
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

LEANNA SHIPP,

Appellant,

vs.

MASON GENERAL HOSPITAL FOUNDATION, et al.,

Appellees.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR MASON COUNTY

The Honorable Carol Murphy

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Plaintiff Leanna Shipp, following numerous delays and repeated court-imposed sanctions for missed litigation deadlines, asks this Court to overturn the well-considered decision by the trial court that there were no issues of material fact in dispute and that the Defendant, the Mason General Hospital Foundation (Hospital Foundation), was due judgment as a matter of law. Though the plaintiff contorts the language cited in the plaintiff's declarations from untimely-disclosed witnesses (much of it excludable as hearsay), the plaintiff cannot surmount the simple facts that the Hospital Foundation conduct was not "outrageous."

The trial court correctly dismissed plaintiff's claims of retaliation, and plaintiff's arguments to the contrary fail to establish a material fact that rebuts the employer's legitimate, stated reasons for termination. Further, although the trial court ruled for the Hospital Foundation on the "ultimate issue," the trial court declined to rule on the Hospital Foundation's motion to exclude witnesses which were untimely disclosed by the plaintiff materially prejudiced the Hospital Foundation's ability to defend the trial court's decision.

II. STATEMENT OF THE CASE

The plaintiff filed her suit on January 19, 2007, almost three years after she was terminated for disobeying her supervisor and relating what

the supervisor believed to be untrue statements about a fellow employee.¹ Plaintiff does not challenge that she was an “at-will” employee.

Plaintiff began her at-will employment with the Hospital Foundation on January 1, 2003, and prior to that time she was employed by Mason General Hospital.² Plaintiff was terminated for cause on January 21, 2004.³ Plaintiff claims that she notified her superior that she would be filing a worker's compensation claim on January 19, 2004,⁴ however she never actually filed the claim until February 5, 2004 – several weeks after her termination.⁵

i. Plaintiff's termination

Plaintiff's Supervisor at the time of her termination was Elizabeth Johnston. On January 16, 2004, the plaintiff, who served as manager of the “Treasures” store (a thrift store supporting the hospital foundation), met with Ms. Johnston, Leigh Bacharach and Sara Watkins, her former

1 See Plaintiff's Complaint (CP 198); Declaration of Elizabeth Johnston at 2 (CP 139).

2 Declaration of Leanna Shipp at 1-2 (CP 69).

3 Exhibit B to the Declaration of Elizabeth Johnston (CP 146).

4 Solely for purposes of the motion for summary judgment below and for purposes of this appeal, the Hospital Foundation does not contest that the plaintiff notified her supervisor that she would be filing a worker's compensation claim.

5 See Exhibit B to the Declaration of Christopher Keay (CP 153). Plaintiff alleged that she filed improper paperwork with the Department of Labor and Industries (specifically, that she filed paperwork as if the Hospital Foundation were “self-insured” instead of participating in the general state worker's compensation scheme). For purposes of the motion below and this appeal, the Hospital Foundation does not dispute that the plaintiff filed improper paperwork on January 19, 2004. Plaintiff signed the correct form on February 5, 2004, and that is the date cited above, even though the claim was signed by her physician several days later and filed after that.

supervisor.⁶ Plaintiff was asked if she had gossiped about events concerning Treasures. Plaintiff denied being the source of such gossip and indicated that another employee was responsible.⁷

Plaintiff, by her own account, believed that her job had been in jeopardy for months (long before any indication on her part of an intent to file a worker's compensation claim). Plaintiff's notes of a September 26, 2003, meeting with Elizabeth Johnston indicated that the plaintiff believed she would be fired.⁸

The events of January 2004, where Elizabeth Johnston believed that the plaintiff had discussed events which occurred at a Hospital Foundation Board meeting after Elizabeth Johnston had specifically directed the plaintiff not to do so, led to the plaintiff's termination for cause on January 21, 2004.⁹

ii. Procedural history

Plaintiff's remaining claims are "outrage" and "retaliation" for filing a worker's compensation claim with the Department of Labor and

6 Ms. Bacharach was taking a leave of absence, and thus Ms. Johnston assumed the duties as plaintiff's supervisor. Declaration of Leanna Shipp at 5(CP 72).

7 Declaration of Elizabeth Johnston at 2 (CP 139). See also Exhibit B to Elizabeth Johnson's Declaration (Disciplinary Action Form) (CP 146).

8 Plaintiff's notes, received in discovery and attached to the Declaration of Christopher Key as Exhibit A (CP 152). Also attached to the Declaration of Leanna Shipp as Exhibit A (CP 82).

9 See Exhibit B to Elizabeth Johnson's Declaration (Disciplinary Action Form) (CP 146).

Industries.¹⁰ As noted above, plaintiff filed her suit on January 19, 2007. The suit was dismissed by the Mason County Superior Court on the basis of insufficient service of process, a decision reversed by this Court in an unpublished opinion.¹¹

Upon remand the Superior Court issued a case schedule.¹² This Order required the plaintiff to “disclose all primary witnesses and experts no later than the 30[th] day of June, 2009.”¹³ The plaintiff failed to comply with the Superior Court's Order, and never disclosed any witnesses.

The Hospital Foundation moved for summary judgment on October 9, 2009.¹⁴ In response, plaintiff moved to continue the hearing on the motion and untimely filed responsive briefing. This untimely briefing

10 See Plaintiff's Appellate Brief. Plaintiff has voluntarily dismissed the third cause of action (for additional compensation) set forth in her complaint. Plaintiff's Response Opposing Motion for Summary Judgment at 1 (CP 97).

11 *Shipp v. Mason General Hosp. Foundation*, 147 Wash.App. 1023, 2008 WL 4868879 (2008).

12 See Respondent's Designation of Supplemental Clerk's Papers.

13 In contrast, the Hospital Foundation did disclose its primary and expert witnesses. The Hospital Foundation sent their Disclosure of Primary and Expert Witnesses to the plaintiff on July 30, 2009. The plaintiff's failure to disclose witnesses as required by the Superior Court's Scheduling Order was just the most important of many court-imposed deadlines the plaintiff failed to meet. Plaintiff failed to file a statement as to joinder of parties and claims by May 1, 2009, as required by the scheduling order, and failed to appear at the mandatory status conference to set trial dates on October 1, 2009. See Order Setting Mandatory Status Conference, CP 182. Please note that while the handwritten text on the initial Order indicated that the Hospital Foundation's defense counsel also did not appear on that date, defendant's counsel did appear, and the clerk issued a corrected order with a hand-written notation acknowledging that defendant's counsel appeared.

14 Hospital Foundation's Motion for Summary Judgment and Motion to Dismiss (CP 172).

included declarations from witnesses which had not been disclosed in conformance with the trial court's scheduling order. The Hospital Foundation, in its reply, objected to the use of declarations from these undisclosed witnesses and moved that these declarations be stricken.¹⁵

Following transfer to Thurston County, Superior Court Judge Carol Murphy granted the Hospital Foundation's motion in an Order dated May 21, 2010.¹⁶ This appeal followed.

III. ARGUMENT

a. The Hospital Foundation's alleged actions are not "outrageous" as a matter of law:

Plaintiff's "outrage" claim, reduced to its essential elements, comes down to the allegations that she was fired, escorted from the premises, and told not to return. Although plaintiff's allegations are vague, one might additionally read the plaintiff to be claiming that the Hospital Foundation's exercise of its *statutorily-guaranteed* rights to challenge plaintiff's unemployment and worker's compensation claims was somehow "outrageous."¹⁷ None of these claims even comes close to meeting the

15 Hospital Foundation's Objection to Plaintiff's Late Response to Summary Judgment, Motion to Strike and for Terms (CP 37). In this motion, the Hospital Foundation also noted that the discovery deadline had passed (it was September 30, 2009), and that the plaintiff's declarations "incorporate extensive hearsay remarks." *Id.* at 2 (CP 38).

16 Order Granting Defendant's Motion for Summary Judgment (CP 14).

17 Plaintiff also appears to make a very vague claim that some unidentified member of the Mason General Hospital Foundation "board" impeded her potential employment with her church in some unidentified way. *See* Declaration of Leanna Shipp at 11 (CP 69) ("I was turned down for the position, in part, because a board member who

legal requirements to establish the tort of outrage.

The elements of tort of outrage that the plaintiff must prove:

- (1) extreme and outrageous conduct;
- (2) intentional or reckless infliction of emotional distress; and
- (3) the plaintiff's actually suffering severe emotional distress.

Corey v. Pierce County, 154 Wn.App. 752, 763, 225 P.3d 367 (2010).

To prove extreme and outrageous conduct, it is not enough to show that the defendant acted with an intent that was tortious or even criminal, or that he intended to inflict emotional distress, or even that his conduct can be characterized by malice. *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). Liability exists only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Id.* (Emphasis added.) Liability does not extend to mere insults, indignities, threats, annoyances, petty

allegedly believed the false reason that was given for my termination, said that I was unsuitable for the position.”(Emphasis added)). Thus, even the plaintiff's declaration admits that the alleged conduct of the unidentified “board member” did not cause her church not to hire her. Yet further this vague allegation is not sufficiently factually specific to even buttress a claim. The plaintiff has the duty to present “specific facts” and cannot rest on mere allegations. *Dicomes v. State*, 113 Wn.2d 612, 631, 782 P.2d 1002 (1989).

Further, to the extent plaintiff's claims rely upon the Hospital Foundation or its employee's participation in state administrative proceedings opposing plaintiff's unemployment compensation or worker's compensation claims, the Foundation and its employees enjoy witness immunity. See *Wynn v. Earin*, 163 Wn.2d 361, 181 P.3d 806 (2008).

oppressions or other trivialities. *Strong v. Terrell*, 147 Wn. App. 376, 385-86, 195 P.3d 977 (2008), *review denied*, 165 Wn.2d 1051, 208 P.3d 555 (2009). Bad faith or malice is not enough to prove an outrage claim. *Dicomes*, 113 Wash. at 612., 782 P.2d 1002 (1989). The trial court had an initial duty to determine if reasonable minds could differ on whether their conduct was sufficiently extreme as to result in liability. *Strong*, 147 Wn. App. at 385.

Washington's analogous precedents strongly argue in favor of the trial court's determination that the Hospital Foundation's conduct simply was not "extreme in degree," not "outrageous in character," and not "beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community," and therefore did not constitute the tort of "outrage" as a matter of law. Daily verbal abuse, sexist jokes, and daily ridiculing comments over a *two-year* period (including disparaging remarks about a woman's personal life, the house she purchased, her husband's employment, and calling her a "bum mother" because she placed her son in therapy) did not constitute "outrage" as a matter of law. *Strong*, 147 Wn. App. at 386.

Discharging an employee following the intentional creation of a "false report created for the sole purpose of embarrassing, humiliating and then terminating" the employee was insufficient to support a claim of

outrage. *Dicomes*, 113 Wn.2d at 612.

Workplace disciplinary actions such as writing administrative reports, receiving oral reprimands, and internal affairs investigations are not “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Nor do threats to terminate or to suspend constitute outrageous conduct in light of *Dicomes*, where not even actual termination constituted outrageous conduct.

Kirby v. City of Tacoma, 124 Wn.App. 454, 474, 98 P.3d 827 (2004) (quoting *Grimsby*, 85 Wn.2d at 59) (emphasis added).¹⁸

Indeed, one federal court noted that escorting a terminated employee out of the building is not “‘atrocious’ or otherwise intolerable conduct – rather, it is arguably a routine occurrence.” *Dease v. Beaulieu Group, Inc.*, 2009 WL 113739, 3-4 (M.D.Ala., 2009). Even being escorted from the building without being able to collect one's personal belongings or say goodbye to coworkers is not outrageous. *Carraway Methodist Health Sys. v. Wise*, 986 So.2d 387 (Ala.2007).

The New York Court of Appeals (the highest New York State court, occupying the same position as our state Supreme Court), examined a case where a terminated plaintiff alleged that after he wrote a report about illegal pension reserves and raised the issue with his superiors, he was:

- discharged,

¹⁸ Even the deliberate exposure of an employee to chemicals the employer allegedly knew would harm her did not constitute the tort of outrage. *Hope v. Larry's Markets*, 108 Wash.App. 185, 196, 29 P.3d 1268 (2001)

- ordered to leave the building at once,
- when he returned the next day for his belongings he was placed under guard,
- barred from saying goodbye to his colleagues,
- told that his belongings had been taken from his desk (allegedly by breaking the lock),
- publicly escorted out of the building,
- when he came, as directed, to collect his possessions, he was summarily ordered out of the building,
- and his possessions dumped on the street beside him.

The New York Court of Appeals held that “the facts alleged by plaintiff regarding the manner of his termination fall far short of this strict standard” for demonstrating the tort of intentional infliction of emotional distress (“outrage”). *Murphy v. American Home Products Corp.*, 112 Misc. 2d 507, 508-509, 447 N.Y.S.2d 218 (Sup. Ct. N.Y. Cty. 1982), *aff’d*, 58 N.Y.2d 293, 303, 461 N.Y.S.2d 232, 236, 448 N.E.2d 86, 91 (1983).¹⁹

Plaintiff relies almost entirely on the *Corey* case. *See* Brief of Appellant at 18-19. Yet *Corey* contained far more egregious alleged facts.

In *Corey*, a former prosecuting attorney had been falsely and *publicly* accused by her employer of *criminal* behavior despite actual knowledge that no such criminal acts occurred. *Corey*, 154 Wn.App. at 764. This is far removed from plaintiff’s allegations that she was fired for gossiping when she allegedly did not gossip. Gossip is not criminal

¹⁹ The description of the alleged conduct is contained in the New York Superior Court opinion, and the dismissal of these alleged facts as constituting the tort of outrage is at the cited pages of the New York Court of Appeals opinion.

offense carrying a particular stigma within the community, a stigma the *Corey* court noted would be particularly abhorrent to a former *prosecutor*. *Id.*²⁰

The trial court's rejection of plaintiff's outrage claim should be affirmed.²¹

b. Plaintiff's retaliation claim

i. The trial court correctly dismissed the plaintiff's retaliation claim.

Plaintiff was fired from her job for gossiping, lying and wrongly accusing another employee.²² Plaintiff urges the court to consider whether

²⁰ Further, in other cases where employment-related outrage claims were allowed to proceed the conduct was similarly far more egregious than that alleged in the case before the Court, involving racial slurs and "names so vulgar that they have acquired nicknames, such as "the C word[.]" *Robel v. Roudup Corporation*, 148 Wn.2d 35, 52, 59 P.3d 611 (2003)(use of the "C-word"); *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 741, 565 P.2d 1173 (1977) (racial slurs and false allegations of theft of company property). No such conduct has been alleged in the present case.

²¹ Plaintiff, in a single paragraph stretching from the bottom of page 19 of her brief to the top of page 20, sets forth the Hospital Foundation's alleged conduct without any citation to the record. Among this laundry list are included items such as "terminated her medical benefits" (without explaining how a terminated employee would be allowed to continue medical coverage) and a list of purported "conflicting, false claims" allegedly put forward by the Hospital Foundation *after* plaintiff's termination. Plaintiff does not cite to the record regarding these allegations, and an appellate court will not consider an issue unsupported by citation to the record. *Eugster v. City of Spokane*, 118 Wn.App. 383, 424-425, 76 P.3d 741 (2003) (citing RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992)). To the extent that the Court is inclined to search through the record to locate these isolated statements (both of which constitute hearsay), it is respectfully submitted that two isolated statements of rationales for an employee's dismissal (arguably on grounds that would not necessarily reflect negatively on the employee, such as the store losing money) that differ from the rationale given to the employee do not even approach the "outrage" standard of being "atrocious and utterly intolerable in a civilized community." *Grimby*, 85 Wn.2d at 59.

²² Declaration of Elizabeth Johnston at 2 (CP 139). See also Exhibit B to Elizabeth Johnston's Declaration (Disciplinary Action Form) (CP 146).

in fact she committed these acts, whilst the proper inquiry instead is whether her supervisor, Elizabeth Johnston believed she had done these things and whether that belief was the reason for terminating plaintiff's employment.²³ The trial court correctly found no material issue of fact regarding the grounds for the plaintiff's termination for cause.²⁴ The trial court correctly determined that the plaintiff's termination for lying, gossiping, and wrongly accusing another employee were justifiable grounds for termination.

RCW 51.48.025, prohibits employers from terminating employment because of filing, or intention to file an L&I claim. It does not prohibit an "employer from taking any action against a worker for other reasons...." The Legislature did not hand employees a trump card to use whenever their employment was in jeopardy. RCW 51.48.025.

In a retaliation claim, an employee/plaintiff has the initial burden of establishing a prima facie case of retaliation. When an employee successfully establishes a prima facie case of retaliatory termination, the burden of production shifts to the employer; to satisfy this burden, the employer must articulate a legitimate reason for the discharge that is neither pretextual nor retaliatory. *Anica v. Wal-Mart Stores, Inc.* 120 Wash.App. 481, 84 P.3d 1231, (2004), as amended on denial of

²³ See Plaintiff's Appellate Brief and Declaration of Elizabeth Johnston at 2 (CP 139).
²⁴ Order Granting Defendant's Motion for Summary Judgment (CP 14).

reconsideration (Feb. 24, 2004).

Plaintiff argues that days before her termination she told Elizabeth Johnston that she planned to file for Worker's Compensation benefits and Elizabeth Johnston has testified that an employee has a right to file such a claim and such filing would not affect her actions, one way or the other.²⁵ Plaintiff claims she actually filed a Worker's Compensation claim at about the same time as the termination, but evidently she did not file it with the Hospital Foundation, but rather with the hospital, which is a separate legal entity and not a party to this litigation. There is no evidence that the Hospital Foundation had any knowledge of the filing of this claim until many weeks after the termination.²⁶

We are left with the plaintiff, who in her own words²⁷ knew in advance that her job was in jeopardy, and according to plaintiff announced, just prior to her termination that she was contemplating filing an L&I claim. The plaintiff's egregious, unrelated conduct (lying,

²⁵ Declaration of Elizabeth Johnston at 2 (CP 139).

²⁶ See Exhibit B to the Declaration of Christopher Keay (CP 153). Plaintiff alleged that she filed improper paperwork with the Department of Labor and Industries (specifically, that she filed paperwork as if the Hospital Foundation were "self-insured" instead of participating in the general state worker's compensation scheme). For purposes of the motion below and this appeal, the Hospital Foundation does not dispute that the plaintiff filed improper paperwork on January 19, 2004. Plaintiff signed the correct form on February 5, 2004, and that is the date cited above, even though the claim was signed by her physician several days later and filed after that.

²⁷ Plaintiff's notes, received in discovery and attached to the Declaration of Christopher Keay as Exhibit A (CP 152). Also attached to the Declaration of Leanna Shipp as Exhibit A (CP 82).

gossiping, disobeying her supervisor, etc.) which resulted in her termination cannot be rebutted by her assertion, three years later, that a substantial motivation for her termination was her threat to file an L&I claim. To find otherwise allows for the absurd conclusion that any time an employee's employment is threatened, the employee must only threaten to file an L&I claim to avoid dismissal. Legitimate reasons for the plaintiff's termination exist and these reasons were the only basis for the plaintiff's dismissal.²⁸

None-the-less, should the court find that plaintiff has raised sufficient facts to warrant return of this portion of the case to the trial court, respondent urges this court to carefully consider the evidence which the trial court reviewed and considered, and which forms a basis for the present review, as discussed below.

ii. The trial court should have exercised its discretion and ruled on the Hospital Foundation's objections and motions to strike the plaintiff's declarations from undisclosed witnesses:

The Hospital Foundation, in its summary judgment response, objected to the plaintiff's declarations from witnesses it failed to disclose in compliance with the trial court's scheduling order.²⁹ The Superior Court, in its oral ruling following argument on the summary judgment

28 Declaration of Elizabeth Johnston at 2 (CP 139). *See* also Exhibit B to Elizabeth Johnston's Declaration (Disciplinary Action Form) (CP 146).

29 Hospital Foundation's Objection to Plaintiff's Late Response to Summary Judgment, Motion to Strike and for Terms (CP 37).

motion, declined to rule on the Hospital Foundation's motions to strike because she indicated she was granting the summary judgment motion.³⁰ The Court indicated that the Hospital Foundation could renew its objections if the case ever went to trial and the court would then consider appropriate sanctions for the failure to disclose witnesses.³¹

The trial court declined to rule on the Hospital Foundation's motions to exclude the undisclosed witnesses materially prejudiced the Hospital Foundation. By considering the plaintiff's declarations of undisclosed witnesses, even while granting the Hospital Foundation's motion for summary judgment, the Court denied the Hospital Foundation important procedural protections. To cite merely one example, the plaintiff's failure to disclose her witnesses meant that none of those witnesses could be deposed prior to the Hospital Foundation's motion for summary judgment, and therefore the Hospital Foundation could not explore potential inconsistencies in the plaintiff's witness testimony which could have resulted in negation of such testimony under the *Marshall* rule.³²

30 RP 29.

31 RP 30.

32 When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony. *Marshall v. AC & S Inc.*, 56 Wn.App. 181, 185, 782 P.2d 1107 (1989) (quoting *Van T. Junkins & Assocs., Inc. v. United States Indus., Inc.*, 736 F.2d 656, 657 (11th Cir.1984)).

Trial courts have several mechanisms to enforce their orders. The violator of a court order can be found in contempt. *See, e.g., Stella Sales, Inc. v. Johnson*, 97 Wn.App. 11, 21, 985 P.2d 391 (1999). Further:

The court may impose such sanctions as it deems appropriate for unexcused violations of its scheduling orders. Dismissal is justified when a party acts in willful and deliberate disregard of reasonable and necessary court orders, the other party is prejudiced as a result, and the efficient administration of justice is impaired. Disregard of a court order without reasonable excuse or justification is deemed willful.

Apostolis v. City of Seattle, 101 Wn.App. 300, 304, 3 P.3d 198 (2000) (citations omitted).

Plaintiff's counsel in the present case provided no excuse for having failed to disclose witnesses in compliance with the trial court's scheduling order. A trial court may properly exclude witnesses or testimony as a sanction where there is a showing of intentional or tactical nondisclosure, willful violation of a court order, or unconscionable conduct. *Blair v. TA-Seattle East #176*, 150 Wn.App. 904, 909, 210 P.3d 326 (2009).

While trial courts have broad discretion to determine the appropriate penalties for dilatory disclosure and gamesmanship, *Id.*, the failure to exercise discretion is an abuse of discretion. *Brunson v. Pierce County*, 149 Wn.App. 855, 861, 205 P.3d 963 (2009). The trial court, by declining to rule on the Hospital Foundation's objections and motion to

strike the declarations of plaintiff's undisclosed witnesses, materially prejudiced the Hospital Foundation. Needless to say that if the trial court's sanction had been to exclude the witnesses then the Hospital Foundation would have been in a better position to defend the trial court's grant of summary judgment. But even if the trial court had ordered a lesser remedy, such as ordering the plaintiff to bear the full costs of depositions of these undisclosed witnesses and transcribing those depositions, the Hospital Foundation could have impeached these witnesses or at a minimum explored their ambiguous testimony.³³

Washington has a long, clear tradition of condemning gamesmanship in civil discovery. *Matter of Firestorm*, 129 Wn.2d 130, 150, 916 P.2d 411 (1996) (Talmadge, J., concurring). The imposition of sanctions must deter, punish, and ensure that wrongdoers do not profit from their wrongs. *Blair*, 150 Wn.App. at 909 (citing *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993)). In *Blair*, the trial court struck *half* of the plaintiff's witnesses that were untimely disclosed in violation of the trial court's case scheduling order. *Blair*, 150 Wn.App. at 907-908. This Court should remand this matter to

³³ By way of example, plaintiff's witness Dawn Parnell's ambiguous testimony attributing a rationale for terminating the plaintiff to Elizabeth Johnston "to the best of [her] recollection." Declaration of Dawn Parnell (CP 34). The Hospital Foundation should at a minimum been able to explore how strong that recollection actually was, but the Hospital Foundation was denied the ability to do so.

the trial court with directions that the trial court exercise its discretion and impose appropriate penalties, including – if the trial court determines it is warranted – exclusion and striking of the plaintiff's undisclosed witnesses – before this Court examines retaliation claims based in part on the testimony of plaintiff's undisclosed witnesses.

V. CONCLUSION

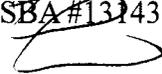
Even if the plaintiff's declarations from undisclosed witnesses are considered, the plaintiff's allegations are insufficient as a matter of law to constitute the tort of "outrage." The trial court's dismissal of this claim should be affirmed.

Further, the trial court's dismissal of the plaintiff's retaliation claim should be affirmed. In the alternative, the plaintiff's retaliation claims should be returned to the trial court with direction that the trial court exercise its discretion to sanction the plaintiff for its unexcused failure to disclose the witnesses upon whose declarations the plaintiff relied in opposing the Hospital Foundation's motion for summary judgment.

Respectfully submitted this 15th day of February, 2011.

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By: 

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Attorney for Respondent 

COURT OF APPEALS
DIVISION II

11 FEB 15 PM 2:58

STATE OF WASHINGTON
BY [Signature]
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LEANNA SHIPP,

Appellant,

vs.

MASON GENERAL HOSPITAL
FOUNDATION, et. al.,

Respondent.

NO. 40647-1-II

CERTIFICATE OF SERVICE

Respondent brief in the Matter of the Appeal of Leanna Shipp v. Mason General Hospital Foundation was mailed by first-class mail through the United States Postal Service to: Christopher W. Bawn, Attorney at Law, West Hills Office Park Building A-3, 1700 Cooper Point Road, Olympia, WA 98502; additionally the respondent's brief was faxed to: Christopher W. Bawn at 360-539-1805.

And was delivered by ABC Messenger to: Washington State Court of Appeals, Division 2, 950 Broadway, Suite 300, Tacoma, WA 98402

DATED this 15 day of February, 2010.

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