NO. 94240-4

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

v.

TACOMA MALL PARTNERSHIP, and SIMON PROPERTY GROUP, INC. a Delaware Corporation, and SIMON PROPERY 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.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Tacoma Mall Partnership, Simon Property Group, Inc. and Simon Property Group, L.P. ("the Mall"), and U.S. Security Associates and Andrews International, LLC[1] ("U.S. Security") (collectively "Petitioners"), were the Defendants at the trial court level and Respondents in the Court of Appeals, Division II.

They now seek review by this Court.

II. CITATION TO COURT OF APPEALS DECISION

Plaintiff/Respondent, Cherie Cook, received permission from the Court of Appeals to pursue an interlocutory appeal of Judge Phillip Sorenson's October 16, 2015 pretrial Order denying her "Motion for Reconsideration Re: Case Scheduling Order," and on January 7, 2017, the Court of Appeals reversed Judge Sorenson's Order.[2]

For the reasons outlined below, the Court of Appeals erred, and did so in a way that creates an issue of significant public importance.

III. ISSUE PRESENTED FOR REVIEW

I. Whether the Supreme Court should accept review pursuant to RAP 13.4(b)(4), where the Court of Appeals (inaccurately) weighed evidence to revisit rational and lawful rulings within the fundamental purview of the trial court.

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[1] Includes all Andrews International entities identified in the Caption. The Court of Appeals, Division II appears to have incorrectly stated the caption in its opinion.
[2] A copy of the opinion of the Court of Appeals is attached as Appendix A.

IV. STATEMENT OF THE CASE

A. Background

This case arises out of an attempted purse-snatching, by an unknown criminal, in broad daylight at the Nordstrom parking lot of the Tacoma Mall on May 28, 2012.[3] An unknown woman attempted to take Cook's purse, but in the process knocked Cook to the ground injuring her.[4]

At the time of the incident, Tacoma Mall Partnership, the owner of the Tacoma Mall, contracted with U.S. Security,[5] a licensed security guard company in the State of Washington, to provide security services for the Tacoma Mall.[6] Public safety officer, John Waldron, an 11+ year licensed officer, was in full uniform and on patrol that afternoon in the parking lot areas, in a marked T-3 Patroller. Officer Waldron witnessed the unknown woman sitting outside of Nordstrom talking on her cell phone before she attempted to take Cook's purse.[7]

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[3] CP at 36-42.
[4] CP at 36-37.
[5] Andrews International and U.S. Security merged during the life of the contract, and were both identified as Defendants in Petitioners' recent Fourth Amended Complaint. CP at 672; CP at 784-793.
[6] CP at 153.
[7] CP at 154; 163-64. At approximately 1:25 p.m., Officer Waldron was traveling on the T-3 past Nordstrom when he noticed a young slender African American female sitting quietly on a small wall outside of the entrance of Nordstrom. CP at 154. There was nothing particularly unusual about this, as that location is a place where people frequently sit while waiting for someone inside of the Mall. It was not known to be a hot spot for criminal activity, especially not of this particular nature. Officer Waldron passed by about 5-10 feet away from the woman, making eye contact with her as she waved and smiled at him. *Id.* To Officer Waldron, she appeared to be waiting for someone or taking a break, and did not appear suspicious. *Id.* Approximately twenty minutes later, Officer Waldron returned and passed the same woman who was sitting on the wall outside of Nordstrom.
(*footnote continued on the following page*).

Police responded to the scene, conducted interviews, and drafted a lengthy report containing the names and contact information of all witnesses and persons with knowledge of the incident, including that of Officer Waldron and the U.S. Security Director, Jason Sadler.[8]

B. Complaint Filed and Case Schedule Issued

Cook filed suit against Simon Property Group, Inc. and John Does 1 through 10 on October 9, 2014, and an Order Setting Case Schedule was issued that same day.[9]

C. Cook's Counsel Was Aware of U.S. Security's Role As Security Contractor at the Inception of This Lawsuit

Cook's original counsel, Donald Cook,[10] was aware of U.S. Security's role as the Tacoma Mall security contractor at the outset of this case.[11] Mr. Cook had independently formed the misimpression that IPC International Corporation, a bankrupt corporation, was the security contractor for the Tacoma Mall.[12] But—and contrary to the Court of Appeals' incorrect assumption[13]—Mr. Cook was in possession of the lengthy police report with the relevant names and contact information of

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CP at 155. This time, Officer Waldron traveled approximately 10-15 feet away from her, and noticed that she was on her cell phone. *Id.* According to Cook, approximately 15 minutes after the second encounter, the same woman "suddenly ran after" Cook as she exited the west side of Nordstrom. CP at 36-37.

[8] CP 960-980. Plaintiff was in possession of this police report before the lawsuit was filed.

[9] CP 26.

[10] Donald Cook is Ms. Cook's brother-in-law.

[11] CP at 672-723at ¶¶ 4-7. The record directly refutes the Court of Appeals' statement that Mr. Cook "learned of U.S. Security" in late April 2015. Opinion, at p. 3

[12] CP 453.

[13] See Opinion, at p. 3, footnote 3.

the security officers before this lawsuit was even filed. Any confusion, which Petitioners did nothing to contribute to, was in any event short-lived.[14]

Further, both before and after filing suit, Mr. Cook was in contact with Tacoma Mall's in-house and local counsel,[15] who confirmed that the correct security entity was U.S. Security. This information was *never* kept a secret from Mr. Cook. It could not be; there was an indemnity agreement between the Mall and U.S. Security, a tender, and the two entities were *jointly represented by the same counsel.*[16]

As the trial court litigation wore on, Mr. Cook amended the Complaint three times, filing the Third Amended Complaint on January 20, 2015.[17] Despite undeniable awareness of U.S. Security, none of the amendments added U.S. Security (or any other security entity as a party).[18] Soon after, on February 5, 2015, Mr. Cook filed the Confirmation of Joinder, representing that no additional parties would be joined.[19]

D. Cook's Counsel Was Well Aware Of U.S. Security's Identity Before The Statute Of Limitations Ran

In addition to the knowledge Mr. Cook had at the outset of the

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[14] CP 202.
[15] *Id.*
[16] CP 672-673.
[17] CP 36-42; CP 43-51; CP 52-60.
[18] *Id.*; CP 673.
[19] CP at 69; 197 at ¶ 10. Mr. Cook, in fact, discussed the Confirmation of Joinder with the Petitioners' counsel before it was filed, and the record reflects that Mr. Cook specifically indicated that no additional parties were going to be identified. CP 672-673, at ¶ 25.

case, U.S. Security's role was thoroughly evident throughout the case.

In April 2015, the Mall timely provided Cook with its Disclosure of Primary Witnesses, which identified U.S. Security as the security company that contracted with the Mall to provide security services at the time of the incident.[20]

Cook's new counsel has repeatedly attempted to imply—but in no way explain or prove—that the Mall did something wrong in discovery. This is categorically false, a fact borne out in the record.[21] There was no hide-the-ball. When Cook propounded requests in April 2015, they were timely and thoroughly responded to. But this was something of a moot point, however, as the Mall had already disclosed the identity of U.S. Security with Cook's counsel several times by this point; had already had telephonic and documented discussions about U.S. Security by this point; and timely served Primary Witness Disclosures identifying U.S. Security by this point.

All of this occurred well before the statute of limitations ran.[22] As Judge Sorensen rightly concluded, based upon the totality of the record

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[20] CP 680. In addition, On May 20, 2015, the Mall's counsel had another telephone conversation with Mr. Cook about U.S. Security, and after the telephone call, the Mall's counsel sent an email *again* clarifying in writing that U.S. Security/Andrews was the contracted security entity at the time of the subject incident. CP 691.

[21] *See*, for example, CP 198-205.

[22] CP at 199 at ¶ 17; CP 213-214 at ¶¶ 5, 6, 7; CP 224. The documents produced and depositions conducted in this matter included U.S. Security documents and depositions. See CP 2119-2135; CP 201-02, at ¶ 25; CP 914; CP 937; CP 587-589.

and detailed briefing, Cook's failure to name U.S. Security was a conscious choice, not the product of sandbagging. To the extent it created problems in the run-up to trial, Cook was merely burdened by her own legal strategy.

E. Cook Obtained The Relevant Discovery From The Mall and U.S. Security Before The Discovery Cutoff

The record conclusively demonstrated that by early July 2015, Cook was in possession of all pertinent discovery related to both the Mall and U.S. Security.[23] The voluminous documentation included both the full security services contract and indemnity agreement between Tacoma Mall and U.S. Security; and all of the Tacoma Mall and U.S. Security's written security policies and procedures.[24] [25]

F. The Parties Were Preparing For Trial.

In early July 2015, since settlement discussions had not been fruitful, the parties discussed the remaining discovery to be conducted.[26] The parties agreed on dates for the remaining depositions, ensured that Mr. Cook was satisfied with the Mall's supplemental discovery responses, and confirmed that the trial was still going to take place in early October

[23] Over the course of discovery, the parties cooperated and conducted several discovery conferences to clarify certain requests, and also worked together to draft a Stipulated Protective Order in order to protect sensitive documents. No motions to compel were necessary or needed. All of the documents were submitted *as agreed by the parties*, and were all in Mr. Cook's hands by early July 2015. *See* CP 201-202.

[24] *See* CP at 201-02 at ¶ 25. This is in addition to the lengthy police report that Cook had since 2012, which included interviews with all of the witnesses, including security personnel, and all contact information. CP 960-980.

[25] Cook actually exceeded the permitted written interrogatories. CP 207.

[26] CP 200-207.

2015.

At no time did Mr. Cook indicate that he needed additional time, mention anything about a continuance, or suggest that he was experiencing any personal difficulties that would inhibit his ability to try the case as scheduled.[27] The opposite was true; he expressed his unequivocal intent to try the case.[28] Given the parties' plan for the remaining discovery and trial, the Mall prepared for trial, cleared its calendars, scheduled experts, and witnesses made arrangements to attend.[29] The Mall also drafted its motion for summary judgment, planned trial strategy, and drafted trial pleadings.[30]

G. Cook Associated New Counsel in July 2015 After the Tacoma Mall Noted a Motion for Summary Judgment.

On July 9, 2015, the Mall notified Mr. Cook that it planned to file a Motion for Summary Judgment, and the hearing was being set for September 4, 2015.[31] On July 20, 2015, exactly one month before the August 20, 2015 discovery cutoff, Mr. Cook associated new counsel.[32]

Even Cook's new counsel, however, did not conduct or request any additional discovery before the discovery cutoff.[33] Instead, new counsel scheduled a hearing for August 21, 2015 (the day *after* the discovery

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[27] *Id.*
[28] *Id.*
[29] CP 207-208.
[30] *Id.*
[31] CP at 205, at ¶ 37; CP at 226.
[32] CP at 100 – 102.
[33] VTP (Vol. I) at 11:1-4.

cutoff), requesting that the trial court move the trial date and reopen discovery.[34] In support of their request to effectively start the case over, Cook accused the Mall of *taking advantage* of Cook's original attorney, whom Cook called an "elderly, solo-practitioner that simply lacks the resources to effectively battle in discovery," and alleged factors—*e.g.*, the attorney's age, health, lack of litigation experience, home office, and lack of staff—all issues never mentioned or apparent to Petitioners.[35]

This, unfortunately, led to a frenetic series of hearings.

H. Motions and Subsequent Hearings.

1. August 21, 2015 Hearing: Given the above-stated facts and the posture of the case, the trial court denied Cook's Motion for a Continuance and declined to issue a new case schedule reopening discovery. But, the trial court granted Cook's CR 56(f) request to postpone summary judgment almost two months, to October 2, 2015.[36]

2. September 11, 2015 Hearing: Although discovery was closed, Cook moved to compel on discovery the parties had already agreed

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[34] See VTP (Vol. I) at 1-26.

[35] *Id.*; CP 204-05 at ¶¶ 32-36.

[36] CP 246-247. "... I guess what I'm inclined to do is move the summary judgment motion closer to our trial date, and leave the trial date as set and then see where we're at after the summary judgment motion..." VTP (Vol. I) at 19:16-20; "I'm allowing them [Cook's new counsel] to gather whatever materials and analyze whatever materials. If they think there's a need for something else, they will have to get leave from the Court to inquire further of you [defense counsel]." VTP (Vol. I) at 21:9-13; "...if the discovery requests that have been made currently, you believe have been insufficiently complied with...bring your motions to compel, and we will find out if there's anything else to be provided, and if there's not, I guess you are left with the discovery that you've got." VTP (Vol. I) at 21:17-20; 21:22-25; see also CP 246-247.

upon, and sought an even longer extension on the summary judgment motion and trial date, which the trial court denied. But again, the trial court was careful to handcraft the relief to ensure substantial justice to both parties.

In this respect, the Court of Appeals' assumption that Cook "still had not learned the identity of the security person patrolling when she was attacked[37]" (Officer Waldron), was just plain wrong. In fact, Cook not only knew the identity of that individual, but at this juncture the trial court permitted Cook to conduct the deposition of Officer Waldron. Cook was also permitted to conduct the deposition of the U.S. Security director *and* the Tacoma Mall Corporate Designee—all after the discovery cutoff, and despite the fact that the identities of all three individuals had long been disclosed and available.[38] The trial court underscored the extreme lenience Cook received:

> I allowed the motion [for summary judgment] to be continued to give you the opportunity to take over for Mr. Cook...and now it sounds like Mr. Cook didn't put forth many efforts, if any efforts, and maybe my rationale for giving the Cook family more time to investigate this case was misplaced. So, I mean, I think it is what it is at this point. I am not giving any more time.[39]

3. September 18, 2015 Hearing: Nearly *two months* after new counsel appeared, Cook's new counsel filed a motion for leave to amend

[37] Opinion, at p. 8.
[38] CP at 587-589; VTP (Vol. II) at 1-23.
[39] VTP (Vol. II) at 19:25 – 20:9.

the complaint under CR 10(a) to *substitute* U.S. Security for one of the "John Doe" defendants in this matter, as well as an additional motion for CR 56(f) relief and a continuance of the trial.[40] The trial court reluctantly granted Cook's motion to substitute so that U.S. Security could be on the verdict form at trial, but again denied her motion for more time.[41] In doing so, the trial court stated:

> ... [defense] counsel has put in a declaration that says, hey, we've - - I'm not sure what his problem is. We've talked about this over the course of the last eight months. He's amended his complaint three different times. Every time, I mean, my sense is, every time he's making an amendment I'm expecting U.S. Securities to be in there. I'm not asking - - I don't know, maybe Ms. Loucks [defense counsel] even asked, why isn't U.S. Securities in your amended complaint. That's sort of the gist that I'm getting as this is moving along. **What does the defense - - do they have to write the complaint for Mr. Cook in order to get it right? I guess I'm just wondering at what point does the - - and I understand you folks just got into this thing, so this is not directed at you. But I'm just, at what point does the plaintiff bear a responsibility for due diligence, and even just minimal diligence in terms of making sure they're suing the right people?**[42]
>
> **I am concerned that for 10 months, this thing proceeded on one track and all of the sudden somebody new jumps in, and now the defense, which has been preparing one way for 10 months, is now put in a position of having to completely revamp what they're doing, and you know, yes, I do need to be fair to Ms. Cook, and I want to be fair to Ms. Cook. I also want to respect the civil rules**

[40] CP at 733-734.
[41] CP at 733-734; VTP (Vol. III) at 1-41.
[42] VTP (Vol. III) at 10:6 – 11:7 (emphasis added).

that are in place to protect defendants who have the lawful right to defend their case as they see fit.[43]

4. October 2, 2015 Hearing: The trial court denied summary judgment; and denied Cook's additional motion for more time under CR 56(f).[44] But, still declining to grant Cook a continuance that would reopen discovery[45], the trial court allowed the parties an opportunity for a hearing on their related motions for reconsideration. Given the summary judgment hearing was on October 2, 2015—only six days before trial—the next hearing was scheduled for October 16, 2015, which necessitated moving the October 8, 2015 trial date.[46] The trial court continued the trial date to March 16, 2015 (calling it an "arbitrary" trial date that was to be revisited by the parties and the court after the subject motions were heard), without reopening discovery.[47] The trial court explained:

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[43] VTP (Vol. III) at 35:15 – 36:2 (emphasis added).
[44] CP at 1862-1864; VTP (Vol. V) at 1- 50.
[45] *See* RP 47, where Judge Sorenson stated: "I think we are past discovery cutoff, and that's why I directed however long ago, two, three weeks ago, that we were done. So I guess, and I am declaring today that we are still done, so I guess I haven't changed my mind. So if you want me to change my mind, Mr. Hastings [Cook's counsel], I guess you need to tell me why I need to do that."
[46] Judge Sorenson did not grant a motion for continuance, or overturn his prior denial of Cook's Motion for Continuance. Rather, he allowed for the parties to bring further motions (for reconsideration) concerning Cook's amendment of the Complaint to substitute U.S. Security Associates and with respect to his ruling that discovery would not be reopened with the substitution of U.S. Security as a "John Doe" defendant. *See* RP 47-49, where Judge Sorenson agreed that the motions could be heard on October 16, 2015, and that a new case scheduling order would be issued with an "arbitrary" trial date pending the motions. Consistent with his prior orders denying Cook's motion to continue, the new case scheduling order provided only the trial date, and did not reopen discovery. CP 1854-1855.
[47] *Id.*

> ... in terms of ongoing, continued discovery, no, that's not my intention. If U.S. Security is an appropriate party that should have been pled originally, I am allowing you the ability to do that, but that's the extent of what I am granting at this point in time.[48]

The trial court then invited Cook to bring a motion to reopen discovery, explaining:

> I'm not disagreeing with you [defense counsel], but in terms of their - - I don't know that the expectation should be that they [Cook] would walk into today's hearing believing that discovery was going to be forever terminated with regard to a new party. **So, it's my intention that that be the case, but I think that there ought to be some rationale articulated why that's happening.**[49]
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> I think we are past the discovery cutoff, and that's why I directed however long ago, two, three weeks ago, that we were done. So I guess, and I am declaring today that we are still done, so I guess I haven't changed my mind. So if you want me to change my mind, Mr. Hastings [Cook's new counsel], I guess you need to tell me why I need to do that.[50]
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> The court set the hearing for that motion for October 16, 2015.[51]

Cook brought a "motion for reconsideration" accordingly.[52]

5. October 16, 2015 Hearing: After thorough argument and careful consideration, the trial court again denied Cook's motion:

> It does seem to me that, by all accounts, 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

[48] VTP (Vol. V) at 37:4-20.
[49] VTP (Vol. V) at 45:14-23.
[50] VTP (Vol. V) at 47:2-13 (emphasis added).
[51] VTP (Vol. V) at 43:12-16.
[52] VTP (Vol. IV) at 1 – 29.

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. ...

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.[53]

I. The Court of Appeals Reverses Judge Sorenson's Order

On January 7, 2017, the Court of Appeals reversed this discretionary reconsideration Order, holding that Judge Sorenson abused his discretion when he declined to re-open discovery with respect to U.S. Security.[54] Besides being a substantial injustice based upon a misapprehension of the record, Petitioners now seek review because the trial court needs the tools to weigh competing evidence and argument, consider the needs of a given case, and fashion appropriate remedies. The Court of Appeals fundamentally overstepped, and this Court should give

[53] VTP (Vol. IV) at 11:5 – 13:10 (emphasis added).
[54] A copy of the opinion of the Court of Appeals is attached as Appendix A.

appropriate guidance—and credence—with respect to the trial court's authority to manage its docket.

V. ARGUMENT

A. Review Should Be Granted Under RAP 13.4(b)(4) Because the Court of Appeals' Decision Undermines The Civil Rules and A Trial Court Judge's Authority To Preside

RAP 13.4(b)(4) provides that the Supreme Court may accept review of a petition "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court. "A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue."[55]

The decision rendered by Division II, of the Court of Appeals, not only erodes the significance of the civil rules, but the trial court's ability to govern a litigation schedule. Management of discovery, the case schedule, and the timing of proceedings are uniquely within the purview of the trial court—which is in the best position to evaluate the competing

[55] *In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413 (2016); *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005) (granting review under RAP 13.4(b)(4) where "[t]he Court of Appeals holding, while affecting parties to this proceeding, also has the potential to affect every sentencing proceeding in Pierce County . . ."); *Sessom v. Mentor*, 155 Wn. App. 191, 195, 229 P.3d 843 (2010) (granting review as a substantial public interest where "[a]lthough the underlying case involved a money judgment in a suit between private parties only, the issue of how the extension of judgments statues is to be applied could potentially affect many cases and it is thus a matter of broad public import."); *In re Adoption of T.A.W.*, 184 Wn.2d 1040, 387 P.3d 636 (2016) (granted review under RAP 13.4(b)(4) because if impact on future cases where"[t]his context may also provide grounds for difference of opinion in resolving the plain meaning of the words in RCW 13.34.040.").

considerations and afford the parties appropriate relief. This is why appellate deference on legal issues is minimal, whereas the above-types of procedural rulings are not disturbed absent a "manifest abuse of discretion," that is, a conclusion "no reasonable judge would reach."[56]

Judge Sorenson, as indicated above, based upon a developed record, concluded that Cook was *willful* in failing to add U.S. Security as a party earlier, and that waiting until three weeks before trial to substitute U.S. Security as a party was highly prejudicial to the Tacoma Mall and U.S. Security. He therefore fashioned a solution that would allow Cook to put U.S. Security on the verdict form at a later trial date—and prosecute a case against them, based upon evidence developed throughout a complete case schedule—while minimizing the prejudice to Petitioners by declining a wholesale reopening of discovery.

The Court of Appeals' decision to overturn that eminently reasonable solution undermines Judge Sorenson, and the trial court's authority generally. Trial courts should be permitted to methodically govern a case and work out rational, "middle ground" approaches to protect the rights of both parties. The Court of Appeals' decision sends a

[56] "We review a decision to deny a continuance for a manifest abuse of discretion. Under a manifest abuse of discretion standard, the trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion." *In re Welfare of N.M.*, 184 Wn. App. 665, 673, 346 P.3d 762 (2014).

clear message to the bench and bar: trial courts should not share their reasoning, the appellate court is willing to re-weigh the evidence, and anything less than a one-sided ruling will be attacked on appeal as an irrational holding "no reasonable judge could reach." This is the wrong message to trial courts, and the wrong outcome.

It was Judge Sorenson who was right. He recognized, albeit compassionately, that "[a] scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril . . . Disregard of the order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier."[57] Washington generally adheres to this notion. The cases interpreting good cause have "specifically rejected" self-created hardship as a basis, even in the context of a defendant's liberty.[58] Citing self-inflicted wounds is not, and should not be, enough.

The Court of Appeals' reasoning and understanding of the record was wrong, to be sure. But rightly *or* wrongly, it was error for the Court

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[57] *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992).

[58] *State v. Luvene*, 127 Wn.2d 690, 718, 903 P.2d 960, 975 (1995); see also *State v. Mack*, 89 Wn.2d 788, 794, 576 P.2d 44 (1978) ("[s]elf-created hardship is not an excuse for violating mandatory rules"); *State v. Dearbone*, 125 Wn.2d 173, 181, 883 P.2d 303 (1994) (good cause "required an unavoidable and unusual delay which was outside the State's control."); *In re Kirby*, 65 Wn. App. 862, 868–69, 829 P.2d 1139 (1992) (same).

of Appeals to replace its own reasoning for the trial courts in this arena, absent application of an erroneous legal standard or irrational ruling.

B. Review Should Be Accepted Because The Court Of Appeals Based Its Decision—Which Impacts Future Litigation—On Incorrect Facts And Assumptions

Acknowledging that this is not an "error correcting" Court, Petitioners do however feel compelled to highlight the Court of Appeals' misinterpretations and inaccuracies—if only to underscore why such rulings are properly entrusted to the trial court.

By way of illustration:

The Court of Appeals stated that "the Mall had failed to provide knowledgeable deponents so that discovery against Security was necessary." Not accurate, or even relevant.[59] It is not only undisputed that Cook received *all* of the relevant contracts and policy documents of both the Mall and U.S. Security during the discovery period, as well as responses to more than the permissible number of written discovery requests, but Judge Sorenson permitted Cook to conduct discovery *beyond* the discovery cutoff (in the weeks before trial) for the purpose of allowing her to depose all of the knowledgeable individuals from U.S. Security.[60] There was no showing that Petitioners withheld any information from

[59] See pp. 10, 11 Supra.

[60] Again, these were personnel—including the officer on duty in the subject area at the time—that had already been identified both in the police report that Cook had been in possession of since 2012, and in the Mall's timely witness disclosures several months before.

Cook. Moreover, to the extent that Cook had not obtained discovery with respect to U.S. Security, Judge Sorenson understood that Cook could have subpoenaed U.S. Security at any time during the discovery process pursuant to the civil rules and elected not to do so.

The Court of Appeals also asserted that "the superior court's decision to allow Cook to amend her complaint meant that the superior court *accepted* Cook's reasons for not adding Security at an earlier point in the litigation."[61] This, too, is simply wrong. Judge Sorenson did *not* accept Cook's reasons or excuses at any point in the record. In fact, the trial court found her failure to add U.S. Security *willful*, which is why he allowed the substitution of U.S. Security for a John Doe, but declined a complete re-opening of discovery.[62]

Lastly, the Court of Appeals' contention that at the October 2, 2015 hearing the trial court "granted Cook's motion to continue the trial date and moved the trial from October 2015 to March 2016"[63] is factually incorrect. As the record demonstrates, Judge Sorenson *repeatedly denied* Cook's motions for a continuance. The trial court was clear that it moved the October 8, 2015 trial date only to accommodate the parties' respective motions for reconsideration, and merely set what he called an "arbitrary"

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[61] Opinion, at p.8 (emphasis added).
[62] As Judge Sorenson clearly understood, the dilatory and willful conduct of Cook's original counsel is a separate issue, and Washington law provides separate remedies for that.
[63] Opinion, at p. 9.

trial date in March. The Court of Appeals' opinion is predicated on a misapprehension that Cook was granted a continuance and therefore should also have been afforded reopened discovery. But that is a faulty premise.

Judge Sorenson made it clear in the record that he was not granting leave to amend the complaint under CR 15. He was granting leave to amend under CR 10(a). He simply allowed a *substitution*, so that U.S. Security would be listed on the verdict form. Nothing more. This not only makes perfect sense in the context of the case, but animates the wisdom of the decision *not* to re-open discovery. The Court of Appeals erred in second-guessing that wisdom, and manifest trial court decision.

VI. CONCLUSION

As a former superior court judge recently pointed out:

> Unfortunately, practitioners do not always achieve civility in the adversarial system... When this happens, the trial judge must step in and restore order and she must have the tools to do so. Here, the majority treads too heavily on the trial court's authority to restore order and conduct a fair trial.

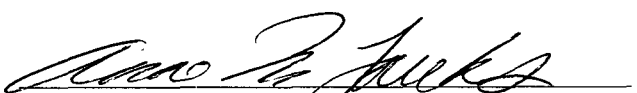
Jones v. City of Seattle, 179 Wn.2d 322, 371, 134 P.3d 380 (2013) (González J., concurring).[64] The trial court is in the best position to evaluate the needs of the case, the diligence of counsel, the prejudice

[64] Of note, the issue in *Jones* was the failure of the trial court to perform a *Burnet* test prior to excluding a witness disclosed mid-trial. The trial court was affirmed because the colloquy and record, in any event, supported her rulings. In our case, the trial court *did* perform a *Burnet* analysis—though, under no apparent obligation—and the record supports the ruling.

flowing from various rulings, and a multiplicity of other real-time considerations. When that authority is taken—as Division II's decision did—especially based upon incorrect facts—it has consequences. Review is warranted, because trial courts should be free to perform their constitutionally-mandated role, and do justice within the bounds afforded any other member of the bench.

Petitioners respectfully request that this Court grant review, reverse Division II's ruling, and in doing so confirm these fundamental principles of jurisprudence.

RESPECTFULLY SUBMITTED this 8th day of March, 2017.



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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 8th day of March, 2017, I caused a true and correct copy of the foregoing document to be delivered to the following counsel of record as indicated:

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Dated this 8th day of March, 2017, at Seattle, Washington.

Jaimisha Steward, Legal Assistant

Appendix A

Filed
Washington State
Court of Appeals
Division Two

February 7, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHERIE Y. COOK, individually, and CLARK T. COOK, individually and their marital community, Appellants, v. TACOMA MALL PARTNERSHIP, and SIMON PROPERTY GROUP, INC. a Delaware Corporation, and SIMON PROPERTY GROUP, L.P., a Delaware Limited Partnership, and Defendants' successors and assigns, and JOHN DOE 1 through 10, Respondents.	No. 48284-3-II UNPUBLISHED OPINION

JOHANSON, J. — We granted Cherie Y. Cook discretionary review of a discovery ruling and order denying reconsideration. Cook argues that the superior court abused its discretion when it prevented discovery as to a party added after the discovery cutoff and requests remand to a different superior court judge with instructions to reopen discovery as to all defendants. We hold that the superior court abused its discretion here when it declined to allow discovery as to a newly added party and denied Cook's reconsideration motion. We reverse and remand with instructions to allow discovery as to the newly added party.

FACTS

I. COMPLAINT FILED AND CASE SCHEDULE ISSUED

In October 2014, Cook sued Simon Property Group Inc. (Simon) for negligence. Cook alleged that in May 2012, an unknown female assailant attacked Cook, attempted to rob her, and knocked her to the ground outside the Tacoma Mall and that a security person, a Simon agent, had witnessed the assailant loitering outside the mall before the attack. According to Cook, these events established that Simon had breached its duty to protect Cook, a business invitee, from foreseeable harm.

Pierce County Superior Court issued an order designating the case for a standard track and setting the case schedule. The deadline for confirmation of joinder of parties, claims, and defenses was February 5, 2015, the discovery cutoff date was August 20, and trial was set for October 8.

A week after Cook filed her complaint, Simon tendered its defense and indemnification to U.S. Security Associates Inc. under a security services contract with U.S. Security and its predecessor, Andrews International Inc.[1] Security agreed to defend and indemnify Simon.

Cook subsequently amended her complaint and added Tacoma Mall Partnership, Tacoma Mall Inc., and Simon Property Group L.P. as defendants.[2] Cook claimed that the "security person was an employee of a company that contracted with [the Mall] to provide security services to the

[1] We refer to these two companies, which merged while the security contract was in effect, as "Security."

[2] We refer to Simon, Simon Property Group L.P., Tacoma Mall Partnership, and Tacoma Mall Incorporated collectively as "the Mall."

Mall" and that the security company was "in Chapter 11 bankruptcy proceedings." Clerk's Papers (CP) at 56.

II. Cook Learns of Security

In late April, the Mall identified Security in its primary witness disclosure. In May, in response to Cook's interrogatories, Tacoma Mall Partnership identified Security as the security contractor when the incident occurred.[3] In July, Cook moved to add Security as a defendant, despite having filed a joinder confirmation in February that stated that she would not seek to join any additional parties. That July joinder motion was stricken.[4]

III. New Counsel and Security Joined

In July, Cook retained additional counsel and unsuccessfully sought to continue the trial date and extend case deadlines.[5] In support of this request, Cook's original attorney submitted a declaration that he was an 80-year-old solo practitioner in poor health who had suffered several family tragedies in early 2015.

In September, with the benefit of new counsel, Cook again moved for leave to add Security as a defendant and argued that Security's addition would prevent the Mall from avoiding liability

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[3] The Mall's attorney submitted a declaration that Cook knew about Security as early as the fall of 2014. The Mall's attorney claimed that Cook's attorney said he would not add Andrews as a defendant because the company was bankrupt and that the Mall's attorney advised him that Andrews was not bankrupt. But Cook's first attorney submitted a declaration that he had wanted to add a different security contractor—IPC International Corporation—and did not do so when he learned that that company was bankrupt.

[4] Cook's original attorney apparently withdrew the motion.

[5] Although this first request to continue the trial date was unsuccessful, Cook later renewed her request, and the superior court ultimately granted the continuance motion at a hearing on October 2.

by shifting blame to Security. On September 18, the superior court granted Cook leave to amend her complaint, and Cook subsequently filed a fourth amended complaint naming Security as a defendant. In November, Security answered the fourth amended complaint and asserted affirmative defenses, including that Cook's injuries were caused by intervening events out of Security's control.

IV. SUMMARY JUDGMENT HEARING AND DISCOVERY RULING

On October 2, the superior court heard argument on the Mall's summary judgment motion. During her argument, Cook noted that she still had not learned the identity of the security guard patrolling the mall when she was attacked. The superior court denied summary judgment and then heard the Mall's argument that the decision to allow Cook to amend her complaint should be reconsidered. The Mall's attorney stated that Cook had known "about [Security] since the beginning of this case, and it's -- I just wonder where this is going to go at this point. Is discovery going to be reopened?" Report of Proceedings (RP) (Oct. 2, 2015) at 37. In response, the superior court stated that it would not reopen discovery.

Cook responded that the rules allowed a new discovery period as to Security and requested that the superior court issue a new case schedule that provided for discovery against Security. In particular, Cook claimed that the Mall had failed to produce knowledgeable deponents so that discovery against Security was necessary. The superior court responded,

> To the extent that's a motion that I can hear today, I am going to deny the motion, and both of you can bring reconsideration for any issue that we've addressed, but . . . it took every bit of energy for me to [deny the Mall's summary judgment motion]. And so I don't know what to tell you [Cook] beyond that, but I've allowed you to amend your complaint.

RP (Oct. 2, 2015) at 39. Although the superior court understood that Cook reasonably believed she was entitled to discovery as to the new party, the superior court ruled that there could be no new discovery unless it was outstanding at the time of the summary judgment hearing. There was no motion for discovery sanctions before the superior court. The superior court amended the case schedule to move the trial date from October 2015 to March 2016.

V. RECONSIDERATION OF DISCOVERY RULING

On October 16, 2015, the superior court heard argument on Cook's motion to reconsider the discovery ruling. At the reconsideration hearing, the Mall argued that it would be substantially prejudiced if discovery as to Security were allowed.

In response to Cook's argument that the discovery ruling amounted to an improper sanction under *Burnet v. Spokane Ambulance*,[6] the superior court stated,

> [When I denied the summary judgment motion,] it was all I could do to admit that you have even a simple case. . . .
>
> 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. [But] 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 . . . wasn't subject to being reopened.

4 RP at 11. The superior court noted that, in its view, Cook's original attorney had willfully declined to add Security despite knowing about the company for months. According to the superior court, the Mall had "articulated a substantial prejudice . . . in being ready for trial" but having the case "push[ed]. . . four months downstream." 4 RP at 12. The superior court stated

[6] 131 Wn.2d 484, 933 P.2d 1036 (1997).

that it had "been more than generous in allowing this case to be prosecuted the way you want it to be prosecuted." 4 RP at 13. Accordingly, the superior court denied Cook's reconsideration motion. Cook sought discretionary review.[7]

ANALYSIS

I. DISCOVERY RULING

Cook argues that the superior court abused its discretion when it ruled against allowing discovery as to Security and that the civil rules generally provide for discovery when a party is sued. The Mall responds that the superior court did not abuse its discretion, particularly when Cook caused the situation by delaying filing her motion for leave to amend. We agree with Cook.

A. APPLICABLE LAW

We review a decision not to extend a discovery cutoff for an abuse of discretion. *Buhr v. Stewart Title of Spokane, LLC*, 176 Wn. App. 28, 33, 308 P.3d 712 (2013). A trial court abuses its discretion when its decision is "manifestly unreasonable" or "exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

After the commencement of an action, parties are generally allowed to obtain discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." CR 26(b)(1). We "liberally construe[ ]" CR 26, which provides for a "right to discovery" without requiring a good cause showing. *Cook v. King County*, 9 Wn. App. 50, 51-52, 510 P.2d 659 (1973).

[7] A commissioner of this court granted Cook's petition for discretionary review for "obvious error" under RAP 2.3(b)(1). Ruling Granting Review, *Cook v. Tacoma Mall P'ship, LLC*, No. 48284-3-II, at 11 (Wash. Ct. App. Feb. 16, 2016).

PCLR 3(i) schedules discovery cutoff to occur 28 weeks after the date for confirmation of joinder in standard track cases. Joinder of additional parties is not allowed after the joinder confirmation date unless the superior court orders otherwise "for good cause and subject to such conditions as justice requires." PCLR 19(b). Under PCLR 3(e), the superior court, on a party's motion or by its own initiative, may modify any date in the case schedule other than the trial date "for good cause."

B. ABUSE OF DISCRETION

Here, Cook requested that the superior court allow discovery because a new party, Security, had been added and because in Cook's view, the Mall had failed to provide knowledgeable deponents so that discovery against Security was necessary. Under CR 26, which is to be liberally construed, after commencement of an action, discovery of "any [unprivileged] matter" relevant to the subject matter of the action is allowed. *Cook*, 9 Wn. App. at 51-52. Thus, Cook had a legitimate expectation that discovery would follow after the trial court allowed her to join and therefore commence an action against a new party to the litigation.

Although the trial court acknowledged that Cook's expectation that she would be entitled to some discovery as to Security was "[not] unreasonable," the superior court declined to allow discovery as to Security, in part because the cutoff had passed. RP (Oct. 2, 2015) at 45, 47. The superior court told Cook that "it took every bit of energy for me to [deny the Mall's summary judgment motion]. And so I don't know what to tell you beyond that, but I've allowed you to amend your complaint." RP (Oct. 2, 2015) at 39.

The superior court's reasoning when it denied Cook's request was that discovery had ended and that the superior court had already favored Cook when it allowed her to amend her complaint

and denied summary judgment for the Mall. Dates in the case schedule may be modified "for good cause." PCLR 3(e). Here, the superior court rejected Cook's arguments that the structure of the civil rules and her need for additional discovery against Security were good cause to amend the discovery cutoff date. The superior court's reason for doing so—that it had already indulged Cook with favorable rulings—is untenable. Favorable rulings should not be a trade-off for discovery. Additionally, that the discovery date had passed is an untenable reason to deny discovery because Security was not a party to the scheduling order when the discovery date passed.

The Mall argues that Cook should not be relieved from a self-imposed hardship. But the superior court's decision to allow Cook to amend her complaint meant that the superior court accepted Cook's reasons for not adding Security at an earlier point in the litigation. It was untenable for self-imposed hardship that created the late joinder to be a reason for the superior court to subsequently prevent discovery after allowing joinder. The remedy for a late joinder motion was to deny that motion. But this, the superior court did not do.

The Mall additionally argues that Cook failed to set forth what discovery she hoped to acquire. To the contrary, Cook specifically argued at the summary judgment hearing that she still had not learned the identity of the security person patrolling when she was attacked. And without discovery, Cook could not investigate and fully respond to Security's affirmative defenses.

To hold that the superior court abused its discretion here does not, as the Mall warns, result in a new "per se" rule that whenever a party is joined, discovery must be reopened. Here, the superior court relied on previous favorable rulings and the expiration of a prior scheduling order discovery date to deny discovery as to a newly joined party who asserted affirmative defenses. This ruling was exercised on untenable grounds and for untenable reasons. Accordingly, we hold

that the superior court abused its discretion when it ruled that it would not allow discovery as to Security.

II. RECONSIDERATION MOTION

The Mall reiterates its reconsideration motion argument that opening discovery as to Security will prejudice the Mall. This argument fails.

We review the denial of reconsideration for abuse of discretion. *Christian v. Tohmeh*, 191 Wn. App. 709, 728, 366 P.3d 16 (2015), *review denied*, 185 Wn.2d 1035 (2016).

Here, as discussed, the superior court abused its discretion, so that the superior court should have granted Cook's reconsideration motion. Rather than doing so, however, the superior court denied reconsideration and stated that the Mall would suffer "substantial prejudice" from being ready for trial but having the case "push[ed] . . . four months downstream." 4 RP at 12. This logic is untenable: at the October 2 hearing, the superior court had granted Cook's motion to continue the trial date and moved the trial from October 2015 to March 2016. Because the superior court had already moved the trial date five months later by the time of the reconsideration hearing, it is unclear how the Mall would have suffered any prejudice.

The Mall's prejudice argument fails, and, as discussed, the superior court's discovery ruling was an abuse of discretion. Thus, we hold that the superior court also abused its discretion when it denied Cook's reconsideration motion.

III. APPEARANCE OF FAIRNESS

Cook argues for the first time that the superior court judge's comments are evidence of bias so that we should remand the case to a different judge.[8] We disagree.

The appearance of fairness doctrine requires recusal where the facts suggest a judge is actually or potentially biased. *Tatham v. Rogers*, 170 Wn. App. 76, 93, 283 P.3d 583 (2012). Under this doctrine, it is enough to present evidence of actual or potential bias. *Tatham*, 170 Wn. App. at 95. The appearance of fairness doctrine is satisfied if a "reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing." *Tatham*, 170 Wn. App. at 96. The test for whether a judge's impartiality might reasonably be questioned is objective and assumes that a reasonable person knows and understands all relevant facts. *Tatham*, 170 Wn. App. at 96 (quoting *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)). And we presume that the trial court performs its functions regularly and properly without bias or prejudice. *Tatham*, 170 Wn. App. at 96.

At the October 2 hearing, the judge stated that it took him "every bit of energy" to deny the Mall's summary judgment motion. RP (Oct. 2, 2015) at 39. And at the reconsideration hearing, the judge said it was all he could do to admit that Cook had "even a simple case" and that he had

[8] Although we agree with the Mall that the superior court's comments do not merit remand to a different judge, we disagree that Cook has waived this issue. Although a party generally first files a motion for recusal in the trial court before seeking reassignment on appeal, reassignment may be sought for the first time on appeal where the issue raised on appeal is also the basis for the reassignment request. *State v. McEnroe*, 181 Wn.2d 375, 386-87, 333 P.3d 402 (2014). Because Cook's request for remand to a different judge is based on comments that the superior court made when it made the discovery ruling and denied her reconsideration motion—both of which decisions Cook now appeals—she may request reassignment for the first time on appeal.

"been more than generous in allowing this case to be prosecuted the way [that Cook] want[ed] it to be prosecuted." 4 RP at 11, 13.

Although perhaps ill considered, these comments do not rise to the level that a reasonable person with knowledge of all relevant facts would reasonably question the superior court judge's impartiality. *See Tatham*, 170 Wn. App. at 96. Cook is correct that the superior court's rationale for denying the request to allow discovery as to Security and in denying reconsideration was erroneous. But we disagree with Cook that the superior court's comments in doing so evince actual or potential bias such that the presumption that the superior court performed its functions regularly and without bias has been overcome. *See Tatham*, 170 Wn. App. at 96. Accordingly, we decline to remand this case to a different judge.

IV. Discovery Opened Only as to Security

Cook argues for the first time in her reply brief that if we agree that the superior court erred, we should remand with instructions to reopen discovery as to all defendants, not just open discovery as to Security. Cook contends that this remedy is necessary because discovery directed to Security may produce evidence that will "further implicate Simon's culpability." Reply Br. of Appellant at 6. We decline to address this argument because it is first raised in a reply brief. *See In re Marriage of Bernard*, 165 Wn.2d 895, 908, 204 P.3d 907 (2009).

We reverse and remand to the same judge, with instructions to allow discovery as to Security.[9]

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.

JOHANSON, J.

We concur:

WORSWICK, P.J.

SUTTON, J.

[9] Should discovery as to Security reveal facts that require further discovery as to the Mall, our holding should not be construed to foreclose Cook from moving the superior court to reopen discovery under PCLR 3(e).

WILLIAMS KASTNER™

Transmittal

Date: March 8, 2017

File No: 29465.0101

To: *SENT VIA ABC MESSENGER*
Washington State Court of Appeals Division II
950 Broadway, #300
Tacoma, WA 98402

From: Jaimisha Steward, Legal Assistant

Re: *Cook v. Tacoma Mall Partnership, et al.*
COA Division II No. 48284-3

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Thank you very much for your assistance,

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