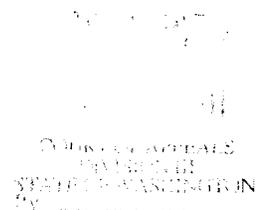


No. 29700-4



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

ROCHELLE CORNWELL, Plaintiff/Petitioner,

v.

ROSES & MORE, a corporation,  
Defendants/Respondent

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**RESPONDENT'S BRIEF**

---

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## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

The trial court did not err in granting Defendant's motion for summary judgment dismissing Plaintiff's claims for wrongful termination.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Plaintiff, Rochelle Ms. Cornwell ("Ms. Cornwell"), filed suit claiming her former employer, Roses & More ("Roses"), terminated her for filing a worker's compensation claim after injuring her hand at work. The undisputed fact is that Roses did not terminate Ms. Cornwell because of the hand injury or the worker's compensation claim. Roses terminated Ms. Cornwell because Roses received serious customer complaints about her being rude and disrespectful over the phone. Some of the customers were so offended that they told Roses' management they would take their business elsewhere if they had to continue working with her. The severity of these customer complaints was significant, given that Ms. Cornwell's primary duty was to work directly with the customers.

Roses moved for summary judgment and submitted uncontested declarations of some of the complaining customers and various co-workers. In particular, the customer declarations describe the severity of Ms. Cornwell's behavior and what the customers communicated to Roses in that regard. Roses also submitted the uncontested declarations of Roses' management, which describe not only the timing and scope of the customer complaints, but also that

the resulting decision to terminate Ms. Cornwell was made before Ms. Cornwell injured her hand or filed her worker's compensation claim, negating any inference that either event was a factor in Roses' decision to terminate her, let alone a "substantial factor" as required by Washington law.

In response, Ms. Cornwell submitted her own affidavit: a document containing hearsay, conclusory statements, suppositions, and speculative testimony not based upon personal knowledge. She claimed in her affidavit that she was a model employee and argued that Roses' supposed failure to comply with certain procedures in its employment manual created an inference that the customer complaints were made up *post hoc* and thus were a pretext for discrimination and retaliation. Roses objected to most of Ms. Cornwell's affidavit by claiming it contained inadmissible testimony incapable of establishing material issues for trial under CR 56.<sup>1</sup> (CP 108-13)

The trial court granted summary judgment on the ground that Ms. Cornwell failed to refute with admissible evidence Roses' undisputed reason for her termination. The issues before this Court are:

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<sup>1</sup> The trial court sustained Roses' objection and only considered those admissible portions of Ms. Cornwell's affidavit. (CP 108-13) (Verbatim Report of Proceeding, 22:9-23:12) Therefore, at a minimum, the following portions of Ms. Cornwell's affidavit should not be considered on appeal: CP 79:4-6, 11-15; CP 80: 19-21; CP 81: 14-16; CP 82:5-11. Roses renews this objection on appeal insofar as the Court is only to consider evidence that would be admissible at trial under CR 56. See pp. 8-9, *infra*.

1. Did Roses' reason for terminating Ms. Cornwell --- an undisputed series of escalating customer complaints --- entitle it to a judgment as a matter of law?
2. Did the undisputed fact that Roses decided to terminate Ms. Cornwell before she injured her hand and filed a workers compensation claim entitle Roses to judgment as a matter of law?
3. Can Ms. Cornwell's personal disagreement with the customers' assessment of her, or Roses' alleged lack of pre-injury documentation of Ms. Cornwell's poor work performance, establish a material issue of fact for trial in light of the un rebutted customer declarations?

### **III. STATEMENT OF THE CASE**

#### **A. ROSES IS A WHOLESALE FLORAL SUPPLY COMPANY.**

Roses is a wholesale floral supply company headquartered in Spokane, Washington. (CP 35, ¶ 2) Roses specializes in selling flowers and floral supplies (vases, ribbon, synthetic flowers, etc.) to regional retail floral shops around the Inland Northwest. (*Id.*) Roses' customers include floral shops at grocery store chains, such as Albertsons or Safeway, as well as many independent florists located in Spokane, Washington; Sandpoint, Idaho; Bozeman, Montana; and other locations. (*Id.*)

**B. WITHIN SIX MONTHS OF HER HIRE, MS. CORNWELL RECEIVED AN ESCALATING AMOUNT OF CUSTOMER COMPLAINTS.**

Roses hired Ms. Cornwell on January 19, 2009, to work in Roses' supply department. (CP 15:19-21; 36, ¶ 4) Ms. Cornwell's duties included taking wholesale orders from customers and preparing them for shipping and delivery. (*Id.*, ¶ 4) As early as February 2009, Ms. Cornwell's performance was less than satisfactory. (*Id.*) She struggled with staying on task and following instructions. (*Id.*) Many co-workers complained of her being disruptive and not attentive to her duties. (CP 36, ¶ 4; CP 48, ¶¶ 6-7) Chris Chandler, Ms. Cornwell's supervisor ultimately counseled her on this behavior on April 15, 2009. (CP 36, ¶ 4) Mr. Chandler memorialized the counseling in a memorandum. (*Id.*)

In addition to these co-worker complaints, Mr. Chandler eventually received customer complaints as well. (CP 36, ¶ 5) At first, customers complained generally about how Ms. Cornwell did not know how to do her job. (*Id.*) Mr. Chandler attributed initially these complaints to Ms. Cornwell's inexperience as a new worker who was still learning the process. (*Id.*) As a result, Mr. Chandler simply reminded Ms. Cornwell verbally to be professional and to be careful with the orders. (*Id.*)

Over the next few months, Mr. Chandler reminded Ms. Cornwell off and on to improve her phone skills; but by July 2009, it became apparent that Ms. Cornwell had refused to take his advice. (CP 36, ¶ 6) By this time, the escalating

complaints had become much more frequent and significantly more serious. (*Id.*) The complaints were no longer just about mistakes in orders, but were about her being rude, condescending, and even "flippant on the phone." (CP 36, ¶ 6; 48, ¶¶ 5-7; 54 ¶¶ 5-11; 57, ¶¶ 6-9) Some customers even communicated to Mr. Chandler that if Ms. Cornwell was their employee, they would have "fired her a long time ago." (CP 36, ¶ 7; 54, ¶ 9) Also, by early July 2009, some customers started refusing to work with Ms. Cornwell, though her primary job was to work directly with customers. (CP 36, ¶ 7; 51, ¶ 6; 54, ¶ 8; 57, ¶¶ 8-9) In fact, some customers told Mr. Chandler that if they had to continue working with her, they would change floral suppliers and take their business elsewhere. (CP 36, ¶ 7; 54, ¶ 8; 57, ¶ 9)

**C. ROSES DECIDED TO TERMINATE MS. CORNWELL IN EARLY TO MID-JULY DUE TO THE ESCALATING COMPLAINTS.**

As a result of the escalating complaints, in early to mid July 2009, Mr. Chandler informed Cheryl O'Boyle, who was in charge of human resources, that he would like to terminate Ms. Cornwell. (CP 37, ¶ 8; 60, ¶ 4) In doing so, however, Mr. Chandler explained that he did not want to effectuate the termination until his return from vacation in early August 2009 because, in part, he did not want to have to worry about finding a replacement until his return. (*Id.*) Ms. O'Boyle agreed he could delay the termination a few weeks until after his return from vacation. (*Id.*)

On July 29, 2009, after Mr. Chandler had spoken to Ms. O'Boyle, but before he left on vacation, Ms. Cornwell injured her hand at work. (CP 37, ¶ 9; 60, ¶ 5) Ms. Cornwell went to the doctor and filed for worker's compensation benefits that same day. (CP 37, ¶ 9; 60, ¶ 5) At first, the doctor did not place Ms. Cornwell on any work restrictions. (CP 23:7-22) A day or two later, the doctor placed her on restricted duty and Roses accordingly placed her on light duty. (CP 19:4-20:11, 23:24-24:16, 26:11-27:1, 27:20-25, 37, ¶ 9)

During the week of Mr. Chandler's vacation, Robin Robinson filled in as the acting supervisor of the Supply Department. (CP 37, ¶ 9) During this time, Ms. Cornwell received yet another customer complaint. (CP 37-38, ¶¶ 9-11) Ms. Robinson memorialized the complaint in writing and provided it to Mr. Chandler upon his return. (CP 31:22-32:16; 37, ¶ 11; 60, ¶ 6) This complaint further corroborated the basis for Mr. Chandler's earlier decision to terminate Ms. Cornwell. (CP 37-38, ¶ 11)

Mr. Chandler returned to work on August 12, 2009, and planned to effectuate the termination as he had decided he would do before Ms. Cornwell's injury. (CP 37-38, ¶¶ 10-11) On that day, however, Ms. Cornwell was not at work because of her hand. (CP 24:17-25:10; 37:10) The doctor had placed her on a one-week leave of absence, starting the same day as Mr. Chandler's return from vacation. (CP 24:21-25:14; 37, ¶ 10; 60-61, ¶ 7) Mr. Chandler chose to wait until

Ms. Cornwell's return before effectuating her termination. (CP 37, ¶ 10; 60-61, ¶ 7)

On August 19, 2009, Ms. Cornwell returned to work with a few restrictions.<sup>2</sup> (CP 25:1-14; 38, ¶ 12) On that day, Mr. Chandler and Ms. O'Boyle together met with Ms. Cornwell and informed her of her termination. (CP 24:17-25:23; 38, ¶ 12; 61, ¶ 8) At this meeting, Ms. Cornwell signed a document stating that her termination was based upon numerous performance issues. (CP 18:6-14; 38, ¶¶ 12-13; 42) Nonetheless, Ms. Cornwell refused to believe or acknowledge that customers disliked working with her or that they found her to be rude and disrespectful.<sup>3</sup> (CP 38, ¶ 12)

#### IV. SUMMARY OF ARGUMENT

Roses moved for summary judgment on Ms. Cornwell's disability discrimination and wrongful discharge claims. The trial court granted the motion. The trial court did not err because Ms. Cornwell provided no admissible evidence to rebut the declarations of Roses' customers, which conclusively demonstrated that, before Ms. Cornwell hurt her hand and filed a worker's compensation claim, her work performance was so poor that it jeopardized Roses' customer relationships and was the reason for her termination.

Because Ms. Cornwell was an at-will employee, Roses had the unfettered

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<sup>2</sup> Ms. Cornwell's hand injury was not a permanent impairment or severe injury. (CP 21:25-25:22)

<sup>3</sup> As discussed throughout this brief, Ms. Cornwell still disagrees with the customers' opinions of her work performance.

right to terminate her for customer complaints with or without prior notice or warning. *See Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 935 (1996). Contrary to what Ms. Cornwell argues, circumstantial evidence of Roses alleged failure to document the customer complaints or comply with certain procedures in an employment manual did not establish triable issues over whether the customer complaints in fact occurred because the customers themselves provided un rebutted declarations that described the timing and severity of what they communicated to Roses. To be clear, there is no claim in this case for breach of contract or of a personnel manual. (CP 3-6) And whether Roses followed procedure in terminating Ms. Cornwell is immaterial in the wake of the un rebutted customer declarations that establish, as a matter of law, that Roses' decision to terminate Ms. Cornwell was for a lawful reason.

The primary issue on appeal is whether Ms. Cornwell provided any admissible facts to controvert that her poor work performance and rude behavior caused customers to refuse to work with her and even threaten to terminate business relations with Roses altogether. However, Ms. Cornwell presented no such facts. As a result, the trial court did not err in granting Roses' motion for summary judgment.

## **V. ARGUMENT**

### **A. STANDARD OF REVIEW.**

#### ***1. The Summary Judgment Standard.***

The review of a summary judgment decision is *de novo*; the appellate court engages in the same inquiry as the trial court and only considers evidence that would be admissible at trial. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359 (1988). Inadmissible facts cannot create triable issues of material fact to defeat summary judgment. *Id.* A genuine issue of material fact is one upon which the outcome of the litigation depends, in whole or in part. *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 487 (2004).

In this regard, an employee opposing a summary judgment must do more than express an opinion or make conclusory or speculative statements. *Id.*; accord *Marquis v. City of Spokane*, 130 Wn.2d 97, 105 (1996). The plaintiff "must establish specific and material facts to support each element of his or her *prima facie* case." *Anica*, 120 Wn. App. at 488. Likewise, an employee's personal opinions and assessments about his or her job performance are neither material nor relevant in a wrongful termination suit. *Griffith v. Schnitzer Steel Indus.*, 128 Wn. App. 438, 447 (2005).

In sum, "[c]ourts are not to be used as a forum for appealing lawful employment decisions simply because employees disagree with them." *Hill v. BCTI Income Fund – I*, 144 Wn.2d 172, 190 n.14 (2001).

## **2. Summary Judgment in Wrongful Termination Cases.**

Washington courts analyze wrongful termination claims under the well-known burden-shifting scheme first established by the United States Supreme

Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973); *see, e.g., Anica*, 120 Wn. App. at 488; *Milligan v. Thompson*, 110 Wn. App. 628, 636-38 (2002). To survive summary judgment, Ms. Cornwell had to first establish a *prima facie* case by submitting admissible evidence that (1) she belonged to a protected class (*i.e.*, was disabled and had engaged in protected activity<sup>4</sup>); (2) she then suffered a termination; (3) she had been doing satisfactory work; and (4) her termination occurred under circumstances that raise a reasonable inference of unlawful treatment. *Anica*, 120 Wn. App. at 488. If a plaintiff provides specific, admissible facts as to these *prima facie* elements, the burden of production shifts, requiring the employer to come forward with a legitimate, lawful reason for the termination. *Griffith*, 128 Wn. App. at 447; *Anica*, 120 Wn. App. at 492; *Milligan*, 110 Wn. App. at 636-37. When the employer meets this burden, the plaintiff must then present admissible and specific facts that the employer's stated reasons are pretextual and unworthy of belief. *Griffith*, 128 Wn. App. at 447.

In other words, to defeat summary judgment, Ms. Cornwell had to establish specific facts to make out a *prima facie* case and Roses' pretext respectively:

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<sup>4</sup> Engaging in protected activity does not result in absolute immunity; an employee may always be terminated for cause or lawful reasons. *Colville v. Cobrac Svs., Inc.*, 73 Wn. App. 433, 439 (1994).

Once the employee presents a *prima facie* case, a presumption of discrimination exists and the employer must produce evidence of legitimate, nondiscriminatory reasons for the termination. . . . If the employer meets this burden, then the employee must show that the employer's stated reasons are pretextual and unworthy of belief. . . . . The employee shows pretext [1] if the proffered justifications have no basis in fact, [2] are unreasonable grounds upon which to base the termination, or [3] were not motivating factors in employment decisions for other similarly-situated employees.

*Griffith*, 128 Wn. App. at 447 (internal citations omitted) (emphasis added). As discussed below, Ms. Cornwell cannot establish a *prima facie* case or pretext due to the undisputed customer complaints.

**B. MS. CORNWELL FAILED TO ESTABLISH A *PRIMA FACIE* CASE.**

Based on the foregoing, Ms. Cornwell had to establish a *prima facie* case by affirmatively presenting *admissible* evidence that she was part of a protected class, had engaged in protected activity, and had been doing her job in a satisfactory manner when Roses decided to terminate her. Ms. Cornwell failed to establish any of these elements.

First, Ms. Cornwell did not dispute that Roses decided to terminate her before her hand injury and worker's compensation claim (*i.e.*, before she was disabled and before she engaged in protected activity). Second, Ms. Cornwell presented no facts, other than her personal opinion, that her work performance was satisfactory. Such-self serving testimony cannot defeat summary judgment in a wrongful discharge case. *Griffith*, 128 Wn. App. at 447. Indeed, in light of the

undisputed customer declarations, Ms. Cornwell could not establish that her work performance was satisfactory as a matter of law. Therefore, Ms. Cornwell did not establish a *prima facie* case of discrimination or wrongful discharge and the trial court did not err.

**C. ASIDE FROM WHETHER MS. CORNWELL ESTABLISHED A *PRIMA FACIE* CASE, THE RECORD CONTAINS ABUNDANT AND UNCONTROVERTED EVIDENCE THAT NO DISCRIMINATION OR RETALIATION OCCURRED.**

Defendant submitted six un rebutted declarations by Roses' employees, managers, and customers in support of its motion. The declarations established beyond dispute the type of customer complaints that would justify a termination under any standard of law or business. The declarations also established without contravention that Roses decided to terminate Ms. Cornwell before she injured her hand because of what the customers had been reporting to Roses. Simply put, Ms. Cornwell failed to rebut Roses' legitimate reason for her termination and failed to establish a triable issue over pretext.

Ms. Cornwell argues that Roses' supposed lack of documentation and putative phone recordings are circumstantial evidence that the customer complaints were fabricated *post hoc* and that Roses is making everything up after the fact. Though circumstantial evidence may on occasion be enough to establish a material issue over pretext, such as when perhaps an employee's word is pitted against that of his or her employer, this is not such a case. In this case, the customers themselves came forward and established the existence and severity of

their complaints and what they communicated to Roses. There simply is no genuine issue over what the customers told Roses about Ms. Cornwell's performance. See *Griffith*, 128 Wn. App. at 450 (an employer's lack of documentation of an employee's poor performance did not create a triable issue in light of the undisputed direct evidence of a lawful reason for termination).

Nonetheless, Ms. Cornwell further argues that, *in her opinion*, she was a model employee and suggests the customers are either wrong or lying.<sup>5</sup> *Brief of Appellant*, pp. 5-6. (CP 79) To reiterate, such self-assessments of work performance cannot establish a triable issue in a wrongful discharge case and the trial court did not err by giving it no weight. *Griffith*, 128 Wn. App. at 447; ("an employee's subjective beliefs and assessment as to his performance are irrelevant [on summary judgment]"); *Hill*, 144 Wn.2d at 190 n.14 ("courts must not be used as a forum for appealing lawful employment decisions because an employee disagrees with them"). It speaks volumes that Ms. Cornwell could have offered, but failed to provide any customer support or other independent evidence of her supposed "model" work performance.

Simply put, Roses presented uncontroverted independent evidence that the customer complaints in fact happened and that no discrimination or unlawful conduct took place. Roses is thus entitled to judgment as a matter of law because, in light of the abundant, independent evidence, no trier of fact could reasonable

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<sup>5</sup> Ms. Cornwell continues to disregard the well established rule in business that the customer is always right.

conclude that discrimination or retaliation was even a factor in Roses' decision to terminate Ms. Cornwell, let alone a substantial factor in their decision to terminate her:

[A]n employer will still be entitled to judgment as a matter of law if no rational trier of fact could conclude that discrimination was a substantial factor in the employer's action. [citations omitted]

For instance, an employer would be entitled to judgment as a matter of law if the record *conclusively* revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue *and* there was *abundant and uncontroverted* independent evidence that no discrimination had occurred.

*Griffith*, 128 Wn. App. at 448; *Milligan*, 110 Wn. App. at 637 (*citing Reeves v.*

*Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097 (2000))

(emphasis added). Here, the record conclusively showed with abundant and uncontroverted evidence that Roses' terminated Ms. Cornwell for lawful reasons.

**D. PLAINTIFF'S AFFIDAVIT DID NOT ESTABLISH MATERIAL ISSUES OF FACT FOR TRIAL.**

Ms. Cornwell argues the trial court erred by failing to find triable issues over her job performance, contending that had customers in fact complained about her commencing in January 2009, Roses would have recorded them over a phone-monitoring system and reviewed them with her in an April 15, 2009, counseling session with Mr. Chandler. (*Brief of Appellant*, pp. 6, 12) She further argues that her poor performance would have been documented and contemporaneously

placed in a file before her injury in accordance with a 2004 employment manual. (*Brief of Appellant*, pp. 7, 12) Four additional reasons demonstrate why these arguments did not create material issues of fact and why the trial court did not err.

First, nowhere in the record did Roses argue that the customer complaints began on January 15, 2009, when Ms. Cornwell was first hired. Instead, the record established that the customer complaints slowly accumulated and evolved over time, becoming more severe as time passed and reaching an unacceptable level sometime in early-to mid-July 2009 when customers started refusing to work with Ms. Cornwell and threatening to cease doing business with Roses if they were required to do so. (CP 36-37, ¶ 7; 51, ¶ 6; 54, ¶ 8; 57, ¶ 9) Despite all her arguments, the existence of the customer complaints is beyond dispute and alone justifies her termination.

Second, Ms. Cornwell argues a jury could reasonably infer that there were no customer complaints because Mr. Chandler's April 15, 2009, memo allegedly failed to identify the complaints. Again, in light of the sworn testimony of the complaining customers, no reasonable inference could be drawn that the complaints did not occur, did not exist, or were contrived after the fact. There simply was no evidence submitted to rebut the customer declarations.

Moreover, the so-called absence of recorded complaints in the April 15, 2009 memo is actually consistent with Mr. Chandler's declaration testimony wherein he testified that, at first, he did not attribute too much to early customer

complaints due to Ms. Cornwell's inexperience on the job. (CP 36, ¶ 5) It remains undisputed, however, that the customer complaints thereafter continued, worsened, and accumulated over time until they became so severe that they jeopardized Roses' relationship with its customers, and that is when Mr. Chandler decided to terminate Plaintiff. (CP 36-37, ¶¶ 5-7) What was written or discussed between Ms. Cornwell and Mr. Chandler in mid-April is simply immaterial too and has no bearing on what undisputedly took place over the next two or so months. Indeed, contrary to what Ms. Cornwell suggests, there was no legal or contractual duty for Mr. Chandler to document anything and his alleged failure to do so creates no material issues of fact over the existence of a legitimate reason for Ms. Cornwell's termination. The employment manual gave Ms. Cornwell no additional protections to her "at will" status and specifically reserved the right by Roses to terminate an employee without a prior warning of poor performance. (CP 123, 132)

Third, though a 2004 employment manual reserved the right of Roses to occasionally monitor its employees' use of computers, internet, phone systems, and other technology, it is undisputed that Roses never in fact deployed or utilized such technology either before or during Ms. Cornwell's employment. (CP 118:4-24) Ms. Cornwell's subjective and conclusory belief otherwise is rank speculation

that cannot establish a triable issue and should not be considered by the Court.<sup>6</sup> *Dunlap v. Wayne*, 105 Wn.2d 529, 535 (1986) (a court may not consider inadmissible evidence on summary judgment.).

Fourth, as indicated above, the alleged lack of so-called "pre-injury" documentation of the customer complaints does not negate their actual existence when the complaints are undisputedly established by the sworn testimony of the two customers themselves (and two other employees) all of whom described the timing, scope and seriousness of the complaints. Put differently, contrary to what Plaintiff argues, the outcome of this litigation does not depend on whether Mr. Chandler failed to document Ms. Cornwell's poor performance or whether he followed the 2004 employee handbook. *Morris v. McNicol*, 83 Wn.2d 491, 494 (1974) ("A 'material fact' is a fact upon which the outcome of the litigation depends, in whole or in part."); *Anica*, 120 Wn. App. at 487. There is no claim for breach of contract or of the employment manual, which expressly reserved Roses' right to terminate Ms. Cornwell without notice or prior warning of poor

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<sup>6</sup> The policy manual referred to by Ms. Cornwell does not state that Roses had any technology to monitor phone calls or that an employee was ever designated to do so. It merely notified employees that equipment is company property to be used for company purposes, and consequently, employees should not expect any right to privacy when using the company equipment. It also states that the "company may monitor these systems" without any statement that they in fact do or what systems they would monitor if chosen to do so. (CP 163) (emphasis added). Plaintiff's argument that there was in fact a monitoring system based solely on this language is an inadmissible conclusion based upon her own speculation and thus, cannot establish a material issue of fact. (CP 110) Lastly, Roses made it clear, via the undisputed deposition testimony of defendant-employee Robert Hamacher that Roses never deployed the monitoring system. (CP 118:4-25)

work performance. (CP 5, 132) Instead, the outcome of the litigation depends on whether Roses decided to terminate Ms. Cornwell before she injured her hand and filed a worker's compensation claim, and whether Roses claim of receiving serious customer complaints about Ms. Cornwell performance is "unworthy of belief" or constitutes "pretext."

As to those issues, the record is replete with undisputed facts, all of which point in one direction. Roses decided to terminate Ms. Cornwell before her hand injury because of the customer complaints it received about her and the customer threats to cease working with Roses if they had to continue working with Ms. Cornwell. To reiterate, no amount of circumstantial evidence could create a reasonable inference for trial that the customer complaints were made up because the customers submitted their sworn statements as to what they told Roses. Plaintiff simply did not dispute that. Indeed, even had Roses decided to terminate Ms. Cornwell after her injury and worker's compensation claim, the undisputed customer complaints establish conclusively an independent, nondiscriminatory reason for her termination as a matter of law under *Griffith*<sup>7</sup>, *Milligan*, and *Anica*.

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<sup>7</sup> Ms. Cornwell argues under *Griffith* that the customers' sworn statements should be disbelieved because: (1) she denies them; and (2) they were signed 16 months after her injury and termination. (Brief of Appellant, pp. 5, 11-12, 16). This argument should be rejected for at least two reasons. First, as stated above, Ms. Cornwell's opinion of her own work performance is not material. Second, though the customer declarations were executed contemporaneously with the motion for summary judgment, the declarants provide sworn, admissible testimony based upon their personal knowledge and recollection of the events as they happened. Ms. Cornwell's argument that the trial court erred by relying upon such admissible evidence is contrary to CR 56(e). The purpose behind CR 56 is for the Court to review affidavits or declarations to determine whether a trial is warranted. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Furthermore, Ms. Cornwell mischaracterizes the record by claiming there was no contemporaneous documentation of the customer complaints. Roses submitted a memo prepared by Mr. Chandler, dated August 4, 2009. (CP 44) Though the memo was dated August 4, 2009, it was undisputed that Mr. Chandler started the memo much earlier, supplementing it over time with new complaintants. (CP 37, ¶ 8; 44) Likewise, Robin Robinson documented a customer complaint about Ms. Cornwell while Mr. Chandler was on vacation. (CP 31:22-32:16; 45-46) Thus, there is undisputed contemporaneous documentation that is consistent with and corroborated by the ongoing customer complaints, and more importantly, no documentation exists to the contrary or which would even hint that the customer complaints were contrived after the fact, fake, or untrue. The fact that the documentation was dated after Ms. Cornwell's injury is not material given the undisputed declarations of Ms. Carr and Ms. French, and the timing and severity of the customer complaints.<sup>8</sup>

Lastly, the Court should not be tempted to reverse the trial court's ruling based on Ms. Cornwell's contention that Roses and its customers are untruthful or biased, suggesting that only a jury can decide such issues. (*Brief of Appellant*, pp. 5-6, 16) Courts consistently hold such arguments do not defeat summary

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<sup>8</sup> Additionally, proximity in time between the commencement of the protected activity and discharge does not give rise to an inference of impermissible activity when, as here, there is undisputed, direct evidence of poor work performance. *Compare Anica*, 120 Wn. App. at 491 ("Proximity in time between the protected activity and the employment action when coupled with evidence of satisfactory work performance supports an assertion of retaliatory motive.") (emphasis added).

judgment. *See Wessel v. Buhler*, 437 F.2d 279, 282 (9th Cir. 1971) ("Of course, the jury could have disbelieved the denials, but disbelief does not become a substitute for affirmative evidence."); *Nat'l Union Fire Ins.*, 701 F.2d 95, 97 (9th Cir. 1983) ("The true thrust of National's argument is that much of the evidence upon which the court relied came from employees of Argonaut and its broker, whose interests are identical and biased. National contends that it should have the opportunity to impeach them at trial. However, neither a desire to cross-examine an affiant nor an unspecified hope of undermining his or her credibility suffices to avert summary judgment."). *See also Soar v. Nat'l Football League Player's Assoc.*, 550 F.2d 1287, 1289 n.4 (1st Cir. 1977) ("A court is not obliged to deny an otherwise persuasive motion for summary judgment on the basis of a vague supposition that something might turn up at trial.").

In sum, the record conclusively reveals the existence of severe customer complaints about Ms. Cornwell and that Roses decided to terminate her because of those complaints. Ms. Cornwell simply submitted no affirmative facts to refute the declarations of Ms. Carr, Ms. French, or Mr. Iseman other than to disagree with their assessments of her, which is insufficient to establish a material issue of fact for trial. *Griffith*, 128 W. App. at 447. The trial court's summary judgment dismissal of Ms. Cornwell's lawsuit was proper and should be affirmed.

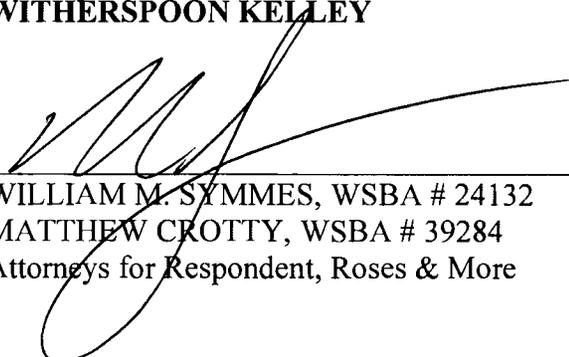
## VI. CONCLUSION

Ms. Cornwell argues that there are two reasons why a jury should decide

her case. First, she disagrees with customers' assessment of her as set forth in the customers' declarations. Second, she claims that the customer complaints are false or made up, arguing that had the customers actually complained, Roses would have documented it in her personnel file. The first argument is not even admissible or material in wrongful termination case under *Griffith*. The second argument, based simply on a false premise, is not material because the customers who in fact complained about Ms. Cornwell submitted sworn statements that described the timing, scope, and severity of the complaints they made to Roses about her. In the wake of this abundant and uncontroverted evidence, no trier of fact could reasonably conclude that discrimination or retaliation had any factor to play in Roses' decision to terminate her.

DATED, this 5th day of July, 2011.

**WITHERSPOON KELLEY**



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 5th day of July, 2011, the within document described as RESPONDENT'S BRIEF was delivered to the following persons in the manner indicated:

Gregory Staeheli, WSBA #4452 Attorney at Law 301 W. Indiana Avenue Spokane, WA 99205	Via Hand Delivery <input checked="" type="checkbox"/> Via United States Mail <input type="checkbox"/> Via Federal Express <input type="checkbox"/> Via Facsimile Transmission <input type="checkbox"/> Via Electronic Mail at: <input type="checkbox"/> <u>gs@staehelilaw.com</u>
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Alicia Asplint