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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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JACK WALTER and VIVIAN WALTER, husband and wife,

Respondents,

v.

ALICE A. BAUER,

Appellant.

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OPENING BRIEF OF RESPONDENT'S  
JACK WALTER AND VIVIAN WALTER

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LOZIER & RIPLEY, P.S.

By

Ronald S. Ripley, WSB#8293

Attorney for Respondents Jack Walter and

Vivian Walter

LOZIER & RIPLEY, P.S.

Attorneys at Law

1111 So. Fawcett Ave., Ste. 102

Tacoma, WA 98402

TABLE OF CONTENTS

	Page
I. ASSIGNMENT OF ERROR	4
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	4
III. STATEMENT OF THE CASE	5
IV. ARGUMENT SUMMARY	7
V. ARGUMENT	9
VI. REQUEST FOR ATTORNEY'S FEES	13
VII. CONCLUSION	14

## TABLE OF AUTHORITIES

### Cases-Washington

Crown Controls Inc. v. Smiley 110 W.2d 695, 756 P.2d 717 (1988)	_____ 8
Doe v. Blood Bank 117 W.2d 772, 819 P.2d 370 (1991)	_____ 10
Labriola v. Pollard Group Inc. 152 W.2d 828, 100 P.3d 791 (2004)	_____ 13
Morton v. McFall 128 App. 245, 115 P.3d 1023 (2005)	_____ 12
Reid Sand & Gravel v. Bellevue Property 7 Wash.App. 701, 502 P.2d 480 (1972)	_____ 11
Santos v. Dean 96 Wash.App. 849, 982 P.2d. 632 (1999)	_____ 9,11
Talps v. Arreola 83 W.2d 655, 521 P.2d 206 (1974)	_____ 10

### Cases-Federal

Freed v. Plastic Packaging Material 66 F.R.D. 550 (E.D. Pa. 1975)	_____ 10
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### Other

Washington CR 5(a)	_____
Washington CR 26(i)	_____ 6
Washington CR 36.	_____ 5,9,11
Washington CR 56	_____ 8,10,11

**I.**  
**ASSIGNMENT OF ERROR**

Respondents do not believe that the trial court committed any error in these proceedings. However, based upon statements made in the petitioner's brief, respondents believe that the issues pertaining to the assignment of error should be restated.

**II.**  
**ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Did the trial court commit error, or abuse its discretion in deeming that Alice Bauer made certain admissions when a combined set of Requests for Admission was served upon the individual defendants who were represented by the same attorney, no objections were filed, and in view of the fact that this issue was not raised by the appellant prior to the trial court rendering its decision?
2. Did the Requests for Admission request Alice Bauer to admit she should lose the lawsuit?
3. Did the trial court abuse its discretion by not allowing Alice Bauer additional time to respond to Requests for Admission, when in fact there had been no request by Ms. Bauer or her attorney for additional time to submit responses?
4. In reviewing Request for Admission Number two in its entirety, did the trial court err by treating Alice Bauer as having admitting to being the registered owner of the business known as Wholesale Tool Outlet?

5. Did the evidence submitted by the appellant in this proceeding raise a genuine issue of material fact as to whether Alice Bauer owned Wholesale Tool Outlet and should be held responsible as an undisclosed principal?

### **III. STATEMENT OF THE CASE**

This case arises from a default on a commercial lease executed July 1, 2004 between Jack and Vivian Walter, as landlord and Scott Bauer, d/b/a Wholesale Tool Outlet, as tenant. Scott Bauer is the adult son of Alice Bauer. At the time of executing the lease, the Walters were unaware of the existence of Alice Bauer. After Scott Bauer defaulted on the lease, the Walters, while attempting to serve Scott Bauer, upon searching business registration records with the State of Arizona, learned that Alice Bauer was in fact registered with the State of Arizona, as the owner of Wholesale Tool Outlet.(CP 172).

In their amended complaint, the Walters alleged that Scott Bauer entered into the lease as the agent of his mother, Alice Bauer, who was an undisclosed principal. (CP 34) In September of 2006, the Walters, pursuant to CR 36, through their attorney served Requests for Admission upon the attorney representing both Scott Bauer and Alice Bauer in this proceeding. The Requests for Admission included Request for Admission Number two which stated: “You are requested to admit that Alice A. Bauer is shown by the records of the Arizona Secretary of State and registered with the Secretary of State to be the owner of the business known as Wholesale Tool Outlet”. (Emphasis added) (CP 76).

Plaintiff’s Requests for Admission, and first Interrogatories were submitted to defendants on September 11, 2006. (CP 73). After thirty days had passed and no Answers were received, Plaintiffs scheduled a discovery conference pursuant to CR 26(i), which

took place on October 19, 2006. At the discovery conference, counsel for the defendant promised to provide responses within two weeks which would have been no later than November 2, 2006 but failed to do so. (CP 73). On November 8, almost sixty days after the Interrogatories and Requests for Admission were served, and almost thirty days after they were due, plaintiffs moved for an order compelling discovery, and for the court to determine that the matters set forth in the Requests for Admission be deemed admitted for the purposes of this litigation. (CP 73).

Subsequent to filing and serving the motion to compel discovery, the plaintiff did receive Answers to Interrogatories and Request for Production of Documents. (CP 184). The court record reflects that the defendant filed no response to the motion to compel, nor was a response filed to plaintiff's motion to the court to have the matters in the Requests for Admission deemed admitted. The defendants did not request an extension of time to submit the responses to the Requests for Admission, and the issue was not before the court at the hearing that occurred on November 22, 2006. On November 22, 2006 the court heard the plaintiff's motion to have the matters contained in the Requests for Admission deemed admitted. (CP 217, 218). After hearing argument, the court ruled favorably upon the plaintiff's motion, granted terms on plaintiff's discovery motion and ordered that those matters set forth in plaintiff's Requests for Admission dated September 8, 2006 were deemed admitted, and documents A & B attached to Requests were deemed genuine. (CP 263, 264). Thereafter, upon plaintiff's motion for summary judgment, the court granted judgment to the plaintiff for unpaid rent against Scott Bauer, and Alice Bauer as the undisclosed principal. (CP 302-307). A subsequent motion to vacate the judgment filed by new counsel for Alice Bauer was denied by the court.

**IV.  
SUMMARY OF  
RESPONSE TO ARGUMENT**

Throughout this proceeding, and in their brief, the defendant has used the existence of an LLC by the name Wholesale Tool Outlet as a red herring to distract the court from the plaintiff's case. While the defendant has referred to a purchase of the assets of Wholesale Tool Outlet by Scott Bauer from his parents in May of 2002, they never provided the court with a copy of the sale agreement. Plaintiff does not, however, deny the existence of such an agreement.

Be that as it may, the existence of the LLC and the sale of the assets of the LLC to Scott Bauer are not the issue. As defendants noted, they operated a proprietorship under the trade name Wholesale Tool Outlet from 1990 to 1999. In June of 1999 they formed an LLC called Wholesale Tool Outlet LLC and registered that entity with the Arizona Secretary of State: (CP 252-253, 241). Although they may have conducted business under the auspices of the LLC, Alice Bauer also kept current the separate registration of the proprietorship known as Wholesale Tool Outlet. The record reflects that the initial registration of the proprietorship of Wholesale Tool Outlet was filed in 1996: (CP 255). The registration was renewed in 2001, after the LLC was formed: (CP 80). It should be noted that when the proprietorship was re-registered under the trade name Wholesale Tool Outlet in 2001, it was registered at the address of 2519 West Houston Ave., Apache Junction, AZ, which is a different address than the initial registration: (CP 255) and a different address than the LLC: (CP 247-250). This distinction lies at the heart of plaintiff's argument: There were two separate business registrations. At no time did the defendant address this issue, or attempt to explain to the trial court why she had two

separate business entities, registered under two separate registration numbers, with two separate addresses. Although Alice Bauer claims to have had no interest in the LLC business after the LLC assets were sold to her son in May of 2002 which may be true, it is irrelevant to plaintiff's case. She remained as the registered owner and agent of the proprietorship which was a separate and distinct entity. (CP 80). This has never been denied, and no material question of fact exists on this issue.

Defendant is correct when she states that when the lease was negotiated, Scott Bauer represented that Wholesale Tool Outlet was his personal business. The lease makes no mention of an LLC: (CP 105-124). The Walters did not know of Alice Bauer prior to execution of the lease. This is in fact what gives rise to their claim against her as an undisclosed principal: (CP 171-174) Crown Controls Inc. v. Smiley, 110 W.2d 695, 756 P.2d 717 (1988). The LLC, however, is a red herring; it is not an issue and never has been an issue. The ownership of the sole proprietorship was the focus of the plaintiff's complaint.

The defendant at no time addressed the issue to the trial court as to whether or not Alice Bauer was the registered owner of the business known as Wholesale Tool Outlet with an address of 2519 West Houston Ave., Apache Junction, AZ: (CP 80), which has a separate address from that registered by the LLC which is 2944 W. Shiprock St., Apache Junction, AZ: (CP 247-250). The fact that the answer to the complaint may contain such a denial, is immaterial and irrelevant. When a motion for summary judgment is made, and supported by affidavit as provided in CR 56, an adverse party may not rest on mere allegations or denials in his pleadings, but must respond by affidavit or otherwise provided by CR 56: (CR 56(e)).

As to the issues raised by the defendant, they will be addressed in the same order of argument as set forth in Appellant's Brief.

**V.  
ARGUMENT**

**A. The Trial Court did not abuse its discretion in making the deemed admissions.**

1. Under the facts of this case, the court's action was entirely reasonable. The defendant's reliance upon Santos v. Dean, 96 Wn. App. 849, 857-58, 982 P.2d 632 (1999), is misplaced. In Santos, the Court of Appeals analyzed whether a trial court erred by granting an extension of time with which to respond to Requests for Admission, and set forth the general framework deciding the abuse of discretion question, which included a two prong test, as to whether permitting the extension subserves the presentation of the merits of the case and whether the extension will prejudice the opposing party. Under the facts of Santos, which involved only a request for a seven day extension, the court found that the opposing party was not prejudiced and the extension would subserve the presentation of the merits of the case.

In Santos however, the parties had the opportunity to address those issues and present argument to the trial court which then rendered its decision. In the case at bar, the issue was not raised in the form of a motion prior to the hearing that provided the respondents the opportunity to address those issues. Furthermore, under CR 36(b), once the admission was deemed made, the defendant had the opportunity to move the court to withdraw the admission or amend it using the same two prong test i.e.... "When the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court withdrawal or amendment will prejudice

him in maintaining his action or defense on the merits". In the case at bar, the trial court was not afforded the opportunity to consider the issue since it was not raised by the defendant prior to the court making its ruling, and there was no request to withdraw or amend the admission.

2. Defendant has provided no evidence to this court that the Requests for Admission were not properly served. While it is correct that the Requests for Admission were directed to both Scott Bauer and co-defendant, Alice Bauer, they have provided no evidence that only a single set of the requests were served on Alice Bauer's former attorney. The issue was not raised at the discovery motion, or at the time of the summary judgment hearing. A theory not presented at trial will not be considered on appeal, Talps v. Arreola, 83 W.2d 655, 521 P.2d 206 (1974); Doe v. Blood Bank, 117 W.2d 772, 819 P.2d 370 (1991). The appellants have provided no evidence to this court that in fact only one set of the Requests for Admission were served on Bauer's former attorney and should not now be allowed to argue factual allegations not contained in the record, or raise issues on appeal that were not raised below.

That being said, even if, arguendo, only one copy of the request had been served on the attorney, this constitutes adequate service since the defendants were each represented by that attorney. Defendant's reliance on Freed v. Plastic Packaging Materials, 66 F.R.D. 550 (E.D.Pa. 1975), is misplaced. That case raised the question as to whether a defendant, unrepresented by counsel had been properly served. In this case, however, it is undisputed that the Requests for Admission were served upon the attorney who jointly represented each of the defendants. Pursuant to CR 5(b)(1), service upon the attorney constitutes service on the party, unless otherwise ordered by the Court.

If in fact the opposing attorney failed to properly transmit the requests to his respective clients, that is not a reason to challenge the efficacy of the service. If the defendant's attorney failed to advise her of the proceedings, that issue can best be resolved in a civil action between the client and her lawyer.

3. Making the deemed admission did not prevent the case from being resolved on the merits or prevent the defendant from raising issues of fact. There is no dispute that the purpose of CR 36 is to obtain admission of facts as to which there is no real dispute and which the adverse party can admit cleanly without qualifications: (Reid Sand & Gravel v. Bellevue Property, 7 Wash.App. 701, 704, 502 P.2d 480 (1972). Request for Admission Number Two, however, did not, in effect, request the defendant to admit she should lose the lawsuit. She could well have admitted the fact that she was registered as the owner of the business and still raised issues of fact as to whether Scott Bauer was acting as her agent, or within the scope of his authority as her agent. She did none of those things. Instead, she refused to address the issue at all and directed her efforts to the sale of LLC assets to Scott Bauer. By refusing to address the issue head on she raised no issue of material fact, and the trial court, with undisputed facts was proper in granting summary judgment. (CR 56(c)).

4. With respect to the argument that Walters could show no prejudice from allowing a late response to their Requests for Admission, the facts are simple: Walters were never afforded that opportunity, since the issue was never raised before the trial court. It is disingenuous to argue that the late submission by counsel for appellants was in effect a request for extension of their original deadline for the response. The opportunity was there, they did not take it, unlike the facts in Santos v. Dean (supra). The issue was not

before the trial court, and by failing to raise the issue they have not preserved it for appeal: Talps v. Arreola (supra).

**B. The Trial Court did not err by granting summary judgment**

1. Plaintiffs have no argument with the defendant that the well established standard of review of a summary judgment is de novo: Morton v. McFall, 128 Wn.App. 245, 252, 115 P.3d 1023 (2005). However, when considering a motion for summary judgment, the court in reviewing the evidence must view what was actually submitted below. The defendant should not be allowed to argue facts that they wish had been submitted to the court, to-wit:

2. The declarations of Alice Bauer, Scott Bauer, and T. Gerald Chilton Jr. submitted in opposition to plaintiff's motion for summary judgment do not, as defendant states, contest the Walter's assertion that Alice Bauer was Scott Bauer's undisclosed principal. The Chilton declaration, (CP 240-251) does not address the issue, nor does the declaration of Scott Bauer, (CP 219-220). Once again, Alice Bauer in her declaration (CP 252-255), talks about the LLC. She does not address the issue about the separate business of which she was registered as the owner, or the agency question.

Defendant is correct in that the Request for Admission number two is a key admission. It states: "You are requested to admit Alice A. Bauer is shown by the records of the Arizona Secretary of State and registered with the Secretary of State to be the owner of the business known as Wholesale Tool Outlet": (CP 76) (emphasis added). This asks more than what the records of the Secretary of State showed, it asked her to admit that she is registered with the Secretary of State to be the owner of the business. It was up to her to deny such registration or ownership of the proprietorship. She did not do so.

Contrary to the argument of the defendant, this is more than admission as to what was reflected in the records of the Arizona Secretary of State. It was a request for her to admit that she was in fact registered as the owner, an issue which she has never directly addressed.

## **VI. REQUEST FOR ATTORNEY'S FEES**

Under the terms of the lease, the prevailing party is entitled to a reasonable sum for attorney's fees: (CP 15). Plaintiffs/Respondents were awarded attorney's fees as part of the award of summary judgment: (CP 305-306). If the plaintiffs prevail on this appeal, they should be awarded additional attorney's fees incurred in responding to this appeal, as provided by paragraph 26 of the lease.

In the event the defendant should prevail by raising a genuine issue of material fact, then in such event this case will have to be remanded to the trial court for trial. Defendants reliance on Labriola v. Pollard Group Inc., 152 Wash.2d 828, 100 P.3d 791 (2004), to support a request for attorney's fees on this appeal is misplaced. In Labriola, the appellant appealed the dismissal of her case by summary judgment. The Supreme Court not only reversed the issuance of the summary judgment, but granted summary judgment in favor of the appellant, therefore resolving the matter on its merits. As such, pursuant to the contract she was awarded attorney's fees. Those facts vary substantially from those facts that are before this court, since the defendant, at very best, is asking for this case to be remanded for trial. If such were to happen, until the case is determined at the trial court level the prevailing party will not be able to be ascertained. Therefore, defendant's request for attorney's fees should be denied.

**VII.  
CONCLUSION**

There was no abuse by the trial court in determining that Alice Bauer was the owner of Wholesale Tool Outlet, (the proprietorship, not the LLC). It is too late for her at this stage in the proceedings to attempt to withdraw the admission or seek to create an issue of fact. She had opportunity to do so at the discovery hearing, and prior to, or at the summary judgment hearing, and she did neither.

There was no denial by Alice Bauer of the ownership of the proprietorship known as Wholesale Tool Outlet. That is the crux of this case, and as such the defendant's request for reversal of the summary judgment should be denied. Plaintiff should be awarded reasonable attorney's fees on this appeal.

RESPECTFULLY SUBMITTED on this 14<sup>th</sup> day of May, 2007.

  
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Ronald S. Ripley, WSB#8293  
Attorney for Respondents

COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION II

ALICE A. BAUER, )  
Appellant. ) NO. 35885-9-II  
v. )  
JACK WALTER and VIVIAN WALTER, )  
Respondents. )  
CERTIFICATE OF SERVICE )  
\_\_\_\_\_ )

I hereby certify that on the 14<sup>th</sup> day of May, 2007, I caused all parties hereto to be served with the Opening Brief of Respondent's Jack Walter and Vivian Walter, and this Certificate of Service by directing delivery to the following persons by the means stated:

**By delivery in person on May 14<sup>th</sup>, 2007, to:  
Attorney for Appellant:**

Donald L. Anderson  
1201 Pacific Ave., Ste. 1200  
Tacoma, WA 98402-4395

**By mailing on May 14, 2007, to:  
Attorney for Scott Bauer:**

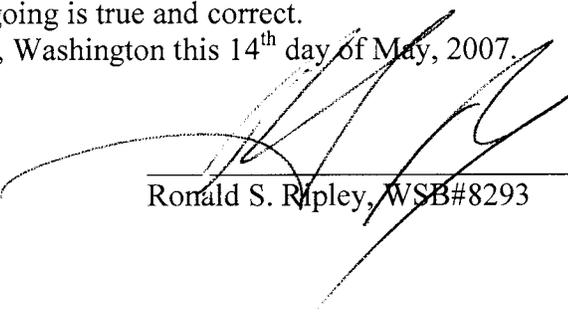
Bryan D. Lane  
Lane Law Firm, PLLC  
114 E. Magnolia 4<sup>th</sup> Floor  
Bellingham, WA 98225

**By delivery in person on May 14<sup>th</sup>, 2007, to:**

Clerk of Court  
Washington State Court of Appeals, Division II  
950 Broadway, #300  
Tacoma, WA 98402

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Tacoma, Washington this 14<sup>th</sup> day of May, 2007.

  
\_\_\_\_\_  
Ronald S. Ripley, WSB#8293

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MAY 14 2007  
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