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No. 52665-4

IN THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION II

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TRUEBLUE, INC., a Washington corporation; and its wholly owned  
subsidiary, LABOR READY NORTHWEST, INC.,

Appellants,

v.

KELLY MARCHEL a/k/a KELLY LANGLOIS; and ANYTIME  
LABOR-SEATTLE, LLC d/b/a LABORMAX,

Respondents.

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KELLY MARCHEL a/k/a KELLY LANGLOIS,

Counterclaim Plaintiff,

v.

TRUEBLUE, INC., a Washington corporation; and its wholly owned  
subsidiary, LABOR READY NORTHWEST, INC.; PAUL  
SHEVCHENKO, an individual; TATIANA REEVES, an individual;  
and MARLINDA NEWMYER, an individual,

Counterclaim Defendants.

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**BRIEF OF APPELLANTS**

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## INTRODUCTION

This appeal arises out of an employment dispute. Kelly Marchel worked for TrueBlue, Inc. and its subsidiary, Labor Ready Northwest, Inc., (collectively TrueBlue) for eight years. She then took a job with TrueBlue's competitor, Anytime Labor, LLC, d/b/a LaborMax (collectively Marchel). She solicited TrueBlue's clients, violating her noncompete agreement. These facts are admitted.

While the trial court rejected Marchel's argument that TrueBlue breached her employment agreement by changing her compensation (where the agreement expressly allows TrueBlue to do so), it found (on summary judgment despite factual disputes) that TrueBlue misclassified her under the Wage & Hour laws, and then (based on an argument no one raised) ruled that her alleged misclassification somehow breached her employment contract, barring TrueBlue's noncompete argument. All of this is wrong.

Then, despite finding in April that it could not impose full **Magaña** sanctions under **Burnet** and these facts, it entered them in May, after monetary sanctions had prompted a 16,000-page production.<sup>1</sup> There were three months left to trial. This is untenable.

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<sup>1</sup> **Burnet v. Spokane Ambulance**, 131 Wn.2d 484, 933 P.2d 1036 (1997); **Magaña v. Hyundai Motor Am.**, 167 Wn.2d 570, 220 P.3d 191 (2009).

## ASSIGNMENTS OF ERROR

1. The trial court erred in granting Marchel partial summary judgment.
2. The trial court erred in denying TrueBlue summary judgment.
3. The trial court erred in failing to make proper ***Burnet*** findings and in sanctioning TrueBlue.
4. The trial court erred in depriving TrueBlue of its constitutional right to a trial on (at least) noneconomic damages.
5. The trial court erred in finding that TrueBlue was “unapologetic, defensive, and refused to admit that they have violated their discovery obligations.” CP 2814.
6. The trial court erred in finding that it “has fully reviewed the discovery at issue and . . . that the discovery sought by Defendants was tied directly to Plaintiffs’ trade secrets misappropriation claim; Defendant Marchel’s burden of proof on her age discrimination counterclaim; Plaintiffs’ affirmative defenses; and Defendants’ damages.” CP 2815.
7. The trial court erred in finding that “a pattern of intentional discovery abuse has gone on throughout this litigation,” “willful and deliberate obstruction of the discovery process, and this has prejudiced Defendants’ ability to prepare for trial.” CP 2815.

## ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court erred in granting partial summary judgment to Marchel on her wage claim, and in determining that decision rendered TrueBlue's breach of her non-compete agreement unenforceable, where the plain terms of the agreement are directly contrary to her argument and to the argument the trial court made.
2. The trial court erred in denying TrueBlue's motion for partial summary judgment that Marchel's employment with Labor Ready violated the terms of her noncompete agreement with TrueBlue, where she admitted the violations.
3. The trial court abused its discretion in failing to make appropriate ***Burnet*** findings and in sanctioning TrueBlue, where lesser sanctions worked, it applied the wrong legal standard for willfulness, and any prejudice was alleviated by a continuance.
4. The trial court violated TrueBlue's constitutional rights (both due process and the right to a trial on damages) by awarding noneconomic damages without a trial as a sanction – the severest sanction ever leveled by a Washington State court.
5. The trial court erred in making the findings identified *supra*, which are unsupported by substantial evidence in the record.

## STATEMENT OF THE CASE

### **A. Background summary.**

This appeal arises from an employment dispute. Kelly Marchel worked for TrueBlue, Inc. and its subsidiary, Labor Ready Northwest, Inc. (collectively TrueBlue) from December 2007, until November 2015. CP 5, 7-8, 23-27, 129. Marchel then took a job with TrueBlue's competitor, Anytime Labor, LLC, d/b/a LaborMax (collectively LaborMax) and began soliciting TrueBlue's clients, violating her non-compete agreement. CP 5-6, 8, 129.

### **B. Procedural summary.<sup>2</sup>**

TrueBlue sued Marchel and LaborMax (collectively Marchel) for breach of contract, interference with contractual relations, and violations of Washington's Uniform Trade Secrets Act (UTSA). CP 4-46. TrueBlue secured a preliminary injunction to prevent further interference with its business. CP 635-44; Supp RP 35-37, 42.

On August 16, 2016, the court granted a TRO, set a September 9 hearing for a preliminary injunction, and expedited discovery. CP 90-93. Marchel sought to dissolve the TRO. CP 303-

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<sup>2</sup> This appeal largely concerns procedural errors. What follows here is an overview of the relevant procedure. The details regarding the specific challenged rulings are set forth in the related Argument sections.

12.<sup>3</sup> On September 9, 2016, the court granted TrueBlue a preliminary injunction, enforcing the provisions of the employment agreement, and denied Marchel's request to dissolve the TRO. CP 635-44; Supp RP 35-37, 42.

On September 14, TrueBlue filed an amended complaint, alleging the same substantive legal claims in light of the preliminary injunction. CP 645-62.

On September 16, Marchel sought to dissolve the preliminary injunction and to dismiss the amended complaint based on a mandatory arbitration provision in the employment agreement and the alleged lack of a bond to support the preliminary injunction. CP 712-29. TrueBlue argued that the forum and injunction were appropriate based on the claims asserted and the bond in place. CP 730-50. On September 23, the court denied the motion to dismiss, but increased the bond. CP 791-92; Supp RP 67-69, 73.

On October 24, Marchel filed her answer and a counterclaim against TrueBlue, alleging violations of the Minimum Wage Act (MWA) and age discrimination under RCW 49.60.180. CP 799-812.

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<sup>3</sup> In responding to the TRO, Marchel requested a copy of her employment file on August 29, 2016. CP 446, 459. TrueBlue provided the file on September 12. CP 446, 664.

Marchel also filed individual claims against her TrueBlue supervisors, Paul Shevchenko, Tatiana Reeves, and Maralinda Newmyer. CP 808-09. On November 16, 2016, LaborMax filed its answer and affirmative defenses. CP 813-22. On January 17, 2017, TrueBlue answered the counterclaims. CP 836-43.

Marchel also issued her first discovery requests in January 2017. CP 845, 848-67. TrueBlue responded on March 1. CP 845, 871, 955. Based on Marchel's questions, TrueBlue agreed to supplement its responses by May 17. CP 916, 923. Marchel filed her first motion to compel on May 18. CP 925-35. TrueBlue continued its production and sought a protective order to limit the unrestricted scope of Marchel's requests. CP 936-51, 955.

The parties filed a joint status report on June 2, asking for a four-day bench trial. CP 996-98. The court set a trial date of May 21, 2018. CP 3426.

The trial court worked with the parties to narrow the scope of each discovery request. Supp RP 81-212. In July 2017, TrueBlue again supplemented its responses and offered Marchel electronic access to further supplement its responses. CP 1131-32, 1144-70. The court entered an order on the first motion to compel and related issues on September 27, granting relief to both parties. CP 1686-92.

The court awarded Marchel fees, but did not issue an order on fees until June 2018. CP 1692, 2812, 2821.

Meanwhile, the parties filed cross-motions for summary judgment in September 2017. CP 1260-99, 1433-63. The court entered an oral ruling on October 11, granting Marchel's overtime claim, which it deemed a breach of the employment agreement that barred TrueBlue's contract claims against Marchel. Supp RP 271-75; CP 1847-50. The court lifted the preliminary injunction, reserving its rulings on Marchel's requests for fees under the MWA and the contract. Supp RP 276.<sup>4</sup>

Marchel issued her second discovery requests in January 2018. CP 1858, 1863-88. Marchel noted depositions of TrueBlue's representatives in February 2018. CP 1858. It is unclear to what extent the parties met and conferred over these discovery requests. CP 1859, 1967, 1978, 1981.

Marchel filed a motion to compel on March 2, 2018. CP 1916-22. On March 9, TrueBlue filed a motion to continue the May 21 trial date. CP 1946-53. On March 19, the court ruled that TrueBlue's failure to respond or object to the second discovery requests was

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<sup>4</sup> The court never entered a ruling on this issue, but did include fees and costs in its final judgment. CP 3123.

willful and prejudicial two months before trial, ordering TrueBlue to respond within 7 days. CP 2173-75; Supp RP 301-02. The court awarded fees and costs, reserving further sanctions. Supp RP 302. The court refused to continue the trial date. Supp RP 302-03.

The next day, TrueBlue offered further production, and to open its electronic files to Marchel on April 4 and/or 5, 2018. CP 2448-50, 2477, 2484; see also CP 2441, 2445. Marchel deemed these efforts inadequate and sought additional sanctions on April 6. CP 2422-33. Marchel asked the court to terminate the litigation and award judgment in her favor. CP 2431-32.

On April 11, the court ruled that TrueBlue's offer of unrestricted access to its files was not reasonable compliance with the discovery requests. RP 47. The court observed that it previously found willful noncompliance because TrueBlue had not answered at the time of the hearing. *Id.* But the court recognized that "[w]e have a response by TrueBlue now" and that "there has been a significant effort put forth by TrueBlue." *Id.* The court thus recognized "an attempt by TrueBlue to comply." RP 48. But the delayed response created a tight timeline that required a trial continuance and, therefore, required a sanction, but not the full "sanctions that are anticipated by *Burnet*." RP 49.

The court ordered TrueBlue to complete discovery in 30 days (by May 11) and to produce four witnesses for deposition in 60 days (by June 11). CP 2525-26; RP 60. It continued the trial date to August and asked for briefing on appropriate sanctions. CP 2525-26; RP 48-49, 55, 62-63, 65, 67. The court also awarded Marchel fees and costs associated with the discovery motion. CP 2525-26; RP 60.

At the May 10, 2018 hearing – the day before the court’s May 11 deadline for TrueBlue’s compliance – the court suddenly ignored TrueBlue’s efforts to comply with its April 11 order, instead awarding full ***Magaña*** terminating sanctions. RP 118-23. The court issued findings and conclusions terminating the litigation in favor of Marchel, then reduced those to judgment, barring trial or even argument on the *noneconomic damages* it also awarded. CP 2807-21, 3122-24. The court entered judgment for Marchel and LaborMax. CP 3123.

TrueBlue timely appealed eight trial court orders. CP 3125-67.

## ARGUMENT

**A. The trial court erred in granting partial summary judgment on Marchel’s wage claim and in ruling its decision precluded TrueBlue’s non-compete claim.**

The trial court erred in granting partial summary judgment to Marchel on her wage claim, in determining that decision rendered TrueBlue’s breach of her non-compete agreement unenforceable, and in denying TrueBlue’s motion for summary judgment that Marchel’s employment with Labor Ready violated the terms of her noncompete agreement with TrueBlue. This Court should reverse and remand all claims for trial.

**1. Standard of review.**

This Court reviews summary judgment *de novo*, engaging in the same inquiry as the trial court. *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 677, 319 P.3d 898 (2014) (citation omitted). The “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, [must] show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). “A material fact is one upon which the outcome of the litigation depends.” *Jumamil*, 179 Wn. App. at 677 (citation omitted).

This Court reviews all facts and the reasonable inferences therefrom in the light most favorable to the nonmoving party – here, TrueBlue. *Id.* (citation omitted). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from the evidence presented. *Id.* (citation omitted).

## **2. Procedural background.**

TrueBlue moved for summary judgment on September 6, 2017. CP 1177-1299; Sealed CP 3179-87. Marchel opposed the motion on September 25. CP 1580-1685. TrueBlue replied on September 29. CP 1693-1707. Marchel breached the restrictive covenants in the “Agreement Regarding Non-Competition, Non-Interference, Non-Solicitation, and Confidentiality” (RCA), which she signed when she was employed as branch manager in 2007, and breached when she took a job with a competitor within the 25-mile restricted territory and solicited business from prior customers. CP 1178, 1261.<sup>5</sup>

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<sup>5</sup> Marchel’s response alleged that the signed Salas declaration was not produced in discovery (CP 1609-12); that the Reed exhibits are unnumbered and may contain previously unproduced documents (CP 1611); and that TrueBlue ignored an ESI order. CP 1612. The Reed document was previously produced. Supp RP 266. And while the court raised ESI and generally confirmed that metadata should be produced, the court did not enter an ESI order. See Supp RP 81-212.

Marchel also moved for partial summary judgment on September 6. CP 1300-1463; Sealed CP 3188-3420. She argued that TrueBlue breached its contract with her and could not enforce its restrictive covenants, deprived her of overtime by mischaracterizing her as an exempt employee, and owed her 1.5x the regular rate for all unpaid overtime. CP 1447. TrueBlue opposed the motion on September 25, 2017. CP 1467-1575. Marchel replied on October 6. CP 1731-48, 1772-94.

The court heard argument on the cross-motions for summary judgment on October 11. Supp RP 217-81. The court rendered an oral ruling at the close of argument based on an argument no one raised. Supp RP 271-81. It *found* that Marchel's primary duty was sales, but that she had limited-to-no discretion to bind the company, so she was a nonexempt employee; TrueBlue "breached" the agreement by not paying her overtime; and she was due time-and-a-half for overtime. Supp RP 271-73; CP 1849. Because of that "breach," the court found her noncompete agreement – which the court deemed bilateral to the separate employment contract – unenforceable. Supp RP 273, 275. The court denied summary judgment on the claim relating to unconscionability due to issues of

fact regarding contract formation and the alleged change in pay structure. Supp RP 273-74.

Marchel asked the court to lift the preliminary injunction and to award her fees under the MWA and the contract. Supp RP 276. TrueBlue argued that a fee determination was inappropriate until evidence was presented on whether Marchel received sufficient compensation under the MWA. *Id.* The court lifted the preliminary injunction, but reserved on the damages and fee award. *Id.*

On October 30, 2017, the court issued a written order on the cross-motions for summary judgment. CP 1847-50. The order granted Marchel partial summary judgment, ruling that TrueBlue breached its agreement with Marchel by misclassifying her as an exempt employee – the argument no one raised. CP 1849; *see also* Supp. RP 217-18. The court dismissed TrueBlue’s claim for breach of contract with prejudice, vacated the preliminary injunction, and awarded Marchel 1.5x her regular rate for any time over 40 hours per week that she could prove at trial. CP 1849. The court also denied TrueBlue’s motion for partial summary judgment. CP 1849.<sup>6</sup>

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<sup>6</sup> TrueBlue sought discretionary review of the summary judgment ruling. CP 1851-56. This Court denied the motion on May 18, 2018. CP 2822-35.

### **3. Argument re: contracts.**

The trial court erred in granting partial summary judgment for Marchel that TrueBlue breached its contract by misclassifying her as an exempt employee. The court further erred in ruling that the alleged misclassification precluded TrueBlue from enforcing the RCA, which Marchel admittedly violated.

#### **a. Marchel's argument that TrueBlue breached the Employment Agreement by changing her compensation structure is contrary to the unambiguous terms of the contract.**

Marchel argued that TrueBlue breached its employment agreement by changing her compensation structure and, therefore, that breach rendered the agreement unenforceable. CP 1448-53. But it is indisputable that Marchel signed two separate documents when she took the job as branch manager for TrueBlue in 2007, the "Employment Agreement," and an "Agreement Regarding Non-Competition, Non-Interference, Non-Solicitation, and Confidentiality" (the RCA). CP 664-65, 667-71, 697-700, 1441, 1449.<sup>7</sup> It is also indisputable that the "Employment Agreement" permits TrueBlue to change Marchel's compensation, including her bonus structure:

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<sup>7</sup> The court determined that the Employment Agreement and the RCA were effectively one bilateral contract. Supp RP 273. TrueBlue disputes this conclusion, but it is not necessary to resolve the issue for this appeal.

**B. Position and Compensation.** Employee's position and compensation will be set forth on the most recent Personnel Action Notice (PAN) on file with Labor Ready's Employee Services Department. This PAN may be modified by Labor Ready from time to time. . . . If employee is eligible for a bonus under any such plan, Employee understands and agrees that Labor Ready has the right to change or discontinue any bonus plan at any time . . . [Emphases altered.]

CP 697, 1469-70. It is also undisputed that Marchel's compensation comprised salary plus a bonus throughout her tenure with TrueBlue.

CP 1472-73, 1501-02, 1507-43.

The parties to a contract are bound by its terms. **Torgerson v. One Lincoln Tower, LLC**, 166 Wn.2d 510, 517, 210 P.3d 318 (2009). An employment agreement is a contract, subject to the usual rules of contract interpretation. **Nye v. Univ. of Wash.**, 163 Wn. App. 875, 882-83, 260 P.3d 1000 (2011) (citation omitted) (recognizing validity of express contract term allowing for unilateral modification of contract). The parties' intent is derived from the contracts' ordinary meaning. *Id.* (citing **Hearst Commc'ns, Inc. v. Seattle Times Co.**, 154 Wn.2d 493, 503, 115 P.3d 262 (2005)). "Courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves." **Clements v. Olsen**, 46 Wn.2d 445, 448, 282 P.2d 266 (1955).

Here, it is indisputable that the employment agreement contains a provision expressly permitting TrueBlue to change Marchel's bonus and compensation structures. Such a change thus cannot be deemed a "breach" of contract as a matter of law. Marchel was simply wrong, as the trial court apparently agreed when it ruled on an argument no one raised.

**b. The trial court's determination that Marchel was misclassified, violating the contract, is erroneous under the facts and the law.**

Perhaps rejecting Marchel's obviously incorrect argument that changes in compensation/bonus structure supported her breach of contract claim, the court instead ruled that TrueBlue's alleged misclassification breached the employment contract, rendering it unenforceable. Supp RP 272-73. This too is incorrect.

Only a material breach can relieve the contracting party from enforcement of a contract. **224 Westlake, LLC v. Engstrom Prop., LLC**, 169 Wn. App. 700, 724, 281 P.3d 693 (2012). A material breach "substantially defeats the primary function" of the contract. *Id.* Materiality is a question of fact. *Id.* And no precedent says that an alleged wage and hour misclassification breaches an employment contract. Not even Marchel raised this claim.

Moreover, TrueBlue presented evidence on the work Marchel performed, which contradicted her claim that she was misclassified as an exempt employee. See CP 1550-75. The court saw TrueBlue's proffered evidence, but nonetheless made a factual determination that TrueBlue's evidence was insufficient to establish her exempt status. Supp RP 271-73. It could not properly resolve this fact question on summary judgment, much less take the facts in the light most favorable to Marchel on her summary judgment motion. ***Jumamil***, 179 Wn. App. at 677.

Summary judgment for Marchel was both unprecedented and inappropriate as to misclassification. The improper resolution of this factual dispute cannot support a "breach" ruling. This Court should reverse and remand for trial on this independently sufficient basis.

- c. The trial court legally erred in denying TrueBlue's motion for summary judgment that Marchel breached the non-compete agreement, which is based on undisputed facts.**

Based on the court's erroneous rulings discussed *supra*, it failed to consider the undisputed evidence that Marchel violated the non-compete by taking a job at the LaborMax office less than 25 miles from her prior jobsite. See CP 1445 (Marchel's admission that

she took a job with TrueBlue's competitor in the Vancouver market); CP 1198, 1209, 1212-13 (Marchel's deposition admission).

Washington courts will enforce non-compete agreements that are reasonable and validly formed. **Labriola v. Pollard Grp., Inc.**, 152 Wn.2d 828, 833, 100 P.3d 791 (2004). Agreements signed at the time employment begins are generally considered valid, reasonable, and with sufficient consideration. **Labriola**, 152 Wn.2d at 834. Questions of validity and reasonableness may be decided as a matter of law. *Id.* at 847; **Knight v. McDaniel**, 37 Wn. App. 366, 368, 680 P.2d 448 (1984) (citation omitted).

Here, it is undisputed that Marchel signed the RCA when she was first employed in 2007. CP 664-65, 667-71. It was thus legally valid, reasonable, and for valid consideration; therefore, it is enforceable. It is also undisputed that Marchel took employment with TrueBlue's, competitor LaborMax within 25 miles of TrueBlue's Vancouver office and then began soliciting business from TrueBlue's customers. CP 1198, 1209, 1212-13, 1232-34, 1249, 1263, 1698-99. Based on the undisputed evidence, the court erred in denying TrueBlue summary judgment on its claim that Marchel violated her non-compete agreement.

**B. The trial court abused its discretion in failing to make appropriate *Burnet* findings and in sanctioning TrueBlue.**

The court defaulted TrueBlue, applying the most severe sanctions ever leveled by a court in Washington. This startling assertion is accurate because, beyond sanctioning TrueBlue by striking its claims and defenses, granting Marchel's claims, and awarding monetary sanctions, it also awarded her *noneconomic damages* – without a trial. No court has gone this far. While this judgment certainly is not the largest in a sanctions case, prior cases were simply defaults, but where a *jury* had determined (or would determine) damages. See, e.g., ***Jones v. City of Seattle***, 179 Wn.2d 322, 318 P.3d 380 (2013) (jury verdict affirmed despite ***Burnet*** violation); ***Magaña***, *supra* (default on remand, where jury's damages verdict remained valid); ***Smith v. Behr Process Corp.***, 113 Wn. App. 306, 347, 54 P.3d 665 (2002) (default, with jury left to determine damages, but the case then settled).

The trial court went too far. As explained *infra*, it determined that monetary sanctions were meaningless, even though they had successfully prompted TrueBlue to produce the requested documents roughly three months prior to trial. It determined that TrueBlue's discovery violations were willful under a legal standard

expressly rejected in **Jones**. It found prejudice despite the production of 16,000 documents, one day before it had ordered them produced, three months before trial, and without making any specific findings about why Marchel could not prepare for trial in the remaining months. The legal error alone requires reversal.

**1. Standard of review & legal standards.**

The Court reviews discovery-violation sanctions under an abuse of discretion standard. **Blair v. TA-Seattle E. No. 176**, 171 Wn.2d 342, 348, 254 P.3d 797 (2011) (citing **Mayer v. Sto Indus., Inc.**, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. **Teter v. Deck**, 174 Wn.2d 207, 215, 274 P.3d 336 (2012) (citing **Marriage of Littlefield**, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)):

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

When addressing a discovery violation, “the court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery.” **Blair**, 171 Wn.2d at 348

(quoting **Burnet**, 131 Wn.2d at 495-96). While a trial court generally has broad discretion to fashion discovery-violation remedies, “before imposing a severe sanction, the court must consider the three **Burnet** factors on the record: whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party.” **Keck v. Collins**, 184 Wn.2d 358, 368-69, 357 P.3d 1080 (2015) (citing **Jones**, 179 Wn.2d at 338). The “harsher remedies allowable under CR 37(b)’ are dismissal, default, and exclusion of testimony – sanctions that affect a party’s ability to present its case – but [do] not encompass monetary compensatory sanctions.” **Mayer**, 156 Wn.2d at 690 (quoting **Burnet**, 131 Wn.2d at 494 (quoting **Snedigar v. Hodderson**, 53 Wn. App. 476, 487, 768 P.2d 1 (1989), *rev’d in part*, 114 Wn.2d 153, 786 P.2d 781 (1990))).

“The discovery sanction should be proportional to the discovery violation and the circumstances of the case.” **Magaña**, 167 Wn.2d at 590 (citing **Burnet**, 131 Wn.2d at 496-97). Thus, the least severe sanction that does not undermine the purpose of discovery (*i.e.*, the production of relevant evidence) is required. **Teter**, 174 Wn.2d at 216; **Burnet**, 131 Wn.2d at 495-96; **Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.**, 122 Wn.2d 299,

355-56, 858 P.2d 1054 (1993). The sanction is “to deter, to punish, to compensate, to educate, and to ensure that the wrongdoer does not profit from the wrong.” **Burnet**, 131 Wn.2d at 496; **Fisons**, 122 Wn.2d at 355-56. But this **Burnet** burden falls on Marchel. **Jones**, 179 Wn.2d at 338 (burden on party seeking sanctions).

## 2. Facts relevant to the **Burnet** issue.

There is no question here that TrueBlue was not timely in responding to discovery requests. Corporate counsel repeatedly apologized to the court and to Marchel: (see, e.g., CP 2769):

Regardless of the legal standards applied in this case, I personally and on behalf of TrueBlue, Inc., reiterate my previous on-record apologies for discovery participation which, while not deliberate, was still not completed with the urgency, focus or overall care that should be expected of any party appearing before our courts.

I offer this declaration simply to clarify some points that I felt were important to complete the record, but in no way want to lose [the] fact that I recognize, as does TrueBlue, the need to apologize to the Court and Ms. Marchel.

TrueBlue also apologizes to this Court for its untimeliness. Marchel’s argument – laid into a trial court “finding” – was that TrueBlue was defiant and unapologetic. CP 2814. The record is to the contrary.

Indeed, the court recognized TrueBlue’s extraordinary March-April efforts, and found in April that it could *not* order severe **Burnet** sanctions under the facts of this case – where no “smoking gun”

documents were withheld and no trial-by-ambush was attempted. Yet fewer than 30 days later, with three months still left to trial, the court imposed full *Magaña* sanctions.

**a. Marchel's discovery requests.**

The parties agreed that discovery would likely involve confidential, proprietary, or private information; they stipulated to a protective order filed on November 16, 2016. CP 823-32. Marchel served her first discovery on January 18, 2017. CP 845, 848-67. When TrueBlue did not respond by February 17, Marchel proposed an extension to February 28. CP 845, 869. TrueBlue notified Marchel that its responses would be done by March 1. CP 845, 871, 955.

TrueBlue produced its responses to 15 interrogatories and 24 requests for production on March 1. CP 845, 874-99. TrueBlue objected that Marchel's discovery was overbroad and irrelevant. CP 940, 956. Throughout its responses, TrueBlue invoked the Stipulated Protective Order, designating documents as "HIGHLY CONFIDENTIAL-OUTSIDE COUNSEL EYES ONLY," or "Confidential." See, e.g., CP 878-79, 888-90. TrueBlue provided 315 pages of responsive documents. CP 940, 955.<sup>8</sup>

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<sup>8</sup> The record contains the written discovery responses, but does not contain the documents produced.

On April 11, 2017, Marchel complained that the responses were inadequate. CP 845, 901-13. Marchel challenged the use of general objections and argued that TrueBlue “rewrote” her requests to avoid fully responding. CP 901-02. Marchel alleged TrueBlue ignored her “definitions” to avoid fully responding. CP 902-03. She claimed the “Confidential” and “HIGHLY CONFIDENTIAL” designations were used to withhold documents, rather than producing them subject to the designation, and that the relevance objections lacked justification. CP 903. Marchel individually challenged all 15 interrogatory responses and all 24 production responses. CP 904-13.

On April 18, 2017, the parties conducted a discovery conference to discuss the alleged deficiencies. CP 915. Marchel asked TrueBlue to verify whether it withheld responsive materials and whether it produced all responsive materials for each request. *Id.* Marchel also asked TrueBlue to provide materials in a manner that preserved electronically stored information (ESI). CP 915-16. TrueBlue confirmed that supplemental responses should be complete by May 17. CP 916, 923. Marchel acknowledged that the parties did not resolve all their disputes and would need the court to rule on some production issues. CP 922.

**b. Marchel's first motion to compel.**

Marchel filed a motion to compel on May 18. CP 925-935. Marchel argued that (1) TrueBlue's general objections improperly limited its responsive obligations; (2) TrueBlue failed to conduct a good faith search for responsive materials, including failing to produce in original format and failing to search for ESI; and (3) TrueBlue failed to meaningfully participate in discovery. CP 930-34.

TrueBlue provided supplemental responses on May 23, 2017, including an additional 167 pages of documents. CP 940, 955-56, 969-95. That production included sales information, policies, and employee handbooks. *Id.* TrueBlue responded to Marchel's motion, seeking a protective order, on May 24. CP 936-51.

The court heard the motion to compel and motion for protective order on May 26, and June 5. Supp RP 81-121, 122-212. The court ruled on each Interrogatory, generally requiring production, but limiting the scope to Washington, Oregon, and Idaho records, for Labor Ready Northwest, and for specified periods, depending on the request. Supp RP 109-12, 122, 140; *see generally* Supp RP 122-212. The court raised ESI at various points during the hearing, but never ruled on it. *Id.*

TrueBlue supplemented its discovery responses on July 11, producing an additional 970 pages. CP 1131, 1144-70. TrueBlue offered to restore its server information, at its expense, to allow additional searches from sources that were destroyed per company document-retention policies. CP 1131-32. TrueBlue also asked Marchel for a list of search terms and a restore date, but Marchel failed to respond to these requests. CP 1132.

The court entered its first written discovery order on September 27, 2017, making detailed rulings on numerous issues CP 1686-92. The court ordered TrueBlue to pay Marchel's fees and costs "incurred in obtaining responsive discovery." CP 1692. Marchel filed her fee affidavit on October 9. CP 1749-71. TrueBlue objected. CP 1801-28. The court did not immediately rule. Supp RP 303 (court reminded at the March 19 hearing that there was no ruling on the cost bill). Marchel resubmitted her fee request in her second cost bill. CP 2182-2212.

**c. Limited issues remained for discovery and trial after summary judgment.**

The court's October 2017 summary judgment order did not resolve all the issues in the case. CP 1847-50. The remaining issues included (1) Marchel's overtime damages, if any; (2) Marchel's

damages from the injunction, if any; (3) LaborMax's damages from the same injunction, if any; (4) Marchel's unlawful discrimination claim; and (5) TrueBlue's UTSA claim. CP 2032.

**d. Marchel's second motion to compel.**

Marchel issued a second set of interrogatories and requests for production on January 26, 2018. CP 1858, 1863-88. Marchel did not serve these requests on TrueBlue's new counsel until February 9. CP 1924, 1947, 1959, 1975.

Marchel requested dates for the TrueBlue and individual defendant depositions by email at 5:09 p.m. on February 12. CP 1858, 1890. Marchel then noted those depositions on February 13, without allowing time for response to the schedule query and without further consultation. CP 1858, 1892-97, 1899-1901, 1903-05.<sup>9</sup>

On February 28, the parties conferred in person about an agreed schedule for the depositions. CP 1860. It is disputed to what extent the parties discussed pending discovery. CP 1859-60, 1967, 1981, 2141-42. The parties conferred further on March 2. CP 1967, 1978, 2148, 2158-59. The specific topic of that conference is also

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<sup>9</sup> The topics for the TrueBlue CR 30(b)(6) deposition are substantially broader than the issues remaining after summary judgment. *Compare* CP 1847-50 *with* CP 1895-97.

disputed. CP 1967, 1978, 2148, 2164-65. Shortly after that discussion began, Marchel served a second motion to compel. CP 1857-1922, 1967-68, 1983.

In the motion, Marchel argued that TrueBlue “blew the deadlines off” and, therefore, the court should compel production, preclude any objections, and award fees. CP 1917-19. Marchel failed to address questions as to the scope of the new discovery requests or TrueBlue’s agreement to respond before the agreed dates of the depositions of TrueBlue and its employees. See CP 1916-22. Marchel argued that monetary sanctions were insufficient to change TrueBlue’s noncompliance. CP 1920.

On March 9, 2018, TrueBlue moved for a six-month trial continuance. CP 1923-53. Marchel opposed any continuance. CP 2031-2131. TrueBlue also opposed Marchel’s second motion to compel. CP 1954-2030. Marchel replied. CP 2137-72.

- e. In April, the trial court granted a motion to compel and denied a continuance while TrueBlue was complying, but later granted a continuance, finding no basis to impose the severest sanctions.**

The court heard argument on the motions to compel and for a continuance on March 19. Supp RP 281-304. TrueBlue asked the court not to decide the issue, where it was trying to comply, but there

had been insufficient time for the parties to work out their disputes. Supp RP 289-91. Marchel was simply trying to win through discovery, contrary to the Civil Rules. Supp RP 291-92.

The court gave an oral ruling. Supp RP 300-03; CP 3427-28. It also issued a written order granting the motion to compel and denying the continuance. CP 2173-75. The court ordered TrueBlue to respond in seven days. *Id.* It awarded Marchel fees and costs. *Id.* It reserved on further sanctions. *Id.*

The next day, TrueBlue contacted Marchel to initiate the required production. CP 2449, 2484. TrueBlue reframed its communication at Marchel's request, but Marchel failed to respond for ten days – after the court's deadline had passed. CP 2448-50, 2483, 2486-87. TrueBlue made its files available within days of Marchel's clarification. CP 2448-50, 2461, 2491.

TrueBlue placed a high priority on responses to Marchel's second discovery requests, assigning multiple company representatives to assist in the production, including senior corporate counsel Kevin Reed, director of human resources Hilary Cahill, human resources manager Shawna Moore, and director of IT

infrastructure, Thomas Word. 2440-41, 2444-45, CP 2494-95,<sup>10</sup> 2502-05.<sup>11</sup> Based on Marchel's requests, TrueBlue opened its Tacoma office for inspection of its records, including its electronic records, on April 5, 2018. CP 2491, 2495, 2503-04.

To facilitate the production, TrueBlue provided Marchel a computer and access to subject-matter experts. CP 2450, 2495-96. TrueBlue's staff attempted to assist in the electronic production. CP 2440-2500. Both Cahill and Moore confirmed that they participated in meetings regarding the discovery and that they reserved April 4 and/or 5 to address any questions Marchel had regarding the electronic production. CP 2441, 2445. Cahill was asked fewer than 20 questions in less than 30 minutes before she was dismissed. CP 2441. Cahill followed up and produced all requested materials. CP 2441-42. Moore was asked fewer than 10 questions over less than an hour. CP 2446-47. Moore produced all requested documents and continued to work on getting information from vendors in response to Marchel's request for a specific type of report. CP 2446. Marchel's

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<sup>10</sup> Unfortunately, TrueBlue's internal lead in the production suffered a concussion on March 19, 2018, and on doctor's orders, was on a limited schedule until April 2. CP 2501.

<sup>11</sup> On March 21, 2018, TrueBlue sought discretionary review of the March 19 order compelling discovery and denying continuance. CP 2176-81. TrueBlue withdrew its request; this Court dismissed April 17. CP 2804-06.

representatives spent fewer than four hours reviewing the computer and asking questions. CP 2223, 2450, 2496.

The next day (April 6, 2018) Marchel filed a motion for an order to show cause for imposition of additional discovery sanctions, asserting that TrueBlue failed to timely provide court-ordered discovery. CP 2208-12, 2216, 2421-33. Marchel also filed a motion to shorten time and to reset the briefing schedule on the show cause motion so that the hearing could take place on April 11. CP 2213-15. Both were served on TrueBlue's counsel at 4:47 p.m., leaving two court days for response to both motions. CP 2451, 2493.

Marchel alleged that TrueBlue refused to provide the information required in the court's prior order and then refused to respond to its questions relating to that production. CP 2424-26. Marchel argued that the ***Burnet*** factors were met and warranted the following harsher sanctions. CP 2429-32:

- (i) strike TrueBlue's UTSA claims;
- (ii) strike TrueBlue's affirmative defenses;
- (iii) impose an adverse inference against TrueBlue on liability for Marchel's age discrimination claim;
- (iv) find TrueBlue's alleged MWA violation willful under RCW 49.52.070;
- (v) enter judgment on Marchel's MWA claims;

(vi) enter wrongful-injunction damages judgments; **and**

(viii) award Marchel reasonable attorneys' fees and costs under her Employment Agreement, the MWA, and the WLAD.

In opposition, TrueBlue maintained that it did not intentionally fail to disclose discoverable material, that it did not willfully violate the court's order, and that it has not otherwise engaged in unconscionable conduct that would warrant **Burnet** sanctions. CP 2440-47, 2454-75, 2494-2518. TrueBlue also opposed the request to shorten time. CP 2448-53, 2476-93.

On April 11, 2018, the court granted the order shortening time. CP 2523-24. The court also granted the motion for order to show cause on additional sanctions, in part. CP 2525-26. The court orally ruled that opening the office and allowing access to 750 terabytes of unfiltered information was unreasonable. RP 47-48. The court also said it had previously found willful noncompliance with discovery rules on March 19, but that TrueBlue had made significant efforts since that time. *Id.* The court ruled that the effort was insufficient, but that the court could not impose the severest **Burnet** sanctions based on the record before it (RP 49, 62):

It's not these sanctions that are anticipated by **Burnet**. I'm not going to go there at this point. I'm weighing the interests in the state of Washington of hearing cases on the merits, and I know the case law around here and the cases on the merits relates to default. I'm not thinking about default, but I think

when we give inferences and strike affirmative defenses that is the most extreme remedy. And so I don't think I can proceed to those remedies on this record. [Emphases added.]

The court continued the trial date four months, to August 6, 2018, alleviating alleged prejudice due to having a trial date two months away. RP 48, 67. The court instead anticipated a monetary penalty to offset any benefit to TrueBlue from the continuance. RP 55, 62.

The court also ordered further production, including (1) conducting a reasonable search and certifying discovery is complete within 30 days; and (2) producing four witnesses for deposition within 60 days. CP 2526; RP 60. The court further agreed with TrueBlue that its March 19 order did not waive attorney-client privilege or work-product protections. CP 2526; RP 5. The court awarded Marchel fees and costs associated with the discovery motions. CP 2526; RP 60. The court ordered Marchel to present fees and costs on the breach of contract and wage claims. *Id.*

But the court refused to impose the most extreme sanction on this record, including TrueBlue's significant discovery efforts: "I'm specifically not going down the **Magaña/Burnet** road here." RP 62-63. The court also invited the parties to submit briefing on an appropriate sanction for hearing on May 10, 2018. RP 62-63, 65.

**f. The full *Magaña*.**

On May 8, Marchel submitted supplemental briefing on sanctions and sought clarification of the court's April 11 order. CP 2527-2609. Marchel argued that monetary sanctions were insufficient to address TrueBlue's discovery conduct. See CP 2532-40.<sup>12</sup> In the alternative, Marchel asked the court to confirm that discovery was closed, except for TrueBlue's obligations to complete discovery by May 11, and to produce four witnesses for deposition by June 11. CP 2541.

TrueBlue replied on May 9. CP 2610-88. TrueBlue explained its ongoing, significant, good-faith efforts at producing responsive information. CP 2612. TrueBlue presented a declaration showing how its corporate witness appropriately responded to the identified topics. CP 2612-13, 2620-88.

The court heard argument on May 10. RP 72-127. The court summarized the issues it was deciding to include (1) Marchel's request for fees and costs associated with the prior discovery orders;

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<sup>12</sup> While the court ordered payment of Marchel's fees and costs associated with the discovery motions in its prior orders, it had not ruled on the sum to be paid at the time of the April 11 hearing. Marchel sought an additional \$21,511.50 in fees and costs associated with discovery after the April 11 order, for a total of \$93,638.50 in monetary sanctions. CP 2540.

(2) the appropriate sanctions under CR 37(b)(2); and (3) clarification of the April 11 order. RP 72.<sup>13</sup>

Despite its prior rulings that harsher sanctions were not appropriate based on the existing record, the court nonetheless took argument on whether harsher sanctions were appropriate. RP 75. TrueBlue noted that it had dedicated significant resources to comply with the April 11 production order – a production that was not due until the next day. RP 78, 104. It had prepared an additional 16,000 documents for production. *Id.* (stacks of documents being numbered for production).

The court gave an oral ruling, determining that (1) Marchel's request for attorney's fees and costs was reasonable (RP 116-17); (2) summarizing the history of discovery in the case (RP 117-21); (3) finding TrueBlue's responses after the second order to compel could not cure the prejudice of lost time (RP 121); attorneys' fees are a "meaningless" sanction because they were owed under the contract and wage claims already resolved (*id.*); "TrueBlue as a corporate

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<sup>13</sup> As an initial matter, the court ruled that it did not intend to reopen discovery, but merely to permit TrueBlue to complete its responses and Marchel's four depositions. RP 73.

entity” was willful (*id.*); Marchel was prejudiced (RP 122). On lesser sanctions, the court stated (*id.*):

I've tried sanctions. I've tried monetary. I've ordered discovery. I've ruled that discovery can proceed with one party but not the other. Certainly, recently there's been a change, but now we're seeing all these documents come in from a withholding that has spanned over a year now.

The court therefore entered the harshest conceivable sanctions – ***Magaña*** plus – striking TrueBlue's UTSA claims and its affirmative defenses; deeming Marchel's WLAD claims admitted, and even deeming her MWA claims – which she had already won on summary judgment – admitted; deeming all claims for damages admitted, including for a “wrongfully” issued injunction. RP 123.

TrueBlue argued that the court should reconsider its position because it was contrary to the prior order, which gave TrueBlue the opportunity to comply within 30 days, which had not yet expired, and with TrueBlue showing the court the 16,000 pages of production it was prepared to make. RP 124. The court rejected TrueBlue's request to submit supplemental briefing. RP 126.

TrueBlue later attempted to submit a supplemental declaration providing contrary evidence in response to the numerous arguments Marchel made in support of harsher sanctions. CP 2688-2765. The court refused to entertain argument on the supplemental

materials on May 25, 2018. RP 132-33. TrueBlue submitted a second supplemental declaration, setting forth its substantial efforts to comply with the court's April 11 order on production. CP 2766-73. Marchel objected to both declarations. CP 2792-94.

**g. Judgment for Marchel.**

The court entered its Findings and Conclusions on June 15. CP 2807-21 (attached as Appendix A). Marchel submitted a proposed judgment on July 9. CP 2836-3005. New counsel for TrueBlue (Peter Stutheit and David Ongaro) appeared and sought admission on July 20, which was approved by the court. CP 3006-08; RP 135. The parties also agreed to dismiss the claims against the individual defendants on July 20. CP 3009-11.

TrueBlue opposed the entry of judgment on July 25. CP 3012-38. TrueBlue argued that it has a constitutional right to a trial on damages, which if permitted would include evidence to contradict Marchel's overtime claims, her emotional-distress damages, her prejudgment interest calculations, and the damages from the injunction. CP 3017-33. TrueBlue also argued that the attorney's fee claim was inappropriate because it was unsegregated. CP 3033-34. Marchel objected to TrueBlue's opposition as contrary to the court's findings and conclusions. CP 3039-3117.

**3. The trial court abused its discretion in entering the severest sanctions after ruling that it could not do so on this record, particularly where the documents had been produced.**

A court's discretion to impose a "severe" sanction is constrained by the three factors articulated in *Burnet*, as elucidated in its progeny: "whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party." *Keck*, 184 Wn.2d at 369 (citing *Jones*, 179 Wn.2d at 338 (addressing *Burnet*)). Here, the court abused its discretion on all three *Burnet* factors.

**a. The trial court's conclusion that lesser sanctions would not suffice is untenable.**

As explained *supra*, the trial court did consider lesser sanctions on the record. But it also had to impose the least severe sanction to serve its purpose. *Teter*, 174 Wn.2d at 216; *Burnet*, 131 Wn.2d at 495-96; *Fisons*, 122 Wn.2d at 355-56. It failed to do so.

As noted, the court explained its reasoning (RP 122-23):

I've tried sanctions. I've tried monetary. I've ordered discovery.<sup>14</sup> I've ruled that discovery can proceed with one party but not the other. Certainly, recently there's been a change, but now we're seeing all these documents come in from a withholding that has spanned over a year now.

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<sup>14</sup> Ordering discovery is not a recognized discovery sanction.

Fees were somehow “meaningless” because they were owed on the wage and contract claims. RP 121. Monetary sanctions somehow could not adequately punish, deter, or educate TrueBlue. CP 2819.

The court was incorrect. It seemingly failed to recognize that TrueBlue was standing in court with 16,000 pages of production, 29 days after the court had said it *could not* issue **Burnet** sanctions, one day *before* the court had ordered them produced, and *three months* before trial. Presumably, this production resulted (at least in part) from the “sanctions” the court said it had already tried. Its conclusion is untenable and ungrounded in the facts.

Moreover, the court simply had not tried substantial monetary sanctions. As it noted, the fee award under the wage claim *was not a sanction at all*: rather, Marchel obtained an incorrect partial summary judgment on that claim. Up to the point of the May 10 hearing, the court had not awarded *any* actual monetary sanctions. When it did – after this point – it was under \$100,000 in fees and costs for the discovery motions. While this is a substantial sanction, it came after-the-fact, *and yet had already produced the documents*. It is untenable to summarily assert that money sanctions won’t work – *they worked here*.

Finally on lesser sanctions, the court did not only award substantial monetary sanctions. It did not only find liability on Marchel's claims as a sanction. It did not only dismiss TrueBlue's claims as a sanction. It did not only dismiss TrueBlue's affirmative defenses as a sanction. It did not even "only" do *all* those things. It also awarded *noneconomic damages without a trial*.<sup>15</sup> Surely, when "mere" monetary sanctions had successfully prompted a 16,000-page document production, one day early, and three months before trial, nothing more was required. But just as surely, any one (or more) of these additional sanctions would be much more than enough to punish, deter, and educate, and would prevent TrueBlue from "profiting" from its untimely disclosures.

The court's ruling on lesser sanctions is untenable. It did not impose the least severe sanction that would prompt document production – the purpose of the sanction. One month after saying it could not impose severe ***Burnet*** sanctions – and after 16,000 more pages *were* produced – it applied full ***Magaña*** sanctions. This Court should reverse and remand for trial.

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<sup>15</sup> As discussed *infra*, that violated TrueBlue's constitutional trial right.

**b. The trial court applied the wrong legal standard for willfulness.**

The court ruled on willfulness as follows (CP 2818):

The Court concludes Plaintiffs' discovery violations were willful and have continued to be willful since its discovery orders have not been complied with. The Court's March 19 and April 11 Orders finding Plaintiffs' violations to be willful specifically reserved ruling on additional sanctions under CR 37(b). Moreover, "A party's disregard of a court order without reasonable excuse or justification is deemed willful. *Magana*, 167 Wn.2d at 584. The Court finds that Plaintiffs have not presented a reasonable excuse or justification for their non-compliance.

The court thus applied the wrong legal standard.

*Jones* expressly rejects the standard from *Magaña* that the trial court quoted. 179 Wn.2d at 345. *Jones* holds that willfulness is *not* a lack of "good cause" or "reasonable justification," nor mere noncompliance with a court rule. *Id.* (citing *Blair*, 171 Wn.2d at 350 n.3). "Something more is needed." *Id.*

*Jones* explains that equating willfulness with a lack of "reasonable justification" wrongly presumes that a mere rule violation deserves the severest sanctions:

*Burnet* and its progeny require the opposite presumption: that late-disclosed testimony will be admitted absent a willful violation, substantial prejudice to the nonviolating party, and the insufficiency of sanctions less drastic than exclusion.

179 Wn.2d at 343 (citing *Mayer*, 156 Wn.2d at 688; *Burnet*, 131 Wn.2d at 494). As noted, the lesser-sanction ruling was incorrect.

In sum, the court abused its discretion in applying the wrong legal standard to find willfulness. An error of law is an abuse of discretion. See, e.g., **Council House v. Hawk**, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006) (citing **Estate of Treadwell v. Wright**, 115 Wn. App. 238, 251, 61 P.3d 1214 (2003); **Marriage of Lawrence**, 105 Wn. App. 683, 686, 20 P.3d 972 (2001)).

The court's untenable misstatement of the law was most harmful, where defaulting a party for its mere inability to comply with the court's schedule is untenable – particularly where, as here, three months remained until trial, the documents were produced one day early, and monetary sanctions would alleviate any benefit to TrueBlue. This sort of scheduling violation bears no resemblance to conduct that warrants severe sanctions, like hiding a “smoking gun” or an “explosive” witness. **Jones**, 179 Wn.2d at 342, 353; **Smith**, 113 Wn. App. at 326-27. There's no smoke here, much less fire. This Court should reverse and remand for a fair trial.

**c. The trial court also abused its discretion as to prejudice.**

The court apparently found that disclosure of four documents three-to-four months before trial, and perhaps 16,000 documents roughly three months before trial, “caused [Marchel] substantial

prejudice in conducting discovery in this case, in preparation for trial and for the trial of this case.” CP 2818; *accord* CP 2815. It specifically noted that, “[a]s discussed above, the discovery sought relates to Defendant Marchel’s age discrimination counterclaim, [TrueBlue’s] trade secrets misappropriation claim, and [Marchel’s] damages.” *Id.* The only discussion “above” pertains to four documents disclosed during a deposition of TrueBlue’s CR 30(b)(6) witness. CP 2812-13. The 2010 Employee Handbook was produced on April 24, 2018 (over three months before trial). CP 2813. The other three documents (a confidentiality policy, an electronic device policy, and an employee separation guide) were produced on May 9, one day before the court had ordered their production, and roughly three months before trial – the very day the court defaulted TrueBlue. *Id.*

No other specific documents are referenced in the court’s order. Nor is there any finding as to how receiving four documents three-to-four months before trial substantially prejudiced Marchel’s ability to prepare for trial, as required by ***Burnet, Magaña, Jones***, etc. The court’s findings and conclusions are untenable.

Prejudice derives both from the timing and from the substance of the late-disclosed evidence. ***Jones***, 179 Wn.2d at 346; ***Smith***, 113 Wn. App. at 325-26. In ***Jones***, for example, witnesses late-disclosed

just before opening statements, half-way through trial, and just days before trial was over, were prejudicial, where parties have the right to rely on discovery cutoffs and to present their cases without new, contradictory evidence unexpectedly emerging during trial. 179 Wn.2d at 344-46, 353. Producing four documents three or four months before trial does not substantially prejudice a party. The absence of any findings about the 16,000 pages of discovery TrueBlue produced one day before it was ordered to do so leaves no finding on prejudice from that production.<sup>16</sup>

Indeed, in ***Burnet*** itself, our Supreme Court reversed sanctions far less severe than this court imposed as “too severe in light of the length of time to trial, the undisputedly severe injury to [the plaintiff,] and the absence of a” willfulness finding.<sup>17</sup> 131 Wn.2d at 498 (citing ***Lane v. Brown & Haley***, 81 Wn. App. 102, 106, 912 P.2d 1040 (“[T]he law favors resolution of cases on their merits”), *rev. denied*, 128 Wn.2d 1028, 922 P.2d 98 (1996)). While there was more

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<sup>16</sup> It does not appear from the record that the court even looked at the 16,000-page production before defaulting TrueBlue. Thus, its finding that it “fully reviewed” the discovery produced (CP 2815) is unsupported by substantial evidence. *See, e.g., Shelcon Constr. Grp., LLC v. Haymond*, 187 Wn. App. 878, 889, 351 P.3d 895 (2015) (findings reviewed for substantial evidence and for whether they support the conclusions of law).

<sup>17</sup> As noted *supra*, the court’s willfulness finding here was based on an incorrect legal standard, so it cannot stand.

time until trial in **Burnet**, the sanction was also far less severe. **Burnet** counsels that trials on the merits are preferred where, as here, there is no finding or evidence that Marchel could not prepare for trial even after the documents were produced. Again, this case presents nothing like the prejudice in **Smith**, or **Magaña** – where the parties were heading into a *second* trial when the discovery was finally produced. Nor is it as severe as in **Jones**, **Blair**, **Teter**, or **Keck**, where the sanctions were nonetheless reversed.

It appears that the court – at the behest of Marchel – simply wanted to punish TrueBlue for its admitted – and regretted – untimeliness. That is not the primary purpose of **Burnet** sanctions, nor can it alone justify imposing the ultimate sanctions at issue here. The court compensated Marchel, and TrueBlue was (and is) thus chastened, educated, and deterred. But we still *try* cases here in Washington. This Court should reverse and remand for a trial.

**C. The trial court violated TrueBlue’s constitutional right to a trial on damages.**

The court noted, as “discussed in *Magana*, ‘[t]he right of trial by jury shall remain inviolate.’ [WASH.] CONST. ART I, § 21; *see also* CR 38.” CP 2816. It nonetheless believed that this “right may be negated, and due process is satisfied . . . if before entering a default

judgment or dismissing a claim or defense, the trial court concludes that there was ‘a willful or deliberate refusal to obey a discovery order, which refusal substantially prejudices the opponent's ability to prepare for trial.’” *Id.* (citing **Magaña**, 167 Wn.2d at 591). As explained *supra*, the court failed to meet the **Burnet** requirements as modified by **Jones**, so its rationale here fails.

More importantly here, the court apparently failed to recognize that the roughly \$8 million judgment in **Magaña** was a *jury verdict*. Neither **Magaña** nor any other authority remotely supports the idea that a court may, as here, simply award *noneconomic damages* as a sanction, without pausing for evidence, testimony, cross examination, etc. These draconian sanctions are unsupported by any legal authority and must be reversed.

Our Supreme Court has unequivocally held that the trial rights guaranteed by our constitution “include allowing the jury to determine the amount of damages in a civil case.” **Sofie v. Fibreboard Corp.**, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). These rights must remain inviolate, so where, as here, the trier of fact was the court, it cannot be permitted to diminish the right to a trial on damages. *Id.* (“For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees”). Thus, the

“amount of damages is a matter to be fixed within the judgment of the fact finder,” “within the range of relevant evidence.” **Mason v. Mortg. Am.**, 114 Wn.2d 842, 850, 792 P.2d 142 (1990) (citing **Rasor v. Retail Credit Co.**, 87 Wn.2d 516, 531, 554 P.2d 1041 (1976); **Sherwood v. Bellevue Dodge, Inc.**, 35 Wn. App. 741, 749, 669 P.2d 1258 (1983); **Cultum v. Heritage House Realtors, Inc.**, 103 Wn.2d 623, 633, 694 P.2d 630 (1985); **Kwik-Lok Corp. v. Pulse**, 41 Wn. App. 142, 149-50, 702 P.2d 1226 (1985)).

The amount of damages that will fairly compensate a plaintiff is a question for the trier of fact. See, e.g., **Nielson v. Spanaway Gen. Med Clinic, Inc.**, 135 Wn.2d 255, 267, 956 P.2d 312 (1998). Foregoing the entire process by which damages are established also violates due process. See **Sitton v. State Farm Mut. Auto. Ins. Co.**, 116 Wn. App. 245, 258, 63 P.3d 198 (2003) (trial plan violated due process by allowing damages absent proof of causation); **Magaña**, 167 Wn.2d at 595 (“an unjustified denial of the jury trial right implicates due process considerations of both the Washington and United States Constitutions”).

As noted *supra*, even in default cases, noneconomic damages are determined by a factfinder. See **Smith**; **Magaña**; **Jones**; and **Crews v. Avco Corp.**, No. 70756-6-1, 2015 Wash. App.

LEXIS 728, \*1 (Apr. 6, 2015) (unpub. op. cited as persuasive authority under GR 14.1) (“The trial court struck all of Avco’s affirmative defenses and deemed all allegations in Crews’s complaint admitted. As a result, the court found liability and causation established and set separate trials on compensatory damages and punitive damages”). Anything less violates constitutional norms.

TrueBlue gave the court a detailed explanation of the specific challenges it would bring in a damages trial. CP 3019-34. Briefly, TrueBlue would challenge (a) unsupported overtime claims (CP 3019-21); (b) disputed misclassification claims, including willfulness (CP 3021-24); (c) excessive and unsupported emotional distress damages (CP 3024-26); (d) inaccurate and unsupported expert calculations (CP 3026-27); (e) inaccurate overtime calculations (CP 3027-29); (f) inaccurate interest calculations (CP 3029-31); (g) unsupported injunctive damages calculations (CP 3031-33); and (h) unsegregated attorney fees demands (CP 3033-34). These detailed challenges do not rely on any potentially excluded discovery. And TrueBlue was ready to go to trial on damages immediately.

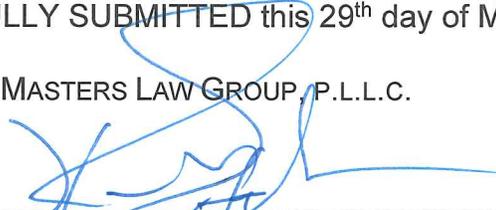
But the court skipped the trial. It violated constitutional protections for trials on damages. This Court should reverse and remand for trial.

## CONCLUSION

This Court should reverse and remand for trial. The summary judgment errors likely render the subsequent *Burnet* and constitutional violations moot, since they never should have been rendered. But if the Court does not reverse the summary judgment rulings and simply remand for trial, it should do so under *Burnet*, and based on the constitutional trial right deprivations.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of March 2019.

MASTERS LAW GROUP, P.L.L.C.



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# **APPENDIX A**

**Findings of Fact and Conclusions of Law and  
Order Granting Defendants' Joint Motion for  
Order to Show Cause. CP 2807-21.**

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IN THE SUPERIOR COURT OF WASHINGTON  
FOR CLARK COUNTY

TRUEBLUE, INC., a Washington corporation;  
and its wholly owned subsidiary, LABOR  
READY NORTHWEST, INC. ,

Plaintiffs,

v.

KELLY MARCHEL a/k/a KELLY  
LANGLOIS; and ANYTIME LABOR-  
SEATTLE, LLC d/b/a LABORMAX,

Defendants.

Case No.: 16-2-01556-9

~~PROPOSED~~  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AND  
ORDER GRANTING  
DEFENDANTS' JOINT MOTION  
FOR ORDER TO SHOW CAUSE

KELLY MARCHEL a/k/a KELLY  
LANGLOIS,

Counterclaim Plaintiff,

v.

TRUEBLUE, INC., a Washington corporation  
and its wholly owned subsidiary, LABOR  
READY NORTHWEST, INC.; PAUL  
SHEVCHENKO, an individual, TATIANA  
REEVES, an individual, and MARLINDA  
NEWMYER, an individual,

Counterclaim Defendants.

~~PROPOSED~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW/ORDER  
GRANTING DEFENDANTS' MOTION FOR ORDER TO SHOW CAUSE - 1  
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AMF

1 THIS MATTER came on for hearing on May 10, 2018, on the Court's request for  
2 supplemental briefing and argument on Defendants' Joint Motion for Order to Show Cause. Dkt.  
3 No. 165.

4 On April 11, 2018 the Court granted in part Defendants' Motion, affirming its findings of  
5 March 19, 2018, that Plaintiffs' discovery violations were willful and had substantially  
6 prejudiced Defendants' ability to prepare for trial, awarded Defendants' attorneys' fees and costs  
7 in bringing the motion, imposed a 30-day deadline for Plaintiffs to fully and completely respond  
8 to Defendants' discovery, found additional sanctions warranted but reserved ruling pending  
9 additional briefing and argument from the parties on appropriate additional discovery sanctions  
10 against Plaintiffs TrueBlue, Inc. and its wholly owned subsidiary Labor Ready Northwest, Inc.  
11 The Court having considered the files and records herein, the supplemental briefing submitted by  
12 the parties, along with all declarations, exhibits, proposed orders, and argument of counsel, now  
13 makes the following findings of fact and conclusions of law.

14 **A. Findings of Fact**

15 If any finding should be denominated as a conclusion of law, it shall be so stated.

16 Plaintiffs commenced this action by filing a complaint and seeking temporary restraining  
17 orders against their former employee, Kelly Marchel, and her new employer, Anytime Labor-  
18 Seattle, LLC. Plaintiffs' complaint alleged that Defendant Marchel was working for a competitor  
19 in violation of her employment agreement, that Defendants were using Plaintiffs' trade secret  
20 information in violation of the Washington Trade Secrets Act, RCW 19.108 *et seq.* (WMWA),  
21 and that Anytime Labor-Seattle, LLC had wrongfully interfered with its contract by knowingly  
22 employing Defendant Marchel in violation of her employment agreement with Plaintiffs.

23 Dkt. No. 3. Defendant Marchel counterclaimed, alleging that Plaintiffs had violated the  
24 Washington Minimum Wage Act, RCW 49.46 *et seq.*, and discharged her from employment

1 because of her age in violation of the Washington Law Against Discrimination, RCW 49.60.180  
2 and RCW 49.44.090 *et seq.* (WLAD). Dkt. No. 50.

3 Defendant Marchel served Plaintiffs with her First Set of Interrogatories and Requests for  
4 Production of Documents on January 18, 2017. These requests comprised 15 interrogatories and  
5 24 requests for production of documents. Pursuant to CR 33 and 34, Plaintiffs' responses were  
6 due on February 17, 2017. Plaintiffs did not respond or object prior to February 17, 2017, but  
7 eventually served responses containing boilerplate objections following a series of CR 26(i)  
8 conferences. On May 18, 2017, Defendant Marchel moved to compel complete answers to her  
9 interrogatories and production of documents. On May 24, 2017, Plaintiffs moved for entry of a  
10 protective order limiting the scope of discovery.

11 After lengthy oral arguments on May 18, May 26, and June 5, 2017, this Court found that  
12 Plaintiffs failed to properly and timely respond to Ms. Marchel's first set of discovery requests,  
13 granted in part Defendant Marchel's motion to compel and granted in part Plaintiff's cross-  
14 motion for protective order. On September 27, 2017, the Court made the following express  
15 ruling:

16 Pursuant to CR 37(a) Plaintiffs shall pay Defendants' reasonable  
17 attorneys' fees and costs incurred in obtaining responsive discovery.  
18 Defendants are directed to submit a cost bill and fees declaration not later  
19 than 10 days following this order. Plaintiffs may provide a response to  
20 Defendants' submission on fees and costs by 15 days following this  
21 order. Defendants shall submit pleadings to the court for further  
22 proceedings on the issue of fees and costs.

23 Dkt. No. 103 at 7:9-14. Defendants submitted a cost bill, requesting \$43,985 in attorneys' fees  
24 and \$448 in costs incurred pursuing discovery from Plaintiffs. Dkt. No. 110.

25 Plaintiffs moved for reconsideration of the September 27 Order, which this Court denied  
26 on October 25, 2017. Dkt. No. 120.

1 On October 30, 2017, this Court granted Defendant Marchel's Motion for Partial  
2 Summary Judgment because she established there were no material facts in dispute over her  
3 claim that Plaintiffs breached their agreement with her and that they had misclassified her as an  
4 overtime-exempt employee under RCW 49.46.130. The October 30 Order further dissolved the  
5 preliminary injunction entered by this Court against Defendants on September 9, 2016. Dkt. No.  
6 121. Plaintiffs' employment agreement with Defendant Marchel contains an attorneys' fees  
7 provision, making fees and costs payable to the prevailing party in any dispute arising from or  
8 related to the employment relationship. The WMWA provides for costs and attorneys' fees to  
9 prevailing employees. RCW 49.46.090.

10 On January 26, 2018, Defendant Marchel served her Second Set of Interrogatories and  
11 Request for Production of Documents on Plaintiffs. As with her first set of written discovery,  
12 Plaintiffs did not timely respond. On March 2, 2018, Defendant Marchel filed her Second  
13 Motion to Compel Discovery from Plaintiffs. Dkt. No. 134. Plaintiffs then moved to continue the  
14 trial date of May 21, 2018, arguing that their retention of new lead counsel, Aaron Rocke of the  
15 Rocke Law Group, and the parties' discovery dispute, provided good cause to continue the trial  
16 of this matter. The Court notes that Mr. Rocke filed a Notice of Association of Counsel  
17 appearing on behalf of Plaintiffs on November 29, 2017, Dkt. No. 123, and on February 8, 2018,  
18 Plaintiffs' prior counsel filed a notice of withdrawal and substitution of Mr. Rocke as lead  
19 counsel. Dkt. No. 131.

20 On March 19, 2018, this Court granted Defendant Marchel's Second Motion to Compel  
21 Discovery Responses. Dkt. No. 150. The Court ordered Plaintiffs to serve their answers and  
22 responses no later than March 26, 2018, awarded Defendants' reasonable attorneys' fees and  
23 costs occurred in obtaining discovery, reserved ruling on additional discovery sanctions, and  
24

1 denied Plaintiffs' motion for continuance. *Id.* With regard to discovery sanctions, this Court  
2 expressly found that Plaintiffs' violation of the discovery rules was willful; that Plaintiffs' failure  
3 to participate in discovery substantially prejudiced Defendant Marchel's ability to prepare for  
4 trial; that monetary sanctions under CR 37(a)(4) sufficient to compensate her for bringing the  
5 motion were warranted; and, citing *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933  
6 P.2d 1036 (1997), reserved ruling on the harsher sanctions under CR 37(b)(2) that Defendants  
7 requested.

8 On March 20, Plaintiffs notified Defendants that documents and information responsive  
9 to Defendant Marchel's second set of discovery were available for inspection at their corporate  
10 headquarters in Tacoma, Washington. Plaintiffs asked that Defendants provide 36-48 hours'  
11 notice so that they could make files accessible. The only information provided to Defendants  
12 regarding the inspection was this:

13 Internal storage devices containing approximately 750 terabytes of data in  
14 multiple formats, accessed through various methods, and protected by multiple  
levels of differing security mechanisms...

15 Plaintiffs did not respond to defense counsel's emails asking (1) whether Plaintiffs' production  
16 was complete and (2) requesting a description of the systems and formats Plaintiffs expected  
17 Defendants to search.

18 On April 4, 2018 the Court scheduled a hearing for April 11 to address the status of  
19 discovery. Later that same day, Plaintiffs offered to make documents available for Defendants'  
20 inspection on April 5. At approximately 9 a.m. on April 5, 2018, defense counsel, accompanied  
21 by an information technology specialist, arrived at Plaintiffs' offices in Tacoma. Plaintiffs did  
22 not have records available for inspection. Instead, Plaintiffs' in-house counsel offered to perform  
23 any searches of Plaintiffs' systems that defense counsel proposed and to produce the search  
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1 results at a later time. Ultimately, only a handful of records, including records that were  
2 previously produced, were provided to defense counsel over a period of four hours.

3 On April 6, 2018, Defendants filed a Joint Motion for Order to Show Cause, requesting  
4 that the harsher sanctions under CR 37(b)(2) be assessed. Dkt. No. 165. This Court granted  
5 Defendants' motion in part, finding that the April 5 inspection where Plaintiff sought to shift the  
6 entire burden of searching through 750 terabytes of raw data, the equivalent of more than one  
7 billion bankers' boxes of documents, was unreasonable and not in compliance with the discovery  
8 rules; continued the trial to August 6, 2018 due to Plaintiffs' desultory discovery tactics; allowed  
9 Defendants to continue obtaining discovery from Plaintiffs; awarded Defendants' fees and costs  
10 incurred in bringing the motion; found that additional sanctions were warranted in light of  
11 Plaintiffs' conduct; and requested additional briefing by the parties on the appropriate sanction in  
12 light of the Court's oral rulings of March 19 and April 11. Dkt. No. 177. Defendants submitted a  
13 cost bill, Dkt. No. 153, requesting \$27,694 in attorneys' fees incurred in obtaining responsive  
14 discovery in 2018, in addition to the \$44,433 in fees and costs incurred in obtaining responsive  
15 discovery in 2017.

16 Defendants took the CR 30(b)(6) deposition of Plaintiff TrueBlue, Inc. on April 20, 2018.  
17 The deposition notice revealed the areas of inquiry to be explored. Dkt. No. 182, Ex.1. During  
18 questioning of TrueBlue's designated witness, Associate General Counsel Jay Sauve, Defendants  
19 asked about TrueBlue's various policies relating to personnel matters and the measures TrueBlue  
20 takes to maintain its information confidential. These areas of inquiry relate to Defendant  
21 Marchel's counterclaim under the WLAD and Plaintiffs' claim against Defendants for  
22 misappropriation of trade secrets. Mr. Sauve's answers revealed that there were company  
23 policies responsive to Defendant Marchel's first set of written discovery that had never been  
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1 produced. Mr. Sauve and TrueBlue's Director of Litigation, Matthew Parman, represented that  
2 these policies were being collected in real time as they were being identified by Mr. Sauve and  
3 that they would be provided to defense counsel.

4 On April 24, 2018, TrueBlue for the first time produced a 2010 Employee Handbook.  
5 This document was responsive to Defendant Marchel's first set of written discovery and which  
6 this Court ordered produced on September 27, 2017. On May 9, 2018, the day before oral  
7 argument on what additional sanctions this Court should impose, Plaintiffs produced a copy of a  
8 confidentiality policy, a personal electronic device policy, and an employee separation guide that  
9 were also responsive to Defendant Marchel's Request for Production No. 19, originally served  
10 on January 18, 2017, and which the Court ordered produced on September 27, 2017—a delay of  
11 224 days. These three policies, as well as the handbook produced on April 24, were not produced  
12 until after the CR 30(b)(6) deposition of Plaintiff TrueBlue revealed their existence.

13 Both parties submitted supplemental briefing on additional sanctions. Dkt. Nos. 181, 184.  
14 Defendants argued in their supplemental briefing that monetary sanctions are insufficient to  
15 address Plaintiffs' continuing discovery misconduct and the prejudicial effect of that misconduct  
16 on Defendants' ability to prepare for trial. Defendants requested the Court to exercise its  
17 discretion to: (1) strike TrueBlue's claims under the Washington Trade Secrets Act; (2) strike  
18 TrueBlue's affirmative defenses; (3) deem Defendant Marchel's counterclaim under the WLAD  
19 admitted; (4) deem Defendant Marchel's claims for damages, including double damages under  
20 the Washington Minimum Wage Act, admitted; and (5) deem Defendants' claims for damages  
21 incurred as the direct and proximate result of a wrongfully issued injunction admitted.

22 Defendants additionally sought clarification of this Court's Order of April 11. On May 2, 2018,  
23 Plaintiffs served a notice of CR 30(b)(6) deposition of Defendant Anytime Labor-Seattle, LLC  
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1 and a notice of deposition of Kelly Marchel. In their supplemental briefing, Defendants asked  
2 that the notice of deposition of Kelly Marchel and notice of deposition of Anytime Labor-Seattle,  
3 LLC be stricken.

4 Plaintiffs' supplemental briefing ignored the Court's prior findings and avoided the issue  
5 of what additional sanctions the Court should impose. Plaintiffs instead argued that: (1) Plaintiffs  
6 did not willfully violate any discovery order or rule or engage in misleading conduct;  
7 (2) Defendants were not prejudiced in their ability to prepare for trial; (3) the discovery sought  
8 was unrelated to the sanctions proposed by Defendants; and (4) Defendants' request for  
9 attorneys' fees should be denied. As to their deposition notices, Plaintiffs argued that the Court  
10 implicitly re-opened discovery for both sides by operation of its Order of April 11 continuing the  
11 trial date to August 6. In their supplemental briefing to the Court, Plaintiffs were unapologetic,  
12 defensive, and refused to admit that they have violated their discovery obligations.

13 Where this Court intends to re-open discovery, its practice is to issue a new scheduling  
14 order providing the new deadlines. The Court did not do so here. This Court did not intend to re-  
15 open discovery. The deposition notices Plaintiffs served on May 2 are stricken. Any subpoenas  
16 issued with the notice of deposition of Kelly Marchel and/or notice of deposition of Anytime  
17 Labor-Seattle, LLC are quashed.

18 Plaintiffs did not object to the reasonableness of defense counsel's hourly rates set out in  
19 their fee applications in response to the Court's sanctions orders. Dkt. Nos. 110, 153, 182.  
20 Plaintiffs did object that defense engaged in block billing. Counsel's hourly rate is reasonable in  
21 the Puget Sound region. The Court finds that defense counsel has not engaged in block billing  
22 and that the time entries submitted in support of Defendants' cost bills do not suggest  
23 unnecessary duplication of effort or time spent on tasks unrelated to the discovery disputes at  
24

1 issue. The time entries reflect work reasonably required to advance Defendants' interests  
2 regarding Plaintiffs' discovery tactics and prepare appropriate pleadings and exhibits. The Court  
3 finds the total amount of \$93,638.50 in attorneys' fees and costs requested by Defendants in  
4 connection with this Court's Orders of September 27, 2017, March 19, 2017, and April 11, 2018  
5 to be reasonable.

6 The Court finds that Plaintiffs failed to comply with this Court's Orders of September 27,  
7 2017 and March 19, 2018. Plaintiffs offered no reasonable justification or excuse for their failure  
8 to respond to Defendant Marchel's discovery.

9 This Court has fully reviewed the discovery at issue and finds that the discovery sought  
10 by Defendants was tied directly to Plaintiffs' trade secrets misappropriation claim; Defendant  
11 Marchel's burden of proof on her age discrimination counterclaim; Plaintiffs' affirmative  
12 defenses; and Defendants' damages.

13 The Court finds that a pattern of intentional discovery abuse has gone on throughout this  
14 litigation that both pre-dates and post-dates the Rocke Law Group's involvement as plaintiffs'  
15 counsel. Plaintiffs TrueBlue, Inc. and Labor Ready Northwest, Inc. engaged in willful and  
16 deliberate obstruction of the discovery process, and this has prejudiced Defendants' ability to  
17 prepare for trial. The Court finds that continuing trial a second time will reward Plaintiffs'  
18 discovery violations.

19 **B. Conclusions of Law**

20 "A trial court exercises broad discretion in imposing discovery sanctions under CR 26(g)  
21 or 37(b)[.]" *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684 (2006). As stated in *Magana v.*  
22 *Hyundai Motor Am.*, 167 Wn.2d 570, 576, 220 P.3d 191 (2009) "[t]rial courts need not tolerate  
23 deliberate and willful discovery abuse." "CR 37(d) authorizes a court to impose the sanctions in  
24

1 CR 37(b)(2), which range from exclusion of evidence to granting default judgment when a party  
2 fails to respond to interrogatories and requests for production.” *Id.* at 584.

3 In assessing a discovery violation, “the court should impose the least severe sanction that  
4 will be adequate to serve the purpose of the particular sanction, but not be so minimal that it  
5 undermines the purpose of discovery.” *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494-96,  
6 (1997). A trial court’s reasons for imposing discovery sanctions should “be clearly stated on the  
7 record so that meaningful review can be had on appeal.” *Burnet*, 131 Wn.2d at 494. An appellate  
8 court can disturb a trial court’s sanction only if it is clearly unsupported by the record. *Magana v.*  
9 *Hyundai Motor Am.*, 167 Wn.2d 570, 583 (2009) (citing *Ermine v. City of Spokane*, 143 Wn.2d  
10 636, 650, 23 P.3d 492 (2001) (noting that a reasonable difference of opinion does not amount to  
11 abuse of discretion)).

12 As discussed in *Magana*, “[t]he right of trial by jury shall remain inviolate.” Const. art I,  
13 § 21; *see also* CR 38. This right may be negated, and due process is satisfied, however, if before  
14 entering a default judgment or dismissing a claim or defense, the trial court concludes that there  
15 was “a willful or deliberate refusal to obey a discovery order, which refusal substantially  
16 prejudices the opponent’s ability to prepare for trial.” 167 Wn.2d at 591. When a trial court  
17 imposes one of the harsher remedies under CR 37(b), the record must clearly show that (1) one  
18 party willfully or deliberately violated the discovery rules and orders, (2) the violation  
19 substantially prejudiced the opposing party’s ability to prepare for trial, and (3) the trial court  
20 explicitly considered whether a lesser sanction would have sufficed. *Id.* at 584.

21 **1. Plaintiffs’ Failure to Answer Written Discovery**

22 Civil Rule 33(a) provides that “any party may serve upon any other party written  
23 interrogatories to be answered by the party served[.]” It also provides that each interrogatory is to  
24 be answered separately and fully in writing under oath, unless it is objected to, in which event

1 the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the  
2 person making them, and the objections signed by the attorney making them. "The party upon  
3 whom the interrogatories have been served shall serve a copy of the answers, and objections, if  
4 any, within 30 days after the service of the interrogatories[.]" Similarly, Civil Rule 34(a)  
5 provides that "any party may serve on any other party a request for the production and/or  
6 inspection of "documents, electronically stored information, or things-including writings,  
7 drawings, graphs, charts, photographs, sound recordings, images, and other data or data  
8 compilations" within the responding party's possession, custody, or control. Civil Rule 34(b)  
9 provides that "the responding party shall serve a written response within 30 days after the service  
10 of the request," and that such written response "must either state that inspection and related  
11 activities will be permitted as requested or state a specific objection to the request, including the  
12 reasons." Under these rules, Plaintiffs had three alternatives: (1) fully answer the discovery;  
13 (2) seek a protective order relieving them from the obligation to answer or limiting the scope of  
14 the discovery; or (3) answer by noting their objections. It was not an option to simply refuse to  
15 answer.

16 At oral arguments on March 19, April 11, and again on May 10, Plaintiffs attempted to  
17 demonstrate that since current counsel was substituted on February 5, 2018, Dkt. No. 129, their  
18 behavior comported with the Civil Rules. However, Plaintiffs' conduct in failing to answer  
19 discovery and subsequent delays in producing documents since February 5, 2018, is no different  
20 than it was prior to that date when they were represented by other counsel. The constant  
21 discovery abuses in this case are attributable to Plaintiffs TrueBlue, Inc. and Labor Ready  
22 Northwest, Inc., the parties resisting discovery. Plaintiffs further argued that CR 37(b) sanctions  
23 are not appropriate because they did not withhold "smoking gun" documents. This argument,  
24

1 too, has no merit. It is not the case that only withholding of “smoking gun” type evidence can be  
2 sanctioned. To read *Fisons* and *Magana* as limited to “smoking gun” cases would vitiate the rule.  
3 If litigants are free to conceal responsive discovery and employ delaying tactics, the purpose  
4 behind our modern day procedural rules, which exist to foster and promote “the just, speedy, and  
5 inexpensive determination of every action,” would be compromised. CR 1; *cf Lybbert v. Grant*  
6 *County, State of Wash.*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000). As the Supreme Court ruled in  
7 *Fisons*, “Misconduct, once tolerated, will breed more misconduct and those who might seek  
8 relief against abuse will instead resort to it in self-defense.” *Washington State Physicians’ Ins.*  
9 *Exch. v. Fisons Corp.*, 122 Wn.2d 299, 355 (1993).

10 The Court concludes Plaintiffs’ discovery violations were willful and have continued to  
11 be willful since its discovery orders have not been complied with. The Court’s March 19 and  
12 April 11 Orders finding Plaintiffs’ violations to be willful specifically reserved ruling on  
13 additional sanctions under CR 37(b). Moreover, “A party’s disregard of a court order without  
14 reasonable excuse or justification is deemed willful.” *Magana*, 167 Wn.2d at 584. The Court  
15 finds that Plaintiffs have not presented a reasonable excuse or justification for their non-  
16 compliance.

17 The Court concludes that the discovery violations caused the Defendants substantial  
18 prejudice in conducting discovery of this case, in preparation for trial and for the trial of this  
19 case. The Court’s Orders of March 19 and April 11 found that Plaintiffs’ non-compliance has  
20 substantially prejudiced and continues to substantially prejudice the Defendants in their  
21 prosecution of the case. As discussed above, the discovery sought relates to Defendant Marchel’s  
22 age discrimination counterclaim, Plaintiffs’ trade secrets misappropriation claim, and  
23 Defendants’ damages.

1 The Court concludes that a fair trial of this case could not be held on the continued trial  
2 date because of Plaintiffs' conduct and because Defendants were deprived of the evidence, in the  
3 custody and control of the Plaintiffs, material or central to the remaining issues to be tried, and  
4 not collateral to them. The prejudice prong of the test looks to whether the aggrieved party was  
5 prejudiced in preparing for trial. *Magana*, 167 Wn.2d at 589. Full and complete responses to  
6 interrogatories and production of the documents would have been demonstrably useful in the  
7 discovery stage, including identification of witnesses, witness depositions, and preparation of  
8 Defendants' expert witness on liability and damages. Continuing trial a second time is not  
9 appropriate where Plaintiffs show no indication of a plan to change their conduct in the future.

10 The Court has considered all discovery sanctions authorized by CR 37(b)(2) and CR 26  
11 as well as those propounded by the parties, and concludes that the only sanction that suffices is  
12 as follows:

13 1. The sanction of monetary damages alone was considered by the Court. Such  
14 sanction in the typical case serves the purposes of compensation but does not accomplish that  
15 end here where the Defendants are already entitled to their attorneys' fees and costs incurred in  
16 obtaining partial summary judgment on the merits of Plaintiffs' breach of contract claim and  
17 Defendant Marchel's WMWA counterclaim. Dkt. No. 50. Moreover, in this case monetary  
18 sanctions do not adequately punish, deter or educate. Despite repeated orders to compel  
19 adherence to discovery requests, Plaintiffs continued their tactics of obstruction.

20 2. The sanction of striking witnesses or limiting evidence was considered by the  
21 Court but the discovery violations would still prejudice the Defendants in their ability to defend  
22 against Plaintiffs' trade secrets misappropriation claim and to meet their burden of proving the  
23 elements of their causes of action, including damages.

1           3.       The sanction of taking only certain facts as established was also considered by  
2 this Court. That would serve some of the purposes of imposing sanctions but would still  
3 prejudice the Defendants in the same manner and/or would be the equivalent of deeming  
4 Defendants' allegations admitted and striking all of Plaintiffs' allegations and defenses, if any,  
5 on liability and damages.

6           4.       The sanction of default serves all of the purposes of imposing sanctions for the  
7 discovery violations which occurred in this case.

8           5.       Lesser sanctions, including limiting cross examination of witnesses and/or not  
9 allowing arguments by counsel, would similarly allow Plaintiffs to profit from their own wrongs  
10 because Defendants would still be prejudiced in their preparation and trial of this case.

11          6.       Given that any lesser sanction would be inadequate to satisfy the goals of  
12 discovery sanctions set forth in *Fisons* and *Magana*, the sanction which this Court, in its  
13 discretion, imposes is:

- 14               a. Plaintiffs' claims under the Uniform Trade Secrets Act are dismissed;
- 15               b. Plaintiffs' affirmative defenses to all remaining counterclaims are  
16               dismissed;
- 17               c. Defendant Marchel's claims under the Washington Law Against  
18               Discrimination are deemed admitted;
- 19               d. Defendant Marchel's claim for damages under the Minimum Wage Act,  
20               the WLAD, and for damages incurred as the direct and proximate result of  
21               a wrongfully issued injunction are deemed admitted; and

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e. Defendant Anytime Labor-Seattle, LLC's claims for damages incurred as the direct and proximate result of a wrongfully issued injunction are deemed admitted.

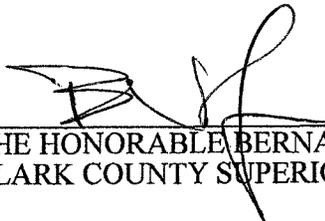
7. It is further ordered that Defendants' attorneys' fees and costs awarded pursuant to CR 37(a) on September 27, 2017, March 19, 2018, April 11, 2018, and May 10, 2018, totaling \$93,638.50 shall be paid by Plaintiffs no later than ~~June 1~~ <sup>August 15</sup>, 2018.

FN

8. Within 15 days of entry of this Order Defendants shall move for entry of Judgment against Plaintiffs TrueBlue, Inc. and Labor Ready Northwest, Inc. At such time Defendants shall set out their damages calculations and reasonable attorneys' fees and costs incurred in this action which shall be awarded pursuant to Plaintiffs' contract with Defendant Marchel, CR 65(c), the WMWA, the WLAD, and the Uniform Trade Secrets Act, RCW 19.108.040.

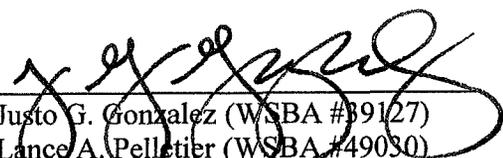
IT IS SO ORDERED.

DATED this 15 day of ~~May~~ <sup>June</sup>, 2018.

  
THE HONORABLE BERNARD F. VELJACIC  
CLARK COUNTY SUPERIOR COURT JUDGE

Presented by:

STOKES LAWRENCE, P.S.

By:   
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Attorneys for Defendants Kelly Marchel and Anytime Labor, LLC, dba LaborMax

**CERTIFICATE OF SERVICE**

I certify that I caused to be filed and served a copy of the foregoing **BRIEF OF APPELLANTS** on the 29<sup>th</sup> day of March 2019 as follows:

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# MASTERS LAW GROUP

March 29, 2019 - 12:59 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52665-4  
**Appellate Court Case Title:** Trueblue, Inc., et al., Appellants v. Kelly Marchell, Respondents  
**Superior Court Case Number:** 16-2-01556-9

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