**No. 48284-3-II**

THE SUPREME COURT
OF THE STATE OF WASHINGTON

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CHERIE Y. COOK, individually, and CLARK T. COOK, individually and their marital community,

Respondents,

vs.

TACOMA MALL PARTNERSHIP, LLC & SIMON PROPERTY GROUP, INC., a Delaware Corporation, and SIMON PROPERTY GROUP, L.P., a Delaware Limited Partnership; U.S. SECURITY ASSOCIATES, a Delaware Corporation; ANDREWS INTERNATIONAL, LLC; a Delaware Limited Liability Corporation; ANDREWS INTERNATIONAL, INC., a Delaware Corporation; and JOHN DOE 1 through 10,

Petitioners.

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# ANSWER TO PETITION FOR REVIEW

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## I. IDENTITY OF RESPONDENTS

Cherie Y. Cook, individually, and Clark T. Cook, individually and their marital community, asks this Court to deny review of Division Two of the Court of Appeals' unpublished opinion *Cook et al. v. Tacoma Mall Partnership et al.*, No. 48284-3-II, 2017 WL 499467 (2017).

## II. RESTATEMENT OF THE CASE

### A. Background.

On May 28, 2012, Cherie Cook went shopping at the Tacoma Mall.[1] She exited the mall from Nordstrom and was assaulted in the parking lot by an assailant who tried to steal her purse.[2] In the process of being assaulted, Cook fell to the pavement, struck her head, and sustained life threatening injuries.[3]

Shortly before the incident, Tacoma Mall security guard John Waldron was patrolling the parking lot.[4, 5] On his first pass around the mall's parking lot, Waldron saw a slender female, approximately 15 to 16 years of age, sitting on a cement wall outside of Nordstrom.[6] The teenager was wearing a gray wool pea coat and dark pants, even though it was a

[1] CP at 4. The motion for summary judgment response was sealed over Cook's objection. Simon argued that the policies and procedures met the stringent standards of closing the court record from the public under *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), and the trial court agreed.
[2] CP at 4-5.
[3] CP at 4-5.
[4] CP at 5.
[5] The Tacoma Mall only had one security guard to patrol the entire parking lot at any given point.
[6] CP at 5.

warm spring day.[7] On his second pass about 20 minutes later, the teenager was sitting in the same spot on her cell phone.[8]

Cook was assaulted about 20 minutes after Waldron made his second pass.[9] At the time of the assault, Waldron was inside the mall and a different security guard who has not been identified was patrolling.[10] When Cook crashed to the pavement, the assailant took off running.[11] The Tacoma Mall video security system captured the assailant fleeing but did not capture the assault.[12]

According to Tacoma Mall's security policies and procedures, "The most serious security incidents often occur in parking lots and garages."[13] In the five years before the underlying incident, eighteen robberies occurred in the Tacoma Mall's parking lot.[14]

**B. Procedural History.**

On October 8, 2014, Cook filed suit against Simon Property Group, Inc.[15] The complaint also identified John Doe 1 through 10 as entities acting as Simon agents who were responsible for the failure to provide adequate security.[16] Different iterations of the same defendant—

[7] CP at 5.
[8] CP at 5.
[9] CP at 5.
[10] CP at 5.
[11] CP at 5.
[12] CP at 6.
[13].CP at 6.
[14].CP at 6.
[15] CP at 27-35..
[16] CP at 27-35.

Simon (collectively, "Simon")—were named in second and third amended complaints filed on December 12, 2014,[17] and January 20, 2015.[18]

After filing, the trial court's case schedule order set the following dates[19]:

| | |
|---|---|
| Discovery cutoff | August 20, 2015 |
| Trial | October 8, 2015 |

On October 16, 2014, Simon tendered the defense to U.S. Security (f/k/a "Andrews International," collectively, "U.S. Security"), the corporation responsible for providing security at the Tacoma Mall during the relevant time.[20] U.S. Security accepted the claim by November 4, 2014, and agreed to indemnify and hold harmless Simon.[21]

On February 4, 2015, Simon filed its first answer ever in response to Cook's third amended complaint.[22] The answer generally denied the allegations of liability and damages and asserted the following affirmative defenses:

> 1. The injuries alleged by Plaintiffs were caused by an instrumentality, person, or entity not within the control of these Answering Defendants and for whom these Answering Defendants are not responsible, which either bars the claims completely or else diminishes the damages by the proportion of such culpable conduct;

[17] CP at 43-51.
[18] CP at 52-60.
[19] CP at 26.
[20] CP at 2070-2071.
[21] CP at 2086.
[22] CP at 61-68.

2. To the extent fault is attributed to such instrumentality, person, or entity, these Answering Defendants rely upon the provisions of the Revised Code of Washington 4.22.070 and other statutes for the apportionment of fault;[23]

Simon's answer did not mention U.S. Security Associates by name.[24]

On April 3, 2015, Cook served her first interrogatories and requests for production.[25] Interrogatory 7 stated:

> Please identify by name, address, and telephone number of all persons or entities (by business name) that provided surveillance, security, or other services related to the safety and security of persons entering Tacoma Mall property at the time of the incent that is the subject of this action.[26]

On May 29, the day after the statute of limitations ran[27], Simon served its written discovery response identifying U.S. Security for the first time in a pleading under oath as the security provider for the Tacoma Mall at the relevant time, stating:

> Defendants object to this interrogatory to the extent that it is overly broad, vague (as to "other services related to safety…"), and unduly burdensome. Without waiving said objections, U.S. Security Associates/Andrews International was under contract with Tacoma Mall to provide security services. Surveillance was performed by

[23] CP at 61-68.
[24] CP at 61-68.
[25] CP at 2106-2121.
[26] CP at 2112.
[27] The statute of limitations for personal injury actions such as this one is three years. RCW 4.16.080(2).

> Tacoma Mall and by some of the stores that are located in the Tacoma Mall. Discovery is ongoing and this Answer may be supplemented.[28]

Simon did not produce the contract between it and U.S. Security until July 2, 2015.[29]

On July 20, 2015, Cook filed a notice of association of counsel.[30] She brought new counsel into the case because her initial counsel was experiencing personal difficulties.[31]

On July 30, 2015, Cook filed a motion to continue the trial date for six months and to reissue a case scheduling order to extend the deadlines to account for the newly associated counsel.[32]

On August 7, 2015, Simon moved for summary judgment on all claims.[33] On August 21, 2015, the trial court heard Cook's motion to continue.[34] The trial court moved the summary judgment motion but held the trial date.[35]

On September 4, 2015, Simon supplemented their responses to Cook's discovery with insurance information, including evidence that Simon tendered a defense to U.S. Security almost immediately after the original complaint was filed.[36]

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[28] CP at 2095.
[29] CP at 1923.
[30] CP at 100-102.
[31] CP at 452-456.
[32] CP at 106-113.
[33] CP at 122-140.
[34] VTP (Vol. I) at 1.
[35] VTP (Vol. I) at 19-20.
[36] CP at 1980.

On September 10, 2015, Cook moved for leave to amend the complaint by adding U.S. Security as a defendant under *Powers v. W.B. Mobile Servs., Inc.*, 182 Wn.2d 159, 166, 339 P.3d 173 (2014).[37] On September 18, 2015, the trial court granted leave[38] and on September 24, 2015, Cook filed the amended complaint.[39]

On October 2, the trial court denied Simon's motion for summary judgment.[40] After the trial court's ruling, Simon began arguing for reconsideration of the order granting leave to amend the complaint.[41] The trial court denied reconsideration as to its decision allowing the new defendants, but then it allowed Simon to argue that no further discovery should be permitted as to any defendant, despite the absence of any motion before the trial court asking for such relief.[42]

Cook objected as to the procedure of the argument, objected to closing discovery, and argued to the trial court that it should issue a new case schedule with a new discovery deadline allowing for discovery against U.S. Security as a newly-added defendant.[43] The trial court responded,

> To the extent that's a motion that I can hear today, I am going to deny the motion . . . I denied the defendants [sic] motion [for summary judgment], and it took every bit of energy for me to do that. And so I don't know what to tell

[37] CP at 442-451.
[38] CP at 733-734.
[39] CP at 784-793.
[40] CP at 1859-1861.
[41] VTP (Vol. V) at 36.
[42] VTP (Vol. V) at 37, 38-39.
[43] VTP (Vol. V) at 38-39.

> you beyond that, but I've allowed you to amend your complaint.[44]

The trial court acknowledged that "a new party has just come into the case, so it doesn't seem unreasonable to me that they would at least believe they would be entitled to gain some discovery as to the new party," but nonetheless orally ruled that it was prohibiting further discovery unless it was outstanding at the time of the hearing on October 2, 2015, and instructed Cook to move for reconsideration if she disagreed with the decision.[45]

Also at the October 2, 2015, hearing, the trial court struck the October 8 trial date and issued a new case schedule with trial on March 2016.[46] The trial court did not offer a rationale as to why it was denying discovery as to U.S. Security and yet nonetheless moving the trial date by five months.[47]

Cook moved for reconsideration, arguing that she was entitled to discovery from U.S. Security as a newly-added party and that the trial court's complete bar to such discovery was a de facto discovery sanction that was improper under *Burnet v. Spokane Ambulance,* 131 Wn.2d 484, 495-96, 933 P.2d 1036 (1997).[48] On October 16, the trial court denied reconsideration.[49] In doing so, it stated,

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[44] VTP (Vol. V) at 39.
[45] VTP (Vol. V) at 45.
[46] VTP (Vol. V) at 39-40; CP at 1854-1855.
[47] VTP (Vol. V) at 39-49.
[48] CP at 1865-1875.
[49] CP at 2099-2100.

[T]he problem that I had when I didn't grant the defense motion for summary judgment, whenever that was, two weeks ago, three weeks ago, I mean, it was all I could do to admit that you have even a simple case. So, I guess that's kind of where I'm coming from.

You sort of told me about the Burnet factors and how I didn't consider lesser sanctions, I didn't consider your lack of willfulness and the violation, I didn't articulate that there's any kind of prejudice to the defense, and there is none. Well, you know, it seems to me that I could have granted your motion for summary judgment. I could have denied your amendment. I could have done those things, and that would have been a different sanction than simply declaring that in my view the discovery that has been completed and that closed five weeks ago, or whenever it was when it closed, wasn't subject to being reopened.

It does seem to me that, by all accounts, Don Cook, either the dilatory Don Cook or the heroic Don Cook knew about U.S. Security and has known about them for months, and for whatever reason, opted not to add them. They were added by you later on. It seems to me that he was willful in his decision about how to prosecute his case.

And the defense has articulated a substantial prejudice. There is a substantial prejudice in being ready for trial and not being able to go to trial at a time when everybody has made arrangements for the trial to take place. You completed all your discovery, you think you know what the case is, and then at the last minute, the judge changes things on you, and I think it is prejudicial to push their case four months downstream. So, I think that when I -- when I did decline, when I have declined to reopen discovery, I'm taking all of those things into account as I'm doing it.

I think that U.S. Security is somebody who's been known about and could have been discovered on. I don't know that any discovery that you obtained from them is going to change the fact that your case is there was some female, either a teen or a young adult, sitting in a particular place using a phone for 20 to 40 minutes in a public area

> outside the Tacoma Mall that was observed by people sitting and talking on her phone, and she was dressed apparently comfortably enough for her that she was able to sit in one place for an extended period of time. I'm not even convinced that that's the person who is the same person that your security guard saw multiple times, but the two of you seem to be convinced of that, so I am willing to go with it.
>
> But I think that I've been more than generous in allowing this case to be prosecuted the way you want it to be prosecuted, but I'm limiting the discovery at this point in time. It is closed, and I'm not reopening it.[50]

The trial court entered its October 16 order embodying this ruling despite having already moved the trial date to March 2016. Cook timely filed a notice for discretionary review, which was granted.

## III. ARGUMENT

### A. Review is not warranted under RAP 13.4(b)(4)

The Court may accept review of a decision of the Court of Appeals if it "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). Here, Petitioners argue that the issue of "substantial public interest" is the erosion of the civil rules and the trial court's ability to manage its docket. But other than proclaiming that the trial court here was "right," Petitioners fail to offer any legitimate explanation as to how the Court of Appeals' finding of abuse of discretion in applying the civil rules would erode those rules.

Although this Court has not strictly defined what an "issue of substantial public interest" means for purposes of RAP 13.4(b)(4), it has

[50] VTP (Vol. IV) at 11-13.

provided examples of such issues. In *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (emphasis added), a case involving sentencing of drug offenders, the Court stated:

> This case presents a prime example of an issue of substantial public interest. The Court of Appeals holding**,** while affecting parties to this proceeding, **also has the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue.**

Unlike in *Watson*, here the Court of Appeals' opinion has no potential to affect proceedings outside this case. The Court of Appeals' holdings regarding a continuance and discovery are contingent on the specific context of this in this case, where the trial court took the highly unusual position of allowing in a completely new party but then denied all discovery as to that party. The Court of Appeals certainly recognized the nominal precedential value in this factually odd and specific case by issuing an unpublished decision.

Ultimately, Petitioners are dissatisfied that the trial court granted leave to amend a new party weeks before trial. But conspicuously missing from Petitioners' argument are the undisputed facts that (1) they did not cross-appeal the amendment; and (2) Respondents had been necessarily diligent in trying to ascertain the name of the security company by virtue of the amendment, and therefore any "willful" finding was contradictory and untenable.[51]

[51] *Powers v. W.B. Mobile Servs., Inc.*, 182 Wn.2d 159, 166, 339 P.3d 173 (2014) ("If a plaintiff is able to show that the plaintiff identified an unnamed defendant with reasonable particularity and tolled the statute of limitations by timely serving at least one named defendant, the statute of limitations will be tolled as to claims against such

It was only after granting leave to amend that the trial court said that counsel was "willful in his decision about how to prosecute his case." But because Petitioners never cross-appealed the decision granting leave to amend, the Court of Appeals properly assumed that the leave to amend was proper. Any argument in the eleventh hour that the trial court had found Plaintiffs "willful" in delaying to add a new party therefore fails. In fact, the trial court's contradictory position only illustrates why the it abused its discretion by finding diligence and granting leave to amend on one hand, but then finding willfulness and denying discovery on the other. Following Petitioners' logic, reversing any trial court decision for abuse of discretion would undermine the civil rules and trial court's authority because there is no evidence that the trial court here did anything other than abuse its discretion.

Moreover, Petitioners fail to address the undisputed fact that the trial court closed discovery as to a newly added party and then continued the trial date for almost six months. Doing so was untenable because Petitioners could not show any prejudice for opening discovery as to U.S. Security. Accordingly, the Court of Appeals' challenged holdings do not involve "issues of substantial public importance," given their fact-specific or discretionary nature, and review is unwarranted under RAP 13.4(b)(4).

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unnamed defendant."). *Powers* defined "reasonable particularity" in terms of making a "diligent effort" to identify the actual defendant. Here, because the trial court granted leave to amend by adding U.S. Security, it necessarily found that Respondents had been diligent.

### B. Petitioner's second argument is irrelevant under RAP 13.4, and the Court of Appeals did not misrepresent anything.

Petitioners concede that this Court does not correct errors yet nonetheless claim that the Court of Appeals' opinion contains factual inaccuracies. The proper remedy to correct any factual inaccuracies is a motion for reconsideration. Petitioners did not raise the purported factual "misinterpretations and inaccuracies" with the Court of Appeals after the decision was issued. Raising the issue now does not do anything to favor acceptance of review under RAP 13.4, and the Court should disregard the argument.

Nonetheless, the Court of Appeals' opinion did not contain any "misinterpretations and accuracies." But because Petitioners have completely failed to show how review is warranted under RAP 13.4(b)(4), Petitioners do not feel the need to waste the Court's time with explaining why the Court of Appeals' opinion was accurate because this is not a basis to accept review.

### C. The Court should award terms under RAP 18.9

Respondent Cheri Cook was born on March 18, 1937, and she is currently 80-years-old. This petition is frivolous, and can only designed by the experienced attorneys at Williams Kaster to delay Respondents' day in court to increase the probability that she will not be alive by then. The single issue raised under RAP 13.4(b)(4) handedly fails because Respondents have no evidence—let alone a credible argument—that the Court of Appeals' holding "involves an issue of ***substantial*** public interest." RAP 13.4(b)(4). Furthermore, by Petitioners' own admission,

the second argument raised does not even apply given that this Court does not correct errors. Respondents, for the foregoing reasons, should be awarded fees and costs associated with responding to this petition under RAP 18.9.

## IV. CONCLUSION

For all the reasons stated above, the Court of Appeals' unpublished opinion does not warrant review under RAP 13.4(b)(4). Respondents respectfully request that the Court deny the Petitioners' petition and enter an award of fees and costs in favor of Respondents for this frivolous petition.

RESPECTFULLY SUBMITTED this 7th day of April, 2017

PFAU COCHRAN VERTETIS AMALA, PLLC

By: /s/ Darrell L. Cochran
Darrell L. Cochran, WSBA No. 22851
Kevin M. Hastings, WSBA No. 42316

STATE OF WASHINGTON )
)ss
COUNTY OF PIERCE )

Sarah Awes, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on April 7, 2017, I placed for delivery with Legal Messengers, Inc., a true and correct copy of the above, directed to:

Rodney Umberger
Anne Loucks
Williams Kastner
601 Union Street, Ste 4100
Seattle, WA 98101

DATED this 7th day of April, 2017.

Sarah Awes
Legal Assistant to
Darrell L. Cochran