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Cause No. 53303-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

KIMBERLY RICHEY

Appellant,

v.

SOUND RECOVERY CENTERS, LLC,

Respondents.

RESPONDENT'S OPENING BRIEF

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TABLE OF CONTENTS

Page(s)

Table of Contents ..... i-ii

Table of Authorities ..... ii-vi

I. INTRODUCTION 1-2

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2-5

A. Errors of the Superior Court Asserted by Appellant/Employee 2-4

B. Issues Related to Assignments of Error 4-5

III. STATEMENT OF THE CASE 5-12

A. Factual Background 5-10

B. Procedural History 10-12

IV. LEGAL DISCUSSION 12-43

A. Standard of Review 12-17

B. The Court Did Not Err in Denying Plaintiff's Motion for New Trial 17-28

C. The Court Properly Exercised Discretion in Excluding Evidence Regarding Employee's Alleged PTSD.....29-32

D. The Court Properly Granted Summary Judgment When the Plaintiff Failed to Produce Admissible Evidence to Support Her Claim of Disability Discrimination.....32-40

E. The Court Did Not Abuse its Discretion By Vacating an Order of Default Upon the Prompt Motion of the Employer Showing Good Cause to Vacate the Judgment.....40-43

V. CONCLUSION 43-44

TABLE OF AUTHORITIES

Table of Cases **Page**

Washington Cases

Barnett v. Sequim Valley Ranch, LLC, 174 Wn.App. 475, 489, 302 P.3d 500 (2013) 19

Becker v. Community Health Systems, Inc., 184 Wash.2d at 258-59, 359 P.3d 746 19

Bercier v. Kiga, 127 Wn.App. at 824, 103 P.3d 232, 127 Wash.App. 809, (2004) 39

Camicia v. Howard S. Wright Constr. Co., 179 Wash.2d 684, 693, 317 P.3d 987 (2014) 15, 16

Cantu v. Dep't of Labor & Indus., 168 Wn. App. 14, 21, 277 P.3d 685 (2012) 13

City of Spokane v. Neff, 152 Wash.2d 85, 91, 93 P.3d 158 (2004) 14, 30

CLEAN v. State, 130 Wash.2d 782, 809, 928 P.2d 1054 (1996) 25

Cox v. Spangler, 141 Wash.2d 431, 442, 5 P.3d 1265 (2000) 31

Darneille v. Dept. of Employment Sec., 49 Wn.Ap.575, 578-79, 744 P.2d 1091 (1987) 12, 13, 18

Davis v. Microsoft Corp., 149 Wash.2d at 532, 70 P.3d 126 (2003) 33

Dicomes v. State, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989) 19

Dlouhy v. Dlouhy, 55 Wash.2d 718, 721, 349 P.2d 1073 (1960) 42

Douglas v. Freeman, 117 Wash.2d 242, 256, 814 P.2d 1160 (1991).....15

Felkins v. City of Lakewood, 774 F.3d 647, 651–52 (10th Cir. 2014).....34

Fisher v. Dep't of Health, 125 Wash.App. 869, 879, 106 P.3d 836 (2005).....22

Gardner v. Loomis Armored Inc., 128 Wn.2d 931, 936, 913 P.2d 377 (1996).....19

Gregoire v. City of Oak Harbor, 170 Wash.2d 628, 635, 244 P.3d 924 (2010).....15

Griggs v. Averbeck Realty, Inc., 92 Wash. 2d 576, 581–82, 599 P.2d 1289, 1292 (1979).....17, 42

Hanks v. Grace, 167 Wn.App. 542, 552–53, 273 P.3d 1029, review denied, 175 Wash.2d 1017, 290 P.3d 133 (2012).....17

Hegwine v. Longview Fibre Co., 162 Wash. 2d 340, 352–53, 172 P.3d 688, 695 (2007).....12, 38

Hiatt v. Walker Chevrolet Co., 120 Wash.2d 57, 66, 837 P.2d 618 (1992).....16

Hull v. Vining, 17 Wash. 352, 360, 49 P. 537 (1897).....42

In re Marriage of Littlefield, 133 Wash.2d 39, 46–47, 940 P.2d 1362 (1997).....15

In re Pers. Restraint of Tortorelli, 149 Wash.2d 82, 94, 66 P.3d 606 (2003).....30

Johnston v. Medina Improvement Club, Inc., 10 Wash.2d 44, 116 P.2d 272 (1941).....41

LaMon v. Butler, 112 Wash.2d 193, 200–01, 770 P.2d 1027, cert. denied, 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989).....16

Mark v. Seattle Times, 96 Wash.2d 473, 497, 635 P.2d 1081 (1981).....22

Martin v. Gonzaga Univ., 191 Wash.2d 712, 425 P.3d 837, 844 (2018).....19, 20

McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006).....33

McCoy v. Kent Nursery, Inc., 163 Wn. App. 744, 769, 260 P.3d 967 (2011), review denied, 173 Wn.2d 1029 (2012).....13

Norhawk Invest., Inc. v. Subway Sandwich Shops, Inc., 61 Wn. App. 395, 398 811 P.2d 221 (1991).....38

Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 642, 9 P.3d 787 (2000)..33

Rhodes v. URM Stores, Inc., 95 Wn.App. 794, 799, 977 P.2d 651 (1999).....33

Ried v. Pierce County, 136 Wn.2d 195, 961 P. 2d 333 (1998).....22

Riehl v. Foodmaker, Inc., 152 Wash. 2d 138, 94 P.3d 930 (2004).....34, 35, 40

Riley v. Iron Gate Self Storage, 198 Wash. App. 692, 712–13, 395 P.3d 1059, 1071, review denied, 189 Wash. 2d 1010, 402 P.3d 830 (2017).....39

Roe v. Quality Transp. Servs., 67 Wash. App. 604, 605–11, 838 P.2d 128, 129–32 (1992).....22, 23, 26

Rose v. Anderson Hay & Grain Co., 184 Wash.2d 268, 277-78, 287, 358 P.3d 1139 (2015).....19, 20, 24

Roth v. Nash, 19 Wash.2d 731, 144 P.2d 271 (1943).....42

Sedlacek v. Hillis, 145 Wash. 2d 379, 36 P.3d 1014 (2001).....24

Sherman v. Pfizer, Inc. 8 Wn. App. 2d 686, 694, 440 P.3d 1016 (2019)...12

Snyder v. Med. Serv. Corp. of E. Wash., 145 Wash.2d 233, 238, 35 P.3d 1158 (2001).....18

State v. Castellanos, 132 Wash.2d 94, 97, 935 P.2d 1353 (1997).....15, 30

State v. Ellis, 136 Wash.2d 498, 504, 963 P.2d 843 (1998) 15, 29

State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971) 41

State ex rel. Humiston v. Meyers, 61 Wash.2d 772, 779, 380 P.2d 735 (1963) 25

Tapper v. Employment Sec. Dep't, 122 Wash.2d 397, 402, 858 P.2d 494 (1993) 13

Terrell v. Hamilton, 190 Wn. App. 489, 498, 358 P.3d 453, 458 (2015) .. 15

Thompson v. St. Regis Paper Co., 102 Wash.2d 219, 232, 685 P.2d 1081 (1984) 23

Wahl v. Dash Point Family Dental Clinic, Inc., 144 Wn.App. 34, 43, 181 P.3d 864 (2008) 18

Wash. Fed'n of State Employees, Council 28 v. Office of Fin. Mgmt., 121 Wash.2d 152, 163, 849 P.2d 1201 (1993) 37

White v. Holm, 73 Wash.2d 348, 351, 438 P.2d 581 (1968) 16

Youker v. Douglas County 178 Wn.App. 793, 797, 327 P.3d 1243 (2014) 22, 31

All other jurisdictions

*Hooker v. Adams, 2008 WL 2788404, *8–9 (E.D. Cal. July 18, 2008)* 34

Ritholz v. Johnson, 244 Wis. 494, 502, 12 N.W.2d 738, 741 (1944) 25

Simmerman v. U–Haul Co. of Inland Nw., 57 Wn.App. 682, 687, 789 P.2d 763 (1990) 33

Court Rules and Regulations

CR 12(b)(6)……...22

CR 43 (k)……..…14

CR 50……..……12, 17

CR 50(a)……17

CR 50(a)(2)……17

CR 50(b)……17

CR 55(c)……..……41

CR 55(c)(1)……..……41

CR 59(a)(1)……...11

CR 60(b)……..…..……41

CR 60(e)……...……41

RAP 10.3(a)(4)……..……39

RAP 10.3(a)(6)……..39

I. Introduction

Respondent, Sound Recovery Centers, LLC, the Employer, had filed a Notice of Cross Appeal. Upon review it has been determined that the Respondent Employer will not pursue the Cross Appeal.

This case involves an employee's challenge to the drug testing protocols established by a drug and alcohol treatment facility that were to be conducted under the purview of health care professionals of the same gender as the employee being tested. The Appellant/Employee challenges the jury's verdict that she was not terminated from employment actually or constructively, the refusal to grant a new trial, the instructions given to the jury on invasion of privacy, the Court's refusal to ask questions posed by jurors related to issues that had been disposed of by summary judgment, the grant of summary judgment on Appellant's unsupported disability claim and asserts that the Court abused its discretion by vacating an Order of Default upon good cause and with the payment of substantial terms.

The Employer asserts the law recognizes the authority of an employer to conduct drug tests for work related purposes and that the testing protocols were justified in an industry where many treatment counsellors, including the Appellant/Employee, are recovering drug or alcohol substance abusers. The testing under the supervision of health care

professionals of the same gender as the employee adequately protected the Employee's privacy. Substantial evidence supports the jury's findings that restricting the Appellant's ability to work until she passed a drug test was not an actual or constructive discharge. The Appellant's failure to submit competent evidence of her disability or the medical nexus to her claimed accommodation supported the dismissal of that WLAD claim on summary judgment. The Court did not abuse its discretion by vacating the default order upon the Employer's very prompt request to set aside the default showing proper justification and justifiable defenses for its actions as borne out by the summary judgment and the jury's verdict and payment of significant terms.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

A. Errors of the Superior Court Asserted by Appellant/Employee

a. Challenges to Evidentiary Support For the Verdict.

i. Employee asserts a new trial should have been granted due to lack of evidence supporting the verdict.

ii. Employee that insufficient evidence existed for the jury to conclude restricting the Employee from working until she successfully passed a drug and

alcohol screening was not a termination or constructive discharge.

b. Challenges to Jury Instructions.

i. Employee asserts that Instruction No. 6 was a "comment on the evidence" although it accurately stated the law.

c. Challenges to the Court's Evidentiary Rulings.

i. Employee asserts the Court abused its discretion by not allowing questions on issues related to claims dismissed by Summary Judgment.

d. Challenge to the Court's Order of Partial Summary Judgment.

i. Employee asserts the Court erred when it dismissed her disability discrimination claim that was not supported by competent evidence.

e. Challenge to Vacation of Order of Default.

i. Employee asserts the Court abused its discretion by setting aside the Order of Default upon Employer's prompt motion to vacate showing justifiable reasons the out of state principal of Defendant failed to file a timely answer, legitimate defenses to Appellant's

allegations and the absence of prejudice to Appellant.

B. Issues Related to Assignments of Error.

a. What is the appropriate standard of appellate review on each of Employee's claimed errors?

b. Does an Employer's methods of drug and alcohol testing using health care professionals to directly observe the specimen collection, or alternatively a brief inspection of the person in a robe to insure no items are taken into the testing area for specimen collection, establish an unreasonable intrusion into an employee's privacy as a matter of law?

c. Does the Employer's drug and alcohol testing protocol contravene a clearly stated public policy of Washington State that has been established by a constitutional, statutory or regulatory provision or scheme or a judicial decision?

d. Does substantial evidence support the jury's finding that Employer's refusal to allow the Employee tp return to work until she took and passed a drug test under the direct supervision of health care professionals did not establish an actual or constructive discharge from employment?

e. Whether the doctrine of estoppel has any application in this case where it is not supported by the evidence or appropriate argument in the Appellant's brief?

f. Whether the Employee's failure to present required evidence on any element of her disability discrimination claim defeats any claim challenging Summary Judgment?

g. Whether the Court acted within its discretion in rejecting juror questions about issues that were no longer part of the case?

h. Whether the Court did not abuse its discretion when it vacated the Order of Default?

III. STATEMENT OF THE CASE

A. Factual Background.

This is litigation related to Plaintiff/Appellant Ms. Kimberly Richey's (hereinafter "Appellant, "Richey," or "Employee") employment with Respondent Sound Recovery Centers, LLC (hereinafter "Employer," "Sound Recovery" or "Respondent"). Sound Recovery is engaged in the business of running drug and alcohol treatment facilities or substance abuse treatment centers, in Washington, Florida, Alabama, Indiana, and Arizona. RP 288.

Prior to working for Sound Recovery, Employee worked for Grace Recovery. RP 144. The recovery centers of Sound Recovery and Grace Recovery were physically separate locations. RP 145. They were separated legal entities. Grace Recovery was dissolved around August 2015. Employee filled out new application forms when she moved from Grace Recovery to Sound Recovery. CP 92,-94, 161. She never discussed any need for accommodation when she moved to Sound Recovery after Grace Recovery closed. CP 162. She was employed by Sound Recovery as a case manager. Ex. 8, RP 189.

Frank Cid is the principal owner of Sound Recovery RP 288 having acquired that business along with the business of seven or eight treatment centers in Washington State in November 2015. RP 146; 290-91. Mr. Cid is based in Florida. RP 288. Mr. Cid has over 600 employees in the treatment industry and over 100 employees in other businesses not connected to the treatment industry. RP 300.

Drug testing of employees in the substance abuse treatment industry is unique. RP 292-300. Mr. CID does not test employees in his other businesses the same way because there is not the same special need. RP 294. The issue of regular testing arises when employees have regular contact with persons in recovery as part of their duties. RP 295. Those with client contact are tested weekly and other non-contact employees are

tested monthly. RP 296. Ritchey was a licensed counsellor who had regular contact with persons in recovery. RP 148.

There are no exceptions to the testing requirements and Mr. Cid, when he was in a treatment role, was tested, as are his father, sister, and wife all tested under the same procedures at issue here. RP 295. Yet the Employee asserts that she did not need to comply with the testing protocol and it was a wrongful termination to prohibit her from returning to work until such time as she took and passed a monitored drug test. CP 1-4; RP 160; 324,305

After Mr. Cid's company took over Sound Recovery, new drug testing protocols were announced for its employees in November 2015. RP 298, Exs. 10, 12, 15. Employee drug testing is very important for substance abuse treatment centers' successful operation. RP 293-300. Many professionals who have client contact are recovering from substance abuse and being drug testing is just part of the job. RP 294. Ritchey acknowledges that she has a history of substance abuse. RP. 143-44, 166-67, 190. She acknowledges that employees in a substance abuse treatment facility are expected to have drug screens and should be tested. RP 166, 190.

Testing of urine is recommended by the SAMHSA[1] and National Association of Drug Testing (NDA) RP 297.

Testing under the prior owners of Sound Recovery had been haphazard. RP 113-14; 292-93. Prior to November 2015, Ritchey and her fellow employees provided unsupervised urine samples in a private restroom. RP 114. Mr. Cid was very concerned that the testing was unsupervised and was easy to circumvent by bringing in "stuff" or adding adulterant to the test sample or a variety of ways to "beat the system." RP 292-93. When the new protocols were put into place five or six employees did not pass the test. RP 309.

Under the new policy employees at the substance abuse treatment centers owned by Mr. Cid had 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 one's pants, and exposing oneself to immediate observation by the test technician who would observe her urination. RP 109, 158, 298-299. Option (2) avoided urination in the direct sight of the technician, instead requiring the full removal of all clothing and don a gown for a visual inspection before urinating for specimen

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[1] Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services samhsa.gov.

collection in private. Exs. 12 & 15, RP 140-41; 198-99, 301-305 The observation of the Employee, either the direct observation option or the opportunity to disrobe, then donning a gown and be visually inspected before urinating in private would be undertaken by a health care worker RP 73, 158 of the same sex. RP 194-95, 299, 303, 316-321.

The Employee asserts that "No Reasonable Person Could Find These Testing Methods Are Not an Unreasonable Intrusion on Privacy." Appellant's Opening Brief, page 10. Of the 197 employees of Sound Recovery, 195 of them complied with the new testing protocols. RP 305. The owner of the Employer testified he personally submitted to such testing when he had direct client contact, as did his wife, father and sister. RP 295.

When Ritchey continued to refuse to comply with the established procedures for a drug test RP 169, 306, on February 12, 2016 Sound Recovery ordered her to leave the property, and informed her that she could not return without taking the test. Ex. 23, RP 118, 168,305-308, 310-324. Mr. Cid did not regard Employee as being terminated at that point. RP 308, 311-12. Richey was free to return to work as soon as she successfully passed a drug test. Sound Recovery continued to pay her medical insurance until she filed suit in May. RP 311. In fact, Employer continued to pay Employee's health insurance. RP 326-27. She never

took a supervised drug test and never returned to work, but instead she filed this lawsuit. RP 198, 201-02, 211.

B. Procedural History

Employee initiated this lawsuit by service upon the Employer's registered agent on April 7, 2016. CP 7. Prior to filing suit, Employee's attorney had been in communication with Employer's attorney, but Employee's attorney did not inform the Employer's attorney that suit had been filed or provide him a copy of the suit. CP 18, 20, 27. Due to issues more fully described herein, Employer did not timely respond and an Order of Default was entered on April 28, 2016, the twenty first day after service. CP 11. On June 6, 2016, Respondent moved to set aside the default. CP 12-34. The court granted the motion upon payment of Employee's attorney fees in the amount of $1,312.50. CP 35-36.

When Employee failed to provide essential evidence to support her claim of disability discrimination including medical evidence supporting the alleged disability and no evidence Sound Recovery failed to adopt measures that were medically necessary to accommodate any disability. Sound Recovery moved for Summary Judgment. CP 43-139. Employee responded CP 140-204. Sound Recovery replied CP 205-215, and the Court granted a partial summary judgment upon the disability discrimination claim. CP 216-217, finding Ritchey failed to establish

essential elements of her claim, proof of her disability CP 50-51; 205-207 and, that she failed to establish a nexus between disability and need for accommodation. CP 52-54; 207-210. The trial Court agreed. CP 216-17.

The Employee's procedural history omitted reference to the one claim upon which Employee employee prevailed, a claim for $715.30 for accumulated paid leave that was not paid when it became obvious Richey was not returning to work. CP 374. Under the Employer's policy, Exs. 4, 24, Richey should have been paid for the accumulated vacation time shown on her last pay check. Ex. 5. RP 312. Employer considered that she had not been terminated RP 311 and because she had made no request to be paid accumulated leave until she filed this lawsuit the payment obligation had not been triggered. RP 311, Employer's view she had not been terminated so the payment obligation had not been triggered. RP 312. This is the sole issue upon which Employee prevailed. CP 373-74.

Following the verdict, Employee made a Motion for New Trial CP 375-382 pursuant to CR 59(a)(1) (Irregularity in Proceeding), (8) (Error in Law) & (9) (substantial justice had not been done) asserting that: (1) no evidence supported the jury's findings Employee had not been discharged or constructively discharged; (2) The Court's evidentiary ruling refusing to submit certain jury questions impacted the outcome and jury's

conclusions and therefore the language of Instruction No. 6 CP 361[2] was a comment upon the evidence.

Employer opposed the Motion for New Trial. CP 383-391. The Court denied the Motion for New Trial. CP 396. The Employee did not bring a Motion for JNOV pursuant to CR 50. CP 375-382.

IV. LEGAL DISCUSSION

A. Standard of Review.

a. General Standards for Appellate Review.

The Appellant glosses over the standard of review to be applied to the multiple issues raised by Employee's appeal acknowledging only that questions of law are reviewed *de novo*, *Hegwine v. Longview Fibre Co.*, 162 Wash. 2d 340, 352–53, 172 P.3d 688, 695 (2007); summary judgment is reviewed *de novo*, *Sherman v. Pfizer, Inc. 8 Wn. App. 2d 686, 694, 440 P.3d 1016* (2019); and that the jury's factual determinations are reviewed for substantial evidence. *Darneille v. Dept. of Employment Sec.*, 49 Wn.Ap.575, 578-79, 744 P.2d 1091 (1987).

b. Review of Motion for New Trial

The Employee asserts that the Court erred in not granting her Motion for New Trial. This argument claims that the jury's verdict; that

[2] Employee's brief erroneously cites to RP 362 which is Instruction No. 7 which was the Constructive Discharge Instruction.

Employee was not discharged from employment either actually or constructively, was not supported by the evidence. The Court disagreed. CP 396. That assertion is to be reviewed by this court for substantial evidence. *Darneille v. Dept. of Employment Sec.,* 49 Wn.Ap.575, 578-79, 744 P.2d 1091 (1987). Substantial evidence is evidence "sufficient to persuade a rational, fair-minded person that the finding is true." *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 21, 277 P.3d 685 (2012). The court must view the evidence in the light most favorable to the nonmoving party. *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 769, 260 P.3d 967 (2011), *review denied*, 173 Wn.2d 1029 (2012). And the court must defer to the trier fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *Id.*

"Analytically, resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying that law to the facts." *Tapper v. Employment Sec. Dep't,* 122 Wash.2d 397, 402, 858 P.2d 494 (1993). The process of determining the applicable law and applying it to these facts is a question of law subject to *de novo* review. *Id. at* 403, 858 P.2d 494.

When Ritchey continued to refuse to comply with the established procedures for a drug test RP 169, 306 on February 12, 2016, Sound Recovery ordered her to leave the property, and informed her that she

could not return without taking the test. Ex. 23, RP 118, 168,305-308, 310-324. Mr. Cid did not regard Employee as being terminated at that point. RP 308, 311-12. Richey was free to return to work as soon as she successfully passed a drug test. Sound Recovery continued to pay her medical insurance until she filed suit in May. RP 311. In fact, Employer continued to pay Employee's health insurance. RP 326-27. She never took a supervised drug test and never returned to work, but instead filed this lawsuit. RP 198, 201-02, 211. That is sufficient evidence to support the jury's finding CP 272-74 that she was not constructively discharged or actually discharged. Ritchey was suspended and chose not to take the test and found a new job. RP 175, 236.

c. Evidence Rulings Excluding Juror Questions.

Employee asserts that the Court's rulings excluding certain juror questions submitted pursuant to CR 43(k) impacted the verdict. It appears that no Washington case has addressed the precise issue of a trial court's handling of juror questions allowed under CR 43(k). However, there is no reason to treat the Court's rulings on questions submitted by jurors differently than other evidentiary rulings of the trial court.

"The standard of review for evidentiary rulings made by the trial court is abuse of discretion." *City of Spokane v. Neff*, 152 Wash.2d 85, 91, 93 P.3d 158 (2004). Reviewing courts will reverse a trial court's evidentiary ruling "only when no reasonable person would

take the view adopted by the trial court." *State v. Ellis,* 136 Wash.2d 498, 504, 963 P.2d 843 (1998) (quoting *State v. Castellanos,* 132 Wash.2d 94, 97, 935 P.2d 1353 (1997)).

The jury questions at issue CP 332, 341 were carefully evaluated by the trial court. RP 237-245; 383-403.

d. Jury Instructions

Whether a jury instruction reflects an accurate statement of the law is reviewed de novo. *Gregoire v. City of Oak Harbor,* 170 Wash.2d 628, 635, 244 P.3d 924 (2010). But a trial court's decision regarding how to word an instruction or whether to give a particular instruction is reviewed for an abuse of discretion. *Douglas v. Freeman,* 117 Wash.2d 242, 256, 814 P.2d 1160 (1991). See *Terrell v. Hamilton*, 190 Wn. App. 489, 498, 358 P.3d 453, 458 (2015), where the court used the abuse of discretion standard in instructing the jury on novel issues of insurance coverage and excluding a requested instruction. "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *In re Marriage of Littlefield,* 133 Wash.2d 39, 46–47, 940 P.2d 1362 (1997).

e. Motion for Summary Judgment.

Review of a trial court's grant of summary judgment is *de novo. Camicia v. Howard S. Wright Constr. Co.,* 179 Wash.2d 684, 693,

317 P.3d 987 (2014). This court may affirm a superior court's ruling on any grounds the record adequately supports. *LaMon v. Butler,* 112 Wash.2d 193, 200–01, 770 P.2d 1027, *cert. denied,* 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989).

To defeat summary judgment Employee must establish *specific and material facts* to support each element of her prima facie case with admissible evidence. *Hiatt v. Walker Chevrolet Co.,* 120 Wash.2d 57, 66, 837 P.2d 618 (1992). Employee did not do so because she lacked medical evidence to establish the alleged disability and the medical nexus between the claimed disability and the need for an available accommodation.

f. Setting Aside Default Judgment.

A proceeding to vacate a default judgment is equitable in character, and relief is to be afforded in accordance with equitable principles. *White v. Holm*, 73 Wash.2d 348, 351, 438 P.2d 581 (1968). The trial court should exercise its authority "liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done." *White v. Holm*, supra at 351, 438 P.2d at 584.

The motion to vacate is addressed to the sound discretion of the trial court and this court, on appellate review, will not disturb the trial court's disposition unless it clearly appears that that discretion has been

abused. Abuse of discretion is less likely to be found if the default judgment is set aside. *Griggs v. Averbeck Realty, Inc.*, 92 Wash. 2d 576, 581–82, 599 P.2d 1289, 1292 (1979).

B. The Court Did Not Err in Denying Plaintiff's Motion for New Trial.

a. Substantial Evidence Supports the Jury's Conclusion that the Employee Was Not Terminated From Employment Actually or By Constructive Discharge and the Motion For a New Trial Was Properly Denied.

Although the Employee asks this court to set aside the jury's verdict as a matter of law, no Motion for JNOV under CR 50 was presented. CR 50 dictates when motions for judgment as a matter of law must be made: "at any time before submission of the case to the jury." CR 50(a)(2). Such a motion may be renewed after trial, but the rule's use of the word "renew" in CR 50(b) indicates that a party must file a motion for a judgment as a matter of law *before* submitting the case to the jury if the party wishes to *renew* its previous motion after the jury returns a verdict. To preserve the opportunity to renew a CR 50 motion after the verdict, a party must move for judgment as a matter of law before the trial court submits the case to the jury *Hanks v. Grace,* 167 Wn.App. 542, 552–53, 273 P.3d 1029, *review denied,* 175 Wash.2d 1017, 290 P.3d 133 (2012); *see* CR 50(a). Employee failed to preserve this issue for review.

Employee asserts that the jury's finding in the Special Verdict Form CP 372-74 that she was neither constructively discharged or actually discharged is contrary to the evidence and is not supported by the evidence. The Appellant acknowledges that the decision to grant or deny a Motion for a New Trial is predominantly a factual determination that should only be reversed if it was clearly erroneous. Appellant's Brief, pg. 9 (citing *Darneille v. Department of Employment Sec.*, 49 Wn.App. 575, 578-79, 744 P.2d 1091 (1987)).

"A cause of action for wrongful discharge in violation of public policy may be based on 'either express or constructive' discharge." *Wahl v. Dash Point Family Dental Clinic, Inc.*, 144 Wn.App. 34, 43, 181 P.3d 864 (2008) (quoting *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wash.2d 233, 238, 35 P.3d 1158 (2001).

In this case, substantial evidence was present to support the jury's conclusion that Employee was not actually or constructively terminated from her job. Mr. Cid testified that she was free to return to her job when she successfully passed a drug test. Ex. 23, RP 305-308, 310-324. Richey acknowledged that was her understanding as well. Ex. 23, RP 118, 168.

The elements of a claim of constructive discharge are that (1) the employer deliberately made working conditions intolerable, (2) a

reasonable person in the employee's position would be forced to resign, (3) the employee resigned because of the intolerable condition and not for any other reason, and (4) the employee suffered damages as a result of being forced to resign. *Barnett v. Sequim Valley Ranch, LLC*, 174 Wn.App. 475, 489, 302 P.3d 500 (2013).

The elements of a claim for wrongful termination in violation of public policy are that (1) the employee's discharge may have been motivated by reasons that contravene a clear mandate of public policy, and (2) the public-policy-linked conduct was a significant factor in the decision to discharge the worker. *Martin v. Gonzaga Univ.*, 191 Wash.2d 712, 425 P.3d 837, 844 (2018). The first element encompasses clarity and jeopardy components. *Id.* at 843 (citing *Becker*, 184 Wash.2d at 258-59, 359 P.3d 746; *Rose v. Anderson Hay & Grain Co.*, 184 Wash.2d 268, 277-78, 287, 358 P.3d 1139 (2015)). If a claim does not fall within one of the four recognized categories of wrongful discharge in violation of public policy[3], the more refined Perritt analysis[4] may be required. *Rose* 184

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[3] (1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing. Gardner v. Loomis Armored Inc., 128 Wn.2d 931, 936, 913 P.2d 377 (1996), (citing Dicomes v. State, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989)).

Wn.2d at 277. In determining the second factor, a burden-shifting procedure applies under which the employer may defeat the claim by proving that the termination was justified by an overriding consideration. *Martin,* 191 Wash.2d at 727-29.

Employee asserts that her public policy claim arises from her right of privacy. However, substantial evidence supported the jury's conclusion that she was not terminated, but Employee chose not to be tested for substance abuse and abandoned her employment. CP 1-4; Ex. 23, RP 118, 160; 168-69, 324, 305-08, 310-324.

b. **The Substance Abuse Testing Protocols are Appropriate for Substance Abuse Treatment Center Employees having Direct Client Contact and Do Not Violate the Public Policy of Washington State.**

In this case, Employee asserts that the drug testing protocols, which are widely accepted and used in the Substance Abuse Treatment profession, were unreasonable and caused her to be terminated. However, the evidence shows that she was not terminated, rather that she voluntary chose not to be tested, was suspended, and found a new job RP 194, 236, with a different employer. Ex. 23, RP 118, 168,305-308, 310-324. Employee concedes that employee testing is important in the substance

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[4] Henry H. Perritt Jr., *Workplace Torts: Rights and Liabilities* § 3.7 (1991).

abuse treatment industry. RP 190. In the context of a substance abuse treatment facility the employer has an overarching need to test the employees having contact with patients and ensure those tests are not circumvented. In this case, the more rigid testing procedures applied discovered five or six employees that failed their tests. RP 309. This finding reinforces the importance of drug testing employees in an industry where so many employees, including Ritchey RP 143, 166-67, have a history of substance abuse. RP 292-300.

Testing of workers at Substance Abuse Treatment facilities is a common feature of that industry where employees have direct client contact. RP 292-300. Mr. Cid testified that he treats his substance abuse center employees that have direct client contact differently than his substance abuse center employees who don't have direct contact, and all of his substance abuse center employees differently than his employees working in his businesses unrelated to substance abuse counselling. RP 294-95.

Mr. Cid has good reason for making that distinction. Many substance abuse counsellors are themselves recovering addicts. RP 294. Ongoing use by counselors impairs their observation skills and exposes risk of impairing treatment. RP 293. Ritchey is herself a recovering addict. RP 190. Six of Sound Recovery's employees failed the test under

the enhanced protocols. RP 309. This means the new protocols worked, and that Sound Recovery employees were working while engaging in substance abuse prior to the enhanced protocols going into effect.

Employee asks this court to rule as a matter of law that the testing protocols violate the public policy of the State of Washington recognized in *Ried v. Pierce County,* 136 Wn.2d 195, 961 P. 2d 333 (1998), and that the protocols constitute the intentional tort of an "intrusion into her seclusion as defined in *Youker v. Douglas County 178 Wn.App. 793, 797, 327 P.3d 1243 (2014).*

> The defendant's intrusion, whether physical or nonphysical, must substantially interfere with the plaintiff's seclusion in a manner highly offensive or objectionable to a reasonable person. *Mark v. Seattle Times,* 96 Wash.2d 473, 497, 635 P.2d 1081 (1981) (quoting and citing RESTATEMENT (SECOND) OF TORTS § 652B & cmt. d). And, "[t]he intruder must have acted deliberately to achieve the result, with the certain belief that the result would happen." *Fisher v. Dep't of Health,* 125 Wash.App. 869, 879, 106 P.3d 836 (2005).

Youker v. Douglas Cty., 178 Wash. App. 793, 797, 327 P.3d 1243, 1245 (2014).

Washington Courts already acknowledge an employer's legitimate right to drug test does not impair employee privacy rights. *Roe v. Quality Transp. Servs.*, 67 Wash. App. 604, 605–11, 838 P.2d 128, 129–32 (1992) upheld a CR 12(b)(6) dismissal of an employee's termination for refusing to comply with a drug test requirement over the employee's

assertion that such tests violated her right of privacy. Noting that the legislature is particularly well suited to balance the employees' privacy interests against employer's interests in drug testing, the *Roe* court found it significant that the legislature had not enacted statutes on drug testing. *Id. at* 131, 838 P.2d. at 609-10.

Roe went on to hold that the common law tort of invasion of privacy did not generate a sufficient support to find a clear mandate of public policy required to establish the clarity element of a public policy claim of wrongful discharge, noting: "*Thompson*[5] requires that we "find" not "create" public policy and further requires that the existence of such public policy be "clear. *See Thompson,* 102 Wash.2d at 232, 685 P.2d 1081."

Employee invites this court to create, upon the record of this case as a matter of law, apublic policy of Washington restricts the procedures by which a substance abuse treatment facility may conduct drug testing of its employees, and to find that Employer violated that heretofore undefined public policy. Not only does that evade the clarity requirement of the public policy analysis,it goes against the evidence in this case and the findings of the jury. It would impose liability retroactively where the public policy had not been clearly articulated.

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5 *Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 232, 685 P.2d 1081 (1984)

In *Sedlacek v. Hillis*, 145 Wash. 2d 379, 36 P.3d 1014 (2001) the court observed the importance of the clarity element of the test for wrongful discharge in violation of public policy, noting that whetehr the clarity element is met is a question of law.

In *Rose v. Anderson Hay & Grain Co.*, 184 Wash. 2d 268, 275–76, 358 P.3d 1139, 1142 (2015) the court reinforced that the tort of wrongful termination in violation of public policy is a narrow exception to the terminable at will doctrine in employment and must be limited "to instances involving very clear violations of public policy." *Id.* at 276. The court went on to note the clarity element was a strict requirement, and failure to strictly apply that requirement might unreasonably expose employers to liability. *Id.*

Not only did the Employer's owner and his immediate family, and 195 of 197 employees of Sound Recovery agree to submit to the testing protocols RP 305, the protocols of urine testing, including direct observation of specimen collection, are specified by the U.S. Department of Health and Human Services. RP 297.

> **Preparing a Specimen Collection Site**
>
> The collection site is a designated area where a patient provides the specimen for a drug test. Collection of most specimen matrices does not require special arrangements. Urine collection in primary care settings needs to be configured for privacy while a patient provides a specimen

> if direct observations are not required. Water for drinking needs to be available in the event the patient cannot provide sufficient urine (shy bladder). **In substance abuse treatment and workplace testing, measures need to be taken to prevent adulteration or substitution, such as** putting a bluing agent in the toilet, not providing access to soap and water in the collection room, and **directly observing specimen provision**. These actions are needed in clinical situations only if adulteration or substitution is suspected. Once specimens are collected and labeled, there must be space and proper conditions for securely and appropriately storing them. A refrigerator is a convenient, appropriate storage place, especially when samples are picked up by a laboratory courier on a daily or less frequent basis.

Clinical Drug Testing in Primary Care – SAMHSA Technical Assistance Publication Series 32 , U.S. Department of Health and Human Services Center for Substance Abuse Treatment, HHS Publication No. (SMA) 12-4668 (2012), Pg. 30[6] (emphasis supplied).

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6 "Judicial notice may be taken at any stage of the proceeding." ER 201(f). Generally, judicially noticed facts are "not subject to reasonable dispute" in the sense that they are "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b). Judicial notice may be taken of those "facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty." *CLEAN v. State,* 130 Wash.2d 782, 809, 928 P.2d 1054 (1996) (citing *State ex rel. Humiston v. Meyers,* 61 Wash.2d 772, 779, 380 P.2d 735 (1963)). Judicial notice may be taken whether or not requested by the parties. ER 201(c). Judicial notice, of which courts may take cognizance, is composed of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty. The court may '* * * resort to encyclopedias, authoritative works upon the subject, reports of committees, scientific bodies and any source of information that is generally considered accurate and reliable * * *.' [Ritholz v. Johnson, 244 Wis. 494, 502, 12 N.W.2d 738, 741 (1944)]. *State ex rel. Humiston,* 61 Wash. 2d at 779, 380 P.2d at 739–40.

Mr. Cid testified in considerable detail about the SAMHSA and National Association of Drug Testing (NDA) industry standards are that urine tests are the preferred method. RP 297

Employee makes the unsupported allegation "No Reasonable Person Could Find [Employer's] Testing Methods Are Not an Unreasonable Intrusion on Privacy." Employee's Brief, pg. 10. Yet the Employee provides no evidentiary support for that claim and apparently wants this court to ignore the evidence that 99% of Employer'semployees found the testing reasonable enough they agreed to it, Mr. Cid and his immediate family submitted to it and the SAMHSA finds it reasonable to require direct observation and put into place other safeguards to prevent employees from cheating on the tests.

Employee fails to articulate a clear mandate of public policy regarding specimen collection for employee drug tests and even if such a policy might be extracted from the case law, despite the holding in *Roe v. Quality Transp. Servs.*, 67 Wash. App. 604, 605–11, 838 P.2d 128, 129–32 (1992), Employer has shown an important need for the testing protocols in the substance abuse treatment industry

c. Employees Almost Universally Accepted the Substance Abuse Testing Obligations, which Are a Constant for Substance Abuse Treatment Center Employees.

Testing was done by Sound Recovery's prior owners. Testing is done on all of Mr. Cid's 600 employees in the substance abuse treatment centers RP 292-300, 195 of 197 of Sound Recovery employees agreed to be tested under the new protocols. RP 305. Observed specimen collection is recommended by the U.S. Department of Health and Human Services. (*supra*).

d. The Jury Was Not Confused About Employee's Status.

Employee asserts the jury's decision "introduces a logical conundrum" because it found Ms. Richey was not terminated actually or constructively, yet it found she was owed wages because her employment ended. Employee's Br. Pg. 12. Employee argues that the Employer has sole control over the employment relationship. That is patently untrue, employment relationships are inherently bilateral and may be terminated by either the employee or the employer. In this instance, Richey decided that she would not submit to Employer's requirement and that if she wanted to return to work, she had to pass an observed drug test under Employer's policy. Richey chose not to submit to a drug test and she ended the employer-employee relationship and the jury so found. Even Ritcheyshe thought she was on suspension. RP 234. She started a job with a different employer about six weeks after she was asked to leave. RP 236.

Employer should have recognized the employment relationship had ended either when Richey returned to retrieve her property or when she filed suit and Employer stopped paying for her health care, which triggered the obligation to pay accrued paid leave, but Ritchey was not terminated she was suspended. There is no conundrum here, the jury decided that the Employee quit. Not that the Employer separated her constructively or otherwise.

e. The Termination of the Employment Relationship was the Product of the Employee's Actions, Not the Employer's.

Employee invites this court to "define when the employment relationship ends." Yet Employee's argument continues to view the employer-employee relationship as one unilaterally controlled by the employer. While acknowledging that an employee may resign, Employee argues that if the employer refuses to permit employee to perform work place duties, particularly when this refusal is accompanied by a refusal to pay the employee, the employer has constructively or actually discharged the employee. Employee chose to discharge herself from the employment relationship when she rejected Employer's requirement that she pass a clinically supervised drug test before resuming work. Ex. 23, RP 118, 168-69, 305-308, 310-324. She then went out and found another job. RP 236.

C. The Court Properly Exercised Discretion in Excluding Evidence Regarding Employee's Alleged PTSD.

Employee asserts that the Court's decisions RP 237-42; 383-402 to prohibit jury questions inquiring into the employer's knowledge of Employee's alleged reasons for refusing to comply with the testing protocol was reversible error by excluding relevant evidence.

As discussed below, Ms. Richey's claim of disability discrimination was properly dismissed on summary judgment. The question regarding the reasons for refusing the tests presented the potential of reintroducing the spectre of disability discrimination into the case and the question was objected to under both ER401 and ER 403. RP 238-39. Even Employee's attorney observed, "That's a dangerous question with that point in mind." RP 238-39. And it is a "touchy spot" RP 240. The Court carefully weighed the options and elected not to ask the first question, concluding it would not add any extra information for the jury and was therefore not relevant and created a real ER 403 trap. RP 241-42.

The second time the issue came up RP383-402; there was extended discussion and an offer of proof. The Court wrestled with where the question began and ended and how it would re-introduce issues foreclosed by summary judgment into the case. RP 388-89.

This time the Employee's attorney advised the Court, "It was not something that I felt was strictly necessary to my case..." RP 394. "...I will not argue that it is relevant to the substantive claim. It is relevant to the damages issue..." RP 396.

Now Employee's counsel is switching positions and arguing the exclusion of the question was a substantive error that affected the findings on liability and "changed the results of the jury's decision...exacerbated by the working [sic] of the instruction regarding the public policy issue, which highlighted the element of intent unnecessarily. Employee's Brief, pg. 15. Under the invited error doctrine, a party may not set up error at trial and then complain about the error on appeal. *In re Pers. Restraint of Tortorelli,* 149 Wash.2d 82, 94, 66 P.3d 606 (2003).

"The standard of review for evidentiary rulings made by the trial court is abuse of discretion." *City of Spokane v. Neff,* 152 Wash.2d 85, 91, 93 P.3d 158 (2004). Reviewing courts will reverse a trial court's evidentiary ruling "only when no reasonable person would take the view adopted by the trial court." *State v. Ellis,* 136 Wash.2d 498, 504, 963 P.2d 843 (1998) (quoting *State v. Castellanos,* 132 Wash.2d 94, 97, 935 P.2d 1353 (1997)).

In this instance the court carefully weighed what the proposed evidence would add to the fact finding process and determined that the

information was not relevant and/or opened the door to confusion and would potentially devolve into issues that had been foreclosed by the partial summary judgment in this case, which would be contrary to ER 403 and ER 402.

How the failure to allow these questions impacted the verdict and rendered Instruction No. 6 invalid is not clearly set forth by Employee. Jury instructions are sufficient if they permit each party to argue their theory of the case, do not mislead the jury, and when read as a whole, properly inform the jury of the applicable law. *Cox v. Spangler,* 141 Wash.2d 431, 442, 5 P.3d 1265 (2000).

Instruction No. 6 accurately sets forth the law:

> It is public policy that a person has the legal right or privilege to be free from deliberate intrusion into her seclusion in a manner that is highly offensive or objectionable to a reasonable person. The intruder must have acted deliberately to achieve the result with the certain belief the result would happen.

That instruction accurately states the law. See *Youker v. Douglas Cty.*, 178 Wash. App. 793, 797, 327 P.3d 1243, 1245 (2014) discussed *supra* at pages 17 to 22. Employee has not shown or explained how that accurate statement of the law was a comment upon the evidence, or how the Court abused its discretion when it determined the problems with asking the jury question were outweighed by the lack of relevant

information for the jury to consider, the risk of confusion of the issues, misleading the jury or unfair prejudice that might arise from allowing the WLAD claim to leak back into the case.

D. The Court Properly Granted Summary Judgment When the Plaintiff Failed to Produce Admissible Evidence to Support Her Claim of Disability Discrimination.

The Employee lacked necessary medical evidence required to prove her claim of disability discrimination under the WLAD. Specifically, she failed to provide competent evidence of her claimed PTSD CP 46-48; 49-51, 61-139, 205-207 or to establish a nexus between disability and need for accommodation. CP 52-54; 61-139, 207-210 the trial Court therefore properly granted summary judgment CP 216-17.

a. Employee Lacked Required Evidence of The Disability and the Nexus to Accommodation to Assert Her Disability Discrimination Claim to Trigger The Interactive Process.

To establish a *prima facie* case of failure to reasonably accommodate a disability, a plaintiff must show that (1) the employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job; (2) the employee was qualified to perform the essential functions of the job in question; (3) the employee gave the employer notice of the abnormality and its accompanying

substantial limitations; and (4) upon notice, the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality. *Davis v. Microsoft Corp.,* 149 Wash.2d at 532, 70 P.3d 126 (2003).

Whether a person is disabled is traditionally a question for the trier of fact. *Rhodes v. URM Stores, Inc.,* 95 Wn.App. 794, 799, 977 P.2d 651 (1999). A factual issue can be decided as a matter of law on the question of the presence of a disability if, based on expert medical documentation and state of mind, reasonable minds could only make one decision. *Id.* The burden is on the employee to present a *prima facie* case of discrimination, including medical evidence of a handicap. *Pulcino v. Fed. Express Corp.,* 141 Wn.2d 629, 642, 9 P.3d 787 (2000), *overruled in part on other grounds by McClarty v. Totem Elec.,* 157 Wn.2d 214, 137 P.3d 844 (2006). The employee may not rely on speculation, but must set forth specific facts that sufficiently rebut the moving party's contentions. *Simmerman v. U–Haul Co. of Inland Nw.,* 57 Wn.App. 682, 687, 789 P.2d 763 (1990). In order to prove that an impairment is "medically recognizable or diagnosable," it is necessary to offer "expert medical testimony." Id. at 686. In order to prove that an impairment "exists as a record or history," it is necessary to offer "medical documentation." *Id*

Plaintiff failed to find an expert witness to corroborate her alleged disability or the required medical nexus of accommodations to address the impact of the disability. CP 108-09. In the absence of any expert medical testimony, the only witness that plaintiff had to testify concerning the existence of a disability was herself. That testimony was insufficient to establish the existence of a disability. A plaintiff cannot self-diagnose her own disability. *Hooker v. Adams*, 2008 WL 2788404, *8–9 (E.D. Cal. July 18, 2008) ("Plaintiff may not defeat defendants' motion by simply tendering his own opinion and the opinions of lay persons that he is dyslexic and has difficulty reading and spelling."), report and recommendation adopted by 2008 WL 3992733 (E.D. Cal. Aug. 25, 2008), aff'd by 370 Fed.Appx. 776 (9th Cir. 2010); *Felkins v. City of Lakewood*, 774 F.3d 647, 651–52 (10th Cir. 2014) (holding plaintiff's self-diagnosis inadmissible on summary judgment to the extent it diagnosed plaintiff's condition because such a diagnosis required an expert witness).

Even if Ritchey could establish that she had PTSD during the periods relevant to this case – and as illustrated *supra*, she cannot – Ritchey cannot establish that Sound Recovery failed to adopt measures that were medically necessary to accommodate her claimed disability.

In *Riehl v. Foodmaker, Inc.*, 152 Wash. 2d 138, 94 P.3d 930 (2004) (2004), the Court addressed the issue of what is required in this regard. In that opinion, the Court stated as follows:

> If challenged at summary judgment or trial, the employee must provide competent evidence establishing a nexus between the disability and the need for accommodation. This requirement is not burdensome; it simply requires evidence in the record that a disability requires accommodation. Competent evidence establishing a nexus between a disability and the need for accommodation will vary depending on how obvious or subtle the symptoms of the disability are. Medical expert testimony may or may not be required depending on the obviousness of the medical need for accommodation in the sound discretion of the court.

Id. at 147-148.[7]

In *Riehl*, the Court affirmed summary judgment that had been granted in favor of the employer, ruling that "Riehl did not provide a nexus between his disabilities, depression and PTSD, and a need for accommodation beyond what was provided. There was no medical confirmation in the record that Riehl's abnormalities required further accommodation, such as feedback and a performance evaluation, *and the need to accommodate his disability was not obvious and required greater documentation to survive summary judgment.*" *Id.* at 148-49. It is also clear from the record that the urinalysis testing procedure that was adopted by

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7 The Court in *Riehl* did "emphasize that we do not hold expert testimony is per se required at summary judgment so long as other competent evidence, or a reasonable inference of medical necessity, exists." 152 Wash. 2d at 154. But it was also made clear, as noted above, that "medical expert testimony" would be required "depending on the obviousness of the medical need for accommodation..." *Id.* at 148. Because, like the situation in *Riehl*, Ritchey's medical need for accommodation is not "obvious," medical expert testimony would be required to affirm its existence.

Employer, and that is at issue here, *did* in fact provide for unobserved collection of urine samples.

Throughout her deposition testimony, Ritchey admitted that she knew that the Employer's policy provided for unobserved collection of urine samples. *See* Ritchey Depo., pp. 151-155, 159, 161, 169, 173, 176-178, 186, 190. CP 67-71; 72; 73, 75, 76, 77-79; 80; 81. Ritchey's issue with the urinalysis testing procedure did not have to do with whether the collection of her urine sample was being observed, but with concerns about her privacy. As she testified, "the problem is not them watching the actual urine come out of my body. It's watching my body. Looking at my naked body. That's not okay with me. So that was the problem." *Id.* at 191.

There is no medical evidence in the record at the time of summary judgment that there is any nexus between Ritchey's alleged disability of PTSD, and any need to accommodate her in any fashion during specimen collection for urinalysis testing conducted by her employer. Because the medical need for an accommodation in this case cannot be considered "obvious," and because Ritchey introduced no medical evidence to establish a nexus between her alleged disability and a need for an accommodation, summary judgment on her failure to accommodate claim was appropriate.

b. Employee's Claim of Estoppel is Not Well Grounded in Fact or Law.

Employee asserts that a prior employer, Grace Recovery, purportedly allowed Ms. Ritchey not to go on cold weather hikes, purportedly because of PTSD CP 199-201, and therefore this Court should disregard that Sound Recovery is a separate legal entity and find that Sound Recovery should be estopped from both denying Employee's alleged diagnosis of PTSD and be required to waive the element of the medical nexus between the claimed PTSD and her refusal to undergo observed urine testing by the Employer.

The Employee alleges that Grace Recovery did not maintain corporate distinctions and should be disregarded. However, she fails to provide evidentiary support for that argument citing only to RP 63-64; 154; and 177. Since that evidence was not before the Court at the time summary judgment was argued, this court need not consider it.
It is the appellate court's task to review a ruling on a motion for summary judgment based solely on the record before the trial court. *Wash. Fed'n of State Employees, Council 28 v. Office of Fin. Mgmt.*, 121 Wash.2d 152, 163, 849 P.2d 1201 (1993).

Ms. Armenta testified that she worked for Grace Recovery Center as a counsellor after working as a counsellor for Sound Recovery and when Grace Recovery Center closed, she moved back to Sound Recovery as an administrator. CP 199, RP 63-64. Since Grace Recovery had closed,

how is there a disregard of the corporate entity? Ritchey testified that when she first went to work for Grace Recovery Centers her paychecks said Sound Recovery and that her health insurance was provided by Sound Recovery when she started at Grace and was continued under the Grace policy when Grace closed and she accepted a job at Sound Recovery, CP 160-63 "...because you have to be a company for six months before you can get insurance, but when I transferred back over to Grace – or to Sound, I had insurance with Grace Recovery for a long period of time, and then they transferred me to Sound insurance...". RP 154

The issues of corporate disregard and estoppel were resolved on summary judgment and not upon the trial testimony so evidence from the trial should be disregarded.

Employee's record cite to CP 177 provides no support to disregard the corporate entity, CP 177 just talks about how some testing of patients at the Ritchey's new employer, the Tacoma Pierce County Health Department undergo observed testing.

The issue of whether the corporate form should be disregarded is a question of fact. ; Norhawk Invest., Inc. v. Subway Sandwich Shops, Inc., 61 Wn. App. 395, 398 811 P.2d 221 (1991). A trial court's findings of fact are reviewed for substantial evidence. *Hegwine v. Longview Fibre Co.*, 162 Wash. 2d 340, 352–53, 172 P.3d 688, 695 (2007).

Employee cites no legal authority in support estoppel argument that the separate legal entities between Grace Recovery, the employer who allowed Employee to miss cold weather hikes, and Sound Recovery, which imposed the urine analysis testing she refused to take, should be disregarded.

Under RAP 10.3(a)(4) and (6), an appellant's brief must include "assignments of error, arguments supporting the issues presented for review, and citations to legal authority" and references to relevant parts of the record. If an appellant's brief does not include argument or authority to support its assignment of error, the assignment of error is waived. "We need not consider arguments that are not developed in the briefs and for which a party has not cited authority." *Kiga*, 127 Wn.App. at 824, 103 P.3d 232. *Riley v. Iron Gate Self Storage*, 198 Wash. App. 692, 712–13, 395 P.3d 1059, 1071, *review denied,* 189 Wash. 2d 1010, 402 P.3d 830 (2017).

Even if the claim of corporate disregard and estoppel were supported by the facts and law such that knowledge and acceptance of the alleged PTSD diagnosis is imputed to Sound Recovery, the estoppel claim still fails. Appellant also has the burden in proving her failure to accommodate claim to offer "competent evidence establishing a nexus between the disability and the need for accommodation." *See* Defendant's

Motion, p. 10 CP 52, *quoting Riehl v. Foodmaker, Inc.*, 152 Wash. 2d 138, 147 (2004). "Competent evidence establishing a nexus between a disability and the need for accommodation will vary depending on how obvious or subtle the symptoms of the disability are. Medical expert testimony may or may not be required depending on the obviousness of the medical need for accommodation in the sound discretion of the court." *Id.*, *quoting Riehl*, 152 Wash. 2d at 148.

Employee has failed to provide the required medical nexus to the claimed diagnosis and the claimed need to be excused from any form of observed testing. Ritchey's case involves the same condition – PTSD – that was at issue in *Riehl*, where the Court found that the nexus between the disability and accommodation was not obvious. Ms. Richey's disability claim was properly dismissed with or without applying equitable estoppel to impute knowledge and acceptance of her disability upon Sound Recovery from excusing her from cold weather hikes when she worked at Grace Recovery.

E. The Court Did Not Abuse its Discretion By Vacating an Order of Default Upon the Prompt Motion of the Employer Showing Good Cause to Vacate the Judgment.

Employee's attorney had been in discussions with the Employer's attorney regarding Ms. Richey's claims. When the case moved into litigation Employer's attorney was not informed or provided a copy of the complaint despite previous discussions. CP 17-20. Mr. Cid is based in

Florida and has a number of business enterprises under his purview, including Sound Recovery. CP 17. He believed that he had forwarded the lawsuit that had been served upon his registered agent and forwarded to him in Florida upon his Washington attorney. CP 17-18. Unfortunately, that did not happen. *Id.* Appellant obtained an Order of Default upon the 21st day after service of the complaint. CP 1-7; 8-11.

The Motion to Vacate was promptly presented before a Default Judgment was entered. CP 12-20. The Civil Rules provide different standards for vacating orders of default and default judgments. CR 55(c)(1), 60(b).

CR 55(c) provides: "For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default ...." In contrast with CR 60(e), which requires that a defendant seeking to vacate a default *judgment* show a meritorious defense to the action, a party seeking to set aside an order of default under CR 55(c) prior to the entry of the judgment need only show good cause. *See Johnston v. Medina Improvement Club, Inc.,* 10 Wash.2d 44, 116 P.2d 272 (1941) (antedates Civil Rules).

The decision to set aside an order of default is generally within the discretion of the trial court, subject to the good cause requirement of CR 55(c). "Where the decision or order of the trial court is a matter of

discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker,* 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

Courts do not favor default judgments. *Griggs v. Averbeck Realty, Inc.,* 92 Wash.2d 576, 581, 599 P.2d 1289 (1979). Courts prefer to give parties their day in court and have controversies determined on their merits. *Id.* (quoting *Dlouhy v. Dlouhy,* 55 Wash.2d 718, 721, 349 P.2d 1073 (1960)).

A proceeding to vacate or set aside a default judgment is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms. *Roth v. Nash,* 19 Wash.2d 731, 144 P.2d 271 (1943). For more than a century, it has been the policy of this court to set aside default judgments liberally. *Hull v. Vining,* 17 Wash. 352, 360, 49 P. 537 (1897) (" 'where there is a showing, not manifestly insufficient, the court should be liberal in the exercise of its discretion in furtherance of justice.' ") (emphasis omitted) (quoting Robert Y. Hayne, A Treatise on New Trial and Appeal § 347, at 1046 (1884).

In this case, the Court did not abuse its discretion in setting aside the Order of Default and allowing the parties to have their day in court. Employer paid substantial attorney's fees as terms to set aside the Order of

Default CP 35and the jury verdict CP 372-374 demonstrated that Employer had meritorious defenses.

V. CONCLUSION

This court should affirm the trial court in all aspects of its decision and deny Employee the relief she is requesting in this appeal.

Employers may conduct drug tests for work related purposes and the Employer's testing protocols were justified in an industry where many treatment counsellors, including Appellant/Employee, are recovering drug or alcohol substance abusers. The testing under the supervision of health care professionals of the same gender as the employee adequately protected Employee's privacy. Employee has not shown that such drug testing procedures violate the public policy of Washington because she has not met the clarity element of her public policy claim nor has she overcome Employer's overriding justification for conducting tests with strict protocols.

Substantial evidence supports the jury's findings that restricting Employee's ability to work until she passed a drug test was not an actual or constructive discharge.

Appellant's failure to submit competent evidence of her disability or the medical nexus to her purportedly necessary accommodation supported the dismissal of that WLAD claim on summary judgment. Employee has

failed to establish that corporate disregard should apply to Sound Recovery and Grace Recovery. Even if corporate disregard and estoppel applied, that would not bridge the evidentiary gap showing the medical nexus between the alleged disability and necessity of any available accommodation.

The Court did not abuse its discretion by vacating the default order upon Employer's very prompt request to set aside the default showing proper justification and justifiable defenses for its actions, as borne out by the summary judgment and the jury's verdict and payment of significant terms.

RESPECTFULLY SUBMITTED this 21st day of October, 2019.

Richard H. Wooster, WSBA 13752
Attorney for Respondents

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Court of Appeals
Division II
State of Washington
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DECLARATION OF SERVICE

KNOW ALL PERSONS BY THESE PRESENTS: That I, Connie DeChaux, the undersigned, of Bonney Lake, in the County of Pierce and State of Washington, have declared and do hereby declare:

That I am not a party to the above-entitled action, am over the age required and competent to be a witness;

That on the 21st day of October, 2019 I sent via electronic mail and via ABC Legal Messenger a copy of the following documents:

1. Respondent's Opening Brief

properly addressed to the following person:

Matthew John Ley
McGavick Graves, P.S.
1102 Broadway Ste 500
Tacoma WA 98402
mjl@mcgavick.com

ORIGINALS to the following:

Court of Appeals Division II
950 Broadway Ste 300
Tacoma WA 98402

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

Signed at Tacoma, Pierce County, Washington this 21st day of October, 2019.

Connie DeChaux

Kram & Wooster, Attorneys at Law
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KRAM AND WOOSTER

October 21, 2019 - 3:55 PM

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