

APR 30 2012

CASE NO. 301648

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

LISA BUHR,

Appellant,

vs.

STEWART TITLE COMPANY,

Respondent.

BRIEF OF DEFENDANT-RESPONDENT
STEWART TITLE COMPANY

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I. INTRODUCTION

Appellant-Plaintiff Lisa Buhr (“Buhr” or “Plaintiff”) asserted employment discrimination, wrongful termination and wage claims against Stewart Title of Spokane, LLC (“Stewart Title of Spokane”) and Stewart Title Company. Stewart Title of Spokane was Buhr’s employer. Stewart Title Company was not Buhr’s employer. Because Stewart Title Company had no employment relationship with Buhr, it was not a proper defendant and could not be held liable for Plaintiff’s claims arising out of laws which govern the employment relationship. The trial court properly granted summary judgment in favor of Stewart Title Company on this basis.

Plaintiff now appeals, arguing that the trial court erred in dismissing Stewart Title Company on summary judgment. Although she did not timely appeal the issue, Plaintiff also argues that the trial court abused its discretion by denying her motion to allow additional discovery before granting summary dismissal. The trial court acted within its discretion to deny Plaintiff’s motion for additional discovery, and Buhr’s claims against Stewart Title Company were, and remain, without merit. Defendant Stewart Title Company submits this brief in answer to Plaintiff’s appeal, and asks the Court to affirm the trial court’s order granting summary judgment dismissal for Stewart Title Company.

II. STATEMENT OF ISSUES

1. Whether the trial court's denial of Plaintiff's motion for additional discovery can properly be reviewed on appeal given Plaintiff's failure to properly raise and preserve the issue, and if so, whether the trial court abused its discretion by denying Plaintiff's motion for additional discovery where she had ample opportunity to obtain the discovery she sought within the discovery period and previously stipulated to the established discovery deadline.

2. Whether the trial court properly granted summary judgment for Stewart Title Company on Plaintiff's employment claims where Plaintiff had no competent evidence that Stewart Title Company was her employer, and the record evidence conclusively established that Stewart Title of Spokane was her only employer.

III. STATEMENT OF THE CASE

Plaintiff sued Defendants Stewart Title of Spokane and Stewart Title Company in state court in October 2009. (CP 1-20.) In Plaintiff's First Amended Complaint ("Complaint"), Plaintiff asserted a variety of wrongful termination and disability discrimination claims against both Defendants. (CP 20-34.) Specifically, Plaintiff sued Stewart Title of Spokane and Stewart Title Company for alleged violations of the

Washington Law against Discrimination, RCW 49.60.010 *et seq.*; Washington State Family Leave Act, RCW 49.78.010 *et seq.*; Washington Minimum Wage Act, RCW 49.46.010(5); Washington Wage Rebate Act, 49.52.050; and for alleged wrongful discharge. (CP 28-32.)

The trial court issued an initial scheduling order setting a trial date of March 14, 2011 and a discovery cutoff of January 10, 2011. (*See* CP 85, 90, 126.) Plaintiff served discovery on Defendants in the fall of 2010, and Defendants timely served proper objections and responses to Plaintiff's requests. (CP 126; RP 19.) Plaintiff's counsel never sought a ruling from the court on Defendants' objections to that discovery during the discovery period.

Defendants attempted to schedule depositions in the fall of 2010, but because Plaintiff's counsel, Mary Schultz, had a busy trial schedule, Ms. Schultz was not able to attend depositions or conduct other discovery at that time. (RP 13-14, 19-20.) To accommodate Ms. Schultz's schedule, Defendants' counsel agreed to continue the trial date so that depositions for identified material witnesses could take place outside of the discovery deadline and so that the parties could participate in mediation before trial. (CP 82-86; RP 13-14, 19-20.) Defendants' counsel made this agreement with the specific understanding that other case scheduling deadlines,

including the discovery deadline, would not be extended. (CP 82-84; RP 29.)

On February 11, 2011, Plaintiff's counsel filed the parties' Joint Motion to Continue Trial Date reflecting their agreement. (CP 82-86.) The Joint Motion identified depositions which had been scheduled outside of the discovery deadline and sought to continue the trial setting to August 8, 2011, "with the caveat that certain case scheduling deadlines be closed," including the discovery deadline. (CP 82-86.) Plaintiff's counsel filed the Joint Motion along with the corresponding Declaration of William J. Schroeder in support of the motion and was at all times aware and in agreement that the discovery period – which ended a month prior on January 10, 2011 - would remain closed. (CP 82-86; RP 20-21, 23, 29.)

At the hearing on the Joint Motion, Plaintiff's counsel unexpectedly requested that the Court extend the discovery period without any justification or basis for doing so. (RP 5-8.) The Court heard Plaintiff's counsel's arguments, continued the trial date, and issued a new case scheduling order consistent with the parties' agreement as set forth in the Joint Motion. (CP 87-88.) The discovery deadline remained closed. (CP 87-88.)

Then, on March 21, 2011, more than three months after the discovery deadline, Plaintiff filed a Motion to Allow Additional Discovery

and Reset Discovery Cutoff (“Motion to Allow Additional Discovery”). (CP 90-95.) Defendants responded that good cause did not exist to reopen the discovery period because: (1) Plaintiff already possessed the information she claimed she needed; (2) Plaintiff had ample opportunity to conduct discovery in accordance with the rules of procedure during the discovery period and took no action during the discovery period to expand or extend discovery; and (3) Plaintiff had previously agreed the discovery period should remain closed and had jointly requested entry of an order confirming same. (CP 129-135.) Defendants further explained that reopening the deadlines would unfairly prejudice Defendants because Defendants would be forced to incur additional costs and expenses for no purpose other than to accommodate an exploratory venture that would not have resulted in the discovery of any new facts or additional evidence relevant or reasonably calculated to lead to evidence supporting Plaintiff’s claims. (CP 130, 134.) On April 15, 2011, the trial court held a hearing on Plaintiff’s Motion and after considering the parties’ briefing and oral argument, denied the Motion. (RP 12, 36; CP 249-250.)

On June 2, 2011, Stewart Title Company moved for summary judgment on Plaintiff’s claims against it because Plaintiff could not establish the existence of an employment relationship with Stewart Title Company, and Plaintiff did not properly allege, nor could she establish,

that Stewart Title Company was vicariously liable for her claims against Stewart Title of Spokane. (CP 254-266.)

The ultimate facts relevant to summary judgment were simple and compelling: Stewart Title of Spokane was Buhr's employer; Stewart Title Company was not. Plaintiff was employed by Stewart Title of Spokane from June 30, 2006 to October 1, 2007. (CP 282.) She was terminated by that entity (her employer) for falsifying hours reported on her timecard. (CP 274.)

During her employment with Stewart Title of Spokane, Plaintiff reported to Anthony Carollo ("Carollo"), President of Stewart Title of Spokane. (CP 279.) The work Plaintiff performed was for the exclusive benefit of Stewart Title of Spokane. (CP 278.) Plaintiff's compensation and benefits were provided by Stewart Title of Spokane. (CP 278.) Stewart Title of Spokane carried workers' compensation insurance for Plaintiff's benefit and paid employment taxes in connection with Buhr's employment. (CP 283.)

During her deposition, Plaintiff testified that Stewart Title of Spokane was her employer and that she did not have an employment relationship with Stewart Title Company:

Q. Now, Ms. Buhr, you were hired by Stewart Title of Spokane, correct?

A. Yes.

Q. And the work you performed was for Stewart Title of Spokane, correct?

A. Yes.

Q. And you were paid by Stewart Title of Spokane, correct?

A. Yes.

Q. And you were supervised by individuals who were employed by Stewart Title of Spokane?

A. Yes.

Q. And you received employee benefits through Stewart Title of Spokane?

A. Yes.

Q. Were you ever employed by a different Stewart company entity other than Stewart Title of Spokane?

A. No.

Q. Who did you consider your employer to be when you worked at Stewart Title of Spokane?

A. Anthony Carollo.

(CP 278-279.)

In Plaintiff's June 21, 2011 response to the summary judgment motion, Plaintiff referenced various irrelevant and inadmissible documents and other "evidence," but Plaintiff failed to present any competent evidence that Plaintiff had an employment relationship with Stewart Title

Company. (CP 1838-1855.) Plaintiff's response gave no indication that the denial of her Motion to Allow Additional Discovery negatively impacted her response or ability to respond in any way, and she did not reurge her Motion to Allow Additional Discovery or make an offer of proof in her response to the summary judgment motion. (CP 1838-1855.) On July 15, 2011, the trial court granted Stewart Title Company's Motion for Summary Judgment, dismissing all of Plaintiff's claims against Stewart Title Company. (CP 1990-1994.) Plaintiff timely appealed the order of summary judgment. (CP 1996-1997.)

IV. ARGUMENT

A. Standard of Review.

A trial court's grant of summary judgment is reviewed *de novo*. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

A trial court's grant or denial of a motion for continuance is reviewed for abuse of discretion. *Qwest*, 161 Wn.2d at 358. A court does not abuse its discretion where "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established

through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.” *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

B. The Trial Court Did Not Abuse Its Discretion By Denying Plaintiff’s Motion to Allow Additional Discovery.

1. Plaintiff Failed to Preserve Her Argument That She Required Additional Evidence.

For the first time, Plaintiff contends in her brief that the court erred in denying her Motion to Allow Additional Discovery and further asserts that because she was not able to conduct sufficient discovery prior to summary judgment, the order granting summary judgment must be vacated.¹ (Appellant’s Brief at 23-24.)

When a party requires additional discovery in order to respond to summary judgment, the proper way to request that evidence is through a CR 56(f) motion. Under Civil Rule 56(f), a party may request that a motion for summary judgment be denied if additional discovery is needed to defend the motion. CR 56(f) specifically provides:

¹ Plaintiff’s Brief does not explicitly state that she needed the additional discovery requested in order to respond to summary judgment, but to the extent Plaintiff seeks to appeal the Court’s denial of her Motion to Allow Additional Discovery independently of summary judgment, Plaintiff has not preserved this discovery ruling for appellate review. Plaintiff’s Notice of Appeal sought review only of the trial court’s order granting Stewart Title Company’s summary judgment, not the court’s denial of her Motion to Allow Additional Discovery.

Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A court can deny a motion for additional discovery for a number of reasons: “(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.” *Qwest*, 161 Wn.2d at 369-70. Denial is proper if grounded on any one of these three prongs. *Pelton v. Tri-State Memorial Hosp., Inc.*, 66 Wn. App. 350, 356, 831 P.2d 1147 (1992).

A party must comply with CR 56(f) to preserve his or her contention that summary judgment should be delayed or denied on that basis. *See MRC Receivables Corp. v. Zion*, 152 Wn. App. 625, 628-29, 218 P.3d 621 (2009); *Guile v. Ballard Comm. Hosp.*, 70 Wn. App. 18, 24-25, 851 P.2d 689 (1993); *Turner*, 54 Wn. App. at 693-94. A contention by a party that she required additional evidence to respond to summary judgment cannot be successfully presented for the first time on appeal. *See Id.*; accord RAP 2.5 (permitting an appellate court to refuse to review any claim of error which was not raised in the trial court).

In this case, Plaintiff never filed a CR 56(f) affidavit or otherwise indicated that she needed more time to gather facts to oppose Stewart Title Company's summary judgment motion. Plaintiff's Motion to Allow Additional Discovery did not state that Plaintiff required additional evidence to respond to summary judgment; it was filed over two months before Stewart Title Company filed its summary judgment motion and it made no mention of summary judgment. (CP 90-95.)

Because Plaintiff failed to seek a continuance under CR 56(f) or otherwise indicate (even in the alternative) that she required additional evidence to respond to summary judgment, the trial court acted properly in hearing the motion on the basis of the showing before it.

2. The Court's Denial of Plaintiff's Motion to Allow Additional Discovery Was Appropriate Under the Standard Applicable to A Motion for Continuance.

Even if Plaintiff's Motion to Allow Additional Discovery was construed as a motion for additional time to gather facts to oppose summary judgment (which it was not), the trial court had ample reason to deny Plaintiff's motion under the standard applicable to CR 56(f) motions.

a. Plaintiff Had No Good Reason For Delay.

Plaintiff did not offer a good reason for her delay in obtaining evidence during the fourteen-plus months available prior to the discovery deadline. Plaintiff's Motion to Allow Additional Discovery was based on

her alleged need for three categories of documents and a 30(b)(6) deposition of a corporate representative from Stewart Title Guaranty Company, which was not a named defendant in the case. (CP 91-93; RP 15-18.) The specific documents Plaintiff claimed she needed were (1) “alarm system cards upon which Stewart Title bases its discharge of [Plaintiff]”; (2) “evidence that it [Stewart Title of Spokane] ever paid [Plaintiff] for the hours reported on her timecard on the date she was discharged”; and (3) “additional employee timecards . . . to allow Plaintiff to investigate the consistency of the alleged management policy directing employees not to list time worked.” (CP 91-93.)

Defendants produced documents in categories (1)² and (2)³ to Plaintiff. (CP 127, 132-133.) To the extent Plaintiff did not receive

² Defendant Stewart Title of Spokane had previously produced all alarm records in its possession, including the record that was relied upon by Mr. Carollo in connection with the termination of Plaintiff’s employment. The records were provided on September 23, 2010, with Defendant Stewart Title of Spokane’s responses to Plaintiff’s Request for Production. (CP 127, 132.) The documents were produced even though Plaintiff and her counsel already had them in 2008 from state agency proceedings. (CP 127, 132.)

Plaintiff also argued that she needed PIN numbers that corresponded to the alarm records. (RP 33-36.) The trial court ordered Defendants to produce these records (RP 36), and Defendants promptly did so.

³ Plaintiff’s Motion argued that Defendants did not produce evidence that Plaintiff was paid for the hours reported on her final timecard when she was discharged. (CP 92.) Plaintiff never requested this information from Defendants in Interrogatories or Requests for Production of documents during the discovery period; however, Defendants voluntarily provided the records to Plaintiff on April 8, 2011, after receiving Plaintiff’s Motion. (CP 127, 133.)

documents from category (3) or the requested 30(b)(6) deposition, she had ample opportunity to obtain discovery of these during the discovery period and gave no good reason for her failure to do so. (CP 133-134.)

With regard to the documents requested in category (3), Plaintiff's Motion asserted that additional discovery should be allowed so that she might obtain all hourly timecards for Stewart Title of Spokane employees between January 2007 and December 2007. (CP 92-93.) It was and remains Defendants' position that those records were not relevant to Plaintiff's specific claims in this case and were sought for purposes unrelated to the claims and issues to be resolved. (CP 133.) Defendants' timely objected on this basis to Plaintiff's request for production of those records. (CP 126-127, 133.) Plaintiff's counsel never sent Defendants' correspondence requesting additional records, nor did she seek a ruling from the Court on Defendants' objections during the discovery period. (CP 126-127.) Instead, Plaintiff and her counsel waited until discovery closed, and until after depositions scheduled outside the discovery period for their convenience were completed, to challenge Defendants' valid objections. (CP 126-127, 133.)

Plaintiff also contended that she should be allowed to take a CR 30(b)(6) deposition in order to determine whether there were connections between Stewart Title Guaranty Company – which was never a party to

this litigation – and Stewart Title of Spokane, to potentially assert claims against Stewart Title Guaranty Company in the case. (CP 93.) Plaintiff had the entire discovery period to explore any connections between Stewart Title Guaranty Company and Stewart Title of Spokane, but she did not. (CP 134.) Plaintiff had a specific opportunity to investigate the relationship between these two entities when she deposed Stewart Title of Spokane’s President, Mr. Carollo, but her attorney elected not to do so. (CP 134.)

In effect, in her Motion to Allow Additional Discovery, Plaintiff and her counsel sought a “do over” on discovery in the hope of finding some evidence supporting Plaintiff’s claim. Allowing the requested discovery months after the close of the discovery period to determine the potential liability of a third-party would have unfairly prejudiced Defendants by requiring them to expend additional time and resources participating in additional depositions and engaging in additional discovery which could and should have been conducted during the discovery period. (CP 134.)

Plaintiff had over fourteen months to pursue and engage in discovery under the rules of procedure and she elected not to do so. Moreover, Plaintiff agreed, through counsel, that both the discovery period and the deadline to join additional parties would remain closed. (CP 82-

86.) Plaintiff's only explanation for her failure to obtain the discovery she claimed she needed within the discovery period was her counsel's busy trial schedule and limited resources. (RP 13-14.) A heavy trial schedule is not a reasonable excuse for not complying with court orders.⁴ Thus, the trial court's denial of Plaintiff's Motion to Allow Additional Discovery was proper and denial of a CR 56(f) continuance would have been proper on that basis even if Plaintiff had properly requested one.

b. Plaintiff Did Not State How Additional Discovery Would Have Affected the Trial Court's Summary Judgment Analysis.

More importantly, Plaintiff did not tell the trial court, nor does she tell this Court, how the additional evidence she claims she needed would have raised a genuine issue of material fact relevant to her claims against Stewart Title Company. (CP 90-95.) Neither the documents nor the deposition sought had any relevance to the relationship between Plaintiff and Stewart Title Company. The alarm records and timecards had no bearing on any employment relationship between Plaintiff and Stewart Title Company. Likewise, Plaintiff contended that she should be allowed to take a CR 30(b)(6) deposition in order to determine the "liability and/or

⁴ This conclusion is supported by disciplinary action cases which recognize that "[a] heavy workload is not an excuse," *In re Loomos*, 90 Wn.2d 98, 103, 579 P.2d 350 (1978), and that "[a] case overload is a matter of personal control and not a defense." *In re Kennedy*, 97 Wn.2d 719, 723, 649 P.2d 110 (1982).

connection of Stewart Title Guaranty Company,” not the liability and/or connection of Stewart Title Company. (CP 93.) Plaintiff’s Motion also suggested that she needed the 30(b)(6) deposition to determine which entity paid employees or from what account employees were paid (CP 93.), but Plaintiff herself testified that she was paid by Stewart Title of Spokane. (CP 278.) Hence, none of the additional discovery would have raised a genuine issue of material fact for purposes of Stewart Title Company’s summary judgment motion. Because Plaintiff could not and did not explain how additional evidence would have raised a genuine issue of material fact, the trial court’s denial of Plaintiff’s Motion to Allow Additional Discovery was well within its discretion and denial of a CR 56(f) continuance would have been proper on that same basis if she had requested one.

3. The *Burnet* Standard Does Not Apply to Plaintiff’s Motion to Allow Additional Discovery.

By repeated citation to *Blair v. TA-Seattle East, No. 176*, 171 Wn.2d 342, 344, 254 P.3d 797 (2011), Plaintiff’s Brief appears to suggest (though it never explicitly states) that the trial court improperly failed to apply the standard set forth in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), in evaluating Plaintiff’s Motion to Allow

Additional Discovery. (Appellant's Brief at 20-24.) However, *Burnet* is inapplicable.

In *Burnet*, the Washington Supreme Court reversed a Court of Appeals decision affirming a trial court's ruling limiting the scope of discovery and precluding testimony on one of the plaintiff's claims in response to the defendant's rule 26(f) motion. 131 Wn.2d at 492. The Washington Supreme Court held that the trial court's sanction of limiting discovery and precluding testimony was an abuse of discretion because the trial court did not first find a willful discovery violation by the Burnets and substantial prejudice to the defendant and did not consider "a less severe sanction that could have advanced the purposes of discovery and yet compensated [the defendant] for the effects of the Burnets' discovery failings." *Id.* at 497.

This case presents a much different situation. In this case, Defendants did not move the trial court to limit the scope of discovery or strike evidence that Plaintiff had previously obtained. Plaintiff moved the court for discovery of additional evidence three months after the close of discovery, and the court denied Plaintiff's request where she had failed to develop her case over fourteen months of discovery and the parties had previously specifically agreed that the discovery deadline would remain closed.

The parties' case schedule order provided a discovery deadline of January 10, 2011. Plaintiff did not disclose the additional discovery sought until she filed her Motion to Allow Additional Discovery on March 20, 2011. At the hearing on the motion and in her briefing, Plaintiff's counsel contended that good cause existed for permitting the additional discovery because her busy trial schedule did not permit her to complete discovery within the discovery period established by the trial court and she had "assumed" that when the parties previously moved to continue the trial date, the trial court would have automatically pushed back the discovery deadline – an argument that was wholly inconsistent with her submission of the agreed order and joint motion and communications with undersigned counsel. (RP 13-14; *see also* CP 104.) After considering the parties' briefing and oral arguments, the trial court determined that "the case record" and the "basis for [Plaintiff's] Motion" did not justify additional discovery and the motion should be denied. (CP 249-250.)

Unlike *Burnet*, in this case the Defendants did not request, and the court did not impose, any sanction on Plaintiff. Rather, the court acted within its discretion to deny Plaintiff's request for additional discovery where Plaintiff presented no good cause for amending the case schedule order and extending the discovery deadline.

Plaintiff's reference to *Burnet* should additionally be disregarded because Plaintiff did not raise the *Burnet* factors before the trial court. Plaintiff implies for the first time on appeal that the Court failed to properly apply the standards set forth in *Burnet*, but her failure to raise the *Burnet* factors to the trial court precludes their consideration on appeal. RAP 2.5 ("The appellate court may refuse to review any claim of error which was not raised in the trial court."); RAP 9.12 ("On review of an order granting or denying summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.").⁵ Because Plaintiff completely failed to raise the *Burnet* factors before the trial court, she has waived this issue for appeal.

4. The Court's Denial of Plaintiff's Motion to Allow Additional Discovery Was Appropriate Even Under the Standards Set Forth in *Burnet*.

Even if *Burnet* did apply to this case, the record regarding the additional discovery requested indicates that in the colloquy between the bench and counsel, all of the factors identified in *Burnet* were considered

⁵ At the hearing on Plaintiff's Motion to Allow Additional Discovery, the trial court specifically asked Plaintiff's counsel, "Is prejudice a test here?" and Plaintiff's counsel responded, "I don't know that it is." (RP 26.) Plaintiff did not properly object to the court's order and gave the court absolutely no indication that the *Burnet* factors were an issue. (CP 248.)

in the trial court's determination of whether to permit additional discovery.

Plaintiff's counsel did not dispute her noncompliance with the court's case scheduling order. Instead, she stated that she allowed the discovery deadline to pass because of her busy trial schedule and she "assumed" that because the parties negotiated a continuance of the trial date that the discovery deadline would also be reset. (RP 13-14, 24-25.) Plaintiff's counsel claimed that she did not understand that the parties' agreement required that the discovery deadline would remain closed, despite having revised and filed the order that was entered. (RP 13-14, 24-25.)

Plaintiff willfully disregarded the court order without any reasonable excuse or justification. A heavy trial schedule is not a reasonable excuse for not complying with court orders.⁶ Moreover, the trial court rejected Plaintiff's claim that she was not aware the parties' agreement provided for the discovery cutoff to remain in place (RP 33.), noting in its order that Plaintiff's counsel initialed the declaration in support of the joint motion to continue the trial date, which specifically stated that the discovery cutoff would be "closed." (CP 249.) The court

⁶ See *supra* n.4.

justifiably and properly rejected Plaintiff's excuse and found her failure to conduct discovery willful.

Defendants would have been materially prejudiced if Plaintiff's request to reopen discovery had been granted. Defendants' response to Plaintiff's Motion specifically articulated that Defendants would be unfairly prejudiced if forced to spend additional time, costs, and expenses defending additional depositions and engaging in additional discovery which would not result in the discovery of relevant facts or evidence and which should have been conducted during the discovery period. (CP 130, 134.) From these facts, the trial court clearly concluded that Defendants would be prejudiced by an extension of the discovery period.

Lesser "sanctions" were not appropriate in this case. Plaintiff proposed for the court's consideration an alternative to resetting the discovery deadline. (RP 18.) In the alternative, Plaintiff asked that the court allow her to discover the specific documents and conduct the deposition she identified. (RP 18.) The court clearly considered these arguments and rejected them under the unique circumstances presented – including Plaintiff's agreement to close discovery. As such, the trial court

properly exercised its broad discretion in denying Plaintiff's Motion to Allow Additional Discovery.⁷

C. The Trial Court Properly Granted Summary Judgment in Favor of Stewart Title Company.

The only issue properly on appeal in this case is whether summary judgment was properly granted in this case. The record reflects that Plaintiff presented no admissible evidence in response to Stewart Title Company's summary judgment which would have allowed a fact finder to conclude she was an employee of Stewart Title Company or that Stewart

⁷ As noted earlier, Plaintiff cites to *Blair*, 171 Wn.2d 342, a recent Washington Supreme Court decision applying *Burnet*. In *Blair*, the Supreme Court held that the trial court's exclusion of the testimony of late-disclosed witnesses in response to the opposing party's motion to strike was a sanction that could not be imposed absent record findings by the trial court explaining its rationale under *Burnet*. *Id.* at 348-49. The circumstances of this case differ markedly from those in *Blair*.

In *Blair*, the trial court provided no indication whatsoever of its reasoning, and there was no oral argument before the trial court entered its orders. 171 Wn.2d at 348-49. Here, the record clearly reflects that the trial court performed the necessary consideration to provide an aid to the appellate court in reviewing the trial court's exercise of discretion. Here, the trial court made a discretionary evidentiary ruling with the benefit of briefing and oral argument by the parties. The record includes a lengthy colloquy between the parties and the trial court regarding the additional discovery Plaintiff sought (RP 12-36), and it indicates that all of the *Burnet* factors were considered in determining whether to permit additional discovery.

Moreover, the Supreme Court had not decided *Blair* when the trial court was considering whether to allow additional discovery. Thus, the trial court operated without that guidance at the time that it ruled on the matters at issue. In this circumstance, the procedural formality required by *Blair* would not control as to invalidate otherwise substantively proper rulings. See *State v. Rhoads*, 101 Wn.2d 529, 681 P.2d 841 (1984).

Title Company could be liable for the alleged actions of her actual employer, Stewart Title of Spokane.

1. Plaintiff's "Evidence" of an Employment Relationship With Stewart Title Company Is Irrelevant and Inadmissible.

In her summary judgment briefing, Plaintiff attempted to show that Stewart Title Company was her employer by making arguments unsupported by record evidence which were factually and legally wrong, and by attempting to confuse the trial court by conflating Stewart Title Company with other legal entities bearing a similar name.

Plaintiff referenced materials published by various companies affiliated with Stewart Information Services Corporation ("SISCO"), the publicly-traded entity whose Securities and Exchange Commission ("SEC") filings were submitted by Plaintiff as Exhibit 57. (CP 1840, referencing Plaintiff's Exhibit (hereafter "Pl.'s Ex.") 57.) However, neither SISCO nor the other entities referenced are parties to this case. Because Plaintiff never took depositions of representatives of those entities, and never questioned Stewart Title Company or SISCO executives about the documents on which she relied or the actual contractual and business relationships between the various companies, the testimony in her Declaration and her representations to the Court about

what the documents say and mean amount to pure speculation based on inadmissible hearsay.⁸

Plaintiff also tried to blur the issue by referring to all of the companies using a “Stewart National,” “Stewart Title,” or “Stewart” identifier. For example, Plaintiff referenced Exhibit 25, a letter sent to her by Nita Hanks on Stewart Employee Services letterhead. (CP 1847; *see also* Appellant’s Brief at 17-18.) However, Plaintiff inaccurately referred to Ms. Hanks as an executive of “Stewart Title Employee Services.” (CP 1847; Appellant’s Brief at 17.) There was no competent record evidence before the court regarding the relationship between Stewart Employee Services and Stewart Title Company. Nonetheless, Plaintiff speciously pointed to the document as proof that Stewart Title Company was Plaintiff’s employer.

Likewise, Plaintiff submitted Exhibit 57, SISCO’s filing with the SEC, in connection with her opposition to Stewart Title Company’s motion. (CP 1840-1842.) Plaintiff characterized statements in the SEC filing about the businesses which comprise SISCO as evidence that she worked for Stewart Title Company, despite the fact that Stewart Title of

⁸ Defendant objected to Plaintiff’s use and characterization of her Exhibits 4, 10, 11, 13, 17, 18, 25, 27, 52, 57, and 60, among others, to the extent they represent inadmissible hearsay and are characterized in a manner inconsistent with their substance. (CP 1904 n.1.)

Spokane was listed in the same document as a distinct legal entity which was one of the publicly-traded company's subsidiaries (Pl.'s Ex. 57 at Ex. 21-1.) and despite the absence of any information in the document detailing Stewart Title Company's involvement with Plaintiff's employment in any form. Again, no relevant testimony was taken in the case about the relationships between the various SISCO-affiliated entities. Despite that, Plaintiff argued that Exhibit 57 is evidence that Plaintiff worked for Stewart Title Company, the Defendant in this case, which is false.

Those are just representative examples. Plaintiff also submitted as exhibits multiple documents she received in connection with her employment at Stewart Title of Spokane, from which she argued that generic references in the documents to the employer as "Stewart Title" or "Stewart" mean that Stewart Title Company was also her employer. That assertion was and is both legally improper and factually inconsistent with the record evidence. For example, Plaintiff's Exhibit 1, her job application, contained a reference to "Stewart" on the top of the document and stated at the bottom that it should be submitted to "Stewart Title Guaranty – Houston Employee Services." (CP 1842.) Nothing in the document suggested Stewart Title Company, the Defendant in this case, was involved in any way. Similarly, other records relied upon by Plaintiff

contained references to “Stewart,” “Stewart Employee Services” or “Stewart Title” generically, none of which is credible evidence that could be sufficient to establish the legal entity Stewart Title Company employed Plaintiff.⁹ Plaintiff’s argument appeared to be (and still seems to be) that use of the name “Stewart” or “Stewart Title” means the documents automatically refer to Stewart Title Company. That argument is meritless.

Plaintiff also argued that the employee handbook she submitted as Exhibit 52 – which identified the employer as Stewart Title of Spokane on the cover of the handbook – contained references to SISCO and other entities, which Plaintiff claims as evidence of her employment by Stewart Title Company. (CP 1843-1845.) However, the document was unique to Stewart Title of Spokane – there is no evidence other SISCO-affiliated entities used the exact same handbook – and Plaintiff testified at her deposition that she never received a copy of Exhibit 52 and did not rely on it in connection with her employment with Stewart Title of Spokane:

Q. Did you receive a copy of the Stewart Title of Spokane associate handbook in connection with your employment with Stewart Title of Spokane?

A. I did not.

⁹ See Pl.’s Ex. 4, Pl.’s Ex. 5 and Pl.’s Ex. 6, referencing Stewart Employee Services; Pl.’s Ex. 10 and Pl.’s Ex. 13, referencing “Stewart Title”; and Pl.’s Ex. 15 and Pl.’s Ex. 16, referencing “Stewart,” among others.

Q. Were you familiar with the policies in that handbook?

A. I was not.

Q. Did you rely on any of those policies, then, in connection with your employment?

A. I could not.

(CP 345, 1908-1909.) Under Washington law, Plaintiff cannot rely on the employee handbook she never reviewed to support her claims in this case. See *Stewart v. Chevron Chemical Co.*, 111 Wn.2d 609, 614, 762 P.2d 1143 (1988) (employer's policy was not part of the employee's employment contract where it was not relied upon by the employee who had no knowledge of the same); *Kuest v. Regent Assisted Living*, 111 Wn. App. 36, 51-52, 43 P.3d 23 (2002) (the employee must be aware of the policy in the employment manual before she may rely upon it); *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 350, 27 P.3d 1172 (2001) (employee could not have relied on the policy contained in the employment manual where the employee had no pre-termination familiarity with the same).

Even if Stewart Title of Spokane marketed itself under the names "Stewart Title of Spokane" and/or "Stewart Title" as Plaintiff alleges, that would not establish an employment relationship between Plaintiff and Stewart Title Company. The words "Stewart Title" is part of Stewart Title of Spokane's name. Use of "Stewart Title" on business cards or

advertisements was as consistent with its own name as it was with the names of other entities which are not named as defendants in this case; in other words, it is not evidence of Plaintiff's employment status without specific testimony or other reliable evidence on the issue. Other than her own speculation about the relationship between Stewart Title Company and Stewart Title of Spokane, there was and is no admissible evidence in the record which demonstrates Stewart Title Company was ever Plaintiff's employer.¹⁰ Because Plaintiff failed to show any legitimate basis for attaching employer liability to Stewart Title Company, the trial court's grant of summary judgment for Stewart Title Company was proper and should be affirmed.

¹⁰ Moreover, Plaintiff's allegation in her Complaint that Stewart Title of Spokane is a wholly owned corporate subsidiary of Stewart Title Company was and is false. Stewart Title Company is a fifty-one percent (51%) shareholder of Stewart Title of Spokane. (CP 281.) The other forty-nine percent (49%) shareholder is Property Title Investors, LLC. (CP 281-282.) Property Title Investors, LLC is a Washington limited liability company, consisting of approximately 30 local investors. (CP 282.)

Plaintiff's assertion in her Complaint that Stewart Title Company controls material aspects of Stewart Title of Spokane is also false, as evidenced by the attached Declaration of Anthony Carollo. (CP 281-284.) Plaintiff could not and did not present any credible evidence of the exercise of said alleged control which might contradict Carollo's statement. Plaintiff's contention that Stewart Title of Spokane employees held themselves out as employees of Stewart Title Company also had no basis in fact.

2. Stewart Title Company Was Not Plaintiff's Employer Under the WLAD.

Stewart Title Company cannot be considered an "employer" of Plaintiff under the Washington Law Against Discrimination ("WLAD"). The WLAD defines "employer" as any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit. RCW 49.60.040(11). In this case, Plaintiff has failed to allege and cannot show that Stewart Title Company was her employer or acted in the interests of her employer during her employment with Stewart Title of Spokane.

Stewart Title Company was not involved in the decision to hire Plaintiff or terminate her employment. (CP 282-283.) Stewart Title Company had no involvement in determining, administering or funding Plaintiff's compensation or benefits. (CP 282.) Stewart Title Company did not set the terms or conditions of Plaintiff's employment, nor did it exercise control over Plaintiff while she performed her job duties. (CP 283.) During her deposition, Plaintiff acknowledged that Stewart Title of Spokane was her only employer and admitted that she had no employment relationship with Stewart Title Company:

Q. Now, Ms. Buhr, you were hired by Stewart Title of Spokane, correct?

B. Yes.

Q. And the work you performed was for Stewart Title of Spokane, correct?

A. Yes.

Q. And you were paid by Stewart Title of Spokane, correct?

A. Yes.

Q. And you were supervised by individuals who were employed by Stewart Title of Spokane?

B. Yes.

Q. And you received employee benefits through Stewart Title of Spokane?

A. Yes.

Q. Were you ever employed by a different Stewart company entity other than Stewart Title of Spokane?

A. No.

Q. Who did you consider your employer to be when you worked at Stewart Title of Spokane?

A. Anthony Carollo.

(CP 278-279.) Based on Plaintiff's own admissions, Stewart Title Company was not her employer. (CP 278-279.) Because Plaintiff could not (and cannot) establish that Stewart Title Company was an "employer" as defined by the relevant statutes, her claims against Stewart Title Company were properly dismissed as a matter of law.

To rebut her own testimony, Plaintiff offered her own self-serving declaration in conjunction with her summary judgment response, seeking to materially change her story. Washington law is clear, however, that “when a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit [or declaration] that merely contradicts, without explanation, previously given clear testimony.” *Overton v. Consolidated Ins. Co.*, 145 Wn. 2d 417, 430, 38 P.3d 322 (2002), citing, *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989), quoting, *Van T. Junkins & Assoc., Inc. v. U.S. Ind. U.S., Inc.*, 736 F.2d 656, 657 (11th Cir. 1984); *McCormick v. Lake Wash. School Dist.*, 99 Wn. App. 107, 111, 992 P.2d 511 (1999); *Klontz v. Puget Sound Power & Light Co.*, 90 Wn. App. 186, 192, 951 P.2d 280 (1998). To the extent Plaintiff presented testimony in her Declaration that was contrary to her deposition testimony, it was improper and appropriately disregarded by the trial court.¹¹

Because Plaintiff failed to show that Stewart Title Company was her employer under WLAD, the trial court properly dismissed her claims against Stewart Title Company on summary judgment.

¹¹ Defendant objected to paragraphs 16 through 20 of her Declaration as materially inconsistent with her deposition testimony.

3. Stewart Title Company and Stewart Title of Spokane Were Not Joint Employers.

The only basis for liability that Plaintiff asserted against Stewart Title Company in her Amended Complaint was parent/subsidiary liability. Plaintiff's summary judgment response and her Brief failed to address this theory, and as such, Plaintiff effectively conceded that Stewart Title Company could not be held liable on this basis.¹² Instead, in response to Defendant's summary judgment motion, Plaintiff tried to claim for the first time that Stewart Title Company was liable under a "joint employer" or "integrated enterprise" theory. Because Plaintiff did not allege these theories of liability in her Amended Complaint, she should be precluded from asserting them at this juncture.

Even if the court were to consider Plaintiff's "joint employer" theory, her claims must still fail as a matter of law because the Declaration of Anthony Carollo and Plaintiff's own deposition testimony conclusively established that Stewart Title of Spokane – and no other entity – actually employed Plaintiff.

¹² Plaintiff sought to hold Stewart Title Company liable as an owner of Stewart Title of Spokane, solely by virtue of its ownership interest. As noted above, Stewart Title Company is one of two entities that own interests in Stewart Title of Spokane. Holding Stewart Title Company liable for the obligations of Stewart Title of Spokane would be inconsistent with Washington law.

As described above, Plaintiff testified at her deposition that she only worked for Stewart Title of Spokane, was hired by that entity, reported to employees of that entity, had her terms of employment set by that entity, and was terminated by that entity. (CP 278-279.) Likewise, the President of Stewart Title of Spokane, Anthony Carollo, testified that he hired Plaintiff, supervised the company's operations, set Plaintiff's terms of employment, and terminated her employment. (CP 281-284.) Plaintiff presented no competent evidence to the contrary. Accordingly, the trial court's grant of summary judgment in favor of Stewart Title Company should be affirmed.

4. Stewart Title Company and Stewart Title of Spokane Were Not an Integrated Enterprise.

Like her "joint employer" theory, Plaintiff's "integrated enterprise" theory of liability was not raised in her Amended Complaint and warranted denial because she failed to properly raise it in accordance with the trial court's prescribed deadlines.

If this Court nevertheless considers Plaintiff's "integrated enterprise" theory, it should deny it as a matter of law because there was no competent evidence presented by Plaintiff that Stewart Title Company was integrated with Stewart Title of Spokane, only Plaintiff's speculation to that effect. *See supra* pp. 23-28. There was no legitimate factual or

legal basis for Stewart Title Company to remain in this case and, as such, the trial court's judgment dismissing the claims against Stewart Title Company was proper.

5. Stewart Title Company Was Not Involved In the Termination of Plaintiff's Employment.

Plaintiff also argues that Stewart Title Company could be held directly liable for Plaintiff's termination. However, Plaintiff has presented no evidence that Stewart Title Company was involved in her termination in any way. Plaintiff's allegation that Stewart Title Company's direct action is "evidenced by communications between the local, regional, and national office leading to Ms. Buhr's FMLA and her ensuing termination" (Appellant's Br. at 36.) is conclusively contradicted by Mr. Carollo's deposition testimony and declaration. (CP 281-284.) Plaintiff's proffered evidence to rebut Mr. Carollo's testimony – emails from employees of a different company, Stewart Title Guaranty – does not prove that any Stewart Title Company employee made any comment or had anything to do with her FMLA forms or termination. If anything, it reflects involvement by an entirely different legal entity – an entity that was never named as a party to this case. Because Plaintiff cannot show direct or indirect participation by Stewart Title Company with regard to her use of leave or her termination, or any other terms of her employment, Stewart

Title Company was properly dismissed from this suit as a matter of law. The trial court's entry of summary judgment in favor of Stewart Title Company should be affirmed.

D. Stewart Title Company Is Not Liable Even If It Was Plaintiff's Employer.

Finally, Stewart Title Company cannot be liable to Plaintiff even if it is deemed to have been her employer or is found liable for Stewart Title of Spokane's actions. Following two weeks of trial, a jury rejected Plaintiff's claims against Stewart Title of Spokane, having found that Plaintiff's employment terms and termination were lawful. If the jury verdict in favor of Stewart Title of Spokane is upheld, Plaintiff's claims against Stewart Title Company, which are based entirely on the alleged actions of Stewart Title of Spokane, cannot be sustained.

V. ATTORNEYS' FEES

Plaintiff requests an award of attorneys fees and costs on appeal pursuant to RCW 49.60.030(2) and RAP 18.1. RCW 49.60.030(2) has been interpreted as granting the prevailing party a right to attorneys fees on appeal. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn. 2d 340, 362, 172 P.3d 688 (2007) (awarding fees only after concluding that the appellant prevailed on the merits of her underlying claim). However, "[w]here a party has succeeded on appeal but has not yet prevailed on the

merits, the court should defer to the trial court to award attorney fees.”

Riehl v. Foodmaker, Inc., 152 Wn. 2d 138, 153, 94 P.3d 930 (2004).

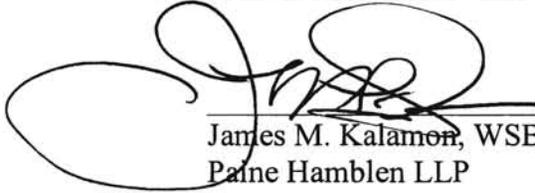
Because Plaintiff’s appeal of summary judgment in favor of Stewart Title Company is meritless, she should not prevail on appeal, and therefore she has no claim to attorney’s fees. Even if her pending appeal was successful, however, Plaintiff would not be entitled to attorneys fees because she has yet to prove the merits of her claims. Accordingly, Plaintiff is not entitled to attorney’s fees on appeal, and her request for attorney’s fees should be denied.

VI. CONCLUSION

For the above-stated reasons, Respondent-Defendant Stewart Title Company respectfully requests that this Court affirm the decision of the trial court in its entirety.

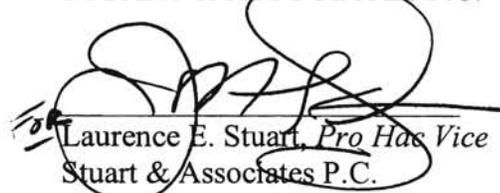
RESPECTFULLY SUBMITTED this 30th day of April, 2012.

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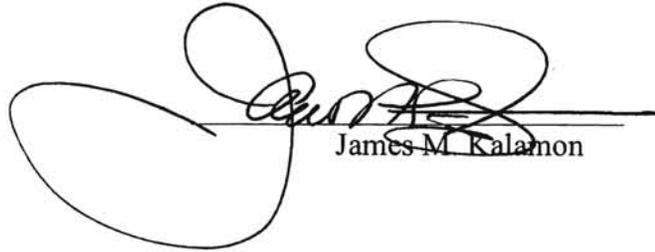
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the document to which this declaration is affixed was sent via regular mail, postage prepaid, on this day, to:

MARY SCHULTZ
Mary Schultz Law, P.S.
111 S. Post Street, Penthouse 2250
Spokane, WA 99201

Dated this 30th day of April 2012, at Spokane, Washington.



James M. Kalamon