc.***, 140 Wn.2d 291, 301, 996 P.2d 582 (2000); ***Mitchell v. PEMCO Mut. Ins. Co.***, 134 Wn. App. 723, 731-32, 142 P.3d 623 (2006); and relevant statutes, WACs, and analogous federal precedents).

This law requires that, in order to establish Marchel's exempt status, TrueBlue must prove the following:

> (1) Marchel was compensated on a salary basis of not less than $250 per week;
>
> (2) her "'primary duty consist[ed] of the performance of office or nonmanual work directly related to management policies or general business operations of [her] employer or [her] employer's customers;'" and
>
> (3) her work "'include[d] work requiring the exercise of discretion and independent judgment.'"

App. A at 15 (quoting ***Fiore***, 169 Wn. App. at 334 (quoting WAC 296-128-520(4)(b))). The appellate court correctly held that the first element "is undisputed and is met." *Id*.

On the second element, "the question of an employee's primary job duty is 'determined based upon all of the facts in a particular case.'" *Id.* (quoting ***Fiore***, 169 Wn. App. at 335). While 50% is a "good rule of thumb," and Marchel claimed that TrueBlue required her to spend 75% of her day "in the marketplace selling," TrueBlue presented substantial evidence that "as branch manager," Marchel "was primarily responsible for developing local policies and growth strategies while running the daily operations of the branch and that she had broad discretion in her job to provide sales support for TrueBlue." *Id*. at 15-16. Indeed, her direct supervisor at TrueBlue, Paul Shevchenko, provided a declaration detailing Marchel's actual significant duties, sharply contradicting Marchel's claims. *Id*. at 4-5; *see also* App. B (Decl. of Paul Shevchenko, CP 1569-75). The appellate court thus correctly held that genuine issues of material fact precluded summary judgment on this element. App. A at 16.

The same was true on the third element, exercise of discretion and sound judgment. *Id*. at 16. This element inquires whether an employment requires an employee to compare and evaluate possible

courses of conduct and to act or decide based on those considerations. *Id*. (quoting ***Fiore***, 169 Wn. App. at 342 (quoting WASH. DEP'T OF LABOR & INDUS., ADMIN. POLICY ES.A.9.4(10), at 5 (issued Jun. 24, 2005)). It implies authority or power to make an independent choice on significant matters, free from immediate direction or supervision. *Id*. Significant matters are those which policymakers may form, or on which decisionmakers may substantially commit an employer, financially or otherwise. *Id*.; ADMIN. POLICY ES.A.9.4(11), at 8.

Here too, "TrueBlue presented evidence through Shevchenko that Marchel's work required her to exercise discretion as a branch manager." *Id*.

> Marchel was in charge of the day-to-day operations, including planning long-term business and marketing strategies, serving as TrueBlue's representative to both clients and employees, researching new business contacts, and maintaining existing client relationships.

Id. "Marchel had the discretion to run the branch as she thought best and she was responsible for basic recruiting, training, disciplining, and managing branch staff." *Id*.; *see also*, App. B.

In sum, the court "must view the evidence, including reasonable inferences, in favor of TrueBlue," so genuine issues of material fact on the second and third elements precluded partial summary judgment on Marchel's MWA claim. *Id*. at 16-17.

The same was true on TrueBlue's noncompete claim. *Id*. at 17-19. The trial court itself found genuine issues of material fact regarding Marchel's "unconscionability" claims. *Id*. at 19. And the appellate court followed this Court's ***Labriola v. Pollard Group, Inc.***, 152 Wn.2d 828, 100 P.3d 791 (2004). *Id*. at 17-19.

Crucially here, "the employment agreement that Marchel signed expressly stated that TrueBlue could change her compensation, including her bonus structure": that agreement "may be modified by Labor Ready from time to time"; and "[i]f [e]mployee is eligible for a bonus under any such plan, [e]mployee understands and agrees that Labor Ready has the right to change or discontinue any bonus plan at any time." *Id*. at 18 (quoting CP 697). Since Marchel plainly agreed that TrueBlue could alter her compensation package (just as *every* employer must be able alter an employee's compensation over the course of a seven-year employment relationship, whether lowering it for unsatisfactory performance, or increasing it for exemplary performance) there is "at least a question of material fact as to whether the consideration for TrueBlue's exercise of its contractual right to change Marchel's compensation structure was her continued receipt of compensation under the

employment agreement." *Id*. at 18. This leaves genuine issues of material fact on Marchel's breach of her noncompete agreement. *Id*.

Based on its premature determination of Marchel's MWA claim, the trial court erroneously failed to reach TrueBlue's statute of limitation defense, and the reasonableness of the noncompete, so remand is necessary on those issues. *Id*. at 19. And again, the trial court found issues of fact on Marchel's unconscionability defense. *Id*. Summary judgment was improper.

REASONS THIS COURT SHOULD DENY REVIEW

A. The Unpublished Opinion is correct on the law, and Marchel did not properly raise her leading argument in the trial court.

As explained *supra*, the Unpublished Opinion correctly followed well established precedents like ***Fiore*** and ***Labriola***. Marchel does not argue that these precedents are incorrect. On remand, she will have an opportunity to establish her claims, and TrueBlue will have the same opportunity. No error occurred.

Moreover, Marchel failed to properly raise in the trial court her leading argument here: that the employment contract (or the noncompete agreement – she is unclear) is "illusory" because her employment agreement expressly reserved the commonly-held right to change her compensation package over the course of her employment. PFR 10-12. Since Marchel took the trouble of attaching her pleadings to her PFR, it is a simple matter to review them. *See* PFR App. 71-103, 120-49, 178-92. She raised the argument for the first time in a paragraph in her reply (CP 1781-82) which is too late. *See, e.g.*, ***Molloy***, 71 Wn. App. at 385 (moving party on summary judgment must raise all issues in motion); ***White***, 61 Wn. App. at 168-69 (allowing new issues in a reply improperly and unfairly deprives nonmoving party of opportunity to respond).

Since Marchel did not properly call this theory to the trial court's attention on summary judgment, this Court should deny review, permitting the trial court to consider the argument in the first instance. An issue not properly raised in the trial court on summary judgment is not review worthy. *See also* RAP 9.12 (appellate courts will not address issues not properly called to the trial court's attention on summary judgment).

B. The Unpublished Opinion does not conflict with any other appellate decisions, and Marchel fails to address controlling authority directly contrary to her arguments.

Marchel claims that the Unpublished Opinion "conflicts with" a number of cases on "illusory contracts." PFR 12. As noted, she did not raise the issue on summary judgment, instead raising it for the first time in her reply brief (CP 1781-82) which is too late. *See, e.g.*, ***Molloy***, 71 Wn. App. at 385 (moving party on summary judgment must raise all issues in motion); ***White***, 61 Wn. App. at 168-69 (allowing new issues in a reply improperly and unfairly deprives nonmoving party of opportunity to respond).

As a result, the appellate court correctly did not reach the issue. *See* App. A. It is impossible for an unpublished opinion that does not address an "illusory contracts" argument to *conflict with*

opinions that do address that issue. There is no need or basis for this Court to address it in the first instance.

Marchel claims that the Unpublished Opinion conflicts with ***Labriola*** and ***Rosellini v. Banchero***, 83 Wn.2d 268, 273, 517 P.2d 955 (1974). PFR 12-14. But the appellate court *followed* ***Labriola***, and no conflict exists with ***Rosellini***, where both involved a subsequent noncompete. App. A at 17-19. No conflicts exist.

As Marchel notes, ***Labriola*** holds only that where (unlike here) the parties enter a noncompete *after the employment began*, independent "consideration involves *new* promises or obligations not previously required of the parties." PFR 13 (quoting ***Labriola***, 152 Wn.2d at 834) (emphases added). Here, the agreements Marchel signed at the outset of her employment expressly permitted TrueBlue to change her compensation, including her bonus structure, where it "may be modified by Labor Ready from time to time" and, if Marchel was "eligible for a bonus under any such plan, [she] understands and agrees that Labor Ready has the right to change or discontinue any bonus plan at any time." App. A at 18 (quoting CP 697). TrueBlue did not require any new or different work from Marchel when it exercised its contractual right to restructure her compensation package. She simply continued her employment.

And in any event, a genuine issue of material fact exists on Marchel's claim that she would make less unless she worked harder. Marchel always made as much or more than she had before. *See, e.g.*, CP 1500-01, 1507-43 (demonstrating that Marchel started out making under $46,000 a year, and ended up making over $70,000 a year before she was terminated for cause). TrueBlue could not "breach" its agreements simply by relying on their plain terms.

The bottom line on this claim is that Marchel is misusing cases like ***Labriola*** and ***Rosellini*** – both of which involved new agreements entered after the employment began, and therefore required new consideration – to argue that where (as here) the noncompete was entered at the outset of the employment, new consideration is required when the employer simply relies on its contractual right to restructure compensation. No case so holds. Thus, no conflicts exist.

Indeed, a case that Marchel cited in the Court of Appeals – but failed to discuss – is directly contrary to her argument:

> "An employer **may unilaterally amend or revoke previously established policies and procedures** as long as the employee receives **reasonable notice** of the change." A change in the employer's policy is effective upon "reasonable notice" to affected employees. "Actual notice is reasonable notice." [Emphases added.]

Duncan v. Alaska USA Fed. Credit Union, Inc., 148 Wn. App. 52, 70, 199 P.3d 991 (2008) (quoting ***Cole v. Red Lion***, 92 Wn. App. 743, 751, 969 P.2d 481 (1998) (citing ***Gaglidari v. Denny's Rests., Inc.***, 117 Wn.2d 426, 434, 815 P.2d 1362 (1991); ***Govier v. N. Sound Bank***, 91 Wn. App. 493, 502, 957 P.2d 811 (1998))). Marchel has never claimed that – as the ***Branch Manager*** – she did not receive reasonable notice of her annual compensation structures.

Marchel raises a new argument for the first time in this Court, asking it to misapply a new statute not applicable here, and to follow some trial court cases from other jurisdictions that do not actually say what she claims. PFR 14-15. Marchel has long-since waived these incorrect arguments. And her claim that an employer may not reduce an employee's compensation – which *did not happen here* – is absurd. There is no public policy in Washington or anywhere else barring an employer from lowering employee compensation for, *e.g.*, poor or inadequate performance. No precedent so holds, and where, as here, none of this was developed in the trial court, this matter is a uniquely inadequate vehicle for examining new public policy.

This Court should deny review to allow the parties to litigate their issues in the trial court in the first instance – where factual determinations are properly made.

C. The Unpublished Opinion does not involve any issue of substantial public interest that this Court should determine in the first instance – nor do her factual arguments do so.

Marchel's final argument – which she first raised on reconsideration *in the Court of Appeals* – just misstates the facts. *Compare* PFR 16-20 *with* App. C at 7-9 (TrueBlue's Answer to Marchel's Motion for Reconsideration in the Court of Appeals). As this Court can plainly see from the attached Shevchenko Declaration, he was uniquely well qualified to contradict Marchel's false assertions. App. B at CP 1569 (as TrueBlue's Market Manager, Shevchenko oversees numerous branches, including Marchel's). He gives a great deal of detail about her actual duties. *Id*. at 1570-73.

In any event, her factual arguments just raise more genuine issues of material fact for remand. She seems to argue that Shevchenko had to do more than swear to the facts, requiring some sort of documentation. But a sworn declaration *is evidence*. *See, e.g.*, CR 56. Neither the trial nor appellate court struck this declaration, nor does Marchel ask this Court to do so. Nor does any case or rule require more.

None of this raises a significant issue that *this Court* should determine. It is for the factfinder. This Court should deny review.

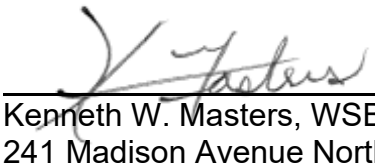
CONCLUSION

For the first time in her conclusion, Marchel argues that the Unpublished Opinion somehow conflicts with the trial court's sanctions order. PFR 20. In denying her motion for reconsideration, the appellate court rejected that false contention. *See, e.g.*, App. C at 4-5. It expressly affirmed the sanctions. App. A at 26. And the trial court improperly granted summary judgment *before* it imposed any sanctions. As the appellate court held, "should Marchel ultimately prevail on the merits of her MWA claim and her breach of contract defense, the determination of those damages as part of the CR 37 sanctions would still apply." *Id.* at 28. No conflict exists.

This Court should deny discretionary review and permit the trial court to resolve the parties' factual disputes.

RESPECTFULLY SUBMITTED this 28th day of September 2020.

MASTERS LAW GROUP, P.L.L.C.



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APPENDIX
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APPENDIX A

Filed
Washington State
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June 2, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TRUEBLUE, INC., a Washington corporation; and its wholly owned subsidiary, LABOR READY NORTHWEST, INC., Plaintiffs/Appellants, v. KELLY MARCHEL a/k/a KELLY LANGLOIS; and ANYTIME LABOR-SEATTLE, LLC d/b/a/ LABORMAX, Defendants/Respondents.	No. 52665-4-II UNPUBLISHED OPINION
KELLY MARCHEL a/k/a KELLY LANGLOIS, Counterclaim Plaintiff v. TRUEBLUE, INC., a Washington corporation; and its wholly owned subsidiary, LABOR READY NORTHWEST, INC.; PAUL SHEVCHENKO, an individual; TATIANA REEVES, an individual; and MARLINDA NEWMYER, an individual, Counterclaim Defendants.	

SUTTON, A.C.J. — This appeal arises from an employment dispute between TrueBlue, Inc., and its subsidiary, Labor Ready Northwest, Inc. (collectively TrueBlue) and Kelly Marchel, a former employee of TrueBlue, and her current employer, Anytime Labor, Inc. d/b/a/ LaborMax (LaborMax). After being terminated by TrueBlue, Marchel worked for TrueBlue's competitor, LaborMax, and allegedly began soliciting TrueBlue's clients and using its trade secrets.

TrueBlue sued Marchel and LaborMax, alleging that Marchel breached her contract by violating her non-compete agreement with TrueBlue, interfered with contractual relations with its customers, and violated the Uniform Trade Secrets Act.[1] Marchel counterclaimed, alleging that TrueBlue misclassified her as exempt from overtime under the Washington Minimum Wage Age (MWA)[2] and terminated her based on age in violation of the Law Against Discrimination (WLAD)[3]. The superior court granted Marchel partial summary judgment on her MWA claim, ruling that TrueBlue had misclassified her as an exempt employee. The court also granted Marchel partial summary judgment on TrueBlue's breach of contract claim, ruling that TrueBlue could not enforce its non-compete agreement because it had breached its contract with Marchel by adjusting her compensation structure without adequate consideration.

The case proceeded regarding the remaining claims. TrueBlue failed to timely or properly respond to multiple discovery requests and in a series of hearings, the superior court found that TrueBlue had repeatedly violated the court's discovery orders and it imposed CR 37 sanctions. The court ultimately dismissed TrueBlue's remaining claims, awarded damages, and entered judgment against TrueBlue in favor of Marchel and LaborMax as a CR 37 sanction.

TrueBlue argues that the superior court erred by (1) granting Marchel partial summary judgment on her MWA claim; (2) granting Marchel partial summary judgment on TrueBlue's breach of contract claim and ruling that TrueBlue could not enforce its non-compete agreement

[1] Ch. 19.108 RCW.

[2] Ch. 49.46 RCW.

[3] Ch. 49.60 RCW.

because it had breached its contract with Marchel by adjusting her compensation structure without adequate consideration; (3) ordering CR 37 sanctions; and (4) violating TrueBlue's constitutional right to a jury trial on the damages awarded to Marchel and LaborMax in its sanction order. Marchel asks for an award of appellate attorney fees and costs.

We hold that the superior court erred by (1) granting Marchel partial summary judgment on her MWA claim because there are genuine issues of material fact regarding her classification, and (2) granting Marchel partial summary judgment on TrueBlue's breach of contract claim because there are genuine issues of material fact regarding whether TrueBlue breached its contract with Marcel by changing her compensation structure without adequate compensation. We also hold that the superior court did not err by imposing CR 37 sanctions and entering judgment against TrueBlue, and the court did not violate TrueBlue's right to a jury trial by imposing liability under CR 37 and awarding damages to Marchel and LaborMax in its sanction order. We deny Marchel's request for an award of appellate attorney fees and costs.

Even though we are remanding for further resolution of the merits, should Marchel ultimately prevail on the merits of her MWA claim and her breach of contract defense, the determination of those damages as part of the CR 37 sanctions would still apply. Additionally, all of the other aspects of the CR 37 sanctions will also apply.

We reverse the partial summary judgment orders and remand for further proceedings, including a determination of whether the non-compete agreement was subject to a one year limitations period and whether TrueBlue's non-compete agreement was valid and enforceable. We affirm the CR 37 sanctions order and the damages awarded to Marchel and LaborMax as a

sanction. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTS

I. BACKGROUND REGARDING TRUEBLUE AND LABOR READY

TrueBlue through Labor Ready provides temporary skilled workers to a variety of business and industries. TrueBlue operates within geographic regions subdivided into markets, and each market has several branches. The market and district managers create sales plans for specific stores and locations within a region; they lead service and sales for that region; and they plan, organize, direct, and monitor strategies to grow market share and improve TrueBlue's position. TrueBlue provides detailed policies, procedures, corporate guidance, and specific sales training for field staff including branch managers.

II. MARCHEL'S POSITION AS BRANCH MANAGER

TrueBlue hired Marchel to work as a branch manager for a Vancouver store from 2007 until her termination in November 2015. Marchel claims that she was required to manage sales for the business and to spend at least "75% of her workday in the marketplace selling." Clerk's Papers (CP) at 1354. That is, she spent at least three quarters of her time on cold calls, emails, solicitations, and site visits. She also spent time opening the store, coordinating with three customer service representatives for the placement and payment of temporary workers, and monitoring the branch's budget. Marchel claimed that she regularly worked between 50 and 70 hours per week and was expected to be on call and available to communicate with clients 24 hours per day.

According to her former supervisor, Paul Shevchenko, Marchel's primary duty was to provide sales support. He claimed that Marchel was responsible for day-to-day management and administration. This included planning long-term business and marketing strategies, serving as the company representative to clients and employees, maintaining existing client relationships, researching new business contacts, and deciding on strategies for growth. Marchel was also responsible for recruiting, training, disciplining, and general managing of other branch staff. Based on her position, TrueBlue classified Marchel as salaried and exempt from overtime pay under the MWA.

II. EMPLOYMENT AGREEMENT AND NON-COMPETE AGREEMENT

As part of her employment, TrueBlue required Marchel to sign an employment agreement. The employment agreement expressly stated in relevant part that TrueBlue (through Labor Ready) may change her compensation including her bonus structure. It stated in part, "This . . . may be modified by Labor Ready from time to time. . . . If [e]mployee is eligible for a bonus under any such plan, [e]mployee understands and agrees that Labor Ready has the right to change or discontinue any bonus plan at any time." CP at 697. Marchel's compensation was comprised of a salary plus a bonus during her employment.

TrueBlue also required Marchel to sign an "Agreement Regarding Non-Competition, Non-Interference, Non-Solicitation, and Confidentiality." CP at 23. The non-compete agreement had post-employment restrictions and provided that the consideration for these restrictions was "the compensation and benefits described in [her] [e]mployment [a]greement." CP at 23. The agreement included the following restrictions: Marchel could not work for a competitor within 25 miles of any TrueBlue office where she was employed, could not obtain confidential information

after leaving TrueBlue, and could not have supervisory responsibility for 12 months after leaving TrueBlue.

Between 2014 and 2015, TrueBlue altered Marchel's compensation package under the employment agreement. Marchel objected to the new bonus structure but continued to work for TrueBlue and to receive her base salary and bonus.

In November 2015, TrueBlue terminated Marchel. Marchel subsequently accepted employment with TrueBlue's competitor, LaborMax, in Tacoma. Marchel later transferred to the Vancouver branch of LaborMax.

III. COMPLAINT AND COUNTERCLAIM

TrueBlue filed a complaint and sought a temporary restraining order against Marchel and LaborMax. TrueBlue alleged that (1) Marchel was working for LaborMax, a competitor, in violation of the non-compete agreement because LaborMax was located within 25 miles of TrueBlue's Vancouver store, (2) Marchel and LaborMax were using TrueBlue's trade secrets information in violation of the Uniform Trade Secrets Act, and (3) LaborMax had wrongfully interfered with its contract by knowingly employing Marchel in violation of the non-compete agreement.

Marchel counterclaimed. She alleged that TrueBlue had (1) violated the MWA by misclassifying her as exempt from overtime, thereby excusing her from having to abide by the non-compete agreement; (2) changed her compensation structure without adequate consideration and in doing so, breached its employment agreement with her; and (3) violated the WLAD by discharging her based on her age and replacing her with a younger, less experienced employee. TrueBlue denied Marchel's counterclaims.

IV. PRELIMINARY INJUNCTION

On September 9, 2016, the superior court granted TrueBlue a preliminary injunction against Marchel and LaborMax, enforcing the provisions of the non-compete agreement. The injunction ordered Marchel and LaborMax to return to TrueBlue any confidential and proprietary information and other property they had allegedly taken. The injunction enjoined Marchel from working in any capacity for any "[c]onflicting [o]rganization and/or any [c]lient within any [b]usiness [a]rea," employing any colleague or current employee of TrueBlue, initiating contact with any potential employment candidates, and soliciting or working with any current TrueBlue client. CP at 637.

V. PARTIAL SUMMARY JUDGMENT MOTIONS AND ORDERS

Prior to the preliminary injunction being lifted, the parties cross moved for partial summary judgment in 2017. TrueBlue moved for partial summary judgment on its breach of the non-compete agreement claim and on its assertion that Marchel's counterclaims were limited to a one year statute of limitations. Marchel moved for partial summary judgment on her MWA claim and on TrueBlue's breach of the non-compete agreement claim.

In October, the superior court granted Marchel partial summary judgment. The court concluded that, as a matter of law, TrueBlue misclassified Marchel as an overtime exempt employee under the MWA and that Marchel was entitled to damages for unpaid wages if proved. The court also ruled that TrueBlue breached its agreement with Marchel by changing her compensation structure without adequate compensation, and thus, TrueBlue could not enforce its non-compete agreement. Therefore, the court dismissed TrueBlue's claim for breach of the non-

compete agreement. Finally, the court vacated the preliminary injunction, ruling that it had been wrongfully entered.

As to TrueBlue's other arguments in its motion, the superior court ruled that there were genuine issues of material fact as to whether Marchel's counterclaims were barred by the one year statute of limitations agreed to by the parties and whether the non-compete agreement was procedurally unconscionable or just generally unconscionable. After the court's ruling, the following issues remained for trial: Marchel's WLAD claim, Marchel's overtime damages, TrueBlue's trade secrets claim, and Marchel's and LaborMax's damages from the wrongfully entered injunction.

VI. MARCHEL'S DISCOVERY, TRUEBLUE'S RESPONSES, AND THE COURT'S ORDERS

It is undisputed that throughout the case, TrueBlue failed to timely or properly respond to Marche's discovery requests. On appeal, TrueBlue admits that its responses to Marchel's discovery requests were not timely as required under CR 26 and as ordered repeatedly by the superior court.

Between January 2017, when Marchel served her first discovery request, and May 2018, when the court imposed the harshest CR 37 sanctions, the superior court held multiple hearings related to TrueBlue's failure to fully participate in discovery, including hearings addressing CR 37 sanctions against TrueBlue. Because the material facts are not in dispute, we briefly discuss these hearings and orders.

In January 2017, Marchel sent her first discovery request to TrueBlue and sent her second discovery request to TrueBlue in January 2018. TrueBlue failed to respond fully to either request and did not produce witnesses for deposition.

In May 2017, Marchel filed her first motion to compel full production. The superior court found that TrueBlue failed to fully and timely respond to the discovery, granted Marchel's motion to compel discovery in part, and ordered TrueBlue to supplement its discovery responses. The court also awarded Marchel her attorney fees and costs under the 2007 employment agreement related to this motion. Despite this order and TrueBlue's CR 26(g) certification that it had complied, TrueBlue continued to withhold responsive, non-privileged documents.

In January 2018, Marchel requested production of all of TrueBlue's employment policies, which the court ordered to be produced by March 26. On April 20, Marchel deposed TrueBlue's CR 30(b)(6) designated witness, who testified that TrueBlue had employee handbooks. At this deposition, Marchel discovered that TrueBlue was withholding documents responsive to Marchel's first discovery requests in January 2017, which the superior court had ordered produced four months earlier.

On March 2, Marchel filed her second motion to compel. On March 19, the superior court granted Marchel's motion to compel, and ordered TrueBlue to fully respond to her discovery requests and produce responsive documents, without objection, no later than March 26, which TrueBlue failed to do.[4] After this hearing, a dispute arose about the court ordered production.

Marchel filed a motion to show cause and requested additional CR 37 sanctions. TrueBlue responded that it did not willfully violate the court's March 19 order and that CR 37 sanctions were not warranted.

[4] TrueBlue's appellate counsel concedes that their discovery responses were untimely and admits that CR 37 sanctions are appropriate.

At the March 2018 hearing, the superior court ruled that over the past one and a half years of discovery, TrueBlue acted willfully and intentionally, and its violations had substantially prejudiced Marchel's ability to prepare for trial. The court continued the trial until August 6. The court ordered further production by TrueBlue, ordered four witnesses of TrueBlue's to be deposed, considered a monetary penalty to address any benefit TrueBlue gained by the trial continuance, and granted Marchel's request for an award of attorney fees and costs related to the motions to compel. The court reserved ruling on whether harsher CR 37 sanctions were appropriate, ruling that it would not impose the harshest sanctions based on the record before it at that time. The court also ordered Marchel to present her attorney fees and costs on her wage claim and her breach of contract claim. The court also invited the parties to file supplemental briefing and set another hearing on whether harsher sanctions were warranted under CR 37(b)(2).

At the next hearing in April 2018, the superior court granted Marchel's motion for additional CR 37(b)(2) sanctions, orally ruling that TrueBlue's method of production for 750 terabytes of court ordered production was unreasonable. The court also ruled that although TrueBlue had been found to be willfully noncompliant at the March 19 hearing, that it had made significant efforts to comply with the production since that time, but that its efforts were still not sufficient. Also in April, after the deposition of TrueBlue's CR 30(b)(6) witness, TrueBlue first produced three employee policies, including a 2010 employee handbook requested by Marchel in her first January 2017 discovery request.

VII. HEARING AND ORDER GRANTING HARSHER SANCTIONS UNDER CR 37

At the next hearing in May 2018, the superior court considered whether harsher sanctions under CR 37(b)(2) were appropriate. The court found that TrueBlue failed to comply with its prior

discovery orders and that TrueBlue offered no reasonable justification or excuse for its failure to respond to Marchel's first and second discovery requests. The court found that "the discovery sought by [Marchel] was tied directly to [TrueBlue's] trade secrets misappropriation claim; [Marchel's] burden of proof on her age discrimination counterclaim; [TrueBlue's] affirmative defenses; and [Marchel's] damages." CP at 2815. The court further found that "a pattern of intentional discovery abuse has gone on throughout this litigation that both pre-dates and post-dates the Rocke Law Group's involvement as [TrueBlue's] counsel. [TrueBlue] engaged in willful and deliberate obstruction of the discovery process, and this has prejudiced [Marchel's] ability to prepare for trial." CP at 2815.

The superior court concluded that TrueBlue's discovery violations were willful and continued to be willful since the court's initial discovery orders were entered. The court further concluded that the discovery violations caused Marchel substantial prejudice in conducting discovery and in preparing for trial, despite the continuance granted earlier which reset trial from June until August 2018. The superior court awarded reasonable attorney fees and costs to Marchel in the amount of $93,638.50 in connection with its orders compelling discovery dated September 27, 2017, March 19, 2018, and April 11, 2018.

The superior court concluded that a fair trial could not be held as scheduled on August 6, 2018, because of TrueBlue's violations and because Marchel was deprived of evidence and personnel policies that were material or central to the remaining issues to be tried related to her defense and claims. The court considered all discovery sanctions authorized by CR 26 and CR 37(b)(2) as well as those argued by the parties, considered that lesser sanctions had already been imposed, and concluded that harsher sanctions under CR 37(b)(2) were now required:

1. The sanction of monetary damages alone was considered by the [c]ourt. Such [a] sanction in the typical case serves the purposes of compensation but does not accomplish that end here where [Marchel is] already entitled to [her] attorneys' fees and costs incurred in obtaining partial summary judgment on the merits of [TrueBlue's] breach of contract claim and [Marchel's] [MWA] counterclaim. . . . Moreover, in this case monetary sanctions do not adequately punish, deter[,] or educate. Despite repeated orders to compel adherence to discovery requests, [TrueBlue] continued their tactics of obstruction.

2. The sanction of striking witnesses or limiting evidence was considered by the [c]ourt but the discovery violations would still prejudice [Marchel] in [her] ability to defend against [TrueBlue's] trade secrets misappropriation claim and to meet their burden of proving the elements of [her] causes of action, including damages.

3. The sanction of taking only certain facts as established was also considered by this [c]ourt. That would serve some of the purposes of imposing sanctions but would still prejudice [Marchel] in the same manner and/or would be the equivalent of deeming [Marchel's] allegations admitted and striking all of [TrueBlue's] allegations and defenses, if any, on liability and damages.

4. The sanction of default serves all of the purposes of imposing sanctions for the discovery violations which occurred in this case.

5. Lesser sanctions, including limiting cross examination of witnesses and/or not allowing arguments by counsel, would similarly allow [TrueBlue] to profit from their own wrongs because [Marchel] would still be prejudiced in [her] preparation and trial of this case.

6. Given that any lesser sanction would be inadequate to satisfy the goals of discovery sanctions set forth in *Fisons*[5] and *Magana*,[6] the sanction which this [c]ourt, in its discretion, imposes is:

a. [TrueBlue's] claims under the Uniform Trade Secrets Act are dismissed;

b. [TrueBlue's] affirmative defenses to all remaining counterclaims are dismissed;

c. [Marchel's] claims under the Washington Law Against Discrimination are deemed admitted;

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[5] *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993).

[6] *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 584, 220 P.3d 191 (2009).

> d. [Marchel's] claim for damages under the Minimum Wage Act, the WLAD, and for damages incurred as the direct and proximate result of a wrongfully issued injunction are deemed admitted; and
>
> e. [AnyTime Labor-Seattle, LLC's] claims for damages incurred as the direct and proximate result of a wrongfully issued injunction are deemed admitted.
>
> 7. It is further ordered that [Marchel's] attorneys' fees and costs awarded pursuant to CR 37(a) on September 27, 2017, March 19, 2018, April 11, 2018, and May 10, 2018, totaling $93,638.50 shall be paid by [TrueBlue] no later than August 15, 2018.

CP at 2819-21. This order resolved the WLAD claim in its entirety and it resolved the amount of damages for the MWA claims.

The superior court entered judgment in the amount of $902,475.29 against TrueBlue and in favor of Marchel. The judgment was not broken down specifically between damages for the MWA claim and the injunction, but it included $486,736.08 in damages (for the MWA claim and injunction), $84,538.16 in interest, $300,778.30 in attorney fees, and $30,422.75 in costs. The court also entered judgment against TrueBlue in favor of LaborMax in the amount of $216,423.00 for the injunction.

TrueBlue appeals the superior court's summary judgment orders and the court's order imposing CR 37 sanctions.

ANALYSIS

I. PARTIAL SUMMARY JUDGMENT ORDERS

A. SUMMARY JUDGMENT STANDARD

We review a superior court's decision on a summary judgment motion de novo. *Zonnebloem, LLC v. Blue Bay Holdings, LLC*, 200 Wn. App. 178, 182, 401 P.3d 468 (2017). Summary judgment is appropriate if there are no genuine issues of material fact and the moving

party is entitled to judgment as a matter of law. *Zonnebloem*, 200 Wn. App. at 182; CR 56(c). A genuine issue of material fact exists if reasonable minds could disagree on the conclusion of a factual issue. *Zonnebloem*, 200 Wn. App. at 182-83. We review all facts and reasonable inferences drawn from those facts in the light most favorable to the nonmoving party. *Zonnebloem*, 200 Wn. App. at 182.

The moving party bears the initial burden of proving that there is no genuine issue of material fact. *Zonnebloem*, 200 Wn. App. at 183. Once a moving defendant shows that there is an absence of evidence to support the plaintiff's case, the burden shifts to the plaintiff to present specific facts that rebut the defendant's contentions and show a genuine issue of material fact. *Zonnebloem*, 200 Wn. App. at 183.

B. CLASSIFICATION AS EXEMPT FROM OVERTIME

TrueBlue first argues that the superior court erred by ruling that TrueBlue misclassified Marchel as overtime exempt under the MWA. In her counterclaim, Marchel alleged that TrueBlue violated the MWA by classifying her as an exempt employee and failing to pay her overtime during her employment. We hold that because there are genuine issues of material fact on this issue, the court erred by granting Marchel partial summary judgment.

RCW 49.46.130(1) and (2)(a) provide that an employer must pay overtime for work over 40 hours per week unless the employee is exempt under RCW 49.46.010(3). RCW 49.46.010(3)(c)[7] exempts persons employed in a "bona fide . . . administrative . . . capacity."

[7] The legislature amended RCW 49.46.010 in 2020. LAWS OF 2020, ch. 212 § 3. Because these amendments are not relevant here, we cite to the current version of this statute.

To show that Marchel was employed in an exempt administrative capacity instead of an nonexempt sales position, TrueBlue had to prove that (1) Marchel was compensated on a salary basis of not less than $250 per week; (2) her "'primary duty consist[ed] of the performance of office or nonmanual work directly related to management policies or general business operations of [her] employer or [her] employer's customers;'" and (3) her work "'include[d] work requiring the exercise of discretion and independent judgment.'" *Fiore v. PPG Indus.*, 169 Wn. App. 325, 334, 279 P.3d 972 (2012) (quoting WAC 296-128-520(4)(b)).

The first element is undisputed and is met. But in order to establish that Marchel was properly classified as an exempt employee, TrueBlue must also show that Marchel's position as a branch manager met both the second and third requirements. *Fiore*, 169 Wn. App. at 335.

As to the second element, the question of an employee's primary job duty is "determined based upon all of the facts in a particular case." *Fiore*, 169 Wn. App. at 335. "[A]lthough not always dispositive, basing the determination on that work performed by the employee for 50% of his or her time is a 'good rule of thumb.'" *Fiore*, 169 Wn. App. at 335 (quoting Wash. Dep't of Labor & Indus., Admin. Policy ES.A.9.4(5), at 3 (issued Jun. 24, 2005)).

Here, Marchel claimed that TrueBlue required her to "[spend] 75% of [the] day in the marketplace selling." CP at 1354. However, the 75% of an employee's time factor is not determinative here, particularly given the specific facts of this case. Shevchenko, Marchel's former supervisor at TrueBlue, contradicted her claim. He explained in his declaration that Marchel, as branch manager, was primarily responsible for developing local policies and growth strategies while running the daily operations of the branch and that she had broad discretion in her

job to provide sales support for TrueBlue. Based on this conflicting evidence, there is a genuine issue of material fact as to the second element.

As to the third element, the exercise of discretion and sound judgment "involves 'the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered.'" *Fiore*, 169 Wn. App. at 342 (quoting Admin. Policy ES.A.9.4(10), at 5). "[I]t 'implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.'" *Fiore*, 169 Wn. App. at 342 (quoting Admin. Policy ES.A.9.4(10), at 5). "'Significant matters' are 'the kinds of decisions normally made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects[,] financially or otherwise.'" *Fiore*, 169 Wn. App. at 342 (quoting Admin. Policy ES.A.9.4(11), at 8).

Here, Marchel claims that she had little discretion in her job. But TrueBlue presented evidence through Shevchenko that Marchel's work required her to exercise discretion as a branch manager. Shevchenko claimed that Marchel was in charge of the day-to-day operations, including planning long-term business and marketing strategies, serving as TrueBlue's representative to both clients and employees, researching new business contacts, and maintaining existing client relationships. Shevchenko said that Marchel had the discretion to run the branch as she thought best and she was responsible for basic recruiting, training, disciplining, and managing branch staff. Based on this conflicting evidence, there is a genuine issue of material fact as to the third element.

We must view the evidence, including reasonable inferences, in favor of TrueBlue. *Zonnebloem*, 200 Wn. App. at 182. Because there are genuine issues of material fact on the second

and third elements, we reverse the superior court's order granting Marchel partial summary judgment on her MWA claim.

C. BREACH OF NON-COMPETE AGREEMENT

TrueBlue next argues that the superior court erred by granting Marchel partial summary judgment on TrueBlue's breach of contract claim based on its ruling that TrueBlue breached its employment agreement by changing Marchel's compensation structure without adequate consideration. We hold that the court erred.

1. Legal Principles

Washington courts will enforce non-compete agreements that are reasonable and validly formed. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 833, 100 P.3d 791 (2004). Agreements signed at the time employment begins are generally considered valid, reasonable, and with sufficient consideration. *Labriola*, 152 Wn.2d at 834.

It is well-established that a bilateral contract cannot be modified without a subsequent meeting of the minds and exchange of new, independent consideration. *Labriola*, 152 Wn.2d at 834 ("Independent, additional, consideration is required for the valid formation of a modification or subsequent agreement."). In a bilateral contract, "[e]ach party is bound by his [or her] promise to the other." *Ebling v. Gove's Cove, Inc*., 34 Wn. App. 495, 499, 663 P.2d 132 (1983).

A material breach by one party can relieve the other party from enforcement of a contract. *224 Westlake, LLC v. Engstrom Prop., LLC*, 169 Wn. App. 700, 724, 281 P.3d 693 (2012). A material breach "substantially defeats [the] primary function of the contract." *Top Line Builders, Inc. v. Bovenkamp*, 179 Wn. App. 794, 808, 320 P.3d 130 (2014). The breach must be serious

enough to justify the other party in abandoning the contract. *224 Westlake*, 169 Wn. App. at 724. Materiality is a question of fact. *Top Line Builders*, 179 Wn. App. at 808.

2. TrueBlue's Alleged Breach

Here, Marchel's compensation structure consisted of a salary plus a bonus during her employment. It is undisputed that TrueBlue changed Marchel's bonus structure. However, the employment agreement that Marchel signed expressly stated that TrueBlue could change her compensation, including her bonus structure. The agreement stated in relevant part that it "may be modified by Labor Ready from time to time" and that "[i]f [e]mployee is eligible for a bonus under any such plan, [e]mployee understands and agrees that Labor Ready has the right to change or discontinue any bonus plan at any time." CP at 697.

Although Marchel objected to the change in her compensation package, she continued to work for TrueBlue and receive her base salary and a bonus. She did not abandon the contract, but continued to work under its modified terms. There is at least a question of material fact as to whether the consideration for TrueBlue's exercise of its contractual right to change Marchel's compensation structure was her continued receipt of compensation under the employment agreement.

As discussed above, we must view the evidence, including reasonable inferences, in favor of TrueBlue. *Zonnebloem*, 200 Wn. App. at 182. We conclude that there are genuine issues of material fact as to whether TrueBlue breached its employment agreement with Marchel.

3. Enforcement of Non-Compete Agreement

The superior court's granting Marchel partial summary judgment on TrueBlue's breach of contract claim was based on its ruling that, as a matter of law, TrueBlue breached the employment

contract. As a result, the court ruled that TrueBlue was precluded from enforcing the non-compete agreement against Marchel. Because that ruling was erroneous, the court erred in granting Marchel partial summary judgment on this claim.

Marchel claimed below that TrueBlue's breach of contract claim is precluded because the non-compete agreement is subject to a one year limitation period. Because the superior court dismissed this claim on summary judgment, the court did not address this issue. This issue must be addressed on remand.

Marchel argues that partial summary judgment still was appropriate because TrueBlue failed to establish the requirements for enforcing a non-compete agreement. We disagree. Courts will enforce non-compete agreements only if they are reasonable, and reasonableness is determined through application of a three-part test. *Emerick v. Cardiac Study Ctr., Inc.*, 170 Wn. App. 248, 254, 286 P.3d 689 (2012). The superior court did not address this issue. On remand, the court must undertake this analysis.

In addition, the superior court ruled that there were genuine issues of material fact as to whether the non-compete agreement was procedurally unconscionable or generally unconscionable. These issues also must be resolved on remand.

We reverse the superior court's grant to Marchel of partial summary judgment on TrueBlue's breach of contract claim and remand for further proceedings.

II. CR 37 SANCTIONS

TrueBlue argues that the superior court erred by imposing CR 37(b)(2) sanctions because it applied the wrong legal standard for imposing sanctions, failed to enter specific *Burnet*[8] findings of prejudice, and its findings are not supported by substantial evidence. We disagree and hold that the court did not err by imposing CR 37 sanctions.

Even though we are remanding for further resolution of the merits, should Marchel ultimately prevail on the merits of her MWA claim and her breach of contract defense, the determination of those damages as part of the CR 37 sanctions would still apply. Additionally, all of the other aspects of the CR 37 sanctions will also apply.

A. STANDARDS OF REVIEW

If a party fails to obey a discovery order, the superior court may "make such orders in regard to the failure as are just." CR 37(b)(2). The superior court has broad discretion as to the choice of sanctions for violation of a discovery order. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). We will not disturb the superior court's ruling on appeal absent a clear showing of an abuse of discretion. *Burnet*, 131 Wn.2d at 494.

Discovery sanctions serve to deter, punish, compensate, educate, and ensure that the wrongdoer does not profit from the wrong. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993). The superior court should impose the least severe sanction that is adequate to serve the sanction's particular purpose but is not so minimal as to undermine the purpose of discovery. *Fisons*, 122 Wn.2d at 355-56.

[8] *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

CR 37(b) presents a nonexclusive list of possible sanctions, including designating facts as established, striking claims or defenses, limiting or prohibiting evidence, default, and contempt. If a superior court imposes one of the harsher remedies under CR 37(b), then "the record must clearly show [that] (1) one party willfully or deliberately violated the discovery rules and orders, (2) the opposing party was substantially prejudiced in its ability to prepare for trial, and (3) the [superior] court explicitly considered whether a lesser sanction would have sufficed." *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 584, 220 P.3d 191 (2009) (citing *Burnet*, 131 Wn.2d at 494).

Under *Magana*, the test for prejudice looks to whether the opposing party was substantially prejudiced in preparing for trial. 167 Wn.2d at 589. When reviewing a court's findings of prejudice, we do not substitute our discretion for that of the superior court. *Magana*, 167 Wn.2d at 590.

We review the imposition of CR 37(b) sanctions for an abuse of discretion. *Magana*, 167 Wn.2d at 582. We normally give deference to the superior court's sanction orders. *Magana*, 167 Wn.2d at 583. We will disturb a superior court's sanction only if it is clearly unsupported by the record. *Magana*, 167 Wn.2d at 583. A superior court abuses its discretion when its order is manifestly unreasonable, is based on untenable grounds, or is based on an erroneous view of the law. *Fisons*, 122 Wn.2d at 339.

B. *BURNET* FINDINGS

Here, the superior court entered the following *Burnet* findings: (1) that True Blue willfully violated the court's discovery orders, (2) that Marchel was substantially prejudiced by TrueBlue's violations in her discovery and preparation for trial, and (3) the court considered whether lesser sanctions were appropriate under CR 37.

1. Willful Violation

TrueBlue argues that the superior court's findings of a willful violation are not supported by substantial evidence. We disagree.

In *Magana*, our Supreme Court stated that "[a] party's disregard of a court order without reasonable excuse or justification is deemed willful." 167 Wn.2d at 584. This rule previously had been recited in other cases. *See Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002).

TrueBlue argues that the Supreme Court adopted a new rule for willfulness in *Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013). The court in *Jones* referenced the holding in *Magana* that "a party's failure to comply with a court order will be deemed willful if it occurs without reasonable justification." 179 Wn.2d at 345 (citing *Magana*, 167 Wn.2d at 584). But the court then stated that it more recently had noted that the "willfulness prong would serve no purpose 'if willfulness follows necessarily from the violation of a discovery order.'" *Jones*, 179 Wn.2d at 345 (quoting *Blair v. TA–Seattle East No. 176*, 171 Wn.2d 342, 350 n.3, 254 P.3d 797 (2011)). The court stated, "Something more is needed." *Jones*, 179 Wn.2d at 345.

We disagree that *Jones* repudiated the *Magana* rule for willfulness in this brief comment. And the court in *Jones* did not in fact apply this "something more" rule. *See Jones*, 179 Wn.2d at 345. In that case, the court reversed because the superior court did not explicitly or implicitly conduct a willfulness inquiry at all. *Jones*, 179 Wn.2d at 345.

Here, the superior court found that TrueBlue willfully violated the discovery rules and the court's discovery orders. The court found that "a pattern of intentional discovery abuse has gone on throughout this litigation that both pre-dates and post-dates the Rocke Law Group's

involvement as [TrueBlue's] counsel. [TrueBlue] engaged in willful and deliberate obstruction of the discovery process." CP at 2815. The court further found that TrueBlue offered no reasonable justification or excuse for their failure to respond to Marchel's discovery.

Marchel propounded two sets of discovery requests to TrueBlue in January 2017 and January 2018, neither of which TrueBlue timely or fully responded to at any point. TrueBlue admits that its responses to both of Marchel's discovery requests were not timely as required under CR 26 and were not complete responses as ordered repeatedly by the superior court. The record supports a finding that TrueBlue's disregard of the court's orders was without justification or excuse. Thus, we hold that the superior court correctly found that TrueBlue's violations of its discovery orders were willful and that substantial evidence supports this finding.

2. Prejudice

The superior court also found that Marchel was substantially prejudiced in preparing for trial as a result of TrueBlue's repeated discovery violations. TrueBlue argues that this finding is not supported by substantial evidence. We disagree.

Under *Magana*, the test for prejudice looks to whether the opposing party was prejudiced in preparing for trial. *Magana*, 167 Wn.2d at 589 (citing *Burnet*, 131 Wn.2d at 494; *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 325-26, 54 P.3d 665 (2002)). When reviewing a court's findings of prejudice, we do not substitute our discretion for that of the superior court. *Magana*, 167 Wn.2d at 590.

Here, TrueBlue challenges the superior court's finding that "[TrueBlue] engaged in willful and deliberate obstruction of the discovery process, and this has prejudiced [Marchel's] ability to prepare for trial." TrueBlue argues that this is not a specific enough finding of prejudice to warrant

harsher sanctions imposed here, damages awarded to Marchel and LaborMax. CP at 2815. TrueBlue maintains that Marchel was not substantially prejudiced from preparing for trial, because in April 2018, she obtained copies of a 2010 employee handbook, a confidentiality policy, a personal electronic device policy, and an employee separation guide. TrueBlue claims that producing these documents several months before trial resolves any prejudice concerns.

TrueBlue ignores the fact that this crucial evidence was not produced until 224 days after the superior court ordered their production and only after TrueBlue's CR 30(b)(6) designated witness revealed their existence during his April 2018 deposition. Further, here, like *Magana*, the withheld documents were crucial for trial preparation. TrueBlue withheld these crucial documents until April 2018, a few months before trial, well past the discovery deadline of September 17, 2017, and 224 days after the court ordered it to be produced. We hold that the superior court did not abuse its discretion by finding that TrueBlue's discovery violations substantially prejudiced Marchel's preparation for trial and this finding is supported by substantial evidence.

3. Lesser Sanctions

TrueBlue argues that the superior court erred because it did not consider the least severe sanctions to adequately serve the purpose before it imposed harsher sanctions under CR 37(b). We disagree and hold that the court explicitly considered lesser sanctions before imposing harsher sanctions under CR 37(b).

A court should issue sanctions appropriate to advancing the purposes of discovery. *Burnet*, 132 Wn.2d at 497. The court has broad authority under CR 26(g) to sanction a party for discovery violations; however, repeated discovery violations are addressed under CR 37. *Fisons*, 122 Wn.2d at 340. The discovery sanctions should be proportional to the discovery violation and the

circumstances of the case. *Burnet*, 131 Wn.2d at 496-97. The least severe sanction that will be adequate to serve the purpose of the particular sanction should insure that the wrongdoer does not profit from the wrong. *Fisons*, 122 Wn.2d at 355-56. "'Before resorting to the sanction of dismissal, the [superior] court must clearly indicate on the record that it has considered less harsh sanctions under CR 37. Its failure to do so constitutes an abuse of discretion.'" *Magana*, 167 Wn.2d at 590 (quoting *Rivers*, 145 Wn.2d at 696). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds, or bases its ruling on an erroneous view of the law. *Fisons*, 122 Wn.2d at 339.

Here, before imposing harsher sanctions under CR 37, the court stated, "I've tried sanctions. I've tried monetary. I've ordered discovery. I've ruled that discovery can proceed with one party but not the other. Certainly, recently there's been a change [by TrueBlue], but now we're seeing all these documents come in from a withholding that has spanned over a year now."[9] Verbatim Report of Proceedings (VRP) (May 10, 2018) at 122-23. The court also considered that TrueBlue's responses after the order to compel could not cure the prejudice of lost time and that the attorney fees it awarded were "meaningless" as a sanction because the fees are owed under the employment agreement and the wage claims which were already resolved. VRP (May 10, 2018) at 121. The superior court explicitly considered lesser sanctions under CR 37 when it found that "[l]esser sanctions, including limiting cross examination of witnesses and/or not allowing arguments by counsel, would . . . allow [TrueBlue] to profit from their own wrongs." CP at 2820. Substantial evidence supports this finding.

[9] The superior court's reference was to its April 11, 2018 order for TrueBlue to produce additional documents by April 12, and TrueBlue's preparations to produce an additional 16,000 documents.

The superior court also found that limiting TrueBlue's presentation of evidence would not alleviate the substantial prejudice to Marchel in her preparation for trial of this case despite a trial continuance having been ordered. TrueBlue's nonproduction hindered Marchel's ability to defend against TrueBlue's trade secrets misappropriation claim and meet her burden of proving the elements of her causes of action, including damages. Restricting TrueBlue's evidence would not remedy this harm.

At the time the superior court ordered harsher sanctions, the focus of the discovery obstruction had moved beyond compliance with the orders to comply and on to punishment and deterrence. Thus, we hold that the court considered lesser sanctions and it did not abuse its discretion by imposing harsher sanctions under CR 37(b).

III. JURY TRIAL ON DAMAGES

TrueBlue argues that the superior court violated its constitutional right to a jury trial by imposing CR 37(b) liability and awarding Marchel and LaborMax damages as a sanction rather than deeming that their claims were established. TrueBlue requests a remand for a jury to determine the amount of damages to which Marchel and LaborMax are entitled. We disagree and hold that once the court made the required *Burnett* findings and imposed CR 37 liability on TrueBlue, due process was satisfied. Thus, TrueBlue is not entitled to a jury trial on the damages awarded to Marchel and LaborMax as a sanction.

In *Magana*, the court referenced the right to a jury trial: "'The right of trial by jury shall remain inviolate.' Const. art. I, § 21; *see also* CR 38. 'Due process is satisfied, however, if, before entering a default judgment or dismissing a claim or defense, the trial court concludes that there was a willful or deliberate refusal to obey a discovery order, which refusal substantially prejudices

the opponent's ability to prepare for trial.'" *Magana*, 167 Wn.2d at 591 (internal quotation marks omitted) (quoting *Behr*, 113 Wn. App. at 330).

No case has addressed whether a defendant is entitled to a jury trial on damages after a court has imposed CR 37(b) liability for the plaintiff's claims as a sanction. However, TrueBlue does not challenge the superior court's ability to essentially enter a default judgment on liability, which also would infringe on the right to a jury trial. TrueBlue does not explain why a damages award is any different.

Here as discussed above, the superior court made the required *Burnet* findings, addressing willfulness, substantial prejudice in preparing for trial, and explicit consideration of lesser sanctions before imposing harsher sanctions under CR 37(b). Under *Magana,* due process was satisfied. 167 Wn.2d at 591. Thus, we hold that TrueBlue's argument fails, and we affirm the CR 37 sanctions order.

ATTORNEY FEES

Marchel requests an award of reasonable appellate attorney fees and costs. Under RAP 18.1, the prevailing party is entitled to attorney fees and costs on appeal when applicable law authorizes the award. *McGuire v. Bates*, 169 Wn.2d 185, 191, 234 P.3d 205 (2010).

Marchel is not the prevailing party on her MWA claim or on TrueBlue's breach of contract claim, and therefore we deny her request for an award of attorney fees on appeal regarding those claims. Marchel did prevail regarding the imposition of CR 37 sanctions, but she does not argue that she is entitled to attorney fees on that issue. Therefore, we do not award attorney fees on appeal regarding that issue.

CONCLUSION

We hold that the superior court erred by (1) granting Marchel partial summary judgment on her MWA claim because there are genuine issues of material fact regarding her classification, and (2) granting Marchel partial summary judgment on TrueBlue's breach of contract claim because there are genuine issues of material fact regarding whether TrueBlue breached its contract with Marcel by changing her compensation structure without adequate compensation. We also hold that the superior court did not err by imposing CR 37 sanctions and entering judgment against TrueBlue, and the court did not violate TrueBlue's right to a jury trial by imposing CR 37 liability against TrueBlue and awarding damages to Marchel and LaborMax as a sanction. We deny Marchel an award of appellate fees and costs.

Even though we are remanding for further resolution of the merits, should Marchel ultimately prevail on the merits of her MWA claim and her breach of contract defense, the determination of those damages as part of the CR 37 sanctions would still apply. Additionally, all of the other aspects of the CR 37 sanctions will also apply.

We reverse the partial summary judgment orders and remand for further proceedings, including a determination of whether the non-compete agreement was subject to a one year limitations period and whether TrueBlue's non-compete agreement was valid and enforceable. We affirm the CR 37 sanctions order and the damages awarded to Marchel and LaborMax as a sanction. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

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, A.C.J.
SUTTON, A.C.J.

We concur:

Maxa, J.
MAXA, J.

Glasgow, J
GLASGOW, J.

APPENDIX B

7

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09-25-2017, 16:06

Scott G. Weber, Clerk

Clark County

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

TRUEBLUE, INC., a Washington corporation; and its wholly owned subsidiary, LABOR READY NORTHWEST, INC., a Washington corporation, Plaintiffs, v. KELLY MARCHEL a/k/a KELLY LANGLOIS; and ANYTIME LABOR, LLC, d/b/a LABORMAX, Defendants.	No. 16-2-01556-9 DECLARATION OF PAUL SHEVCHENKO IN OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

PAUL SHEVCHENKO declares as follows:

1. I am over the age of 18 and have personal knowledge of the facts disclosed herein.

2. I am employed by TrueBlue, Inc. and its wholly owned subsidiary, Labor Ready Northwest, Inc. (which is now referred to as People Ready) as a Market Manager since October 13, 2001, and have worked for TrueBlue since May 26, 1998.

3. In my role as Market Manager I oversee multiple branches, including the Vancouver, Washington branch formerly managed by Kelly Marchel.

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4. A branch manager has a huge impact on the daily operations of a branch and Ms. Marchel's work was of substantial importance to the management of the branch. Often the success or failure of a branch comes down to the quality of the branch manager. In many ways the branch manager is the face of the company and represents it to the world.

5. As a branch manager Ms. Marchel was the frontline person for developing local policies and strategies to grow the business. Branch managers, including Ms. Marchel, are given leeway about how to both maintain existing business, and grow new business. Developing business strategies falls on the shoulders of the branch managers. For the most part my role is to provide encouragement and advice about what has worked in other areas. The leeway given to branch managers is significant enough that I have compared it to starting your own business with somebody else providing the money.

6. For example, while TrueBlue has a range of profit margins that it strives for, the branch manager can set the profit margin for various businesses anywhere in that range according to their business judgment. As such, whenever Ms. Marchel approached a company with a proposal, she was the person who decided what price to propose. She also had the flexibility to negotiate prices in this range on her own without approval of me or the corporate office. This flexibility included being able to set different prices for different industries based upon what made the most sense for her branch. The prices she negotiated were binding on the company even if she was not the one to sign the contract.

7. These ranges are not hard and fast guidelines. If a branch manager wants to go outside of the normal range they have the ability to submit a business justification explaining why in their professional judgment the proposed price makes good business sense. The reasons for these deviations varied, but included things such as her belief that lowering prices would

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attract a new client, or keep an existing client from going elsewhere.

8. It is my recollection that I approved approximately 90% of the out-of-range deviations that Ms. Marchel proposed because she made good arguments about why the deviation made business sense, and sense in the overall scope of her branch strategy. Needless to say in no way, shape, or form were the company guidelines in Ellis set in stone with no room for deviation. Any statement to the contrary is factually incorrect.

9. The branch managers are given this flexibility so that they formulate a plan that can grow their branch in a way that makes sense for their particular market. For example, branch managers, including Ms. Marchel, are given authority to pursue different industries to diversity their portfolio. She was also allowed to pursue a mix of seasonal work, long term work, and on-demand staffing based on what she felt made sense for her particular branch, as well as the long term plans she created for their branch.

10. Branch managers use this flexibility to run their branches in very different ways. I have personally seen branches that focus on highly skilled labor with a few large clients rather than the traditional low skill labor being placed at a high volume of businesses. I also have seen branch managers focus on long term staffing rather than daily staffing. The profit margins for these various contracts are different, but the branch managers have used smart marketing and client development to build very successful branches. Ms. Marchel had this same sort of flexibility to build her branch as she felt was best.

11. Branch managers are also given freedom to market as they see fit. Some prefer to cold call businesses, others use fliers, still others go door to door to solicit work. Ms. Marchel used all of these strategies, as well as others because she understood the market and knew what was effective to increase or promote the business, as well as what worked to

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maintain existing business. It was her job to promote her branch, and the company, as she saw fit for her particular market, and marketing goals.

12. One of Ms. Marchel's best skills was corporate research. Frequently before approaching a business she would do background research on the company so that she could make a determination about whether or not it made business sense to approach them. This research also helped her determine what price she should propose when speaking with these companies. This was not mandated by me, or TrueBlue, but was left up to her discretion and judgment.

13. Maintaining existing business is also part of a branch manager's duties. Every client is different and we rely on the branch manager to use their expertise to keep current clients happy. Branch managers frequently make site visits to ensure clients are satisfied with the company, and to address problems. We also use branch managers to check safety and compliance issues. The business knowledge they possess is highly important because their expertise allows us to hold onto clients, and hopefully expand the business. Ms. Marchel did all of these things as part of her job duties.

14. A branch manager's staff is also important to the success of a branch. It is up to the branch manager to supervise and train employees. Further, should it be necessary to discipline or terminate an employee, it is the branch manager that starts the process and works with human resources to ensure the proper steps are being taken or addressed.

15. This is a much larger responsibility that it would seem. The temporary employees we place are considered employees of TrueBlue. They are issued W-2 forms as opposed to being 1099 contractors. Branch managers such as Ms. Marchel have virtually unfettered authority to terminate these temporary employees so long as it does not violate the

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law. The branch managers also have the authority to decide where to place employees when the employee is qualified for multiple jobs. This is an important job because placement strategy often facilitates client satisfaction.

16. Whether she was pursuing new business, or maintaining existing business, she had the flexibility to run her branch how she saw fit. For example, if a large work order came in Ms. Marchel had the discretion to adjust job duties as she felt was best. If she felt that she needed to forgo any marketing contacts so she could assist with other parts of the operations she had the authority to do so. This flexibility is critical because every day is different it is impossible to say how much of a day must be spent doing various tasks. Even week-to-week it is difficult to say how much time would be spent on Ms. Marchel's job duties.

I certify, under penalty of perjury, under the laws of the State of Washington that the foregoing is true and correct. Executed at _____ [City], _____ [State], on the _____ day of September, 2017.

See next Page
Paul Shevchenko

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flexibility is critical because every day is different it is impossible to say how much of a day must be spent doing various tasks. Even week-to-week it is difficult to say how much time would be spent on Ms. Marchel's job duties.

I certify, under penalty of perjury, under the laws of the State of Washington that the foregoing is true and correct. Executed at Woodburn [City], Oregon [State], on the 19 day of September, 2017.

Paul Shevchenko

Paul Shevchenko

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CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of September, 2017, served a true and correct copy of the foregoing document, via the methods noted below, properly addressed as follows:

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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 25th day of September, 2017, at Tacoma, Washington.

JULIE PEREZ

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APPENDIX C

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

TRUEBLUE, INC., a Washington corporation; and its wholly owned subsidiary, LABOR READY NORTHWEST, INC., Appellants, v. KEYLLY MARCHEL a/k/a KELLY LANGLOIS; and ANYTIME LABOR-SEATTLE, LLC d/b/a LABORMAX, Respondents.	No. 52665-4 ANSWER TO MOTION FOR PARTIAL RECONSIDERATION

I. Identity of Respondent, Relief Requested & Introduction

Appellants TrueBlue, Inc., and Labor Ready Northwest ask this Court to deny Marchel's motion for partial reconsideration. Unlike Marchel, this Court took the facts in the light most favorable to TrueBlue. Nothing new here that was properly preserved.

II. Facts Relevant to Answer

This Court reversed the trial court's erroneous summary judgment rulings due to genuine issues of material fact. Slip Op. at 3 (copy attached). It otherwise affirmed. *Id*. at 3-4. The facts are known to the Court. Slip Op. 4-13. Marchel's "facts" are inaccurate.

III. Argument

A. The standard of review is *de novo*.

Although Marchel does not contest that this Court must take the facts in the light most favorable to TrueBlue in conducting its *de novo* review of summary judgment rulings, she nonetheless construes the facts strongly in her own favor. She is incorrect. Specifics are addressed *infra*.

B. The "illusory contract" argument was not properly raised in the trial court, so this Court properly declined to consider it – and it is wrong in any event.

Under RAP 9.12, this Court will consider only issues and arguments properly called to the trial court's attention. Marchel's motion for partial summary judgment literally said nothing about an "illusory contract" theory. CP 1433-63. She raised the argument for the first time in a paragraph in her reply (CP 1781-82) which is too late. *See, e.g.*, ***Molloy v. City of Bellevue***, 71 Wn. App. 382, 385, 859 P.2d 613 (1993) (moving party on summary judgment must raise all issues in motion); ***White v. Kent Med. Ctr., Inc.***, 61 Wn. App. 163, 168-69, 810 P.2d 4 (1991) (allowing new issues in a reply improperly and unfairly deprives nonmoving party of opportunity to respond). This Court correctly declined to consider this issue, where the trial court never reached it.

The argument is incorrect in any event. *See* TrueBlue Reply at 11-14 (citing numerous cases). As this Court correctly held, "the employment agreement that Marchel signed expressly stated that TrueBlue could change her compensation, including her bonus structure": the employment agreement "may be modified by Labor Ready from time to time"; "If Employee is eligible for a bonus under any such plan, Employee understands and agrees that Labor Ready has the right to change or discontinue any bonus plan at any time." Slip Op. at 18 (citing CP 697). This Court further correctly held that although Marchel objected to the changes, she continued to work under the modified terms. *Id*. Thus, there "is *at least* a question of material fact as to whether consideration for TrueBlue's *exercise of its contractual right* to change Marchel's compensation structure was her continued receipt of compensation under the employment agreement." *Id*. (emphases ours). No one breaches a contract simply by exercising its clear and unequivocal contractual rights, which perhaps this explains this Court's pointed "at least."

Despite the simplicity of this inescapable analysis, Marchel misrepresents the trial court's ruling and attempts to confuse the issues. Mot. for Recon. (MFR) 2-4. The trial court expressly refused to reach Marchel's restrictive covenant violation or her breaches

that TrueBlue alleged. RP 273. It simply ruled TrueBlue's argument "moot." RP 274. Thus, Marchel blatantly misrepresents the record in claim that the trial court "considered TrueBlue's argument that Ms. Marchel's employment agreement permitted it to unilaterally change her compensation, finding that provision rendered the consideration for Marchel's separate non-competition agreement illusory and unenforceable." MFR 2 (citing nothing). It did not.

Marchel again relies upon Commissioner Bearse's unpublished ruling denying review. MRF 2-4. As noted, these arguments were not presented to the trial court. RAP 9.12 precludes their consideration here. And for all the reasons stated above and at TrueBlue Reply 11-14 – and with great respect for the distinguished Commissioner – they are incorrect.

Oddly, Marchel accuses this Court of "conflating" the non-compete and employment contracts. MFR 4. But the trial court ruled that they are "bilateral" – they obviously are read together because they were entered together. RP 273. Marchel is wrong.

Finally, Marchel briefly raises a new argument that this Court's correct summary judgment rulings "implicitly" reverse "CR 37 sanctions this Court purports to affirm." MFR 4. This Court did not "purport" to do anything: it expressly affirmed the sanctions. Slip

Op. 26 ("we hold that the trial court . . . did not abuse its discretion by imposing harsher sanctions under CR 37(b))." While TrueBlue respectfully disagrees with this holding, it is patently false to claim that requiring a trial to resolve genuine issues of material fact "implicitly" reverses it. This is because the trial court improperly granted summary judgment *before* it imposed any sanctions. As this Court thus held, "should Marchel ultimately prevail on the merits of her MWA claim and her breach of contract defense, the determination of those damages as part of the CR 37 sanctions would still apply." Slip Op. at 28. This is perfectly clear.[1]

C. Marchel's confusing argument regarding her breach of the non-competition agreement is incorrect.

Marchel next accuses this Court of being confused, yet her argument is practically indecipherable. MFR 7-11. She now *admits* that TrueBlue may properly modify her compensation under her employment contract, but now claims that "the *only* question presented by this appeal is whether TrueBlue was entitled to enforce [her] separate bilateral Non-Compete Agreement after it

[1] Marchel rehashes her "illusory contract" arguments yet again at MFR 4-7. She continues to rely on inapposite authority regarding new non-compete agreements entered *after* employment commenced. *Id.* TrueBlue has already explained why this is wrong. BA 14-18; Reply 4-11.

admittedly and unilaterally changed the consideration for that agreement." MFR 8-9 (emphasis added). This is patently false: *many* questions were presented.

And her unsupported assertion that TrueBlue "admittedly and unilaterally changed the consideration" *for her Non-Compete* is just false. MFR 9. It is undisputed that Marchel signed that agreement when she accepted employment in 2007. CP 664, 667-71. It was thus legally valid, reasonable, for valid consideration, and enforceable, as this Court correctly held. Slip Op. at 19 (citing ***Emerick v. Cardiac Study Ctr., Inc.***, 170 Wn. App. 248, 254, 286 P.3 689 (2012)). TrueBlue adjusting her *compensation package* (which she now admits it was entitled to do under her *employment agreement* – MFR 9) could not and did not change the past consideration she had long-since received when she accepted employment. This fanciful argument is frivolous.[2]

[2] In a footnote, Marchel blames the undersigned for her confusion. MFR 9 n.2. She now claims a "modification" of her *noncompete agreement* (*but see, e.g.*, BR 18-19, arguing TrueBlue modified her *employment* contract); she never says *how* the Noncompete was modified. MFR 9-11. It wasn't. And her *employment* was sufficient consideration for her *Noncompete*, which was *never* modified. *See, e.g.*, BA 18 (citing ***Labriola v. Pollard Grp., Inc.***, 152 Wn.2d 828, 833-34,100 P.3d 791 (2004); ***Knight v. McDaniel***, 37 Wn. App. 366, 368, 680 P.2d 448 (1984)).

D. There is nothing "unsupported" about Shevchenko's declaration, which plainly raised genuine issues of material fact.

In a new tactic, Marchel now argues that Shevchenko's declaration – which obviously raises genuine issues of material fact by contradicting virtually everything Marchel claimed – is "unsupported." MFR 11-16. As a preliminary matter, all of this is plainly an attempt to reargue the facts. *Id*. That is for a factfinder to determine, not this Court – as this Court has correctly held.

Marchel notes in a footnote that she did the same in the trial court – which did *not* strike Shevchenko's declaration. MFR 12-13 & n.4. But Marchel failed to cross-appeal from the trial court's rulings and failed to raise or argue this issue on appeal. She simply ignored Shevchenko's declaration in her brief. *See, e.g.*, BR 23-26. Ignoring the record does not resolve genuine issues of material fact.

But now she wants to argue the matter. Again, the problem is that she ignores the salient facts. For instance, she claims Shevchenko's statements are "conclusory" and that he lacked a "basis" for his testimony. *Id*. But Shevchenko was uniquely well qualified to contradict Marchel's falsehoods in this case (CP 1569, emphases added):

> [I am TrueBlue's **Market Manager** since October 13, **2001**, and have worked for TrueBlue since May 26, **1998**.
>
> In my role as **Market Manager I oversee** multiple branches, including **the Vancouver, Washington branch formerly managed by Kelly Marchel**.

From his unique vantage point as ***Marchel's supervisor***, he gave great detail about what her job actually entailed (CP 1570):

> A branch manager has a **huge impact on the daily operations of a branch** and Ms. Marchel's work was of **substantial importance** to the **management of the branch**. **Often the success or failure of a branch comes down to the quality of the branch manager**. In many ways **the branch manager is the face of the company** and represents it to the world.
>
> As a branch manager **Ms. Marchel was the frontline person for developing local policies and strategies to grow the business**. Branch managers, including Ms. Marchel, **are given leeway about how to both maintain existing business, and grow new business**. **Developing business strategies falls on the shoulders of the branch managers**. . . . **The leeway given to branch managers is significant enough that I have compared it to starting your own business with somebody else providing the money.** [Emphases added.]

This goes on and on – in *great* factual detail. CP 1570-73 (attached as App. B). It obviously raises genuine issues of material fact. It must be taken in the light most favorable to ***TrueBlue***, not Marchel.

Marchel's apparent factual argument that ***her own supervisor*** does not have adequate knowledge to make these

assertions is unsupported by law and is frankly absurd. But she attempts to transport her sanctions order back in time to the summary judgment rendered much earlier. Had Marchel wished to raise discovery issues as part of her summary judgment motion, she was free to do so. But she did not – preferring to win without the evidence she now claims was essential. This Court will not consider arguments not raised on summary judgment. RAP 9.12. Genuine issues of material fact precluded summary judgment here.

After rearguing the facts *ad nauseum*, Marchel summarily claims that Sevchenko's testimony was "inconsistent with TrueBlue's contract with Ms. Marchel." MFR 16. This is apparently an oblique reference to her earlier factual argument that her contract said she could not bind the company. MFR 13. But that is *not* what it says. Rather, it says that she understood that she could not bind the company to any agreement, "***without prior written permission***." CP 698 (emphasis added). Under this language, she unequivocally *could* bind the company. That is entirely consistent with Shevchenko's testimony. App. B.

Factual arguments are for the trier of fact. This Court correctly found genuine issues of material fact that preclude summary judgment. This Court should deny reconsideration.

E. Marchel is not entitled to appellate attorney fees.

Marchel calls this Court's fee ruling "hyper-technical." MRF 17. It is no such thing. In her fee request to this Court, she listed as legal bases for a fee award (1) her employment agreement; (2) the WLAD; (3) the MWA; (4) CR 65(c) (injunctions); and (5) the UTSA. BR 43-44. She did not seek CR 37 fees, which of course could not be awarded, as TrueBlue prevailed in this appeal and certainly did not violate CR 37 on appeal. This Court's ruling is correct.

Marchel did not substantially prevail, so she is not entitled to a fee award. If she cannot win her MWA and noncompete arguments, she cannot obtain damages, and thus cannot prevail. As TrueBlue has consistently admitted, she is entitled to sanctions, but those have been awarded and were not challenged on appeal – they were not the subject of this appeal. Marchel did not substantially prevail on the appealed issues, so she is not entitled to appellate fees.

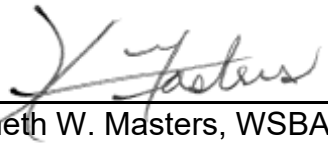
Marchel argues that this Court's denial of fees somehow undermines the trial court's sanctions. Again, TrueBlue did not appeal the amount of the trial court's sanctions. This Court thus affirmed them. There remains no basis for a fee award. This Court was well within its discretion in denying Marchel appellate fees.

IV. Conclusion

This Court should deny reconsideration.

RESPECTFULLY SUBMITTED this 6th day of July 2020.

MASTERS LAW GROUP, P.L.L.C.



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I certify that I caused to be filed and served a copy of the foregoing **ANSWER TO PETITION FOR REVIEW** on the 28th day of September 2020 as follows:

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September 28, 2020 - 4:39 PM

Transmittal Information

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Superior Court Case Number:	16-2-01556-9

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