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Division III
State of Washington
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No. 367355

COURT OF APPEALS, DIVISION III,
STATE OF WASHINGTON

LEANNE LEVNO,

Appellant,

v.

ADDUS HEALTHCARE, INC.,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This Court should affirm the summary judgment ruling for Respondent Addus HealthCare, Inc. (“Addus”) because the trial court correctly determined that no reasonable finder of fact could conclude that Addus treated Appellant Leanne Levno (“Levno”) unfairly, wrongfully, or illegally in any way. This is not a novel case. This is a case where Levno simply failed to present evidence that her claims warranted a trial.

Before this Court, Levno tries to stretch and shrink the undisputed facts of the case to fit her subjective opinions. But Levno could not—and cannot—avoid dismissal of her claims with mere allegations, argumentative assertions, conclusory statements, and speculation surrounding the circumstances of her departure from Addus.

Even viewing the evidence in the light most favorable to Levno, she: (1) failed to establish a *prima facie* case of retaliatory discharge in violation of chapter 74.34 Revised Code of Washington (“RCW”) and (2) failed to establish a *prima facie* case of wrongful discharge in violation of public policy.

While Levno repeatedly raises unverified suspicions, broad generalizations, and argumentative assertions that unresolved factual issues remain, she fails to understand that a complete absence of proof concerning an essential element of her case renders all other facts immaterial, and thereby entitles Addus to judgment as a matter of law.

Levno could not reverse the trial court’s proper summary judgment ruling by manufacturing a new, post-hoc theory of liability in her motion for

reconsideration before the trial court. Similarly, now she cannot propose a new theory of the case for the first time on appeal.

Because Levno has failed to show any error in the trial court's decision granting the summary judgment, this Court should affirm.

II. STATEMENT OF THE CASE

A. Substantive Facts

Levno started working for Addus in Spokane, Washington, in 2007 as a home health caregiver. Clerk's Papers ("CP") at 10 (¶¶ 2.1-2.2), 87 (24-25), 88 (1-11). Levno cared for vulnerable adults, who suffered from physical and/or mental illnesses. CP at 56 (4-10). Levno was a mandated reporter to the Department of Social and Health Services ("DSHS") if a reasonable belief of abuse/neglect existed. RCW 74.34.020(14), 74.34.035(1).

From 2007 until 2012, Levno cared for several clients. CP at 26. From 2012 until 2016, Levno cared for one client, "L.J.D." CP at 57 (15-25), 58 (1-3), 409 (¶ 6).¹

1. Levno's Reports of Neglect of Her Patient

In 2013, Levno believed that L.J.D. had been neglected. CP at 59 (12-21). Levno called Sandra Kester, who was located in the corporate office of Addus. CP at 59 (12-21), 60 (1-25), 61 (1-10), and 62 (8-14). Levno shared her concerns that the client was being left without care on the weekends. CP at 61 (17-22).

¹ In order to comply with the requirements of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Addus has chosen to refer to the client by her initials ("L.J.D.") and to the client's daughter by her initials ("H.D.").

Addus took no adverse action against Levno after she reported the alleged neglect. CP at 63 (19-25), 64 (1-7). Levno continued caring for L.J.D. CP at 63 (11-15). Levno was not reassigned, written-up, demoted, or suspended. CP at 63 (19-25), 64 (1-7). Levno's pay and hours were not changed. CP at 64 (3-7).

In 2015, Levno again believed that her client had been neglected. CP at 10 (¶ 2.6), 64 (8-15). This time, Levno contacted Adult Protective Services (APS) at DSHS. CP at 64 (8-25), 65 (1-7). Levno did not inform her supervisor or anyone at Addus about her report to APS and was not aware of DSHS's investigation or conclusions. CP at 65 (19-25), 66 (1-25), 67 (1-2), 75 (7-18). Levno did not know if Addus was notified of her 2015 report to APS, and no document shows that it was. CP at 66 (20-25), 67 (1-12).

According to Levno, Kelly Crawford, another caregiver for L.J.D., also made a report to APS in 2015 about burns L.J.D. apparently experienced. CP at 76 (7-13). The burns apparently resulted from a faulty heating pad that Levno used with L.J.D. CP at 77 (1-25), 78 (1). According to Levno, she and L.J.D.'s nurse handled that situation properly and L.J.D. was safe and well cared for. CP at 78 (12-21). Levno admitted that it was appropriate for Crawford to make the report. CP at 78 (2-21).

APS investigated Crawford's report, and in May 2015, APS determined that the allegation of neglect was unsubstantiated. CP at 98. Even after these 2015 reports, Levno continued to provide care for L.J.D. CP at 68 (4-16). Addus did not reassign Levno, demote her, suspend her, or reduce her hours or pay. CP at 68 (4-16).

In 2016, Levno again believed that L.J.D. had been neglected. CP at 10 (¶ 2.11), 69 (5-25). She filed a report with Addus on August 30, 2016. CP at 10 (¶ 2.11), 70 (8-13). Addus did not suspend Levno, reduce her hours, or reduce her pay after this report. CP at 71 (1-16). But Addus was concerned about Levno's relationship with L.J.D. because Addus became aware that Levno was providing caregiving services to L.J.D.'s family, which violated Addus's rules about maintaining professional boundaries with clients and their families. CP at 47.

On September 1, 2016, Dawn Taylor, one of Levno's supervisors, called Levno and told her that she could no longer work with L.J.D. "until [she] came into the office to discuss this issue." CP at 3 (¶ 2.13), 72 (6-20). On September 2, 2016, Addus notified L.J.D. and L.J.D.'s husband by letter that Levno would no longer be providing care for L.J.D. CP at 3 (¶ 2.12), 73 (17-25), 74 (1-7), 413. Addus suggested that L.J.D. and her husband work with their case manager to select another home care provider. CP at 413. Levno received a copy of this letter on September 6, 2016. CP at 82 (4-24), 83 (1-2).

Addus scheduled a meeting for September 8, 2016, with Levno, to discuss the situation and informed Levno she could have union representation present if she liked. CP at 3 (¶¶ 2.14-15), 79 (6-21). During the meeting, Addus gave Levno a written warning for insubordination and violating well-established company rules. CP at 47.

2. Levno's Written Warning

The written warning noted that Levno was:

- Not following the plan of care for her client;

- Not reporting changes in the client’s condition and needs to her supervisor;
- Having other health care assistants report to Levno instead of their own supervisors with question or concerns about the client;
- Crossing professional boundaries with her client;
- Providing care for people other than her client; and
- Performing nursing tasks without delegation.

CP at 47, 80 (12-25), 81 (8-25).

The warning makes no reference to being discharged. CP at 47, 350. Levno admits this fact, as she must, and admits that she never received any discharge notice from Addus. CP at 82 (25), 83 (1-2), 84 (1-3). Levno could not identify any document purporting to terminate her employment. CP at 84 (4-25), 85 (1-25), 86 (1-9). Despite not being able to identify any document purporting to terminate her employment (CP at 84 (8-25), 85 (1-25), 86 (1-9)), Levno attempts to rely on inadmissible hearsay statements from “H.D.” (L.J.D.’s daughter), to argue that Addus had orally terminated her employment. Br. of Appellant at 8. Because these statements are inadmissible hearsay, this Court may not consider them.²

Rather than terminating Levno on September 8, 2016, Addus immediately sought to assign Levno to another client. CP at 44 (¶ 3). But Levno

² For the first time on appeal, (Br. of Appellant at 8, 25), Levno refers to a single hearsay statement allegedly made by Taylor—and recounted solely by Levno in her deposition testimony. CP at 83 (3-5). This Court should not consider Levno’s after-the-fact, self-serving statement, especially where she presents it for the first time on appeal, having failed to bring it to the attention of the trial court.

refused to respond to Addus's efforts to contact her for assignment. CP at 44 (¶¶ 3-7). Ultimately, 90 days later, Addus administratively ended Levno's employment in January 2017 for job abandonment. CP at 44 (¶ 7).

B. Procedural Facts

Levno filed her Complaint on August 11, 2017. CP at 3-8. Given that Levno did not specify an amount in controversy and that Addus is a foreign corporation, Addus sought to remove the case to the United States District Court for the Eastern District of Washington. CP at 445, 469. In response, Levno filed an Amended Complaint on September 22, 2017, (CP at 9-16), and alleged that "the amount in controversy in this matter does not exceed seventy-five thousand dollars (\$75,000)." CP at 10 (¶ 4). Addus filed its Answer on October 23, 2017. CP at 18-27.

Based on Levno's representations, Addus ceased its removal efforts and instead provided Levno with a proposed stipulation regarding the amount in controversy in this case. CP at 445, 456-57, 469. Levno did not return the proposed stipulation. CP at 445, 469.

Addus then served Levno with several requests for admission. CP at 461-65. Specifically, the requests for admission asked Levno: (1) to "[a]dmit that your damages, inclusive of any attorney fees and costs, and interest, do not exceed \$75,000" and (2) to [a]dmit that you seek less than \$75,000.00 in this lawsuit, including attorney fees, costs, interest, tax offsets, and any other form of monetary relief." CP at 463. Levno did not respond to the requests for admission. CP at 446, 451.

Addus filed a motion for an order deeming these requests for admission admitted. CP at 444-49, 468-72. On February 2, 2018, the trial court entered an order deeming these requests for admission admitted. CP at 473-74.

On December 20, 2018, Addus filed its summary judgment motion (with a hearing date of January 18, 2019). CP at 29-40. Under CR 56(c) and Spokane County Superior Court Local Rule 56, Levno's response was due *no later than* January 7, 2019. But Levno did not file a timely brief opposing the summary judgment motion. Instead, on January 7, 2019, she simply filed her declaration and H.D.'s declaration. CP at 287-91, 293-94. Addus was not served, however, with H.D.'s declaration until January 14, 2019, and only *after* Addus already had filed its reply in support of the summary judgment motion. CP at 475-76.

In fact, Levno did not file her response until January 14, 2019—seven days *later* than her response was due. CP at 296-98. To compound matters, Levno filed and served her response *after* Addus already had filed and served its reply in support of the summary judgment motion. CP at 296-98, 300-07, 494. Levno showed no reason for her inexcusable neglect of the filing deadline, but the trial court nevertheless refused to strike the untimely response. CP at 379.

On January 18, 2019, the trial court heard the parties' argument and took the matter under advisement. CP at 376. On February 4, 2019, the trial court issued its letter ruling, dismissing Levno's claims. CP at 376-82. The trial court instructed Addus's counsel to prepare an order consistent with its letter ruling for presentment on February 22, 2019. CP at 382.

On February 21, 2019, Levno filed her motion for reconsideration. CP at 383-89. As requested by the trial court, Addus filed its response. CP at 391-99. Levno then filed a reply. CP at 402-06.

On March 8, 2019, the trial court denied Levno's motion for reconsideration. CP at 416-17. Among other things, the trial court stated, "The arguments now advanced by the Plaintiff could have been made in her untimely response to the Defendant's motion for summary judgment that was considered by the Court. There has been no showing as to why these arguments were not previously presented." CP at 417. On March 29, 2019, the trial court entered its order summarily dismissing Levno's claims. CP at 418-24.

This appeal followed. CP at 426-443.

III. ARGUMENT

A. Standards of Review.

Levno incorrectly states that there is only one standard of review for this appeal. Br. of Appellant at 9. In fact, there are two standards of review: (1) *de novo* for the trial court's summary judgment motion and rulings related to that motion, see *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 231, 393 P.3d 776 (2017); *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014); and (2) abuse of discretion for the trial court's ruling on the motion for reconsideration. See *Hook v. Lincoln Cty. Noxious Weed Control Bd.*, 166 Wn. App. 145, 158, 269 P.3d 1056 (2012) (reviewing a trial court's decision on a motion for reconsideration of a summary judgment motion for abuse of discretion); *Fishburn v. Pierce Cty. Planning & Land Servs. Dep't*, 161 Wn. App.

452, 472, 250 P.3d 146, *review denied*, 172 Wn.2d 1012 (2011).

First, while this Court considers the facts in the light most favorable to the non-moving party on summary judgment, *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 410, 430 P.3d 229 (2018), the non-moving party nevertheless must set forth specific facts showing that there is a genuine issue for trial or provide facts sufficient to make a *prima facie* case. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

In so doing, the non-moving party must do more than merely rely upon speculation or argumentative assertions that unresolved factual issues remain. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 848, 92 P.3d 243 (2004); *Young*, 112 Wn.2d at 225; *Vacova Co. v. Farrell*, 62 Wn. App. 386, 395, 814 P.2d 255 (1991). Generalizations and vague conclusions cannot defeat a summary judgment motion. *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993), *review denied*, 123 Wn.2d 1027 (1994).

Unverified suspicions, broad generalizations, and vague conclusions are insufficient to defeat summary judgment. *Thompson*, 71 Wn. App. at 555; *see Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (ultimate facts and conclusory statements of fact are insufficient and will not suffice); *Klossner v. San Juan Cty.*, 93 Wn.2d 42, 45, 605 P.2d 330 (1980) (an affidavit based on “information and belief” is insufficient); *Greenhalgh v. Dep’t of Corrs.*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011) (“Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that preclude a grant of summary judgment.”).

“Where there is ‘a complete failure of proof concerning an essential element of the nonmoving party’s case, all other facts become immaterial and the moving party is entitled to judgment as a matter of law.’” *Fisher-McReynolds v. Quasim*, 101 Wn. App. 801, 808, 6 P.3d 30 (2000) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

Second, motions for reconsideration are addressed to the sound discretion of the trial court, whose judgment will not be reversed absent a showing of manifest abuse of discretion. *Hook*, 166 Wn. App. at 158. “An abuse of discretion exists *only* if no reasonable person would have taken the view the trial court adopted, the trial court applied the wrong legal standard, or it relied on unsupported facts.” *Fishburn*, 161 Wn. App. at 472 (emphasis added). Importantly, for purposes of this appeal, a trial court generally does not abuse its discretion in refusing to consider new theories of a case presented as part of a motion for reconsideration. *See Hook*, 166 Wn. App. at 159; *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005), *review denied*, 157 Wn.2d 1022 (2006); *Int’l Raceway, Inc. v. JDFJ Corp.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999).

B. Levno Failed to Bring Forth Any Admissible Evidence to Make a *Prima Facie* Case that Addus Discharged Her in Violation of Chapter 74.34 RCW.

In her Amended Complaint, Levno claimed that she “was terminated in retaliation of her reporting the abuse/neglect of her client in violation of RCW 74.34 *et seq.*” CP at 13 (¶ 3.10). In response to the summary judgment motion, however, Levno failed to provide sufficient facts to make a *prima facie* case that Addus terminated her. CP at 381. Therefore, the trial court was correct in ruling

that Levno “failed to bring forth any admissible evidence supporting [this] allegation,” (CP at 380). Summary judgment was therefore proper on this claim. CP at 422-23.

To establish a *prima facie* case of retaliatory discharge in violation of chapter 74.34 RCW, an employee must show that: (1) she engaged in a statutorily protected activity; (2) the employer took adverse employment action against her; and (3) the protected activity caused the adverse employment action. *Crownover v. Dep’t of Transp.*, 165 Wn. App. 131, 148, 265 P.3d 971 (2011), *review denied*, 173 Wn.2d 1030 (2012); *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002). The standard for establishing a *prima facie* case for retaliation for opposing discriminatory practices under RCW 49.60.210 is equally applicable to whistleblower retaliation under chapter 74.34 RCW. *See* RCW 74.34.180(1) (“An employee or contractor who is a whistleblower and who as a result of being a whistleblower has been subjected to workplace reprisal or retaliatory action, has the remedies provided under chapter 49.60 RCW.”).

Once a *prima facie* case is established, the burden shifts to the employer to show a legitimate purpose for the discharge. *Milligan*, 110 Wn. App. at 638. If the employer shows a legitimate purpose, then the burden shifts back to the employee to prove pretext. *Milligan*, 110 Wn. App. at 638.

Here, contrary to what Levno implies, (Br. of Appellant at 16-17), the only adverse employment action she pleaded in her Amended Complaint was actual discharge. CP at 12-13 (¶¶ 2.24, 2.25, 2.26, 3.8, 3.10). While she could have chosen to plead other adverse employment actions, she chose not to. Instead, in her Amended Complaint, Levno alleged that she was “*officially terminated*” from

Addus on September 8, 2016. CP at 12 (¶ 2.24) (emphasis added). Levno alleged that she was “*terminated in retaliation*” for her reporting abuse of her client. CP at 12 (¶ 2.25) (emphasis added). Levno alleged that her “*termination*” for reporting abuse violated chapter 74.34 RCW. CP at 13 (¶ 3.8) (emphasis added). Finally, Levno alleged that she was “*terminated in retaliation*” for reporting abuse of her client. CP at 13 (¶ 3.10).

But once Addus demonstrated that it had not terminated Levno, and that no material issues of fact existed about this essential element, (CP at 35-36), the burden shifted to Levno to show otherwise. *Young*, 112 Wn.2d at 225. Under CR 56(e), Levno “[could] not rest upon the mere allegations or denials of [her] pleading, but [her] response, by affidavits or as otherwise provided in this rule, *must [have] set forth specific facts* showing that there [was] a genuine issue for trial.” (Emphasis added). Levno could not rely on speculation, argumentative assertions that unresolved factual matters remain, or in having her affidavits considered at their face value. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 721, 735 P.2d 675 (1986), *review denied*, 108 Wn.2d 1008 (2007).

Yet in opposing the summary judgment motion, that is exactly what Levno did. Levno simply submitted her declaration, which contained similar allegations to those in her Amended Complaint, namely that Addus “fired [her],” “ended [her] employment,” “terminated [her],” and “terminat[ed] [her] employment.” CP at 287-90 (¶¶ 4, 10, 12, 14, 16, 37). But Levno failed to respond to the summary judgment motion “with some showing that related evidence was available that would justify a trial on the issue.” *See Reed v. Streib*, 65 Wn.2d 700, 707, 399 P.2d 338 (1965).

In weighing a summary judgment motion, the court places “the emphasis ... upon *facts* to which the affiant could testify from personal knowledge and which would be *admissible in evidence*.” *Grimwood*, 110 Wn.2d at 359. “A fact is an event, an occurrence, or something that exists in reality.” *Grimwood*, 110 Wn.2d at 359 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 813 (1976)). “It is what took place, an act, an incident, a reality as *distinguished from supposition or opinion*.” *Grimwood*, 110 Wn.2d at 359 (citing 35 C.J.C. *Fact* 489 (1960)) (emphasis added). Ultimate facts and conclusory statements of fact are insufficient and will not suffice. *Grimwood*, 110 Wn.2d at 359-60. Here, Levno’s declaration failed to set forth specific facts showing that there was a genuine issue for trial.

Even on appeal, Levno makes sweeping claims before this Court without any citation to the record, as required by RAP 10.3(a)(5). For instance, in alleging that, “[o]n September 8, 2016, [she] was orally terminated by her supervisor Dawn Taylor, with Dawn Taylor alleging insubordination,” (Br. of Appellant at 16-17), Levno provides this Court with no page numbers to identify which—if any—pages of the clerk’s papers support her allegation.

Furthermore, and contrary to what Levno implies (Br. of Appellant at 13-15, 17), she could not (and did not) create an issue of fact to prevent summary judgment with a self-serving declaration. *See Marshall v. AC & S, Inc.*, 56 Wn. App. 181, 184-85, 782 P.2d 1107 (1989). As this Court has stated, “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 that merely contradicts, without explanation,

previously given clear testimony.” *Marshall*, 56 Wn. App. at 185 (quoting *Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11th Cir. 1984)). Similarly, feigned issues will not preclude summary judgment. 4 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE, CR 56 § 18, at 414 (6th ed. 2012); *see also Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 47, 747 P.2d 1124 (1987) (a summary judgment motion will not be denied on the basis of an unreasonable inference), *review denied*, 110 Wn.2d 1016 (1988).

Here, Levno admitted in her deposition that she never received any sort of termination notice from Addus. CP at 82 (25), 83 (1-2). The September 8, 2016 warning letter to Levno makes no reference to termination. CP at 84 (4-25), 85 (1-25), 86 (1-9). Levno admitted that the September 8, 2016 letter contained no reference anywhere to termination. CP at 84 (1-9). Levno’s self-serving, conclusory declaration statements directly contradicted her deposition admissions. CP at 287-90 (¶¶ 4, 10, 12, 14, 16, 37). And the trial court was correct in disregarding Levno’s contradictory and self-serving declaration statements.

Nevertheless, Levno disputed—and continues to dispute—a number of immaterial facts, such as: whether Addus provided her with a supervisor; when the alleged abuse of her client occurred; and how and when she reported the alleged abuse of her client. CP at 288 (¶¶ 5, 6, 7, 9, 11); Br. of Appellant at 16-17. But the outcome of Levno’s claim of retaliatory discharge in violation of chapter 74.34 RCW does not depend, in whole or in part, on these disputed facts. *See Shields v. Morgan Fin., Inc.*, 130 Wn. App. 750, 758, 125 P.3d 164 (2005) (“A material fact is one upon which the outcome of the litigation depends, in whole or in part.”) (citation omitted). Here, Levno has completely failed to prove an

essential element of her case—namely, that Addus terminated her—and the disputed facts, which Levno does raise, are therefore immaterial. *See Shields*, 130 Wn. App. at 758 (“Where proof of an essential element of a claim is lacking, all other facts are rendered immaterial.”); *Fisher-McReynolds*, 101 Wn. App. at 808.

Levno could not avoid summary judgment by nakedly disputing facts and simply asserting that there are unresolved questions of fact—especially unresolved *immaterial* questions of fact. *See Bates v. Grace United Methodist Church*, 12 Wn. App. 111, 115, 529 P.2d 466 (1974). It was Levno’s burden to furnish the factual evidence on which she relied. *Bates*, 12 Wn. App. at 115 (citing *Lundgren v. Kieren*, 64 Wn.2d 672, 677, 393 P.2d 625 (1964)). “Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that preclude a grant of summary judgment.” *Greenlagh v. Dep’t of Corrs.*, 160 Wn. App. at 714. “Otherwise, “the whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence.” *Bates*, 12 Wn. App. at 115.

For the foregoing reasons, the trial court correctly dismissed Levno’s claim for retaliatory discharge under chapter 74.34 RCW, and this Court should affirm that dismissal.

C. Levno Failed to Bring Forth Any Admissible Evidence to Make a *Prima Facie* Case that Addus Discharged Her in Violation of Public Policy.

In her Amended Complaint, Levno claimed that she “was terminated in violation of public policy,” (CP at 12 (¶ 2.26)), and that she “was terminated ten days after reporting the abuse/neglect of her client.” CP at 12 (¶ 3.5).

Specifically, Levno alleged that “[her] termination for reporting abuse is in violation of RCW 74.34 *et seq.* and therefore, RCW 49.60 *et seq.*” CP at 13 (¶ 3.8). But again, in response to the summary judgment motion, Levno failed to provide sufficient facts to make a *prima facie* case that Addus terminated her. CP at 381. Therefore, the trial court was correct in ruling that Levno “failed to bring forth any admissible evidence supporting [this] allegation,” (CP at 380), and in summarily dismissing this claim. CP at 422.

In wrongful discharge cases where an employee alleges she was discharged in retaliation for reporting employer misconduct, i.e., whistleblowing, the employee first must show that the discharge may have been motivated by reasons that contravene a clear mandate of public policy. *See Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 723, 725, 425 P.3d 837 (2018) (explaining the elements of the wrongful discharge tort depending on the employee’s allegations). If the employee succeeds in presenting a *prima facie* case, then the employer may show a legitimate, non-pretextual, and non-retaliatory reason for the discharge. *Martin*, 191 Wn.2d at 725-26. If the employer meets its burden to show legitimate reasons for the discharge, then the employee must show that her whistleblowing was a significant factor in her discharge. *Martin*, 191 Wn.2d at 726-27.³

Most importantly, the tort of wrongful discharge in violation of public policy applies *only* when there is a discharge. *Roberts v. Dudley*, 140 Wn.2d 58, 76, 993 P.2d 901 (2000). “A discharge may be express or constructive. Either

³ For claims that do not fall neatly into one of the four categories of wrongful discharge in violation of public policy, courts use the Perritt test. *Piel v. City of Federal Way*, 177 Wn.2d 604, 609-10, 306 P.3d 879 (2013); *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996).

way, it will support a cause of action only if it was *wrongful*.” *Riccobono v. Pierce Cty.*, 92 Wn. App. 254, 263, 966 P.2d 327 (1998).

Here, Levno alleged that she “was officially terminated from Addus on September 8, 2016.” CP at 12 (¶ 2.24). The record does not support this assertion. Contrary to what Levno argues, (Br. of Appellant at 20), she failed to raise a *prima facie* case of wrongful discharge based on an express discharge (as alleged in her Amended Complaint). Now, Levno seeks to obfuscate her failure to prove an essential element of her case by citing to the summary judgment motion, (CP at 31), citing to Taylor’s declaration, (CP at 44), and disputing a number of immaterial facts about the September 8, 2016 written warning for insubordination and violating well-established company rules. Br. of Appellant at 20.

But nakedly disputing facts and asserting that unresolved questions of fact remain will not defeat a summary judgment motion. *See Bates*, 12 Wn. App. at 115. Here, no evidence supports Levno’s assertion that she was expressly discharged on September 8, 2016. CP at 12 (¶ 2.24). No evidence supports Levno’s assertion that she was terminated 10 days after reporting the alleged abuse/neglect of her client. CP at 12 (¶ 3.5). Again, the September 8, 2016 warning to Levno makes no reference to termination. CP at 47. Levno admitted in her deposition that she never received any termination notice. CP at 82 (25), 83 (1-2), 84 (1-3). And Levno could not identify any document purporting to terminate her employment. CP at 84 (4-25), 85 (1-25), 86 (1-9).

Levno argues—for the first time on appeal—that “she was indeed orally terminated by Dawn Taylor *on September 8, 2016*, following and in retaliation for

her August 29, 2016 report.” Br. of Appellant at 20 (emphasis added). But Levno provides no citation to the record to support this assertion. *See* RAP 10.3(a)(5) (“Reference to the record must be included for each factual statement.”). This Court need not review matters for which the record is inadequate. *See Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 818 n.13, 225 P.3d 280 (2009), *review denied*, 169 Wn.2d 1012 (2010). Moreover, this Court need not consider an argument raised for the first time on appeal. *See Silverhawk, LLC v. Keybank Nat’l Ass’n*, 165 Wn. App. 258, 265, 268 P.3d 958 (2011) (“An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal”); *see also* RAP 9.12 (“On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.”).

Nevertheless, to the extent Levno now relies for the first time on appeal on a single hearsay statement allegedly made by Taylor—and recounted solely by Levno in her deposition testimony—to allege that Addus terminated her, (Br. of Appellant at 8, 25), this bare allegation is insufficient to preclude summary judgment. *See, e.g., Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 956, 421 P.2d 674 (1966) (a bare allegation is not sufficient to raise a genuine issue of fact); *Reed*, 65 Wn.2d at 707 (a court pierces allegations of facts in pleadings and affidavits); *Bates*, 12 Wn. App. at 115 (a party cannot force a case to trial by a mere assertion that an issue of fact exists without furnishing the factual evidence upon which she relies); *see also Scott*, 50 Wn. App. at 47 (a summary judgment motion will not be denied on the basis of an unreasonable inference). Such conclusory statements of fact will not suffice, *see Grimwood*, 110 Wn.2d at 360,

especially where Levno admitted that the September 8, 2016 letter says nothing about termination. CP at 47, 350.

With Levno having failed to respond to the summary judgment motion “with some showing that related evidence was available that would justify a trial on the issue,” *Reed*, 65 Wn.2d at 707, the trial court was correct in ruling that Levno “failed to bring forth any admissible evidence supporting [this] allegation,” (CP at 380), and in summarily dismissing this claim. CP at 422. Therefore, this Court should affirm the trial court’s order summarily dismissing this claim.

D. Levno Has Failed to Demonstrate That the Trial Court Abused its Discretion in Denying her Motion for Reconsideration.

Without any recognition whatsoever that motions for reconsideration are addressed to the sound discretion of the trial court, *see Hook*, 166 Wn. App. at 158, Levno simply argues that she “was not required to plead constructive discharge.” Br. of Appellant at 23. But Levno fails to support her assignment of error—that the trial court abused its discretion by denying her motion for reconsideration—by argument or citation, and this Court need not consider it. RAP 10.3(a)(6); *see also Orwick v. Seattle*, 103 Wn.2d 249, 256, 692 P.2d 793 (1984) (“It is not the function of trial or appellate courts to do counsel’s thinking and briefing.”).

In any event, Levno apparently takes issue with the trial court’s decision not to reconsider the following sentence from its decision: “The Plaintiff has not alleged she was constructively terminated from Addus.” CP at 380. But there is no merit to Levno’s claims—which she has not even raised, much less argued, before this Court—that this single sentence from the trial court’s decision was

“contrary to law” under CR 59(a)(7) or that “substantial justice has not been done” under CR 59(a)(9). Br. of Appellant at 21-24.

Levno has failed to show that the trial court’s decision denying her motion for reconsideration was manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. While Levno could have chosen to plead a constructive discharge in her Amended Complaint, she failed to do so. Instead, in her Amended Complaint, Levno alleged that she was “*officially terminated*” from Addus on September 8, 2016. CP at 12 (¶ 2.24) (emphasis added). The only reasonable interpretation of Levno’s allegation is that Addus expressly discharged her.

Furthermore, Levno alleged that she was “*terminated*” in retaliation for reporting abuse of her client. CP at 12-13 (¶¶ 2.25 & 3.10) (emphasis added). Levno alleged that she was “*terminated*” in violation of public policy. CP at 12 (¶ 2.26) (emphasis added). And Levno alleged that she was “*terminated*” 10 days after reporting the abuse/neglect of her client. CP at 12 (¶ 3.5) (emphasis added).

The Amended Complaint makes no mention of an alleged constructive discharge based on intolerable working conditions. *See, e.g., Korslund v. DynCorp Tri-Cities Servs.*, 156 Wn.2d 168, 180, 125 P.3d 119 (2005) (employee who is forced to permanently leave work for medical reasons may have been constructively discharged); *Martini v. Boeing Co.*, 137 Wn.2d 357, 366, 971 P.2d 45 (1999) (constructive discharge can result from employment discrimination); *Bulaich v. AT&T Info. Sys.*, 113 Wn.2d 254, 259, 778 P.2d 1031 (1989) (an involuntary or coerced resignation is equivalent to a constructive discharge); *Sneed v. Barna*, 80 Wn. App. 843, 849, 912 P.2d 1035, *review denied*, 129 Wn.2d

1023 (1996) (courts look for evidence of “aggravating circumstances” or a “continuous pattern of discriminatory treatment” to support a constructive discharge claim).

Likewise, in her deposition, Levno did not testify that she resigned because of intolerable working conditions; and she did not argue otherwise in her motion for reconsideration. CP at 384-85. In fact, Levno consistently testified to her subjective belief that Addus terminated her employment. CP at 64 (6-10), 79 (22-24), 80 (5-10), 81 (18-25), 82 (4-24), 84 (6-10, 22-25). For example, Levno testified, “I was wrongfully *terminated* on [September 8th, 2016].” CP at 63 (10) (emphasis added). Levno testified, “I was told I was being taken off the client. But it was a wrongful *termination*. I was wrongfully *terminated*.” CP at 81 (23-25) (emphasis added). Being “taken off the client” does not equate to being involuntarily discharged; they are two very different things.

Levno also testified, “Addus had already made up their mind that they were going to *terminate* me.” CP at 82 (16-17) (emphasis added). Finally, in discussing the letters from September 2 and 8, 2016, Levno testified, “It’s just what they’re – it explains to [me] why they are letting me – yeah, it explains to [me] why they are *terminating* me. These are the reasons why they are *terminating* me.” CP at 84 (6-10, 22-25) (emphasis added). Accordingly, the trial court correctly concluded, “The Plaintiff has not alleged she was constructively terminated from Addus.” CP at 380.

Moreover, Levno did not raise her constructive discharge theory until *after* the trial court dismissed her claims; and she offered no explanation for failing to timely raise this argument. CP at 385-86. The rules do not permit Levno a second

try to oppose the summary judgment motion simply because her first try failed. *See River House Dev., Inc. v. Integrus Architecture, PS*, 167 Wn. App. 221, 231, 272 P.3d 289 (2012) (citing *Rosenfeld v U.S. Dep't of Justice*, 57 F.3d 803, 811 (9th Cir. 1995) (applying parallel federal rule), *cert. dismissed*, 516 U.S. 1103 (1996)). As our Supreme Court has stated, “While inexpert pleadings may survive a summary judgment motion, *insufficient pleadings cannot.*” *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006) (emphasis added). As discussed above, Levno’s Amended Complaint—and her own deposition testimony—were insufficient to state a claim for wrongful discharge based on a constructive discharge theory. Levno could not negate a legally-founded summary judgment ruling by manufacturing a new, post-hoc theory of liability in her motion for reconsideration. *See Pac. Nw. Shooting Park Ass'n*, 158 Wn.2d at 352; *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999) (a party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into briefs and contending it was in the case all along); *Molloy v. City of Bellevue*, 71 Wn. App. 382, 385-86, 859 P.2d 613 (1993) (a complaint must apprise the defendant of the nature of the plaintiff’s claims and the legal grounds upon which the claims rest); *see also Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) (“A plaintiff may not amend [her] complaint through arguments in [her] brief in opposition to a motion for summary judgment.”).

In denying Levno’s motion for reconsideration, the trial court astutely explained:

The arguments now advanced by the Plaintiff could have been made in her untimely response to the Defendant's motion for summary judgment that was considered by the Court. There has been no showing as to why these arguments were not previously presented. For the Court to rule otherwise would allow a non-moving party to advance one strategy on summary judgment (move to strike the moving party's evidence and hearing) and then, if unsuccessful, file a comprehensive response by way of reconsideration. This would render the procedure requirements of CR 56(c) meaningless.

CP at 417. The trial court's statement was not manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. *See, e.g., Hook*, 166 Wn. App. at 159 (generally, a trial court need not consider new theories of a case presented as part of a motion for reconsideration); *Wilcox*, 130 Wn. App. at 241 ("CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision."); *Int'l Raceway, Inc.*, 97 Wn. App. at 7 ("Civil Rule 59 does not permit a plaintiff, finding a judgment unsatisfactory, to suddenly propose a new theory of the case.").

Levno has failed to show that the trial court abused its discretion; therefore, this Court should affirm the trial court's order denying her motion for reconsideration.

E. Levno Has Failed to Demonstrate That the Trial Court Erred in Ruling Certain Statements Were Inadmissible Hearsay.

First, Levno claims that the trial court erred when it ruled that the following statement in H.D's declaration—"In late August 2016, an Addus supervisor called me and told me that Ms. Levno had been terminated"—was not an admission by a party opponent under ER 801(d)(2), but instead was inadmissible hearsay. Br. of Appellant at 24. But as a matter of foundation under ER 104(a), Levno failed to establish the identity of the "Addus supervisor," failed

to establish that the unidentified “Addus supervisor” had authority to speak for Addus, and failed to establish that the unidentified “Addus supervisor” was acting within the scope of his or her authority when making the statement in question. As such, the trial court was correct in ruling, “[H.D.’s] statement as to what an unidentified Addus supervisor told her is inadmissible hearsay.” CP at 380.

While Levno need not provide direct proof of an agent’s authority to speak for Addus, *Farah v. Hertz Transporting, Inc.*, 196 Wn. App. 171, 182, 383 P.3d 552 (2016), *review denied*, 187 Wn.2d 1023 (2017), she still has the burden of establishing the agent’s authority by a preponderance of the evidence. *Condon Bros., Inc. v. Simpson Timber Co.*, 92 Wn. App. 275, 289, 966 P.2d 355 (1998). Importantly, the out-of-court statements of an alleged agent are not admissible to prove agency and authority to speak for a party. *Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 171, 758 P.2d 524 (1988). “Independent proof of the existence of the agency and its scope must be shown.” *Passovoy*, 52 Wn. App. at 172. And using a preponderance test under ER 104(a), the trial court has the discretion to weigh conflicting information and accept that which is more probably true than not. *Condon Bros, Inc.*, 92 Wn. App. at 286.

Here, Levno did not identify the “Addus supervisor” with whom H.D. supposedly spoke. CP at 294 (¶ 8). Levno simply assumes that the “Addus supervisor” must have been Taylor. Br of Appellant at 25. But Taylor clearly stated in her declaration that she was “*one of*” Levno’s supervisors, not *the* supervisor. CP at 43 (¶ 2) (emphasis added). Other than Levno’s unreasonable assumption, there is no evidence that Taylor was the “Addus supervisor” who allegedly called H.D.

Neither Levno nor anyone else can be certain with whom H.D. spoke. *See, e.g., Condon Bros, Inc.*, 92 Wn. App. at 289-90. There is no proof that the unidentified “Addus supervisor” had any authority to speak for Addus or that the unidentified “Addus supervisor” was acting within the scope of his or her authority when making the statement in question. *See, e.g., Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 771-72, 115 P.3d 349 (2005).

Levno simply sought to prove the fact and scope of the agency from the alleged hearsay statement alone. But her effort was insufficient. *See Passovoy*, 52 Wn. App. at 171-72. Levno failed to establish the alleged agent’s authority by a preponderance of the evidence. *See Condon*, 92 Wn. App. at 289-90. And the trial court did not err in ruling, “There is not an exception to the hearsay rule that would allow this statement to be admitted.” CP at 380.

Second, Levno claims that this same out-of-court statement—in paragraph eight of H.D.’s declaration—should have been admissible under ER 803(a)(3). But she did not raise this issue before the trial court. “Failure to raise an issue before the trial court generally precludes a party from raising it on appeal.” *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals. *Smith*, 100 Wn.2d at 37. As such, this Court should decline to exercise its discretion under RAP 2.5(a) to consider the argument made by Levno for the first time on appeal.

Regardless, the out-of-court statement in paragraph eight of H.D.’s declaration does not describe the unidentified declarant’s then-existing emotions, feelings, pain, bodily condition, or health. CP at 294 (¶¶ 8, 9). As such, the

statement cannot be admissible under this exception. *See* 5C KARL B. TEGLAND, WASHINGTON EVIDENCE LAW AND PRACTICE, §§ 803.11, 803.13, at 38-41, 51-52 (6th ed. 2016). The out-of-court statement in paragraph eight of H.D.’s declaration does not describe the declarant’s then-existing intent or plan. CP at 294 (¶¶ 8, 9). As such, the statement cannot be admissible under this exception. *See Doke v. United Pac. Ins. Co.*, 15 Wn.2d 536, 542, 131 P.2d 436 (1942) (to be admissible under this exception, the statement must be of a present existing state of mind); 5C KARL B. TEGLAND, WASHINGTON EVIDENCE LAW AND PRACTICE, §§ 803.12, at 46 (6th ed. 2016). Finally, even assuming that the out-of-court statement could be admissible under ER 803(a)(3), the statement is nevertheless irrelevant and objectionable under ER 401, 402, and 403, as the state of mind of the unidentified declarant is not at issue in the case. *See, e.g., CHG Int’l, Inc. v. Robin Lee, Inc.*, 35 Wn. App. 512, 516, 667 P.2d 1127, *review denied*, 100 Wn.2d 1029 (1983).

Third, Levno claims that the out-of-court statement in paragraphs eight and nine of H.D.’s declaration should have been admissible as circumstantial evidence of its effect on her and H.D. Br. of Appellant at 25-26. But Levno’s argument fails because she offered the statement to prove the truth of the matter asserted (and it would be relevant only if so offered).

“Whether [a] statement is hearsay depends upon the purpose for which it is offered. If it is offered to prove the truth of the matter asserted, the evidence is hearsay. If it is offered for some other purpose, it is not.” *Patterson v. Kennewick Pub. Hosp. Dist. No. 1*, 57 Wn. App. 739, 744, 790 P.2d 195 (1990) (quotations and citation omitted). Out-of-court statements offered to show the effect on the

listener, regardless of their truth, are not hearsay. *Henderson v. Tyrell*, 80 Wn. App. 592, 620, 910 P.2d 522 (1996). But to be admissible on this basis, the listener's state of mind must be relevant to a factual issue of consequence in the case. *Henderson*, 80 Wn. App. at 620 (citing *State v. Parr*, 93 Wn.2d 95, 98-104, 606 P.2d 263 (1980)); *CHG Int'l, Inc.*, 35 Wn. App. at 516.⁴

Levno argues that the out-of-court statement in paragraph eight of H.D.'s declaration "speaks to ... the effect the information had upon [H.D.]." Br. of Appellant 25-26. But H.D.'s state of mind is irrelevant to the issue of whether Levno was wrongfully discharged or retaliated against, and/or retaliatorily discharged, and Levno does not articulate anything to the contrary. The statement is relevant only if considered for the truth of the matter asserted. *See Henderson*, 80 Wn. App. at 620; *CHG Int'l, Inc.*, 35 Wn. App. at 516. As such, the statement is inadmissible hearsay, and the trial court was correct in not considering it when ruling on the summary judgment motion. *See Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986) ("A court cannot consider inadmissible evidence when ruling on a motion for summary judgment.").

Levno claims that the out-of-court statement in paragraph nine of H.D.'s declaration "speaks to ... the effect the information had upon ... [her]." Br. of Appellant at 25-26. But again, Levno fails to explain how or why her state of mind is relevant to the issues of wrongful discharge or retaliation. Levno's state of mind is not an element of either her wrongful discharge claim or her retaliatory

⁴ Levno's reliance on *State v. Horn*, 3 Wn. App. 2d 302, 313, 415 P.3d 1225 (2018), (Br. of Appellant at 25), is simply misplaced. The court in *Horn* was discussing the relevance of impeachment evidence under ER 401, not the admissibility of evidence under ER 801 and ER 802.

discharge claim. *See Martin*, 191 Wn.2d at 723, 725-27; *Piel v. City of Federal Way*, 177 Wn.2d 604, 609-10, 306 P.3d 879 (2013); *Crownover*, 165 Wn. App. at 148; *Milligan*, 110 Wn. App. at 638. Levno’s state of mind does not make her assertions any more probable or less probable than they would be without the out-of-court statement in paragraph nine of H.D.’s declaration. *See ER 401*.

Thus, the out-of-court statement in paragraph nine of H.D.’s declaration is hearsay because it was offered for the truth of the matter asserted and the content of the statement is relevant only if offered for that purpose. *See Ensley v. Mollmann*, 155 Wn. App. 744, 754, 230 P.3d 599, *review denied*, 170 Wn.2d 1002 (2010). Thus, it is inadmissible hearsay, and the trial court was correct in not considering it when ruling on the summary judgment motion. *See Dunlap*, 105 Wn.2d at 535 (“A court cannot consider inadmissible evidence when ruling on a motion for summary judgment.”).

F. Addus is Entitled to its Attorney Fees and Costs on Appeal.

Because there are no debatable issues on which reasonable minds could differ, and Levno’s appeal is totally devoid of merit, *see, e.g., Mahoney v. Shinopoch*, 107 Wn.2d 679, 691-92, 732 P.2d 510 (1987), Addus should be entitled to its attorney fees and costs under RAP 18.9(a), which authorizes an attorney fees award for responding to a frivolous appeal.

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IV. CONCLUSION

For the foregoing reasons, the trial court correctly granted summary judgment, and this Court should affirm, awarding Addus its attorney fees and costs on appeal.

Respectfully submitted this 13th day of August, 2019.

JACKSON LEWIS P.C.

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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 Brief of Respondent was sent via e-mail, addressed to:

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