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No. 53303-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

KIMBERLY RITCHEY,

Appellant,

v.

SOUND RECOVERY CENTERS, LLC,

Respondent.

APPELLANT'S OPENING BRIEF

Matthew J. Ley, WSBA #46074
McGavick Graves, P.S.
Attorney for Appellant
1102 Broadway, Suite 500
Tacoma, WA 98402
Telephone (253) 627-1181
Facsimile (253) 627-2247

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COMES NOW Appellant, Kimberly Ritchey, (“Ritchey”), and hereby submits Appellant’s Opening Brief.

I. INTRODUCTION

A person should not be forced to expose herself to keep her job. Kimberly Ritchey was given just such a choice. Unlike many, she had the courage to stand for her convictions, and refused to submit to an inspection of her genitals to keep her job. Because she stood up for herself, she was ordered to leave the workplace, never to return, unless she submitted to the humiliation of the inspection. Her employer’s claim that she was not fired were persuasive, even though she was not paid, not allowed to use paid leave, and not allowed to be present at the workplace. This miscarriage of justice should be rectified.

II. ASSIGNMENT OF ERROR AND ISSUES RELATING TO ASSIGNMENT OF ERROR

A. Ms. Ritchey makes the following assignment of error:

1. The trial court erred when it denied her motion for a new trial based on the insufficiency of the evidence to support the jury’s verdict.
2. The jury erred in finding that the Defendant did not actually discharge Ms. Ritchey.

3. The jury erred in finding that the Defendant did not terminate Ms. Ritchey's employment through either actual or constructive discharge.
4. The trial court erred when it included in its instruction to the jury "intruder must have acted deliberately to achieve the result with the certain belief that the result would happen" because it resulted in an impermissible comment on the evidence.
5. The trial court erred when it refused to allow a jury questions to be asked of the witnesses, concerning whether upper level management was aware of the reason for refusing to take the drug test.
6. The trial court erred when it granted partial summary judgment in favor of the Defendant.
7. The trial court erred when it granted the Defendant's Motion to Vacate a default without any reasonable excuse for its failure to answer or appear.

B. Issues relating to the assignment of error:

1. Whether the method used for drug testing in this case, to wit, direct observation of the act of urination or submitting to a strip search prior to urination, is an unreasonable intrusion into a person's privacy as a matter of law.

2. Whether the loss of a job because of opposition to the drug test method used in this case supports a claim for Wrongful Termination in Violation of Public Policy.
3. Whether a party may be estopped from denying the existence of a disability when it has once provided a reasonable accommodation.
4. Whether it is appropriate to vacate an order of default where there is no justification for the failure to appear and answer.

III. STATEMENT OF THE CASE

A. Factual Background.

Ms. Kimberly Ritchey is a licensed chemical dependency counselor. RP 148. She has spent many years in the field, working for a variety of treatment providers. RP 148, 152. She has her own history of drug and alcohol abuse, closely related to her history of sexual and physical abuse as a child. RP 143, 166-67. She is proud to be clean and sober for more than fifteen years, and is a passionate advocate for recovery. RP 144.

Ms. Ritchey worked for the Defendant, Sound Recovery Centers, LLC (Sound Recovery) on two occasions. The first time, between October 2013 and December 2013, was a transition period before she moved to another facility under the same owners, Grace Recovery Center

(Grace Recovery). RP 144-45. She worked at Grace Recovery for a little less than two years before the staff was consolidated with Sound Recovery and the Grace Recovery facility was closed. RP 145-46. While working at Grace Recovery, she requested, and was granted accommodations for her PTSD. CP 199-200. During the transition back to Sound Recovery from Grace Recovery, she was paid by Sound Recovery while insured by Grace Recovery. CP 177.

The closure of Grace Recovery was closely followed by a change in the ownership of Sound Recovery. RP 146. With the change in ownership, Sound Recovery announced a change in its drug testing procedures. RP 298. Sound Recovery had always had a drug and alcohol policy prohibiting misuse of either drugs or alcohol. RP 64-65. It was inconsistent in testing its employees, but when it did require drug tests, it used U.S Healthworks. RP 113-14. There, employees would provide their urine sample in a private restroom, after leaving bags and coats in a secure location outside of the restroom. RP 114.

The new testing procedures for Sound Recovery were announced in November 2015. Ex. 10. The initial announcement was that all employees would be subject to observation by a co-worker. Ex. 10. There was complaint from multiple employees, and the policy was subjected to revision, eventually resulting in a memorandum announcing the

procedure. RP 67, Ex. 12. The final memorandum described two options for providing a test sample: (1) provide a urine sample under direct observation, or (2) provide a urine sample in private after a visual inspection. Ex 10. Option (1) consisted of removing her pants, and exposing herself to immediate observation by the test technician who would observe her urinate. RP 109. Option (2) avoided urination in the direct sight of the technician, instead requiring the full removal of all clothing for a visual inspection before urinating. RP 140-41.

Ms. Ritchey complained to her supervisors about the testing procedures. RP 160. She told them that her history of abuse, which resulted in a diagnosis of Post-Traumatic Stress Disorder, and meant that she simply could not subject herself to the exposure that Sound Recovery's testing procedures required. CP 104. She was not alone in her objections, but in the end, she was alone in her resolve. RP 98, 305. She attempted to steel herself to take the test as required, to no avail. In the process, she strained her family relationships, and even had serious thoughts of suicide. RP 166-67.

Ms. Ritchey attempted to work out alternatives with Sound Recovery, without success. Matters came to a head on February 12, 2016, when Sound Recovery ordered her to leave the property, and informed her that she could not return without taking their test. RP 324. She was

denied any pay when she was ordered to leave. RP 168-69. About three weeks later, she did return, to collect personal belongings, at which time she was confronted and told that she could not be on the property. RP 171-72.

Ms. Ritchey eventually applied for unemployment benefits, and obtained a new job. RP 6, 175. In the meantime, she was not permitted to work for Sound Recovery. RP 324. Sound Recovery has persistently claimed that throughout this ordeal that Ms. Ritchey remained their employee. RP 308. This is in spite of their knowledge that she had instituted this lawsuit concerning her employment. RP 311, CP 18.

B. Procedural Background

The lawsuit was started on April 28, 2016, with service on Sound Recovery made by delivery to its registered agent. CP 1, 7. Sound Recovery then chose not to respond, allowing an order of default to be taken before engaging in litigation. CP 11. It obtained a vacation of the Order of Default based on the excuse that the owner of Sound Recovery, Frank Cid, had simply failed to forward copies to his attorney. CP 18, 35-36. The default was vacated, and the case proceeded.

The case originally involved claims of wrongful termination in violation of public policy, disability discrimination, and wrongful withholding of wages. CP 2-3. Ms. Ritchey's treating physician refused

to attend his deposition, and Sound Recovery then moved for summary judgment on all of the claims. CP 43-60. Summary judgment was granted in favor of Sound Recovery on the claim of disability discrimination because Ms. Ritchey did not have an expert to testify to her medical condition, once her treating physician refused to be deposed. CP 216-217.

The case then proceeded to arbitration, after which Sound Recovery moved for a trial de novo. CP 226. The matter was set for a jury trial, and twice continued before trial began on January 7, 2019. RP 3. At the start of trial, Sound Recovery sought motions in limine to exclude evidence of the arbitration hearing, any reference to Ms. Ritchey's unemployment claim, and any reference to either her discrimination claim, or PTSD. CP 226-233. There was no objection to exclusion of the evidence of arbitration. RP 4. The Court overruled objections to limit the extent of the limiting orders concerning unemployment claims and PTSD. RP 10, 21. The case then proceeded to jury selection and the presentation of evidence.

The jury was attentive and engaged throughout the trial. The Court invited, and received insightful questions, many of which were asked of witnesses. CP 325-341. Two notable questions were not asked: both focused on the same issue: whether Ms. Ritchey had informed Sound Recovery of her health condition. RP 242, 400. The Court chose to deny

the answers to avoid any prejudice from introducing evidence of a disability.

Following the presentation of evidence, the jury instructions were finalized. During the finalization of the jury instructions, the Court included language in Instruction No. 6 that an “intruder must have acted deliberately to achieve the result with the certain belief that the result would happen.” CP 362. The Plaintiff objected to the additional language. RP 436. Closing arguments were made, and the case was given to the jury.

The jury returned a verdict in favor of Sound Recovery on the claim of Wrongful Termination in Violation of Public Policy, finding that Ms. Ritchey had not been either constructively discharged or actually discharged from her employment with Sound Recovery. CP 372-74. Ms. Ritchey moved for a new trial following the verdict, but the motion was denied. CP 375-82, 396-97. This appeal followed.

IV. ARGUMENT

A. Standard of Review

The Court reviews questions of law concerning the decision of the trial court *de novo*. *In re Smith-Bartlett*, 95 Wash. App. 633, 636, 976 P.2d 173, 176 (1999). Likewise, a ruling on Summary Judgment is reviewed *de novo*. *Sherman v. Pfizer, Inc.*, 8 Wn.App.2d 686, 694, 440 P.3d 1016

(2019). In contrast, factual determinations of the jury are reviewed for substantial evidence. *Darneille v. Department of Employment Sec.*, 49 Wn.App. 575, 578-79, 744 P.2d 1091 (1987).

B. The Trial Court Erred by Refusing to Grant a New Trial.

The Court erred when it refused to grant a new trial based on a jury verdict that was contrary to the evidence. Because this is predominantly a factual issue, it will only be reversed if the lower court's decision was clearly erroneous. *Darneille v. Department of employment Sec.*, 49 Wn.App. 575, 578-79, 744 P.2d 1091 (1987).

a. *The Intrusive Testing Methods Should be Declared an a Violation of Public Policy as a Matter of Law.*

The Court should rule that the testing procedures used by Sound Recovery are a violation of public policy as a matter of law. The Court has recognized it is the policy of this state to secure the rights of individuals to have their privacy protected. *Reid v. Pierce County*, 136 Wn.2d 195, 212, 961 P.2d 333 (1998). An individual's right to privacy is impaired, inter alia, when there is an intrusion into her seclusion. *Youker v. Douglas County*, 178 Wn.App. 793, 797, 327 P.3d 1243 (2014). This means, that an individual has a right, protected by the Courts, to be secure from deliberate acts intruding into her seclusion in a manner that is objectionable to a reasonable person. *Id.*

The courts of Washington have not had reason to address the specific issue of when the manner in which drug testing is done may constitute an intrusion into a person's seclusion. The Courts have recognized that the act of urinating is an exceptionally private act, one which is so clouded in privacy that it is often spoken of colloquially rather than directly. *Robinson v. City of Seattle*, 102 Wn.App. 795, 818, 10 P.3d 452 (2000), citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). Other courts have noted with specificity that, although drug testing is not itself a violation of a person's protected privacy, the mode and manner of testing is a distinct issue from the testing itself. See *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 626 (3rd Cir. – 1992). Thus, the methods used to obtain a drug test specimen do introduce distinct considerations of a person's privacy that are not included when considering drug testing in general. *Lunsford v. Sterilite of Ohio, LLC*, 108 N.E.3d 1235, 1246 (Ohio Ct. App. 2018), appeal allowed sub nom. *Lunsford v. Sterilite of Ohio, L.L.C.*, 154 Ohio St. 3d 1463, 114 N.E.3d 214 (2018).

b. *No Reasonable Person Could Find These Testing Methods Are Not an Unreasonable Intrusion on Privacy.*

In this case, the testing method is extremely intrusive. Two options were provided for testing: the first required direct observation of

the employee's genitals during urination. RP 109. As described above, this act is itself one of the most particularly private acts that a person performs. Yet, the second option is effectively more intrusive, requiring a full strip search of the employee by a representative of her employer. RP 140-41. This is not a case where there is any particular suspicion that testing is necessary, let alone any indication that tampering with samples might occur. The testing procedure is a pure, unadulterated exercise of power over the employee. By forcing its employees to expose themselves to its agents, the employer is breaking down the independence of its employees, and cementing their relationship of reliance on the employer.

There is no rational argument that this testing program, in which observation is required (as described above) for the provision of test samples, is not objectionable to a reasonable person. It is only where there are some special circumstance that this testing procedure can be justified, where there is a particular safety concern involved, or where there is particular suspicion that someone is tampering with the samples. None of these circumstances are present when an employer generically demands this kind of testing. These concerns with the testing method are particularly egregious in light of the other, readily available alternatives to avoid tampering with test samples, such as the use of mouth swabs or hair follicles for drug testing. *See* RP 177.

c. *The Jury Must Have Been Confused Concerning the Status of Employment.*

The facts of the case do not support the jury's verdict that Ms. Ritchey's employment was not terminated by either actual or constructive discharge. CP 372. The jury's decision introduces a logical conundrum. It found that Sound Recovery owed Ms. Ritchey wages based on the Employee Handbook, which in turn triggered the obligation to pay wages when her employment was ended. CP 373. At the same time, it found that she was not terminated by either constructive or actual discharge. CP 372.

There are only two possibilities. The jury either decided that Ms. Ritchey's employment did not end because of the dispute over the drug testing procedure, or it decided that the dispute over the testing procedure was not enough to represent a violation of public policy. As argued above, there is no rational basis for a reasonable person to conclude that the testing procedure is not offensive to a reasonable person. The only answer then is a conclusion that the testing procedure was not the reason the employment relationship ended.

The most obvious reason that the jury could have concluded this is because Sound Recovery argued that Ms. Ritchey remained its employee. RP 311. The argument is that she remained an employee in spite of being

told not to return to work, that she could not receive pay, and being ordered to leave when she collected her personal belongings. RP 171-72. The heart of the argument is that the employer has sole control over the employment relationship, and may unilaterally decide whether an individual is its employee, even when it denies any opportunity to perform work.

d. *Employment is Terminated When Notice is Given That Services Are No Longer Required.*

There is no clear definition of when a person's employment is terminated. The vast majority of the case law arises in the context of unemployment appeals. *See, e.g. Safeco Ins. Companies v. Meyering*, 102 Wn.2d 385, 687 P.2d 195 (1984), and *Darkenwald v. State Employment Sec. Dept.*, 182 Wn.App. 157, 328 P.3d 977 (2014). In that context, there is a presumption that the employment relationship has ended when there is an application of benefits, and the focus is on the party who was the moving force behind the end of the working relationship. *Safeco Ins. Companies*, 102 Wn.2d at 392-93. The Court has recognized that a clear and unambiguous statement of 'quitting' is not necessary, but still did not provide a firm definition of when the employment relationship ends. *Korslund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 178, 125 P.3d 119 (2005), *overruled on other grounds by Rose v. Anderson Hay*

and Grain Co., 184 Wn.2d 268, 356 P.3d 1139 (2015). The Court should take this opportunity to define when the employment relationship ends: a person's employment is terminated when there is notice from either party that work will no longer be performed for remuneration. This can occur in the obvious cases of a formal firing or resignation, which introduces the distinction between actual and constructive discharge (in the context of a claim of wrongful termination). It will also occur when there is a refusal by the employer to permit further performance of duties in the workplace, particularly when it is accompanied by a refusal to provide any financial remuneration.

Sound Recovery clearly terminated the working relationship with Ms. Ritchey. It ordered her to leave the workplace, and refused not only to allow her to perform work, but denied her request to use accrued leave. RP 169. There is no rational basis on which to conclude that Ms. Ritchey remained an employee of Sound Recovery..

e. Emphasizing Notice and Intent was Prejudicial Error.

The jury may have decided that Sound Recovery did not have notice that Ms. Ritchey was adamant that she was unable to comply with the drug testing procedures it demanded. Without such notice, it could be conjectured that Sound Recovery was not aware of the fact that she could not comply with their requirements. Twice jurors asked questions about

the notice that Sound Recovery had about the reasons for her refusal to comply with their process. RP 237, 384. Twice the Court refused to allow the question to be answered. RP 242, 400. The first time, the court refused to reword the question to avoid any specific reference to “trauma”; the second time, it simply refused to allow the question. In both cases, the Court refused to allow relevant evidence to be admitted, presumably because the potential answer was deemed prejudicial. In both cases, there were readily available mechanisms to avoid the prejudicial effect, which were not allowed. Therefore, it was error to refuse to permit the evidence.

The refusal to allow the answers to the jury’s questions was prejudicial; it changed the results of the jury’s decision. The refusal was exacerbated by the working of the instruction regarding the public policy issue, which highlighted the element of intent unnecessarily. CP 362. In general, an accurate statement of the law is not an impermissible comment on the evidence. *See Kastinis v. Education Employees Credit Union*, 122 Wn.2d 483, 497, 859 P.2d 26 (1993). This is a rare occasion when it was a comment on the evidence that the Court had refused to admit.

The facts of this case are quite clear. Both parties acknowledged that the dispute centered on the drug testing procedures. Ms. Ritchey argued that the procedures were unreasonably intrusive. Sound Recovery argued that they were manifestly unintrusive. The evidence does not

support the conclusion that there was no termination, nor does it support any conclusion other than this: that Ms. Ritchey's employment was terminated because she refused to subject herself to the testing procedures demanded by Sound Recovery.

f. *The Privacy Torts Support a Claim of Wrongful Termination in Violation of Public Policy.*

Sound Recovery is expected to argue once again that privacy tort cannot support a claim for wrongful termination in violation of public policy. It will rely heavily on *Roe v. Quality Transportation Services* for this position. 67 Wn.App. 604, 838 P.2d 128 (1992). The Court should not allow itself to be distracted by this claim. The common law of tort is an expression of the public interest in the mode and manner of dealings among the people of the State of Washington. *See Wahl v. Dash Point Family Dental Clinic, Inc.* 144 Wn.App. 34, 42, 181 P.3d 864 (2008). Tort law is a statement about how the people in the State of Washington are expected to relate to each other to preserve a civil society. *See Landstar Inway Inc. v. Samrow*, 181 Wn.App. 109, 129, 325 P.3d 327 (2014). It is not the realm of contractual agreement which are governed purely by the private relationship of the parties. *See Alejandra v. Bull*, 159 Wn.2d 674, 68, 153 P.3d 864 (2007). Instead, it is controlled by the general expectation that people will treat each other with reasonable care.

See *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 828, 959 P.2d 651 (1998).

In 1992, the privacy torts were found insufficient to support a claim for wrongful termination in violation of public policy for refusing to take a drug test of any kind. *Roe v. Quality Transp. Svcs.*, 67 Wn.App. at 610. The Court at the time noted that the privacy torts were not yet clearly announced, and therefore would not be used to preclude any employment drug testing. *Id.* Some four years later, the Court noted the lack of clarity regarding the privacy torts, and explicitly announced that what had not been clear before was then clear: the State of Washington recognized a common law right to privacy as described in the Restatement of Torts. *Reid v. Pierce County*, 136 Wn.2d 195, 206-07, 961 P.2d 333 (1998). That common law right to privacy had been further elucidated, with the court embracing the various shades of privacy tort, including the one at issue here: the intrusion into a person's seclusion. *Fisher v. State ex rel. Dept. of Health*, 125 Wn.App. 869, 879, 106 P.3d 836 (2005).

Whether a particular public policy will support a wrongful termination claim is a question of law. *Hubbard v. Spokane County*, 146 Wn.2d 699, 708, 50 P.3d 602 (2002), overruled on other grounds by *Rose v. Anderson Hay and Grain Co.*, 184 Wn.2d 268, 358 P.3d 1139 (2015). The critical issue in this case is whether the public policy has been clearly

established, whether by legislative act or at common law. *Wahl v. Dash Point Family Dental Clinic, Inc.* 144 Wn.App. 34, 42, 181 P.3d 864 (2008). There is no real dispute that the jeopardy, causation and absence of justification elements are met. *See Rose v. Anderson Hay and Grain*, 184 Wn.2d 268, 277, 358 P.3d 1139 (2015). The public policy at stake here is the right of a person to be protected from deliberate acts intruding into her seclusion in a manner highly offensive or objectionable to a reasonable person. *Youker v. Douglas County*, 178 Wn.App. 793, 797, 327 P.3d 1243 (2014). Clarity has been provided by the courts on this common law claim. Ms. Ritchey's options were to suffer the intrusion or be fired; refusing her the relief of this claim would be a gross miscarriage of justice.

The evidence in this case can only support the conclusion that Mr. Ritchey's employment was terminated because she refused to subject herself to the intrusive testing methods mandated by Sound Recovery. Those methods should be defined as an intrusion on her seclusion as a matter of law. The legal issues in this analysis are questions reviewed *de novo*, while the facts are questions of substantial evidence. There is no evidence which would support a jury conclusion that Ms. Ritchey was not terminated in violation of public policy. The Court should conclude, as a

matter of law, that her employment was wrongfully terminated in violation of public policy, and remand for a new trial on damages.

C. The Trial Court Erred in Granting Partial Summary Judgment on Ms. Ritchey's Disability Claim.

In the alternative, the Court should hold that Ms. Ritchey's claim of disability discrimination should not have been dismissed on summary judgment. The critical issue at summary judgment was the unavailability of Ms. Ritchey's treating physician to provide testimony about her diagnosis after he refused to attend his deposition. Following his failure to appear at his deposition, no alternative experts were found before the motion was heard. The issue is whether, in light of having provided previous accommodations, Sound Recovery should have been estopped from denying the existence of her Post Traumatic Stress Disorder.

The Court reviews decisions on summary judgment de novo. *Sherman v. Pfizer, Inc.*, 8 Wn.App.2d 686, 694, 440 P.3d 1016 (2019). Summary Judgment is appropriate when there are no disputed issues of material fact, and the moving party is entitled to judgment as a matter of law. *Ranger Ins. Co. v. Pierce Cty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). 192 P.3d 886 (2008). The initial burden is on the moving party to establish that there are no material issues of fact. *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997). Thereafter,

the non-moving party bears the burden of establishing that there is a disputed issue of fact. *Michael v. Mosquera-Lacey*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). This has to be done using factual evidence; mere assertions are not sufficient. *Baldwin v. Sisters of Providence, Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

Two options are available to a defendant moving for summary judgment. *Guile v. Ballard Comm. Hosp.*, 70 Wn.App. 18, 21, 851 P.2d 689 (1993). The traditional option is to introduce evidence establishing their factual claims, and show that on those specific facts, that the law requires judgment in the defendant's favor. *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). The second alternative is to point out elements of the plaintiff's claims that lack evidentiary support. *See White v. Kent Med. Ctr., Inc.*, 61 Wn.App. 163, 170, 810 P.2d 4 (1991). Sound Recovery relied on the second approach. CP 43-44.

It is inequitable to allow Sound Recovery to deny the existence of Ms. Ritchey's disability. *See Kramaravcky v. State Dept. of Social and Health Svcs.*, 64 Wn.App. 14, 18-19, 822 P.2d 1227 (1992) (outlining the elements of equitable estoppel). About two years before the incidents that are at the heart of this litigation, Ms. Ritchey asked for an accommodation for her PTSD. CP 199-200. Her request was accepted by Sound

Recovery, acting as Grace Recovery at the time. CP 199-200. Although separate entities, they did not maintain their corporate distinctions. The separate existence of corporations or LLCs may be disregarded if there is such a comingling of the entities that they are in reality a single entity. *Pittsburgh Reflector Co. v. Dwyer & Rhodes Co.*, 173 Wn. 552, 555, 23 P.2d 1114 (1933). Both Sound Recovery and Grace Recovery were under the same ownership, and staff members were regularly transferred from one to the other, including Ms. Ritchey. RP 63-64, 154. Ms. Ritchey at one point received her pay from Sound Recovery, while her insurance benefits were paid by Grace Recovery. CP 177. The distinctions between the entities were ignored.

Sound Recovery should have been estopped from denying the existence of Ms. Ritchey's disability. But, their denial of her disability was the sole basis for dismissal of her claim. The Court should correct this error, and remand for a new trial on her discrimination claim, whether in conjunction with her damages claim for wrongful termination in violation of public policy, or as a separate trial.

D. The Trial Court Erred When it Vacated the Order of Default.

A trial court may set aside an entry of default for good cause shown and upon such terms as the court deems just. CR 55(c)(1). The trial court is supposed to balance the expectation that a party comply with

procedural rules against the a party's interest in a trial on the merits.

Showalter v. Wild Oats, 124 Wn.App. 506, 510, 101 P.3d 867 (2004).

There is a significant value to an organized system, where delays are not permitted, and litigants comply with court rules. *TMT Bear Creek*

Shopping Center, Inc. v Petco Animal Supplies, Inc., 140 Wn.App. 191, 199-200, 165 P.3d 1271 (2007).

A party seeking to set aside an order of default must establish excusable neglect and due diligence. *Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wn.App. 266, 271, 818 P.2d 618 (1991). Sound Recovery failed to provide any evidence that it had acted with reasonable diligence or excusable neglect. Failure to forward the complaint to legal counsel does not constitute excusable neglect. It is virtually axiomatic that when a company's failure to respond to a properly served summons and complaint was due to a break-down of internal office procedure, the failure was not excusable. *Rosander v. Nightrunners Transport, Ltd.*, 147 Wn.App. 392, 407, 196 P.3d 711 (2008).

This was a case of utter failure by Sound Recovery to take the steps necessary to make a Defense. It is not excusable neglect.

Sound Recovery relied on *Showalter v. Wild Oats* to support its assertion that its failure to respond was reasonable. 124 Wn.App. 506, 508, 101 P.3d 867 (2004). There, the summons and complaint were

served to the registered agent. *Id.* at 509. The registered agent forwarded the summons and complaint to the company's legal department, where it would be received by a paralegal. *Id.* Once the summons and complaint reached the legal department, there was a disruption. The standard operating procedure was that the legal department would forward the original summons and complaint to the internal claims administrator, to eventually reach local counsel. *Id.* On this occasion, rather than personally deliver the summons and complaint to the internal claims administrator, the paralegal asked the manager of the safety and risk department to deliver the summons and complaint to the internal claims administrator. *Id.* The manager of the safety and risk department did not make the delivery to the internal claims administrator. *Id.* He was apparently confused, thinking that the papers were meant for him, since he would often receive copies of any summons and complaints served on the company. *Id.* at 514. On this basis, the court held that "the circumstances surrounding the misunderstanding between Wild Oats' staff are more akin to a mistake than inexcusable neglect. *Id.* at 515.

The *Showalter* holding has been treated as an example of a misunderstanding resulting in mistake, rather than an example of excusable neglect. *Ha v. Signal Electric, Inc.* 182 Wn.App. 436, 451, 332 P.3d 991 (2014). It is cited in support of the conclusion that a default

judgment could be vacated when a bankruptcy attorney was uncertain whether he could accept service, and a bankruptcy financial advisor forwarded the summons and complaint to the wrong insurance company, neither of whom was an employee or principal in the company. *Id.* at 452.

In contrast, it has been clearly stated that:

If a company fails to respond to a complaint because someone other than general counsel accepted service of process and then neglected to forward the complaint, the company's failure to respond is deemed inexcusable neglect.

TMT Bear Creek Shopping Center, Inc. v Petco Animal Supplies, Inc., 140 Wn.App. 191, 212-13, 165 P.3d 1271 (2007). There, the failure of the legal department to track the calendaring system was considered inexcusable neglect. *Id.* at 213. The court noted that there was no strong or virtually conclusive defense, and that the excuse for the failure to appear was meaningful. *Id.* at 212. The case cites favorably those cases distinguished by *Showalter*. *Id.* at 213. Thus, there is reference to inexcusable neglect when the agent served with process simply failed to forward the summons and complaint to counsel for the company. *Johnson v. Cash Store*, 116 Wn.App. 833, 848-49, 68 P.3d 1099 (2003). Similarly, the neglect was not excusable when the summons and complaint were mislaid, and therefore not forwarded to counsel in a timely manner,

resulting in failure to answer the complaint. *Prest v. Am. Bankers Life Assurance Co.*, 79 Wn.App. 93, 100, 900 P.2d 595 (1995).

Substantial time and energy has been expended on this case, which should have been ended by the failure of Sound Recovery to respond and engage. There was no excuse. The reality is that they simply hoped that the case would go away. The Court should reverse the trial court's ruling and remand for trial on damages.

V. CONCLUSION

For the reasons set forth in this brief, Ms. Ritchey requests the Court to reverse the trial court's decisions, and to remand this case for a new trial.

DATED this 30th day of August 2019.

MCGAVICK GRAVES, P.S.

By: 
Matthew J. Ley, WSBA #46074
Of Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I served a copy of the foregoing Appellant's Opening Brief to:

Richard H. Wooster
Kram & Wooster, P.S.
1901 South I St.
Tacoma, WA 98405

Signed at Tacoma, Washington this 30th day of August 2019.

McGAVICK GRAVES, P.S.

By: 

Matthew J. Ley

MCGAVICK GRAVES, P.S.

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