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COURT OF APPEALS
DIVISION II

WASHINGTON STATE COURT OF APPEALS
DIVISION II

2015 MAR 24 PM 1:01

STATE OF WASHINGTON

No. 46653-8-II

BY cm
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Appeal from Thurston County Superior Court
No. 12-2-01866-6

KRISTINE J. BRUMFIELD, Appellant

v.

PAUL TRAUSE, Commissioner
BRUCE DEMPSEY, Deputy Assistant Commissioner,
DEPARTMENT OF EMPLOYMENT SECURITY of the State of Washington, and
STATE OF WASHINGTON, Respondents

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF FACTS AND PRIOR PROCEEDINGS

-----Kristine Brumfield ('Plaintiff') worked for the State of Washington for more than 12 years at the Olympia office of the Employment Security Department ('ESD'), (CP at 147:22-24), under the leadership of Defendant Commissioner Brian Dempsey ('Dempsey'). CP at 108, par. 9. Her supervisors were Pat Seigler ('Seigler'), Id, par. 4, and Brian Roper ('Roper'), CP at 84:21-22 (i.e., ESD, Roper, Dempsey, State, *collectively* 'State' or 'Defendant') and during that time she was regularly promoted in both position and salary, and had no disciplinary incidents *whatsoever* (CP at 144:11-16). In January 2009, Plaintiff emailed to herself an Access Database table (CP at 84:19) in effort to preserve other evidence she had uncovered that certain tax-credits were unjustifiably missing. CP at 147:8-9. This email was at the same time cc'd to her then-supervisor Brian Roper ('Roper'). CP at 146:8. On July 27, 2009, Plaintiff sent an email to Roper and her immediate supervisor Seigler in which she announced that she had filed a whistleblower complaint with respect to said database problems. MSJ at 4/CP at 86:12-19. Defendant and Plaintiff signed a *preliminary* written "interim agreement" that did not permit Defendant access to her home, but only to her "home computer *file*". CP at 136:13-21. Defendant, however, entered her home to access such file *despite Plaintiff's protesting earlier that day that they needed a search warrant and she was denying them permission to enter her home*. CP at 136:10-11. Defendant while inside her home deleted

from her personal email account not only the email containing the database in question, but other emails having nothing to do with this database (CP at 138:18 ff). Ultimately, Defendant presented Plaintiff with a proposed contract terminating her employment. Plaintiff never signed it, and her signature is missing from the original in Defendant's possession (the one which Defendant, for obvious tactical reasons, conveniently doesn't include with its motion for summary judgment ['MSJ']). CP at 126:3-6.

Plaintiff indicated to her Union Representative Judy Devoe ('Devoe') that Plaintiff did not wish to resign her job (CP at 149, par. 33), however, later that same day, Devoe place her own union representative signature on the employment termination contract. Id. Defendant took Devoe's signature to be legally binding on Plaintiff, and found that Plaintiff's signature being missing was of no consequence, , and refused to allow Plaintiff's attempt to rescind. CP at 113, par 25.

II. ASSIGNMENTS OF ERROR AND ISSUES

PERTAINING TO ASSIGNMENTS OF ERROR

Error No. 1: The trial court erred in entering the order of August 22, 2014, granting Defendant's motion for summary judgment.

Issue No. 1: Plaintiff did not meet its own initial burden of *conclusively* proving the truth of its version of the facts.

Issue No. 2: Plaintiff's Opposition to MSJ contravened all material facts alleged by Defendant, sufficiently to require jury trial.

Error No. 2: The superior Court's ignoring Plaintiff's motion to strike was error.

Issues No. 1: The MSJ relied upon inadmissible hearsay within the Declaration of Dempsey.

Issue No. 2: The MSJ relied upon inadmissible hearsay within the Declaration of Roper.

Issue No. 3: Defendant prejudiced Plaintiff by citing to legal authorities in the MSJ which Defendant improperly failed to disclose in discovery.

Issue No. 4: Defendant prejudiced Plaintiff by citing to evidence in its MSJ in support of its affirmative defenses, but which it failed to disclose in discovery.

Issue No. 5: Defendant prejudiced Plaintiff by citing to evidence in its MSJ in support of its defense against Plaintiff's claim of retaliation, but which Defendant failed to disclose in discovery.

Issue No. 6: Defendant prejudiced Plaintiff's ability to defend her lawsuit by destroying relevant evidence in violation of law, and immediately after it anticipated litigation from Plaintiff (i.e., spoliation).

III. ARGUMENT

Error No. 1, Issue No. 1: Failure to meet initial burden

The movant for summary judgment must meet the highest burden logically possible, i.e., that the truth of their version of the facts is *conclusively* established:

The respondent proved only that the gas was odorized in compliance with industry standards and an administrative safety regulation; such compliance, however, does not **conclusively establish** that the gas was adequately odorized. Rather, that evidence is merely relevant on the issue of proximate cause. Respondent, in moving for summary judgment, had the burden of proof that no genuine issue of material fact existed on the question of proximate cause. Because respondent's evidence of compliance with the safety standards does not **conclusively establish** absence of proximate cause, appellants are entitled to a trial on that issue as an element of their product liability claim.

Zamora v. Mobil Oil Corp., 104 Wn.2d 199, 208-09 (1985)

According to the dictionary, “conclusive” requires a showing that places a matter beyond dispute; that is, “putting an end to debate or question especially by reason of irrefutability”. *Merriam-Webster, 1996, 10th ed.* It is logically impossible for there to be a higher standard of proof than *irrefutable conclusive* evidence. Therefore, under settled Washington law, Defendant in this case, in moving for summary judgment, had to meet the burden of using evidence in their favor that was so irrefutable that it *conclusively* established the truth of their version of the facts.

And they had to meet that high burden *irrespective* of whether Plaintiff filed an Opposition:

Initially the burden is on the party moving for summary judgment to prove by uncontroverted facts that there is no genuine issue of material fact. If the moving party does not sustain that burden, summary judgment should not be entered, **irrespective of whether the nonmoving party has submitted affidavits or other materials.**

Jacobsen v. State, 89 Wn.2d 104, 108 (1977)

The Supreme Court recently held that [when] there was abundant and uncontroverted independent evidence that no discrimination had occurred," summary judgment is proper.

Milligan v. Thompson, 42 P. 3d 418, 423 (2002)

citing Reeves v. Sanderson Plumbing, 530 U.S. 133, 148 (2000)

Failure to conclusively defend against wrongful termination.

State's defense against wrongful termination is Plaintiff's deposition testimony that she signed a letter of resignation. CP at 87:15 ff (MSJ page 5 line 15 ff). But State has missed the point: The issue is not whether Plaintiff signed a resignation agreement, but whether she signed it *voluntarily*. Other parts of State's cited transcript shows Plaintiff testifying that she rejected her union representative's advice to take the resignation deal. CP at 28:21 – 29:2), and that she attempted to rescind the involuntary agreement. Declaration of Dempsey, CP at 08, ¶ 25. If Defendant's own evidence includes testimony that Plaintiff rejected her union representative's advice, and that she attempted to rescind the "agreement", then Defendant cannot *conclusively* establish the voluntary

nature of Plaintiff's resignation, therefore the specter of State having involuntarily discharged Plaintiff remains a jury question.

The Whistleblower statute affords its protections both those who file a complaint with the Auditor, as well as to those who did not *but were perceived by their employer as having done so*. RCW 42.40

020(10)(a)(ii). State admits that the first time Plaintiff announced her "actually" having filed a whistleblower complaint was in her July 27, 2009 email to two different authorities over her, Roper and Seigler. CP at 86:14-15. State also admits it viewed Plaintiff as no longer employed effective one month after that email was sent: "The resignation was effective the following Tuesday, September 1, 2009." CP at 89:8). The July 2009 email notification of whistleblowing makes it impossible for State to establish *conclusively* that it didn't perceive her to be a whistleblower during the next month when it terminated her employment.

Failure to conclusively defend against whistleblower claims.

RCW 42.40.050(2) affords to the State several ways for it to rebut the presumption that its adverse employment decision was retaliatory:

proving by a preponderance of the evidence that there have been a series of documented personnel problems or a single, egregious event, or that the agency action or actions were justified by reasons unrelated to the employee's status and that improper motives was not a substantial factor.

MSJ, CP at 94:12 citing RCW 42.40.050(2)

An employer need only be motivated *in part* by retaliatory influences when discharging an employee engaged in protected activity to violate the statute. *Kahn v. Salerno*, 90 Wash.App. 110, 128, 951 P.2d 321 (quoting RCW 49.60.210(1)), review denied, 136 Wash.2d 1016, 966 P.2d 1277 (1998). Since the ‘personnel problems’ mentioned by the statute are those that allow the employer to overcome the presumption of retaliation, those personnel problems are required to be those which the employer says are the real reason they terminated employee, if they wish to use those problems to overcome the presumption of retaliation. Since Defendants themselves don’t believe Plaintiff’s emailing herself a database was a “series” (i.e., they characterize it as a ‘single’ egregious event, CP at 94:21), that particular offense does not count as “documented *series* of personnel problems”. Indeed, State nowhere asserts that it disciplined Plaintiff for anything at anytime, which means the State does not believe that its own documentation of Plaintiff’s other workplace problems collectively rose to the level of justifying firing her. Importantly, State says there is no evidence in the case to establish that Plaintiff would surely have been fired after a full investigation (CP at 322:12-13). If the State itself is admitting the impossibility of predicting that the outcome of the disciplinary hearing would have been termination of Plaintiff’s employment, then the State is tacitly admitting its failure to establish

conclusively that it would have fired her for this falsely alleged “series of personnel problems”, which means those problems do not contribute toward establishing State’s burden here. Moreover, State’s own evidence includes the July 27, 2009 email from Plaintiff in which she disputes the accuracy of the negative and last evaluation of her by her immediate supervisor Pat Seigler. MSJ Declaration of Kuehn, Exhibit D, CP at 59. As such, those personnel problems cannot be pointed to as *conclusive* evidence for the State’s “real” reason for involuntarily terminating her employment, thus State fails in rebutting the presumption of retaliation.

Single egregious event, also not established conclusively or by preponderance: The State argues that Plaintiff’s emailing herself a confidential database constituted the type of “single egregious event” this statute says can overcome the presumption of retaliation. CP at 95:9-13. But again, this ‘event’ is allowed for in the statute so the employer can point to it as the ‘real’ reason they fired an employee (i.e., rebut the presumption of retaliation). But the State’s own evidence indicates they did not believe this single event was sufficiently egregious to deserve firing. First, although Dempsey allegedly thought Plaintiff’s sending the database to herself was “a terminable offense all its own” (Dempsey Declaration, CP 110, ¶ 9), the State admits it did not fire records clerk Robert Page for committing *the exact same error with the exact same*

database (i.e., sending it outside State control). CP 91, fn 7. The State also admitted that there is no evidence in this case to show that the outcome of Plaintiff's disciplinary hearing would necessarily have been the termination of her employment (CP at 322:12-13), which contradicts their obvious intent to argue this event was a terminable offense. Finally, although State responded to Plaintiff's first possession of the database with allegedly great urgency (MSJ, CP at 89, fn. 6), this alleged sense of urgency was nowhere to be found when State learned of Plaintiff's second possession of this database as sent to her by Robert Page; they instead merely *asked* her to return it "immediately", doing nothing more than sending her an envelope with postage prepaid. MSJ, CP at 91, fn. 7. The great difference in the State's sense of urgency due to Plaintiff's first and second possessions of that database, combined with its own admission that there is no evidence in this case to justify thinking the result of a full disciplinary hearing would have been termination of Plaintiff's employment, makes it impossible for Defendant to meet its proper initial goal (as summary judgment movant) to establish *conclusively* that it has shown by preponderance of the evidence that Plaintiff's first possession of that database was the single egregious event of the type the statute says the employer must point to as their 'real' reason for involuntarily terminating Plaintiff's employment.

Failure to conclusively establish lack of improper motive. The last possibility in the statute for overcoming presumption of retaliation is the showing that improper motives were *not* a substantial factor in State's taking the adverse employment action, but the above arguments, already showing failure to conclusively establish overcoming presumption of retaliation, leave intact a possibility of State having improper motives for involuntarily terminating Plaintiff's employment, an issue of material fact and credibility which only a jury can decide. "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

Invasion of Privacy: No conclusive evidence State had Plaintiff's permission to enter her home: Defendants admit in the MSJ that the scope of the search Plaintiff agreed to was contained in a written signed agreement:

Ms. Brumfield signed an agreement which stated that, in return for her resignation and access to her home computer **file**, ESD agreed to not pursue criminal charges against Ms. Brumfield, to seal all information pertaining to her taking the database, to not contest her eligibility for unemployment benefits and to provide neutral references.

CP at 88:9 (emphasis added)

The agreement does not say "with access to her home." It also doesn't say "with access to her home computer". It qualifies "home computer" with "file", which means the written agreement unambiguously limited the

scope of the permitted search to just “home computer file”, in which case Plaintiff could have given them such access by bringing her home computer to a location outside her home, or she could have logged into her private email account from her computer at work and then allowed Defendants to access and delete the emailed database that way. Hence, the written agreement does not *conclusively* establish that Plaintiff was giving permission for State to enter her *home*.

The State quotes much from its deposition of Plaintiff to show that she intended to allow them into her home, but there are several problems that show the inconclusive nature of this evidence: First, Plaintiff’s testimony to the details on how the parties would go about fulfilling the terms of the written search-agreement violates the parol evidence rule: That rule is:

The parol evidence rule precludes the use of extrinsic evidence to add to, subtract from, modify, or contradict the terms of a fully integrated written contract; that is, a contract intended as a final expression of the terms of the agreement. But a party may offer extrinsic evidence in a contract dispute to help the fact finder interpret a contract term and determine the contracting parties' intent regardless of whether the contract's terms are ambiguous. Extrinsic evidence is not admissible, however, to show intention independent of the contract. Washington courts focus on objective manifestations of the contract rather than the subjective intent of the parties; thus, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.

Brogan & Anensen LLC v. Lamphiear, 202 P. 3d 960, 961 (2009)
(citations omitted)

The trial court should have known this case law without waiting for Plaintiff to raise it in her opposition. Second, since the agreement in

question also bound the State to its promise not to seek criminal sanctions against Plaintiff, it is clear that the State believed this written agreement to be the ‘final expression’ of the parties intents expressed therein. This means parol or extrinsic evidence cannot be used to modify the written terms. What did Plaintiff agree to in writing? Not to a “search of her home”, but only to a search of her “home computer *file*” (i.e., the file containing the database at issue). So when Defendant cites to the transcript of Plaintiff’s deposition and falsely interprets it to mean Plaintiff intended to permit access to her “home”, Defendant is using parol evidence to insist that “with access to her home computer file” means “Brumfield agrees to allow ESD into her home so ESD can delete the Access database from Brumfield’s files from that location”. Had the trial court properly observed this parol evidence rule, it would have found that because the written agreement was the final expression of the parties’ intent, nothing stated by Plaintiff in her deposition could be used to modify the written phrase to become the unequivocal phrase State wishes it was. The State thus fails to *conclusively* establish that the final written expression “with access to her home computer file” was Plaintiff’s permission for them to do the necessary work from inside her *home*. And even if parol evidence to show intention or meaning were allowed here, Plaintiff’s deposition testimony includes her **unequivocal refusal to allow**

State to enter her home (“I kept telling them no...” CP at 36:10-11, and “I remember telling him [Dempsey] several times that he needed to get a search warrant and he refused.” (Id at 34:6-8). The state must interpret Plaintiff’s unequivocal denial of permission for State to enter her home, in a light most favorable to her, for purposes of the MSJ, and being under such constraint must admit that the record contains reasonable but competing inferences on just what exact degree of permission Plaintiff gave, thus creating a jury question on a material issue of fact. Even if State convinces the appeal court that it properly fulfilled its initial burden, that would be irrelevant, as binding case law holds that these type of cases normally aren’t suitable for summary judgment even where Defendant has fulfilled their burden:

Even if the defendant articulates a legitimate, nondiscriminatory reason for the challenged employment decision, thus shifting the burden to the plaintiff to prove that the articulated reason is pretextual, summary judgment is normally inappropriate.

Johnson v. State, Dept. Of S&S S’s, 907 P. 2d 1223, 1233 (1996)

Error No. 1, Issue No. 2: Plaintiff’s Opposition to MSJ contravened all material facts alleged by Defendant sufficiently to require jury trial.

Washington law requires the summary judgment movant to avoid using disputed evidence and to limit their supporting materials to just those items that are ‘uncontroverted’:

Initially the burden is on the party moving for summary judgment to prove by uncontroverted facts that there is no genuine issue of material fact.

Amend v. Bell, 89 Wn.2d 124, 136 (1977)
citing LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975)

Because Plaintiff properly controverted each material fact alleged in the MSJ Declarations of Roper and Dempsey (see Plaintiff's rebuttal Declaration, CP 145-148 and 148-150, respectively), she forced the trial Court to re-classify Defendant's version of the facts from "uncontroverted" to "controverted", meaning Plaintiff successfully prevented Defendant from fulfilling its proper initial burden to support the MSJ with "uncontroverted" facts.

Wrongful Termination: State says there can be no wrongful termination because Plaintiff was not 'discharged' but signed a voluntary resignation paper, but Washington law focuses on whether the signing was *voluntary* or *involuntary*, it doesn't simply stop the analysis as soon as a signed resignation is placed into evidence. If resignation was involuntary, then it is the legal equivalent of a discharge:

"an involuntary or coerced resignation is equivalent to a discharge."

Grover v. North Sound Bank, 957 P. 2d 811, fn 1 (1998)

Micone v. Steilacoom Civil Serv. Comm'n, 44 Wash.App. 636, 639,
722 P.2d 1369 (1986)

- a. What does the law say on creating a jury question on whether a termination was involuntary?

The “attempt” to rescind can create a jury question:

To begin with, however, a resignation is presumed to be voluntary and it is incumbent upon the employee to introduce evidence to rebut that presumption. A withdrawal of a resignation **or an attempt to do so** may vitiate the element of voluntariness.

Plaintiff’s Opposition, CP at 125:25
citing Micone v. Town of Steilacoom Civil Serv. Comm’n, 44
Wash.App. 636, 722 P.2d 1369 (1986)
citing Scharf v. Department of Air Force, 710 F.2d 1572, 1574 (Fed.
Cir.1983)

Plaintiff’s burden as non-movant was exceptionally low; the trial court

was obliged to believe all of non-movant Plaintiff’s well-pled facts:

The evidence of the non-movant **is to be believed**, and all justifiable inferences are to be drawn in his favor.

Herron v. King Broad. Co., 112 Wn.2d 762, 768, 776 P.2d 98 (1989)
quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)

"A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." In making this determination, **the court must view the evidence and all reasonable inferences in favor of the nonmoving party.**"

Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552 (2008)

Plaintiff easily met her low burden with several different kinds of

evidence. First, from Defendant’s own evidence, there is material

indicative of involuntary resignation:

“She kept telling me – she kept wanting me to sign the paper. **And I told her I didn’t want to**...and she just kept bullying me to sign it.”

MSJ Declaration of Kuehn, CP at 27:9-15

Q. Judy Devoe advised you to accept the resignation deal, correct?

A. Yes, **I told her, no, I didn’t want to.**

Q. Ultimately you did though, didn’t you...?

A. **No, I didn’t. I was forced into it.**

CP at 28:21 - 29:2

Second, from Plaintiff's Opposition materials, her objection to State

entering her home:

Dempsey is incorrect that nobody objected to his idea of coming into my home. I objected to exactly this numerous times. MSJ Exhibit A, p. 90-99, esp. p. 99 lines 8-12.

Opposition Declaration of Plaintiff, CP at 50, ¶ 35

My union representative did not object to the disciplinary proceedings she was first present at (Dempsey.Decl. at 4:15). This was against my wishes, as I told her ESD was threatening to throw me in jail...It was also against my wishes since the infraction at issue was not worthy of termination in the first place and I had believed, and still do, the discipline was heightened due to whistleblower retaliation. DeVoe failed to object, the bullied and pressured me to resign even after I told her I was a whistleblower.

Id at 49, ¶ 33

Dempsey stated that he would consider the matter of my resignation closed when I signed the resignation papers. A true and correct copy of this email, other emails and resignation document is attached as Exhibit 16. But I never signed that resignation agreement. See lack of my signature. Id, p. 3.

id, at 50, ¶ 37

Finally, State admits through Declaration of Dempsey that:

After she resigned, Ms. Brumfield contacted me and told me that she was "rescinding" her resignation.

CP at 113, at ¶ 25

Since case law is clear that even an "attempt" to rescind an alleged resignation may vitiate the element of voluntariness (*Micone v. Town of Steilacoom, supra*), then Plaintiff's production of clear non-speculative non-conclusory evidence that she did not voluntarily resign, and that she shortly afterward "attempted" to rescind the alleged resignation agreement

(which she never signed in the first place, Plaintiff's Declaration Exhibit 16, CP at 211), easily meets her low burden of production necessary to defeat the MSJ on the point and force a jury trial.

Whistleblower Retaliation: The whistleblower statute must be construed liberally. Opposition, CP at 127:18 ff, citing to *Haddenham v. State*, etc. Naturally, the State construes it narrowly, and thus errs.

Assuming, *arguendo*, that movant/Defendant fulfilled its own initial burden to present *conclusive* evidence in its favor, Plaintiff at that point was obligated under Washington law to meet a burden only of *production*, not a burden of *persuasion*. The Court's job when reviewing summary judgment orders on employment cases is

to pass upon whether a burden of production has been met, not whether the evidence produced is persuasive. That is the jury's role, once a burden of production has been met."

Barker v. Advanced Silicon Materials, LLC, 131 Wn. App. 616, 624, 128 P.3d 633, review denied, 158 Wn.2d 1015 (2006) quoting Renz v. Spokane Eye Clinic, PS, 114 Wn. App. 611, 623, 60 P.3d 106 (2002)

...we clarify that showing "but for" causation is not part of a plaintiff's prima facie case of retaliatory discharge. As the balance of this opinion indicates, we also reject "but for" causation as part of the plaintiff's ultimate burden of persuasion.

MSJ Opp at 20:1-2
citing Allison v. Housing Authority of City of Seattle, 821 P. 2d 34, fn. 3, 118 Wn.2d 79 (1991)

It is axiomatic that on a motion for summary judgment the trial court has no authority to weigh evidence or testimonial credibility, nor may we do so on appeal.

No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc., 71 Wash.App. 844, 854
n. 11, 863 P.2d 79 (1993)

See also *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wash. App. 774,
799 (2005).

Although Plaintiff has smoking gun evidence that Defendant's position against her is pretextual (Dempsey himself expressed worry to other ESD employees that Plaintiff may "call our bluff", CP at 125:1, 'bluff' being a deception or pretense, and whether Defendant's "explanation" for that particular expression is true is a factual question the court is forbidden from deciding in summary judgment), an employee need not produce direct or 'smoking gun' evidence to show pretext:

Milligan need not, and did not, produce evidence of pretext beyond the evidence with which he tried to establish his prima facie case.

Milligan, supra,
citing *Sellsted v. Washington Mut. Sav. Bank*, 69 Wash.App. 852,
860, 851 P.2d 716 (1993)

"Because employers rarely will reveal they are motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose."

Vasquez, 94 Wash.App. at 985, 974 P.2d 348,
citing Kahn, 90 Wash.App. at 130, 951 P.2d 321.

She is not required to produce "direct or 'smoking gun' evidence."
Chen, 86 Wash.App. at 190, 937 P.2d 612 (citing *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wash.App. 852, 860, 851 P.2d 716 (1993)).
Rather, "[c]ircumstantial, indirect, and inference evidence is sufficient to discharge the plaintiff's burden." Id. (citing *Sellsted*, 69 Wash.App. at 860, 851 P.2d 716). Multiple, incompatible reasons may support an inference that none of the reasons given is the real reason. *Sellsted*, 69 Wash.App. at 861, 851 P.2d 716.

Renz v. Spokane Eye Clinic, PS, 60 P. 3d 106, 112 (2002)

Defendant admits that Plaintiff notified it of her 'actual' whistleblowing status on July 27, 2009, then admits that the decision to terminate her took place August 28, 2009:

Ms. Brumfield never announced that she had gone, or was personally and definitely going, to the State Auditor over the issue until July 27, 2009, when she declared in an email to Roper as well as her new supervisor with the Training Academy, Pat Siegler, that she "did a whistleblower on the money WOTC was wasting on a contractor that wasn't doing there (sic) job." Kuehn Dec!, Ex. A (Brumfield Dep. at 33-34); Ex. D (Brumfield Dep. Ex. 4). This is the first notification that Ms. Brumfield can demonstrate regarding her **actually having filed** a whistleblower complaint.

MSJ, CP at 86:12-18

Since Roper and Seigler never testify that they didn't view Plaintiff as a whistleblower after this July 27, 2009 email, they thus *did* view her as a whistleblower after this July 27, 2009 email, and therefore there is a presumption that her involuntary resignation one month later on August 28 was retaliation. It is the jury's job to choose between inferences available among the alleged facts when the record contains reasonable but competing inferences of both discriminatory and nondiscriminatory actions. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 186, 23 P.3d 440 (2001).

Pretext: Defendant admits the earliest of Plaintiff's notification to them of her actual filing a whistleblower complaint is July 27, 2009. MSJ, CP at 86:17-18. Further quotes from the MSJ show state admitting that

the decision to terminate her, and the final written expression of that decision, materialized not more than one month later:

This agreement was supplemented by a final agreement, which was signed on September 1, 2009. Ms. DeVoe of the Union signed on behalf of Ms. Brumfield on that occasion.

Declaration of Dempsey, CP at 11, ¶ 18

Thus establishing that the decision to terminate her employment came not more than one month after Plaintiff notified Defendant of her ‘actually’ having filed a whistleblower complaint. Proximity in time between the protected activity and the discharge may suggest retaliatory motivation.

Estevez v. Faculty Club of Univ. of Wash., 129 Wash. App. 774, 799, 120

P.3d 579 (2005). In the case of *Shaw v. Housing Authority*, 880 P. 2d

1006, 75 Wn. App. 755 (1994)(cited in Opposition, CP at 129), Shaw

during her probation period (during a time the appeal court doesn’t specify

further than “summer in 1991”) raised conflict of interest questions to her

employer Defendant Housing Authority, and was then terminated August

8, 1991. Shaw is directly on point, since Defendant in that case cited

Shaw’s alleged “continuing problem with handling criticism, abrasiveness,

poor public relations, lack of reliability, poor written work, poor budget

presentation, and inefficiency” as the “real” reason they fired her, very

similar to the criticisms against Plaintiff which State made and now

depends on to overcome presumption of retaliation. CP at 87:15 ff.

However, since the summer solstice is June 21, the time period between

protected activity and adverse employment decision which the appeal court found sufficiently short in *Shaw* to allow a jury to properly infer that employer's proffered reasons for discharge were pretextual was *a month and a half* (between June 21 and August 8). The time span in the instant case between protected activity (or Defendant's *perception* of Plaintiff as whistleblower from the July 27, 2009 email) and adverse employment decision, was July 27 – August 28), is one month, **which is two weeks shorter than the time span that was deemed sufficient to force jury trial on the matter of pretext in *Shaw, supra*.** This proximity, combined with evidence of satisfactory work performance and evaluations prior to the discharge, are both factors that suggest retaliatory motivation. *Vasquez v. State, Dep't of Soc. & Health Serv., 94 Wash.App. 976, 985, 974 P.2d 348 (1999), citing Kahn, 90 Wash.App. at 130-31, 951 P.2d 321.*

Plaintiff's Opposition provided extensive documentation showing that for all of her 12+ years working for ESD, she was regularly praised, regularly promoted, given regular pay raises, and had no disciplinary incidents whatsoever. Opposition, CP at 135:16-25, which is a better track record than for Plaintiffs in other similar cases where jury trial was required despite proof of prior disciplinary incidents: "Rice's personnel file contains only one written reprimand..." *Rice v. Offshore Systems, 272 p.3d 865, 874 (2012)*

Moreover, the first adverse employment decision against Plaintiff was not the date Defendant presented her with a voluntary termination agreement. It was the day she was re-assigned to work out of her house pending the disciplinary investigation. Defendant has already argued that reassignment to home is not retaliatory (MSJ Reply brief, CP at 322:8, citing *Connick v. Meyers*. But *Connick* is distinguishable. The issue is not whether employers have a right to assign employees to work out of their home, the issue is whether assignment to home *shortly after hearing Plaintiff was a whistleblower* is sufficient under Washington law for a jury to possibly find that the reassignment was retaliatory. It is:

"Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and `should be judged from the perspective of a reasonable person in the plaintiff's position."

Tyner v. State, 137 Wn. App. 545, 565, 154 P.3d 920 (2007)
quoting Burlington N. & Santa Fe Ry. Co., 548 U.S. at 71)

"`[a]n act that would be immaterial in some situations is material in others."

Burlington N. & Santa Fe Ry Co., 548 U.S. at 69
quoting Wash. v. Illinois Dep't of Revenue, 420 F.3d 658, 661 (7th Cir. 2005)

Invasion of Privacy: The parties' written "Interim Agreement" governs the scope of the search Plaintiff agreed to. As such, this written agreement is subject to Washington's parol evidence rule, namely, that evidence of intent coming from outside the document itself cannot be used to modify or contradict the written expression. The written form of the

agreement nowhere expresses or implies that Plaintiff gave State permission to enter her *home*. The parol evidence rule is:

It is the duty of the court to declare the meaning of what is written, and **not what was intended to be written.**

Berg v. Hudesman, 115 Wn.2d 657, 669 (1990),
quoting J.W. Seavey Hop Corp. v. Pollock, 20 Wn.2d 337, 348-49,
147 P.2d 310 (1944)
(emphasis added)

The operative phrase in the agreement is:

Employment Security Department with access to her *home computer file* finds...”

Opposition, CP at 136:20

The failure of this written agreement to specify exactly how Defendant was permitted to access Plaintiff’s home computer file, does not mean Defendants can use extrinsic evidence to *modify the meaning* of the governing written expression “with access to her home computer *file*”. Under *Berg* citing *J.W. Seavey, supra*, Defendant cannot argue that the written phrase “with access to her home computer file” was intended to be written as “with permission to enter her home”. Since Defendants could have easily accessed Plaintiff’s “home computer file” without Defendants entering Plaintiff’s home (i.e., by Plaintiff bringing her home computer to work or to a neutral location, or by logging into her personal email from work and allowing Defendants from that location to delete said file from her email account), the phrase “with access to her home computer *file*” bears an intelligent meaning all on its own, given the qualifying word

“file”, for which a jury could reasonably believe that Plaintiff only agreed to allow them to access her “home computer file”, not her “home”.

Even if extrinsic evidence were allowed, Plaintiff made clear that she instructed Dempsey and the others that they were not allowed into her home unless they got a search warrant (*e.g.*, **“I kept telling them no...”** CP at 36:10-11, and **“I remember telling him [Dempsey] several times that he needed to get a search warrant and he refused.”** (Id at 34:6-8). Such unequivocal denial of permission to enter her home prevents Defendant from establishing “conclusively” that Plaintiff gave them permission to enter her home.

Error No. 2, Issue No. 1: The MSJ relies on inadmissible hearsay in the Declaration of Dempsey. Dempsey relays the views of Pat Seigler on Plaintiff’s employment situation. CP at 109, ¶ 5, 6. No first-hand testimony from Seigler was ever cited anywhere in the MSJ, and according to case law, this lack of first-hand testimony from the immediate supervisor who had such first-hand knowledge is dispositive in favor of reversal for jury trial:

“Although Davis’s testimony suggests FCA representative Pugh was displeased with Rice’s conduct at the fire, the record contains no declaration or deposition testimony from Pugh”.

Rice v. Offshore Systems, 272 p.3d 865, 874 (2012).

Although Dempsey's testimony suggests Plaintiff's supervisor Seigler was displeased with Plaintiff's conduct at the office, the record contains no declaration of deposition testimony from Seigler.

RCW 42.40.050(2) requires that the employer who wishes to overcome a presumption of retaliation must show by preponderance of evidence a "documented" series of personnel problems. The dictionary says "documentation" means "the act or an instance of furnishing or authenticating with documents". *Merriam-Webster's collegiate dictionary, 10th ed.* Dempsey's MSJ Declaration does not have any attached 'documentation', and even if his Declaration itself could be considered "documentation", **Defendant specifies that it isn't using Dempsey's recollection of Seigler's version of the facts to prove the truth of the matters asserted.** MSJ Reply brief, CP at 320:3 ff.

Because the "personnel problems" mentioned in that statute are allowed for the purpose of the employer rebutting the presumption of retaliation, their purpose must be to show that the employer discharged the employee *for reasons other than whistleblowing*, which requires that these "personnel problems" actually rise individually or collectively to the level of terminable offense (i.e., so the employer can use them to show discharge for reasons other than retaliation). The "personnel problems" of Plaintiff which Dempsey says Seigler dealt with, were not terminable

offenses, either singularly or collectively. Seigler had informed Brumfield in July 2009 that she should outline the changes she needs to make in order to achieve her work-related goals. Opposition, Decl of Brumfield, Exhibit 8. CP at 178, bottom of page, *email from Seigler to Brumfield*. Seigler also commented in this 2009 email that Plaintiff should construct such outline to show goals over “the coming year” (i.e., 2010). **Seigler would never have told her to do this, if he had viewed the deficiencies in Plaintiff’s work performance as calling for her termination.** Since Defendant did not actually fire Plaintiff over these other problems, those problems cannot and thus do not assist Defendant in rebutting the presumption of retaliation.

- a. Did Plaintiff’s Opposition contravene Defendant’s alleged “documentation of personnel problems” sufficiently for reasonable persons to agree with her that Defendant’s proffered reasons for termination were pretextual?

Yes. Plaintiff’s burden as non-movant as one of production only, not persuasion. *Barker v. Advanced Silicon Materials, supra*. She gave evidence and testimony that she was viewed as a ‘good worker’ immediately prior to her July 27, 2009 notification to Defendant of her whistleblowing activity. Opposition Declaration, CP at 143:14 ff.

She testified that her work level in mid-2009 was “overwhelming” and for this reason was not able to accomplish certain work assignments. CP at 144:22 ff. **She also explicitly refuted, in point by point fashion, every material fact alleged against her in the MSJ supporting Declarations of Roper and Dempsey. CP at 145:17 ff and 148:6 ff, respectively.** Plaintiff’s rebuttal to the State’s allegations against her clearly met her already low burden of production, thus the superior Court erred in deciding such jury questions in summary fashion.

- b. Did Defendant’s admission, not made until its MSJ reply brief, that it *wasn’t* using Dempsey’s hearsay to prove the truth of the matter asserted, estopp Defendant from using it to document Plaintiff’s alleged history of ‘personnel problems’?

Yes. Surprisingly, Defendants admit that Dempsey’s recollection of Seigler’s words and actions respecting problems with Plaintiff is *not* being set forth to prove the truth of the matters asserted. MSJ reply brief, CP at 320:5-6. If that is the case, then the only *first-hand* testimony to the Plaintiff’s ‘personnel problems’ is Plaintiff’s testimony in her Opposition Declaration.

- c. Was that hearsay inadmissible at summary judgment?

Yes. Although Defendants said they were not using that hearsay to prove the truth of the matter asserted (MSJ reply brief, CP at 320:5-6), this is a

lie, they cite Dempsey's and Roper's hearsay concerning Plaintiff's alleged "documented series of personnel problems" in the attempt to meet their statutory burden as part to overcome the presumption of retaliation:

Based upon Ms. Brumfield's acknowledgments, **as well as the declarations of those who had supervisory authority over Ms. Brumfield**, she cannot establish that she was only criticized following her revelation of being a whistleblower. Roper Dec; Dempsey Dec.
MSJ, CP at 95:5-9

Defendant cannot trifle that the above quote was only admitting making use of the *first-hand* portions of the Declarations of Roper and Dempsey: The only pre-whistleblower criticisms of Plaintiff mentioned in the Declarations of Roper and Dempsey are sourced in their quotations of Seigler (as Dempsey does) or from unidentified database specialists (as Roper does). Neither Roper nor Dempsey give any *first-hand* testimony to any workplace problems of Plaintiff that could remotely be considered worthy of discharge, yet they are the only Declarants in support of MSJ.

d. Had the court struck this hearsay, would Defendants have lost evidence critical for meeting their burden under RCW 42.40.050(2) to overcome the statutory presumption of Plaintiff's whistleblower status?

Yes. As proven earlier in this brief, Plaintiff's Opposition Declaration explains that the "personnel problems" she discusses in her deposition were a mixture of lies and issues that were beyond her control: she was

viewed as a 'good worker' immediately prior to her July 27, 2009 notification to Defendant of her whistleblowing activity. Opposition Declaration, CP at 143:14 ff. She testified that her work level in mid 2009 was "overwhelming" and for this reason was not able to accomplish certain work assignments. CP at 144:22 ff. Plaintiff fulfilled her low burden sufficiently so as to create a material issue of fact about the real reason Defendant fired her, that reasonable persons could disagree on it, thus requiring jury trial.

Of course, Defendant will point to its MSJ Exhibit B (CP at 51 ff, the pre-disciplinary letter), containing hearsay from Seigler about Plaintiff's workplace problems that allegedly rose to the level of terminable offenses, which Defendant can point to as the "real" reason they discharged her. But Defendant cannot use this document to prove the truth of the matters asserted (i.e., Plaintiff's workplace problems prior to their knowledge of her whistleblower status), because a) signature of alleged author, Dempsey, is missing, and b) even if he signed it, he cites to *Seigler's* comments for *all* the evidence therein of Plaintiff's workplace problems (i.e, hearsay that is inadmissible because Seigler's comments are being used to prove the truth of the matter asserted concerning Plaintiff's pre-whistleblowing workplace problems).

Error No. 2, Issue No. 2: The MSJ relies on inadmissible hearsay

within the Declaration of Roper. None of Roper’s testimony about the database being ‘functional’ comes from his own first-hand knowledge; he sources it in various ‘specialists’ that he never identifies: ”...it was verified **by our IT Department** to be perfectly operational.” CP at 103, ¶ 4

- a. Even if the hearsay was admissible, did it constitute “documentation”?

No. As shown earlier, in the dictionary, “documentation” means to establish something by means of documents. There are no documents attached to the Declaration of Roper, and even if his Declaration was a “document”, none of his comments about the database being operational, draw from his own first-hand knowledge. And given State’s admission in its MSJ reply brief that it wasn’t using the hearsay in these Declarations to prove the truth of the matters asserted, that leaves them with an MSJ that contains no first-hand testimony to contradict Plaintiff’s own first-hand testimony to the extremely corrupt nature of the database.

- b. Even if Roper's hearsay constituted a 'documentation', did this documentation describe "personnel problems" of the type mentioned in RCW 42.40.050(2)?

No. Roper admits that although he found Plaintiff's allegations of a corrupted database to be a complication, she nevertheless was never disciplined or fired for such comments. CP at 104, ¶ 7. Hence, those other personnel problems cannot function as the terminable offenses that the statute allows the employer to point to in rebuttal to the presumption of retaliation. Moreover, Plaintiff's Opposition Declaration is the only first-hand testimony on the subject of whether the Access Database system at issue was properly functional or not (Id. Exhibit 8. CP at 184 ("I have kept extremely thorough records of...glitches in the system.")). The MSJ Exhibit showing Plaintiff's hotline complaint shows Plaintiff testifying to first-hand knowledge of corruptions in the database. MSJ Exhibit C, CP at 57. If Roper's hearsay testimony that the database was "perfectly operational" was *not* used by Defendants to prove the truth of the matter asserted, then the only first-hand testimony whatsoever in this case about the corruption of said database, and the missing tax credits, is Plaintiff's, which means her prima facie case went uncontroverted by Defendant, thus Defendant failed to meet its burden of production, and Plaintiff's uncontradicted testimony was sufficient to justify a jury instruction that

her testimony to such corrupted database has already been found true by the Court:

If a prima facie case is established, a "legally mandatory, rebuttable presumption" of discrimination temporarily takes hold, and the evidentiary burden shifts to the defendant to produce admissible evidence of a legitimate, nondiscriminatory-explanation for the adverse employment action sufficient to "raise[] a genuine issue of fact as to whether [the defendant] discriminated against the plaintiff." This is merely a burden of production, not of persuasion. **"If the defendant fails to meet this production burden, the plaintiff is entitled to an order establishing liability as a matter of law,"** **"because no issue of fact remains in the case,"**

Hill v. BCTI Income Fund-I, 186, 23 P.3d 440, 446 (2001)
quoting Kastanis, 122 Wash.2d at 490, 859 P.2d 26,
and quoting Burdine, 450 U.S. at 254, 101 S.Ct. 1089 (citations omitted)

Even if Defendant fulfilled its burden, *that is all they did*. The whistleblower statute does not say that documenting a series of personnel problems frees the employer of all suspicion of using pretext, or of lying about those personnel problems. If they *did* meet their burden of proof here, that burden is only one of production, not persuasion, and a jury trial is still required because it is far from *conclusive* (the standard an MSJ must meet) that those personnel problems were the real reason Plaintiff was involuntarily terminated.

- c. Did Plaintiff's Opposition contravene Defendant's alleged "documentation of personnel problems" sufficiently for reasonable persons to find that Defendant's proffered reasons for termination were pretextual?

Yes. Plaintiff in her Opposition Declaration refuted (by means of her first-hand testimony and other documentation), all of Roper's material allegations against her. CP at 145, ¶ 21 ff.

- d. Was that hearsay inadmissible at summary judgment?

Yes. Defendant made it clear that the Declaration of Roper was partially responsible for helping Defendant meet the evidentiary burden in RCW 42.40.050(2) to show Plaintiff's personnel problems existing before they knew she was a whistleblower. Notice how the phrase "as well as" is being used in the following quotation:

Based upon Ms. Brumfield's acknowledgments, **as well as** the declarations of those who had supervisory authority over Ms. Brumfield, she cannot establish that she was only criticized following her revelation of being a whistleblower. Roper Dec; Dempsey Dec.
MSJ, CP at 95:5-9(emphasis added)

Error No. 2, Issue No. 3: Defendant prejudiced Plaintiff by citing to legal authorities in the MSJ which Defendant improperly failed to disclose in discovery.

- a. Did Plaintiff ask in discovery for the names and titles of all legal authorities under which Defendant would be making its defense?

Yes. Opposition, CP at 116:20

- b. Were the legal authorities cited in Defendant's MSJ limited to just those it provided in answer to said discovery?

No. First, Defendant's discovery answer cited only one statute, RCW 49.60. Second, the MSJ nowhere cites to this statute, not even within the MSJ's "statement of issues". How can Defendant seriously claim its discovery answer of "RCW 49.60" was "entirely sufficient" to discharge its CR 33(a) obligation to answer that discovery request "fully", **when that statute is never cited even once in its MSJ?** Third, RCW 42.40 and its subsections are quoted numerous times throughout the MSJ, despite the fact that it this other statute was never included in State's discovery answer.

- c. Were the legal authorities in Defendant's discovery answer sufficiently broad that they governed all legal issues which they raised in the MSJ?

No. Indulging the presumption that the legislature is presumed *not* to speak superfluously ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless **or superfluous**", *Whatcom County v. City of Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996)), then the reason Washington has a whistleblower statute (RCW 42.40) separate from RCW 49.60 is because

there are many legal issues on whistleblowing decreed in 42.40 *that cannot be inferred solely from RCW 49.60* (in other words, 49.60 is insufficient, by itself, to entirely govern whistleblower lawsuits).

- d. Did Plaintiff properly plead that Defendant's citation in MSJ to authorities beyond those it revealed in discovery, prejudiced her ability to defend her claims?

Yes:

Plaintiff is pro se and was prejudiced by this failure of discovery and had no idea beyond RCW 49.60 what legal authority Defendants intended to use to shield themselves in this case, thus hampering her ability to prepare for this litigation.

Opposition, CP at 117:3 ff

Before, during and after Defendant Counsel Matthew Kuehn deposed me March 6, I requested that I be allowed to obtain copies of all deposition exhibits. He refused this request, and I have never received them, except as they are used in the MSJ. This discovery failure caused me to become unable to significantly prepare for dispositive motions and trial.

Opposition Declaration, CP at 140, ¶ 2

Error No. 2, Issue No. 4: Defendant prejudiced Plaintiff by citing to evidence in its MSJ in support of its affirmative defenses, but which it failed to disclose in discovery.

- a. Did Plaintiff seek discovery on the facts underlying Defendant's affirmative defenses?

Yes. CP at 118:3. Since it is unknown whether Defendant will press its objections, their objections are reproduced here. The only affirmative

defense this discovery relates to is Defendant's boilerplate "failed to state a claim for which relief can be granted", the first one listed in its Answer to Complaint. The problems with Defendant's response are legion:

Problem No. 1 – The trial judge's granting the MSJ was manifest legal error given that its Order says nothing about Plaintiff's motion to strike.

We review de novo a trial court ruling on a motion to strike evidence made in conjunction with a summary judgment motion.

Rice v. Offshore Systems, 272 p.3d 865, 870, 2012
citing Momah v Bhardi, 144 Wash.App. 731, 749 (2008)

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). No reasonable person in any judge's position would refuse without reason, as Judge Murphy did here, to address within their Order, a party's motion to strike that was made from within that party's Opposition to MSJ. Since review is de novo, the appeal court should decide for itself whether any evidence Plaintiff sought to strike should have been struck by the superior Court, and if so, whether Defendant, having been deprived of that evidence, could still meet their proper initial burden to conclusively establish facts warranting dismissal.

Problem No. 2 - Defendant's objections to Plaintiff's discovery request are exactly the same as the objections by the State which the Court for the Western District of Washington found unpersuasive. In *Campbell v. State*, No. C08-0983-JCC. (W.D., March 5, 2009), (see Appendix), Plaintiff

Campbell served an interrogatory very similar to the one Plaintiff

Brumfield served in the instant case:

Campell v. State

Brumfield v. State

Interrogatory No.4
Plaintiff propounded the following interrogatory on Defendant Pate: Identify each and every fact which supports your contention that Plaintiffs "failed to state a claim for which relief can be granted." (Interrog. No.4 (Dkt. No. 42-2 at 9).)

interrogatory no. 20.

State with specificity each and every fact upon which you rely to support each and every Affirmative Defense as they appear listed in your Answer to Complaint

In *Campbell*, Defendant State of Washington answered with the same exact objections that they now use in the instant case:

Campell v. State	Brumfield v. State
<p>Objection: <u>This interrogatory calls for legal conclusions. Affirmative defenses are legal defenses and the legal reasoning supporting an affirmative defense is work product. Please see applicable case law including, but not limited to, Johnson v. Ocean Ships, Inc., 2006 WL 2166192 W.O. Wash. (2006) and Sporck v. Peil, 759 F.2d 312 (3rd Cir. 1985). Further, the interrogatory is overly broad and unduly burdensome to the extent that it requests each fact supporting the defense.</u></p> <p><u>This kind of open-ended interrogatory is also an unfair trap for defendant because its vagueness and overbreadth can easily produce false accusations that defendant did not completely respond to the interrogatory by stating each and every "fact" that even remotely supports this defense. (Answer to Interrog. No.4 (Dkt. No. 42-2 at 9).)</u></p>	<p>ANSWER: Objection. <u>This interrogatory is overly broad and unduly burdensome in its request for each and every fact, which supports the affirmative defenses. Weber v. Biddle, 72 Wn.2d 22, 431 P.2d 705 (1967). This question also calls for the mental impressions and legal theories of defense counsel. This information is work product and not discoverable.</u></p> <p><u>Furthermore, this kind of open-ended interrogatory is a trap for Defendants because its (sic) can easily produce claims that the Defendants did not completely respond to the interrogatory.</u></p>

The federal district court in *Campbell* was unimpressed with this degree of “hide the ball” and ordered State of Washington to answer fully Campbell's interrogatory seeking facts supporting its affirmative defense of "failure to state a claim":

The Federal Rules expressly direct that "[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact[.]" FED. R. CIV. P. 33(a)(2). The Advisory Committee Notes to the 2007 Amendment states that "[o]pinion and contention interrogatories are used routinely." Further, "contention interrogatories may in certain cases be the most reliable and cost-effective discovery device, which would be less burdensome than depositions at which contention questions are propounded." *Cable & Computer Tech., Inc.*, 175 F.R.D. at 652.

...However, in the instant interrogatory, Plaintiff is not seeking identification of exact documents and witnesses that Defendant Pate intends to use for each affirmative defense. Rather, Plaintiff seeks facts. Therefore, the Court is not persuaded that Johnson or Sporck are on point.

Although it seems reasonable to the Court that a defendant might have some difficulty answering such a contention interrogatory early in the discovery period, the Court expects that by now Defendant has had some opportunity to discover the facts relating to her affirmative defenses. Defendant can-and must-supplement her answer if, during the course of discovery, she finds that her answer is incorrect or incomplete. *fu4 FED. R. CIV. P. 26(e)(1).

(2) Defendants Pate and McGenty are ORDERED to identify facts that support their remaining affirmative defenses:

The fact that the Campbell opinion is not binding, does not mean it can be safely disregarded. It can be persuasive even if not binding:

...it is "appropriate and helpful to refer to the approach used by the federal courts" whose analysis is "helpful" and "persuasive" even if not controlling on our interpretation.

Drinkwitz v. Alliant Techsystems, Inc., 996 P. 2d 582, 592 (2000)

Because Defendant State of Washington was foreclosed from hiding behind those objections in *Campbell, supra*, the appeal court in the instant case should follow the *Campbell* court's reasoning. Defendant may reply that Plaintiff still needs to show actual prejudice, but on the contrary, the

State Supreme Court says such discovery failure creates *presumed* prejudice, and reversed a court of appeals decision on that very issue.

Magana v. Hyundai Motor Am., 167 Wn.2d 570, 220 P.3d 191 (2009).

Defendant in the instant case also refused to provide any documentary evidence in response to the *Request for Production M* which had immediately followed Plaintiff's Interrogatory No. 20. So the only evidence for affirmative defenses State ever divulged in discovery before filing its MSJ, was two short conclusory statements of ultimate fact, not evidentiary fact, namely: 1) plaintiff voluntarily allowed ESD to enter her home, and 2) Plaintiff voluntarily resigned her job. This is legally unacceptable: Those two statements are not evidentiary facts, they are "ultimate" facts given their conclusory nature, and ultimate facts are not discoverable in the first place:

While it is proper to elicit information as to evidentiary facts **as contrasted with ultimate facts**, nevertheless it is improper to ask a party to state evidence upon which he intends to rely to prove any fact or facts.

Weber v. Biddle, 72 Wn.2d 22, 29 (1967)(emphasis added)

The last part of that quote (about it being improper to ask for evidence the other party will rely on to prove a fact) is no longer the law given the Washington Supreme Court's ruling in 2012 against the earlier approach of 'blindman's bluff' during discovery:

Earlier experiences with a "blindman's bluff" approach to litigation, where each side was required "literally to guess at what their opponent would offer as evidence," were unsatisfactory.

Cedell v. Farmers Ins. Co. of Washington, 295 P. 3d 239, 244 (2013)
quoting Lowy v. PeaceHealth, 174 Wash.2d 769, 777, (2012)

However, the inadmissibility of 'ultimate' facts still appears to be good law. Of course, State will argue that since the above argument did not persuade the trial court when Plaintiff used it in her motion for discovery *sanctions*, that argument must be denied now as having no hope of justifying Plaintiff's motion to *strike*. But this confuses two different legal standards. Motions to strike are governed by CR 12(f), motions for discovery sanctions are not. CR 12(f) requires striking of immaterial matter, but nothing between CR 26 and CR 37 requires striking matter merely because it is immaterial. Plaintiff is not seeking sanctions, so the trial court's prior denial of Plaintiff's motion for sanctions is irrelevant. The trial court's finding that Defendant's two short discovery answers didn't justify *sanctions*, does not magically transform those discovery answers into admissible or material matter immune from CR 12(f) striking. The trial court clearly abused its discretion by completely ignoring the motion to strike. Had the Court properly struck all evidence in the MSJ that went beyond these above-cited two unacceptably short discovery responses from State (divulging nothing more than inadmissible 'ultimate facts'), the MSJ would have been divested of all arguments and

evidence that would support their affirmative defense of “failure to state a claim”, necessarily failing the high initial burden of *conclusiveness*.

- b. Did Defendant’s answer to that discovery request include all the discoverable facts they later placed into their MSJ in support of said affirmative defense?

No. The only answers Defendants gave to the discovery request for facts supporting their affirmative defenses was 1) plaintiff voluntarily allowed ESD into her home, and 2) Plaintiff voluntarily resigned. That is all. See Defendant’s discovery answer to Plaintiff’s Interrogatory No. 20 and Request for Production M. CP at 72-73. Yet the MSJ is filled with myriad factual allegations and documentary evidence not disclosed in discovery *but was responsive to those discovery requests*. For example, everything in the MSJ is intended to show that Plaintiff’s lawsuit “fails to state a claim for which relief can be granted” (i.e., Defendant’s first affirmative defense). Defendant is between a rock and a hard place here: If Defendant believes that all facts alleged in the MSJ support its affirmative defense of “failure to state a claim”, then why didn’t Defendant disclose those MSJ facts earlier in its response to discovery? Does Defendant seriously believe that discovery responses need not consist of anything more than short conclusory assertions of ultimate fact that case law says are not discoverable in the first place? Or was

Defendant Counsel Kuehn engaging in the exact game of “hide the ball”
that Washington’s higher courts so despise?

Washington courts will not tolerate efforts by counsel to hide behind
the letter of discovery rules while ignoring their spirit. The purpose of
civil discovery is to disclose to the opposing party **all** information that
is relevant, potentially relevant or reasonably calculated to lead to
discovery of admissible evidence in the trial at hand. CR 26(b)(I).

In re Firestorm 1991, 129 Wash.2d 130,916 P.2d 411 (1996),
TALMADGE, Justice (concurring)

Further evidence of Defendant Counsel Kuehn’s willful ‘ambush
litigation’ tactics is the fact that Defendant’s first affirmative defense
 (“failure to state a claim”) is not an affirmative defense in the first place:
Numerous courts within the 9th Circuit’s purview, including the 9th Circuit
itself, have held that ‘failure to state a claim’ is not an affirmative defense,
but only an allegation that the Complaint is legally or factually defective:

that [a] plaintiff has not met its burden of proof as to an element
plaintiff is required to prove is not an affirmative defense

Zivkovic v. S. California Edison Co., 302 F.3d 1080, 1088 (9th Cir.
2002)

Failure to state a claim is not a proper affirmative defense but, rather,
asserts a defect in [the plaintiff’s] prima facie case

Barnes v. AT&T Pension Benefit Plan, 718 F. Supp. 2d 1167, 1174
(N.D. Cal. 2010)

failure to state a claim is not an affirmative defense; it is a defect in a
plaintiff’s claim

Vogel v. Huntington Oaks Del. Partners, LLC, 291 F.R.D. 438, 442
(C.D. Cal. 2013)

Since State chose to characterize “fails to state a claim” as an affirmative
defense, it was reasonable for pro se Plaintiff to accept it as such and seek

discovery on it. Given the multiple facts and documents cited in the MSJ that were responsive to, but were never provided in response to, Plaintiff's Interrogatory No. 20 and its associated Request for Production M, it is clear that Defendant violated the requirement in CR 33 to answer such discovery "fully", and the Court should have recognized the prejudice to Plaintiff that this ambush created, and accordingly granted the motion to strike.

Finally, the above shows this ambush constituted intentional or tactical non-disclosure, and there is ample authority in case law for striking material that was intentionally withheld in discovery:

The court should exclude testimony if there is a showing of intentional or tactical nondisclosure.

Lampard v. Roth, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984)
citing Barci v. Intalco Aluminum Corp., 11 Wn. App. 342, 351, 522
P.2d 1159 (1974)

- c. Did Plaintiff sufficiently plead that this mismatch between facts in Defendant's MSJ, and facts Defendant disclosed in discovery answers, prejudiced her ability to defend her case?

Yes. See Opposition. CP at 118:3 ff. Such wholesale discovery failure creates *presumed* prejudice:

Hyundai knew about these claims but willfully failed to disclose them thereby prejudicing Magaña's ability to prepare for trial...Hyundai argues a default judgment is appropriate only if the discovery violations irremediably deprived the opposing party of a fair trial on its claims or defenses. Hyundai misstates this prong of the test. As aforementioned, the record must show that the discovery violation

prejudiced the opposing party's ability to prepare for trial. The test looks at preparing for trial, not having a fair trial.

Magana v. Hyundai Motor Am., 167 Wn.2d 570, 220 P.3d 191 (2009)

Hence, Plaintiff did not need to show *actual* prejudice. Since evidentiary material that is too prejudicial qualifies as 'scandalous' by that reason alone, the trial court could have granted the motion to strike on the basis of the reasons given in CR 12(f) *despite its legally frivolous prior ruling denying Plaintiff's motion for sanctions*. Moreover, the Court has inherent authority to control litigation to make sure that a party is not ambushed, and the Court thus could have struck this MSJ material on the basis of its own inherent authority to control litigation even if such basis was not available under CR 12(f).

Error No. 2, Issue No. 5: Defendant prejudiced Plaintiff by citing to evidence in it's MSJ in support of its defense against Plaintiff's claim of retaliation, which evidence Defendant failed to disclose in discovery.

- a. Did Plaintiff seek discovery on the facts Defendant would use to defend against Plaintiff's retaliation claim?

Yes. See Opposition, CP at 119:19-21.

- b. Did Defendant's answer to that discovery request include the evidence they subsequently placed into their MSJ in support of said affirmative defenses?

No. All they produced in answer to this discovery request was “Defendants do not believe Plaintiff was retaliated against”. Nothing more. CP at 119:22-23. Yet the MSJ cites to myriad facts and documents that go far beyond their mere “belief”, in Defendant’s effort to support their defense to the retaliation claim. CP at 93:19 ff.

- c. Did Plaintiff sufficiently plead that this mismatch between facts revealed in the MSJ and facts revealed in discovery, prejudiced her ability to establish her retaliation claim?

Yes. CP at 119:23 ff. See also:

Regardless, pro se Plaintiff would be prejudiced to be forced to deal with all evidentiary material in the MSJ that Defendants should have, but clearly did not, disclose during discovery.

Opposition, CP at 120:19

Error No. 2, Issue No. 6: Defendant prejudiced Plaintiff’s ability to defend her lawsuit by destroying relevant evidence contrary to law and immediately after it anticipated litigation from Plaintiff (spoliation).

- a. What is Washington law on spoliation of evidence?

An appellate court generally reviews the trial court's decision on spoliation for abuse of discretion. *Henderson v. Tyrrell*, 80 Wn. App. 592, 604, 910 P.2d 522 (1996). **However, where the spoliation issue was decided through summary judgment, the court's review is de novo.** *Tavai v. Walmart Stores, Inc.*, 307 P. 3d 811, 817 (2nd Div. 2013).

Spoliation is the intentional destruction of evidence. *Henderson v. Tyrrell*, 80 Wn. at 605. In deciding whether to apply a favorable inference or rebuttable presumption in spoliation cases, the trial court considers the potential importance or relevance of the missing evidence and the culpability or fault of the adverse party. *Henderson*, 80 Wn. at 609.

Culpability turns on whether the party acted in bad faith or whether there is an innocent explanation for the destruction. *Henderson*, 80 Wn. App. at 609. **A party may be responsible for spoliation without acting in bad faith.** *Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 900, 138 P.3d 654 (2006)

Where a party controls evidence and fails to preserve it without satisfactory explanation, the only inference the finder of fact may draw is that such evidence would be unfavorable to that party. *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).

b. Did Defendants engage in spoliation of evidence?

Yes. Plaintiff documented all such destruction in her Opposition. CP at 121:4 ff.

c. Did Plaintiff's argument for spoliation sufficiently specify what exact evidence was destroyed and how it would have helped her case?

Yes. Defendant attempts to escape the spoliation issue by arguing that Plaintiff did not specify what the destroyed materials were or how they were relevant to her causes of action. MSJ Reply, CP at 320-321. This was yet another example of Defendant Counsel Kuehn's *willfully frivolous* litigation conduct, since Plaintiff's Opposition and supporting Declaration did indeed *specify* the destroyed evidence and *how it was relevant*.

Plaintiff cited to WAC 44-14-03005 and ESD Records Policy No. 0005 and how Defendants destruction of all files on her work computer earlier than 30 days after she was fired violated those statutes, CP at 121:4 ff, citing violations of WAC 44-14-03005, and of Employment Security Department ('ESD') Records Policy No. 0005. Plaintiff then proved that within 4 days after being involuntarily discharged she specifically requested the State to preserve all files on her work computer for purposes of the litigation she intended to file, and that both Dempsey and Seigler indicated in cited documents their anticipation of litigation from Plaintiff during that time (CP at 122). But that the deletion took place anyway less than 30 days after her September 1, 2009 discharge. (CP 122:7-9).

- d. Where the non-movant at summary judgment successfully argues that the movant has engaged in spoliation, who must decide whether to draw a negative inference against the moving party? The Court, or a jury?

This involves assessing the guilty party's credibility, and courts at summary judgment are forbidden from assessing witness/party credibility:

...the rule is settled that "[t]he court does not weigh credibility in deciding a motion for summary judgment."

Jones v. State, Dept. of Health, 242 P.3d 825 (2010)
citing 4A Karl B. Tegland, Washington Practice

Hence, the documented spoliation was sufficient to force a jury trial, since whether to give Plaintiff favorable inference or give Defendant a negative inference are factual matters exclusively within the province of the jury.

V. CONCLUSION

For all the foregoing reasons, Plaintiff Brumfield respectfully requests that this Court reverse the trial court's summary judgment order in its entirety, with instructions to allow jury trial on all causes of action, and with an order that Plaintiff be allowed a jury instruction saying Plaintiff's allegations of a corrupted Access database have been found true as a matter of law.

Respectfully submitted,



Dated this 22th day of March, 2015

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APPENDIX

LORAIN CAMPBELL, et al.,

v.

STATE OF WASHINGTON, et al,

Case No. C08-0983-JCC.

United States District Court, W.D. Washington, Seattle.

March 5, 2009.

JOHN C. COUGHENOUR, District Judge.

This matter comes before the Court on Plaintiff's Motion to Compel Discovery from Defendants Mitchell, McGenty, and Pate (Dkt. No. 39), the individual Responses filed in opposition by Defendants Pate (Dkt. No. 41), Mitchell (Dkt. No. 44), and McGenty (Dkt. No. 45), and well as Plaintiff's Reply (Dkt. No. 47). The Court has carefully considered these documents, their supporting declarations and exhibits, and the balance of pertinent materials in the case file. Having determined that oral argument is not necessary, the Court hereby finds and rules as follows.

I. BACKGROUND

The Court has summarized the background facts of this dispute in its Order of February 13, 2009, and will not repeat them here except as necessary to explain its reasoning. Plaintiff's First Amended Complaint alleges four causes of action^[1] related to the death of Justine **Campbell**, a developmentally disabled adult participant in Defendant DSHS's State Operated Living Alternatives program ("SOLA").^[2] Defendants' Answer raises eight affirmative defenses, including (1) failure to state a claim for which relief can be granted; (2) statute of limitations; (3) failure to mitigate damages; (4) qualified immunity; and (5) Plaintiff's lack of standing. (Defs.' Answer (Dkt. No. 25).) In mid-November 2008, Plaintiff served each of the individual Defendants separate First Interrogatories and Requests for Production. In the instant motion, Plaintiff seeks an order compelling Defendants to fully answer those discovery requests. (Mot. 2 (Dkt. No. 39).) Plaintiff asserts that Defendants improperly failed to answer Plaintiff's interrogatories regarding persons with relevant knowledge and regarding Defendants' affirmative defenses by raising nearly identical boilerplate objections. (*Id.* at 2, 4.) In particular, Plaintiff objects to Defendants' assertions of attorney-client privilege and attorney work product objections. (*Id.* at 6.) Plaintiff asserts that the parties have attempted to resolve this discovery dispute in three telephonic discovery conferences and multiple exchanges of letters. (*Id.* at 2.) Plaintiff expressly does not seek costs and attorney's fees incurred in bringing this motion. (*Id.* at 11.) The Court will address each of the disputed discovery requests in turn, below.

II. APPLICABLE STANDARD

"Litigants may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir. 2005) (quoting FED. R. CIV. P. 26(b)(1)). "Relevant information for purposes of discovery is information 'reasonably calculated to lead to the discovery of admissible evidence.'" *Id.* "District courts have broad discretion in determining relevancy for discovery purposes." *Id.* (citing *Hallet v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002)). If requested discovery is not answered, the requesting party may move for an order compelling such discovery. FED. R. CIV. P. 37(a)(1). "The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Cable & Computer Tech., Inc. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 650 (C.D. Cal. 1997). The Federal Rules strongly encourage parties to resolve discovery disputes privately and discourage them from seeking needless court intervention. To this end, before a party may bring a motion for an order compelling discovery, that party must in good faith confer or attempt to confer in an effort to obtain the discovery without court action. FED. R. CIV. P. 37(a)(1). Pursuant to the Local Rules, such good faith conference or attempt to confer must be in person or telephonic. Local Rules W.D. Wash. CR 37(a)(1)(A).

III. ANALYSIS

A. Defendant Pate's Interrogatory Answers

Plaintiff asks that Defendant Pate be compelled to fully answer Interrogatories No. 2 and 4 through 13.

1. Interrogatory No. 2

Plaintiff propounded the following interrogatory on Defendant Pate:

Identify each person known to you who has information relevant to the allegations contained in Plaintiffs' Complaint for Damages, setting forth each person's name, address and relationship to any party herein.

(Interrog. No. 2 (Dkt. No. 42-2 at 8).)

Defendant Pate answered as follows:

Objection: as phrased the interrogatory seeks information protected by the attorney client and work product privileges. The interrogatory seeks the identification not of persons with knowledge but only of persons with knowledge relevant to plaintiffs complaint, a legal conclusion not subject to discovery. Without waiving any objections, please see documents already produced in response to Plaintiffs' Persons who may have knowledge

of the underlying facts in response to Plaintiff's First Requests for Production of Documents to Defendant DSHS and Defendants [sic] initial disclosures.

(Answer to Interrog. No. 2 (Dkt. No. 42-2 at 8).)

Plaintiff asks the Court to compel a complete answer to this interrogatory. Defendant Pate argues that nothing further is required of her with respect to this interrogatory because (1) Plaintiff seeks the opinion of counsel as to which witnesses have *relevant* knowledge, and (2) Plaintiff seeks information that has already been produced. (Resp. 5—6 (Dkt. No. 41).) It appears that Defendants jointly have already disclosed to Plaintiff, by way of their initial disclosures, individuals likely to have discoverable information. (Initial Disclosures (Dkt. No. 31 at 2—3).) Defendant Pate referred Plaintiff to this list in her answer to Interrogatory No. 2. Therefore, the Court is not persuaded that Defendant Pate's answer is incomplete, except that Defendant did not provide addresses for each of those individuals. Plaintiff's motion to compel is accordingly DENIED as to this issue except to the extent that Defendant is ORDERED to provide an address for each of the individuals listed in her initial disclosures.^[3]

2. Interrogatory No. 4

Plaintiff propounded the following interrogatory on Defendant Pate:

Identify each and every fact which supports your contention that Plaintiffs "failed to state a claim for which relief can be granted." [See Defendants' Answer, First Affirmative Defense].

(Interrog. No. 4 (Dkt. No. 42-2 at 9).)

Defendant answered as follows:

Objection: This interrogatory calls for legal conclusions. Affirmative defenses are legal defenses and the legal reasoning supporting an affirmative defense is work product. Please see applicable case law including, but not limited to, *Johnson v. Ocean Ships, Inc.*, 2006 WL 2166192 W.D. Wash. (2006) and *Sporck v. Peil*, 759 F.2d 312 (3rd Cir. 1985). Further, the interrogatory is overly broad and unduly burdensome to the extent that it requests each fact supporting the defense. This kind of open-ended interrogatory is also an unfair trap for defendant because its vagueness and overbreadth can easily produce false accusations that defendant did not completely respond to the interrogatory by stating each and every "fact" that even remotely supports this defense.

(Answer to Interrog. No. 4 (Dkt. No. 42-2 at 9).)

The Federal Rules expressly direct that "[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact[.]" FED. R. CIV. P. 33(a)(2). The Advisory Committee Notes to the 2007 Amendment states that "[o]pinion and contention interrogatories are used routinely."

Further, "contention interrogatories may in certain cases be the most reliable and cost-effective discovery device, which would be less burdensome than depositions at which contention questions are propounded." Cable & Computer Tech., Inc., 175 F.R.D. at 652.

Defendant calls attention to the fact that at least one other court in the Western District has found that "the exact documents and witnesses [a defendant] intends to use for each affirmative defense reveals defense counsel's mental impressions, is work product and so is privileged." See Johnson v. Ocean Ships, Inc., No. C05-5615, 2006 WL 2166192, at *3 (W.D. Wash. July 31, 2006) (Bryan, J). In Johnson, the district court found persuasive the reasoning of the Third Circuit in Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985), in holding that defense counsel's selection process in grouping certain documents together out of thousands produced was privileged work product. The attorney work-product privilege "shields both opinion and factual work product from discovery." Pac. Fisheries, Inc. v. United States, 539 F.3d 1143, 1148 (9th Cir. 2008) (citing FED. R. CIV. P. 26(b)(3) ("Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative[.]"). However, in the instant interrogatory, Plaintiff is not seeking identification of exact documents and witnesses that Defendant Pate intends to use for each affirmative defense. Rather, Plaintiff seeks facts. Therefore, the Court is not persuaded that Johnson or Sporck are on point.

Although it seems reasonable to the Court that a defendant might have some difficulty answering such a contention interrogatory early in the discovery period, the Court expects that by now Defendant has had some opportunity to discover the facts relating to her affirmative defenses. Defendant can—and must—supplement her answer if, during the course of discovery, she finds that her answer is incorrect or incomplete.^[4] FED. R. CIV. P. 26(e)(1). While requiring Defendant to identify "each and every" fact is somewhat overbroad, see, e.g., In re eBay Seller Antitrust Litig., No. C07-1882-JF (RS), 2008 WL 5212170, at *2 (N.D. Cal. Dec. 11, 2008), the Court will GRANT Plaintiff's motion with respect to this interrogatory to the extent that it asks Defendant to identify facts that support her contention that Plaintiff "failed to state a claim for which relief can be granted."^[5]

3. Interrogatory Nos. 5 through 11

Plaintiff propounded interrogatories nearly identical to her Interrogatory No. 4 with respect to each of Defendant's eight affirmative defenses. (Interrog. Nos. 5—11 (Dkt. No. 42-2 at 10—14).) Defendant responded in each case with an identical objection as that asserted in her Answer to Interrogatory No. 4. (*Id.*) For the same reasons as discussed in Section III.A(2) above, the Court compels Defendant to answer these contention interrogatories to the extent that they ask Defendant to identify facts that support her affirmative defenses.^[6] As noted below, Defendants may except from this order any affirmative defenses they are no longer pursuing based on the Court's summary judgment ruling on Plaintiff's state law claims.

4. Interrogatory No. 12

Interrogatory No. 12 asks Defendant to "[i]dentify each and every individual or entity who you believe caused plaintiffs' alleged damages." (Dkt. No. 42-2 at 14.) Defendant answered as follows:

Objection: This interrogatory seeks legal conclusions and work product. Defendants further object as this interrogatory is also an unfair trap for defendants because it could be construed as a request for admission. Without waiving such objections, please see Defendants' Answer to Plaintiff's Complaint, applicable case law, and other authorities.

(*Id.*) Defendant argues that this request is improper because it seeks "not just other involved parties but those parties who have had a causative role in the outcome of the underlying facts, a mental impression of facts that connect them to particular legal theories." (Resp. 10 (Dkt. No. 41).) In addition, Defendant argues, the cumulative documents and the lack of cross claims or third party claims demonstrates the known facts at this time. (*Id.*)

As discussed in Section III.A(1) above, Defendants have already disclosed to Plaintiff, by way of their initial disclosures, individuals likely to have discoverable information. (Dkt. No. 31 at 2—3.) Defendant has not specifically contended that any particular persons or entities are responsible for Plaintiff's damages, as evidenced by the absence of any cross claims or third party claims. The Court is not persuaded to compel Defendant to narrow or supplement her initial disclosures list to identify only those people or entities she believes are responsible for Plaintiff's damages. Therefore, the Court DENIES the motion with respect to this issue.^[7]

5. Interrogatory No. 13

Plaintiff's Interrogatory No. 13 requests the identity of each and every fact that supports her belief that the individuals or entities disclosed in the answer to Interrogatory No. 12 caused Plaintiff's damages. (Dkt. No. 42-2 at 15.) Because the Court has decided that it will not compel Defendant's answer to Interrogatory No. 12, the Court also DENIES Plaintiff's motion with respect to Interrogatory No. 13.^[8]

B. Signatures

Plaintiff asserts that Defendants failed to sign their interrogatory answers under oath. (Mot. 6 (Dkt. No. 39).) Defendant McGenty argues that this was never a topic of a discovery conference and that she advised Plaintiff that counsel was in the process of obtaining Defendants' signatures. (McGenty Resp. 4 (Dkt. No. 45).) Defendant Mitchell also argues that counsel's discovery conference did not include a discussion of Defendants' failure to produce signature pages. (Mitchell Resp. 2 n.1 (Dkt. No. 44).) The Court reminds Defendants that the Federal Rules clearly state that the "person who makes the answers [to interrogatories] must sign them, and the attorney who objects must sign

any objections." FED. R. CIV. P. 33(b)(5). The Court expects counsel in future to comply with the express requirements of the discovery rules so as to avoid occupying the Court's time with such trivial issues.

IV. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS IN PART and DENIES IN PART Plaintiff's Motion to Compel Discovery from Defendants Mitchell, McGenty, and Pate (Dkt. No. 39), as follows:

- (1) Defendants Pate, McGenty, and Mitchell are ORDERED to provide addresses for each of the individuals listed in their initial disclosures;
- (2) Defendants Pate and McGenty are ORDERED to identify facts that support their remaining affirmative defenses;
- (3) Such answers are to be provided within twenty days of this Order; and
- (3) The Court DENIES the motion in all other respects.

[1] The Court has already dismissed at summary judgment Plaintiff's state law claims. (Feb. 13, 2009, Order (Dkt. No. 50).)

[2] Defendant DSHS's discovery responses are not at issue in the instant dispute. (Mot. 2 n.1 (Dkt. No. 39).)

[3] For the same reasons as discussed in Section III.A(1), the Court does not consider Defendant Mitchell's answer to Interrogatory No. 2 (Dkt. No. 40 at 56) or Defendant McGenty's answer to Interrogatory No. 2 (Dkt. No. 40 at 66) to be incomplete and therefore DENIES Plaintiff's motion with respect to these issues, except that Defendants Mitchell and McGenty are ORDERED to provide addresses for each of the individuals listed in their initial disclosures.

[4] It may be that because the Court has already dismissed Plaintiff's state law claims, some of Defendants' affirmative defenses are now moot. Defendants will not be compelled to answer interrogatories regarding affirmative defenses they will no longer be pursuing.

[5] For the same reasons discussed in Section III.A(2), the Court COMPELS Defendant McGenty to answer Interrogatory No. 4 (Dkt. No. 40 at 67) by identifying facts that support her contention that Plaintiff "failed to state a claim for which relief can be granted."

[6] For the same reasons discussed in Section III.A(3), the Court COMPELS Defendant McGenty to answer the remaining contention interrogatories (Dkt. No. 40 at 67—70) to the extent that they ask Defendant McGenty to identify facts that support her affirmative defenses.

[7] For the same reasons discussed in Section III.A(4) above, the Court is not persuaded to compel Defendant Mitchell to further answer Interrogatory No. 4 (Dkt. No. 40 at 11) or to compel Defendant McGenty to further answer Interrogatory No. 12 (Dkt. No. 40 at 71).

[8] Because the Court declines to compel Defendants Mitchell or McGenty's answers to the preceding interrogatory, the Court DENIES the motion with respect to Interrogatory No. 5 propounded on Defendant Mitchell (Dkt. No. 40 at 11) and Interrogatory No. 13 propounded on Defendant McGenty (Dkt. No. 40 at 28) as well.

Certificate of Service

I, Christian Doscher, being over the age of 18, competent to testify and not a party to this action, certify that

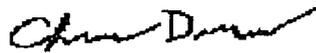
On March 23, 2015, at 2:54 a.m. (p.m.)

I served on Defendant State of Washington a true and correct copy of Plaintiff Brumfield's corrected Opening Appeal Brief. The manner of service was as follows:

Handing paper copy of said document to receptionist at the Attorney General's Office located at 7141 Cleanwater Dr. SE, Tumwater, WA 98512.

Attached to this certificate of service is a true and correct copy of the first page of Plaintiff Brumfield's opening appeal brief, bearing time and date service stamps placed there by the above-cited AG's office.

I certify that the foregoing is true and accurate to the best of my knowledge.



Dated this 23rd day of March, 2015

Christian Doscher
6435 Doe St. SE
Tumwater, WA. 98501

rate

WASHINGTON STATE COURT OF APPEALS
DIVISION II

No. 46653-8-II

Appeal from Thurston County Superior Court
No. 12-2-01866-6

KRISTINE J. BRUMFIELD, Appellant

v.

PAUL TRAUSE, Commissioner
BRUCE DEMPSEY, Deputy Assistant Commissioner,
DEPARTMENT OF EMPLOYMENT SECURITY of the State of Washington, and
STATE OF WASHINGTON, Respondents

APPELLANT'S OPENING BRIEF

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