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DIVISION ONE

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No. 74545-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PUGET SOUND SECURITY PATROL, INC.,

Petitioner,

vs.

KATHRYN BATES,

Respondent.

PETITIONER'S REPLY BRIEF

ROCKE LAW GROUP, PLLC
Aaron V. Roche, WSBA No. 31525
Peter Montine, WSBA No. 49815
101 Yesler Way, Suite 603
Seattle, WA 98104
(206) 652-8670

Attorneys for Petitioner Puget Sound
Security Patrol, Inc.

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I. INTRODUCTION

Respondent Kathryn Bates misstates or misrepresents several key issues in her response brief. The declarations and supplemental brief submitted in support of Petitioner Puget Sound Security Patrol, Inc.'s opposition to Ms. Bates's motion to strike were properly before the trial court at the summary judgment hearing. Ms. Bates was on notice that Puget Sound Security had a claim of unjust enrichment against her. Puget Sound Security's evidence, taken in the aggregate, points to a conspiracy between Mr. and Ms. Bates to achieve unlawful ends through unlawful means. In addition, conspiracy claims deserve special consideration in the context of noncompete agreements. Based on this evidence, the Court should reverse the trial court's grant of summary judgment, reverse the trial court's order striking Puget Sound Security's evidence, and remand this case for further proceedings.

II. ARGUMENT

A. The trial court should have considered Puget Sound Security's evidence.

The court's overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action. *Keck v. Collins*, 184 Wn.2d 358, 369 (2015). The purpose of summary judgment is not to cut litigants off from

their right of trial by jury if they really have evidence which they will offer on a trial—it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exist. *Id.* The primary consideration in the trial court’s decision should be justice, not a draconian application of time limitations. *Coggle v. Snow*, 56 Wn. App. 499, 508 (Div. I 1990) (reversing trial court’s denial of continuance and grant of summary judgment due to untimeliness).

By the time of the summary judgment hearing, Ms. Bates had known about Puget Sound Security’s evidence for years. Ms. Bates took advantage of Puget Sound Security’s unavailability in order to gain a strategic benefit. The trial court endorsed this strategy by excluding Puget Sound Security’s evidence demonstrating genuine issues of material fact. This Court should reverse the trial court’s grant of Ms. Bates’s motion to strike and allow a decision on the merits.

1. The court should not have stricken the declarations.

The trial court may permit affidavits to be supplemented or opposed by further affidavits. CR 56(e). A party has the right to file affidavits or otherwise complete the record up until the entry of the court’s order on a motion for summary judgment. *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn. App. 899, 903 (Div. I 1999). Modern rules of procedure are intended to allow the court to reach the merits, not to

dispose of cases on technical niceties. *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 227 (Div. I 1987).

The trial court should not have struck the declarations of George Schaeffer, D. James Davis, or Jeff Kirby. Puget Sound Security filed each of these declarations before the summary judgment hearing. Each declaration demonstrated the existence of issues of material facts. Puget Sound Security timely filed these declarations with its opposition to Ms. Bates's motion to strike. Ms. Bates had an opportunity to address these declarations in her reply in support of her motion to strike. (CP 751–56.) Striking these declarations because they were filed in support of the opposition to the motion to strike is a hyper-technical decision that prevents the court from addressing Puget Sound Security's claims on their merits. The trial court should not have struck these declarations.

a. Schaeffer Declaration

Puget Sound Security filed the Declaration of George Schaeffer in Opposition to Defendant Bates' Motion for Continuance in November of 2011. (Dkt. 49.)¹ This was nearly two years before Ms. Bates's motion for

¹ This is the Schaeffer declaration stricken by the trial court. (CP 772.) Puget Sound Security relied on this declaration in its Opposition to Motion to Strike Inadmissible Evidence Offered by Plaintiff in Opposition to Motion for Summary Judgment. (CP 684.) In the Petitioner's Brief (Petr. Br. 13), Puget Sound Security mistakenly addressed the Declaration of

summary judgment. Puget Sound Security resubmitted this declaration in support of its opposition to Ms. Bates's motion to strike, which was timely filed. (CP 592–93.)

b. Davis Declaration

Puget Sound Security attached the Declaration of D. James Davis to its opposition to Ms. Bates's motion to strike, filed on August 27, 2013. (CP 700–48.) Under LCR 7(b)(4)(D), Puget Sound Security had until noon the next day, August 28, to file its opposition. (CP 664–70.) Therefore, this declaration was also timely filed.

c. Kirby Declaration

Puget Sound Security filed the Declaration of Jeff Kirby Regarding Kathryn Bates' Conduct at Bandage Ball on August 28, 2013. (CP 749–50.) This declaration was timely filed in support of Puget Sound Security's opposition to Ms. Bates's motion to strike. Puget Sound Security filed this declaration before Ms. Bates's reply was due (CP 751–56) and before the hearing on summary judgment.

George Schaeffer in Support of Motion for Summary Judgment (CP 614–24). Puget Sound Security apologizes for this mistake and does not believe that this will in any way affect the outcome of this appeal.

2. The trial court should not have stricken the supplemental brief.

In its supplemental brief, Puget Sound Security brought relevant case law to the attention of the trial court. (CP 628–32.) It also put before the trial court an email, which was evidence of a genuine issue of material fact. (CP 633.) Ms. Bates acknowledged this email in her deposition. (CP 606.) This excerpt from Ms. Bates’s deposition was incorporated in the Declaration of Abigail Westbrook in Support of Opposition to Defendant Kathryn Bates’s Motion for Summary Judgment. (CP 594–95.) The contents of the supplemental brief were properly before the trial court and should not have been stricken.

3. The trial court should have followed *Burnet*.

In *Keck v. Collins*, 184 Wn.2d 358 (2015), the Supreme Court of Washington held that a trial court should consider the factors from *Burnet v. Spokane Ambulance*, 131 Wn.2d 484 (1997), in determining whether to strike an untimely affidavit. *Keck*, 184 Wn.2d at 369. This decision did not create new law or override existing precedent, but merely revealed the understanding of *Burnet*. *Id.* at 368–69. The court held that *Blair v. Ta-Seattle E. No. 176*, 171 Wn.2d 342 (2011), required trial courts to consider the *Burnet* factors on the record before excluding witnesses disclosed after court’s deadline. *Keck*, 184 Wn.2d at 368. The court then held that *Jones v. City of Seattle*, 179 Wn.2d 322 (2013), required trial courts to consider

the *Burnet* factors on the record before imposing “a severe sanction.” *Keck*, 184 Wn.2d at 368. Based on these prior cases, the *Keck* court held that the trial court had abused its discretion by not considering the *Burnet* factors on the record. *Id.* at 369. Therefore, this Court should also hold that the trial court’s failure to apply these factors to Ms. Bates’s motion to strike was an abuse of discretion.

Ms. Bates’s analysis of the *Burnet* factors is inaccurate. First, the trial court must affirmatively consider on the record whether a lesser sanction would probably suffice. *Keck*, 184 Wn.2d at 368–69. Puget Sound Security could not present evidence that the trial court had considered a lesser sanction because the trial court did not make a record of any such consideration. (CP 770–72.)

Second, Ms. Bates incorrectly argues that the Court should define “willful” as “without a reasonable cause.” (Resp. Br. 12.) The court in *Carlson v. Lake Chelan Comm. Hosp.*, 116 Wn. App. 718 (Div. III 2003) defined “willful” as “without a reasonable excuse” in the specific context of violating a court order. *Id.* at 737 (citing *In re Estate of Foster*, 55 Wn. App. 545 (Div. I 1989) (violation of court order); *Gammon v. Clark Equipment Co.*, 38 Wn. App. 274 (Div. I 1984) (violation of court order)). Because Puget Sound Security did not violate a court order, the Court should use the common meaning of the terms “willful” and “deliberate.”

Ms. Bates cannot show that Puget Sound Security's actions were either willful or deliberate.

Third, Ms. Bates had an opportunity to respond (and did respond) to the materials supporting Puget Sound Security's opposition to her motion to strike. (CP 751–56.) Ms. Bates was also on notice of Puget Sound Security's unjust enrichment claim against her. *See infra* Part II.B. The only “prejudice” Ms. Bates might face is that the trial court be allowed to make its decision based on all of the evidence. If the trial court had properly considered the *Burnet* factors, it would not have granted Ms. Bates's motion to strike.

4. Puget Sound Security could not have practically requested a continuance.

Should it appear from the affidavits of a party opposing a motion for summary judgment that the party cannot present facts essential to justify the party's opposition, the court may order a continuance to permit affidavits to be obtained. CR 56(f). Ms. Bates suggests that Puget Sound Security should have moved for a continuance in response to her motion for summary judgment. (Resp. Br. 8–9.) Moving for a continuance, however, necessarily requires that there be sufficient time for a continuance before the trial date.

The hearing for Ms. Bates's motion for summary judgment occurred on August 30, 2013. (CP 766–67.) At that time, trial was set for September 16, 2013. (CP 529.) Puget Sound Security needed the time after the motion for summary judgment to prepare for trial, which was quickly approaching. This eliminated a continuance as a practical option. Therefore, the Court should not fault Puget Sound Security for deciding not to move for a continuance.

B. The trial court should not have dismissed Puget Sound Security's claim for unjust enrichment.

1. Ms. Bates was on notice of Puget Sound Security's unjust enrichment claim.

Mr. Bates's intellectual property agreement with Puget Sound Security stated that, if Mr. Bates breached the agreement, all income received because of the breach would be held in trust. (CP 623.) One of Puget Sound Security's claims against Ms. Bates states: "Unfair earnings ... should be held by the defendants in constructive trust for the benefit of Puget Sound Security Patrol, Inc." (CP 522.) "Unfair earnings" is synonymous with unjust enrichment. If Ms. Bates needed clarification of this claim, she should have raised this issue in her opposition to Puget Sound Security's motion to amend the pleadings instead of lying in the weeds until summary judgment. The first time Puget Sound Security was required to brief this claim was in its opposition to Ms. Bates's motion for

summary judgment, at which time Puget Sound Security indicated the claim was for unjust enrichment. (CP 592.) Ms. Bates does not state an alternate understanding for this claim, only that it cannot possibly be a claim for unjust enrichment.

Washington follows notice pleading rules and simply requires a concise statement of the claim and the relief sought. *Champagne v. Thurston County*, 163 Wn.2d 69, 84 (2008). A complaint fails to meet this standard if it neglects to give the opposing party “fair notice.” *Id.* In *Champagne*, the Washington Supreme Court reversed the court of appeal’s exclusion of the plaintiff’s claims under the Minimum Wage Act and the Wage Payment Act. *Id.* at 86. The court of appeals held that the plaintiff was precluded from bringing these claims because he had not requested relief specific to those claims. *Id.* at 78. The Supreme Court reversed, holding that the plaintiff’s complaint did not “transgress the liberal bounds of the notice pleading standard.” *Id.* at 86. The court held that the entirety of Champagne’s complaint supplied direct allegations sufficient to give notice to both the court and the defendant that the plaintiff sought relief under the MWA and WPA. *Id.*

Here, Puget Sound Security pled the elements of an unjust enrichment claim in its complaint. The elements of unjust enrichment are (1) the defendant receives a benefit, (2) the benefit is at the plaintiff’s

expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment. *Young v. Young*, 164 Wn.2d 477, 484–85 (2008). Puget Sound Security pled each of these elements: “2.21 Mrs. Bates profited from Mr. Bates’ violation of the non-compete because she collected contributions from Mr. Bates for community expenses and bills.” (CP 519.) “2.14 As a result of Mr. Bates’ actions, Puget Sound Security has been irreparably harmed” (CP 518.) “2.2 Relevant clauses from [Mr. Bates’s] contract include: ... ‘If I breach this agreement, I will hold in trust for PSSP all income I receive as a result of the violation’” (CP 515–16.) Puget Sound Security pled all of the elements necessary for an unjust enrichment claim. This put Ms. Bates and the trial court on notice of Puget Sound Security’s claim. The Court should reverse the dismissal of Puget Sound Security’s unjust enrichment claim against Ms. Bates.

2. Ms. Bates’s motion to dismiss Puget Sound Security’s unjust enrichment claim was actually a motion for judgment on the pleadings.

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. CR 12(c). When a party moves for judgment on the pleadings, the court determines whether the claimant can prove any set of facts, consistent with the complaint, that would entitle the claimant to relief. *Parrilla v. King*

County, 138 Wn. App. 427, 431 (Div. I 2007). The factual allegations contained in the complaint are accepted as true. *Id.* at 431–32.

Ms. Bates did not address any of the factual allegations regarding Puget Sound Security’s unjust enrichment claim in her motion for summary judgment (CP 540) or her reply in support of summary judgment (CP 674–75). Rather, Ms. Bates merely addressed the adequacy of the pleadings themselves. (CP 540, 674–75.) Accepting Puget Sound Security’s pleadings as true, there exists a set of facts that would entitle it to relief for its unjust enrichment claim. If Ms. Bates helped her husband violate his noncompete agreement and then benefitted financially from those violations, Puget Sound Security would be entitled to relief in the form of a constructive trust.

The trial court should have considered the genuine issues of material fact affecting this claim, as required for summary judgment. This is yet another reason why the trial court should not have dismissed Puget Sound Security’s unjust enrichment claim against Ms. Bates.

C. Puget Sound Security’s evidence supports a claim of conspiracy against Ms. Bates.

1. The evidence should be considered in the aggregate.

In Ms. Bates’s response brief, she isolates the pieces of Puget Sound Security’s evidence of her conspiracy with Mr. Bates, then argues that each piece of evidence, taken alone, cannot support a claim of

conspiracy. When this evidence taken is together, along with all reasonable inferences, it is sufficient to sustain Puget Sound Security's claim of conspiracy against Ms. Bates.

It is a well-settled rule that circumstantial evidence, that is, evidence of the acts of the alleged conspirators and of the circumstances surrounding the transaction which is the basis of the charge, is admissible to prove the conspiracy charged. *Lyle v. Haskins*, 24 Wn.2d 883, 900 (1946). Puget Sound Security laid out the circumstantial evidence it presented in support of its conspiracy claim. (Petr. Br. 18–19.) As Puget Sound Security has demonstrated, this evidence, in the aggregate, demonstrates genuine issues of fact regarding Ms. Bates's participation in a conspiracy. Ms. Bates's concerns about the individual pieces of evidence are addressed below.

First, Ms. Bates did more than assist Mr. Bates with his noncompete agreement. (Resp. Br. 18.) Ms. Bates used her experience as a human resources professional (CP 598–601) to help Mr. Bates negotiate specific changes to the noncompete agreement (CP 620–24). This included changes to the provisions regarding Mr. Bates's responsibilities after his employment ended. (CP 622.)

Second, Ms. Bates recommended Mr. Bates negotiate protection from US Security so as to help him breach his noncompete agreement

without exposing themselves to liability. (CP 604–05.) Ms. Bates knew to suggest this because she had seen it done by companies for which she had worked as a human resources professional. (CP 568–69.) Taken in the light most favorable to Puget Sound Security, the permissible inference is that Ms. Bates knew Mr. Bates’s work with US Security would be in violation of his noncompete agreement. Mr. and Ms. Bates were interested in this subject by more than mere “happenstance,” as suggested by Ms. Bates. (Resp. Br. 18.) They were working together to profit from Mr. Bates’s violation of his noncompete agreement. If Ms. Bates did not want to be a member of this conspiracy, she should have refrained from providing guidance and assistance to her husband as he violated his agreement and then knowingly accepting the proceeds of these violations.

Third, Ms. Bates’s witnessing Mr. Bates’s signature shows that Ms. Bates knew or should have known the terms of Mr. Bates’s US Security employment agreement. Ms. Bates should have realized this employment agreement violated Mr. Bates noncompete agreement with Puget Sound Security. Rather than try to stop Mr. Bates, Ms. Bates continued to assist him in his violations.

Fourth, while the email by Mr. Bates’s account from his wife’s company may not support a conspiracy on its own, it is another piece of the growing collection of evidence supporting a conspiracy. Ms. Bates

provided Mr. Bates with opportunities to communicate with US Security, in furtherance of his violations of the noncompete agreement.

Fifth, Puget Sound Security does not argue that the spousal agreement between Mr. and Ms. Bates to pay for community expenses is itself a conspiracy. Rather, Puget Sound Security argues that Ms. Bates financially benefited from her conspiracy with Mr. Bates with money obtained by violating his noncompete agreement. This was the goal and the result of the conspiracy between Mr. and Ms. Bates.

The evidence, taken as a whole, is inconsistent with a lawful purpose. The dispute over the interpretation of this evidence and all reasonable inferences should have been viewed in the light most favorable to Puget Sound Security, precluding the trial court from granting summary judgment on this claim. The Court should reverse the trial court's dismissal of Puget Sound Security's conspiracy claim.

2. *All Star Gas* is inapplicable and unpersuasive; *Thorpe* is applicable and helpful.

Ms. Bates argues that the court should follow *All Star Gas, Inc., of Washington v. Bechard*, 100 Wn. App. 732 (Div. III 2000). *All Star Gas*, however, is inapplicable to the case at hand. In *All Star Gas*, one of the alleged conspirators only learned of the existence of the pertinent noncompete agreement when the lawsuit was commenced. *Id.* at 741.

Conversely, in the present case, Ms. Bates knew of Mr. Bates's noncompete agreement with Puget Sound Security before he even signed it. Furthermore, *All Star Gas* was an appeal of a bench trial, not a motion for summary judgment. *Id.* Here, the Court is reviewing the trial court's grant of summary judgment *de novo*. The facts and procedural posture of *All Star Gas* render it unpersuasive and irrelevant to the present case.

Conversely, the Court should follow Division III's decision in *Sterling Business Forms, Inc. v. Thorpe*, 82 Wn. App. 446 (Div. III 1996). The court in *Thorpe* held that circumstantial evidence, viewed in a light most favorable to the non-moving party, reflected the non-former employee's awareness of the alleged misconduct of the former employees. *Id.* at 453. The court went on to hold: "[T]he entire alleged conspiracy should be placed before the finder of fact, because although the finder of fact must base its decision on clear and convincing evidence, it could find that [the non-former employee] participated in a conspiracy. That determination will require weighing of the evidence, credibility determinations and the drawing of legitimate inferences from the facts." *Id.* at 454. In the same way, Puget Sound Security's conspiracy claim should go before the finder of fact because it could find that Ms. Bates participated in a conspiracy.

3. Conspiracies to violate noncompete agreements require special consideration.

In her response brief, Ms. Bates did not refute that Washington courts give special consideration to conspiracies to violate noncompete agreements. (Resp. Br. 14–24.) Puget Sound Security explained the reasoning and support for this special treatment in its opening brief, citing to multiple Washington Supreme Court decisions. (Petr. Br. 19–20.) These cases stand for the proposition that Washington courts should be particularly sensitive to conspiracies to violate or circumvent noncompete agreements. *Id.* The trial court should have kept this in mind when evaluating Puget Sound Security’s conspiracy claim. The Court should reverse the trial court’s dismissal of Puget Sound Security’s conspiracy claim.

D. Mr. Bates began working with US Security before November 16, 2010.

Ms. Bates implies that Mr. Bates did not start working for US Security until November 16, 2010. (Resp. Br. 4.) Mr. Bates left his employment with Puget Sound Security on October 18, 2010. (CP 94.) Mr. Bates received his employment agreement from US Security on at least October 26, 2010. (CP 307.) He did not sign the agreement with US Security until November 16, 2010. (CP 311.) This delay was likely caused by Mr. Bates seeking assurance from US Security that it would protect him from legal

action taken by Puget Sound Security, as recommended by Ms. Bates. (CP 604–05.) The bankruptcy court found that Mr. Bates was working for US Security by October 2010. (CP 785.)

This factual clarification is important to the present appeal because it further supports Ms. Bates’s involvement in Mr. Bates’s decision to violate his noncompete agreement. Based on this and other evidence, a jury could infer that Mr. Bates would not have left Puget Sound Security for US Security if Ms. Bates had not helped Mr. Bates during the time between his receipt of the offer letter and his signing. This is yet another reason why the trial court should not have granted Ms. Bates’s motion for summary judgment.

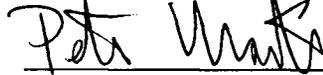
III. CONCLUSION

The trial court should not have stricken Puget Sound Security’s evidence that was filed before the court made its order. Puget Sound Security’s pleadings put Ms. Bates on notice that it had an unjust enrichment claim against her. Puget Sound Security has presented evidence which, in the aggregate, supports a claim of conspiracy against Ms. Bates. Conspiracy claims deserve special consideration in the context of assisting violations of noncompete agreements. The Court should reverse the trial court’s order striking Puget Sound Security’s materials

and the order granting Ms. Bates's motion for summary judgment. The Court should then remand this case so that it may proceed to trial.

DATED this 22 day of August, 2016.

Respectfully submitted,



Aaron V. Rocke, WSBA No. 31525

Peter Montine, WSBA No. 49815

Rocke Law Group, PLLC

101 Yesler Way, Suite 603

Seattle, WA 98104

(206) 652-8670

Attorneys for Petitioner Puget Sound
Security Patrol, Inc.