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No. 244148-III

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WASHINGTON COURT OF APPEALS, DIVISION THREE

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

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**KEN BRIGGS, JUDY ROBERTSON, MARK JOHNSON,  
BEVERLY NUNN, JAMI SMITH, SHIRLEY BADER, PAM  
ZELLER, MARGARET ("PEGGY") CLARK and VALERIE  
BRUCK,**

**Plaintiffs/Appellants**

**v.**

**NOVA SERVICES, a Washington non-profit corporation, and  
LINDA BRENNAN,**

**Defendants/Respondents.**

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**APPELLANTS' OPENING BRIEF**

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## TABLE OF CONTENTS

<b>I.</b>	<b>ASSIGNMENTS OF ERROR</b> .....	1
	Assignments of Error .....	1
	Issues Pertaining To Assignments Of Error.....	1
<b>II.</b>	<b>STATEMENT OF THE CASE</b> .....	2
	A. Background Facts.....	2
<b>III.</b>	<b>ARGUMENT</b> .....	11
	A. Plaintiffs' CR 56(f) Motion for Continuance Should Have Been Granted.....	11
	B. The Motion Compelling Discovery Should Have Been Granted.	17
	C. Defendants' Motion for Summary Judgment on Plaintiff's Claims of Wrongful Termination, Negligent Supervision and Retaliation Should Not Have Been Granted.....	18
	1. Plaintiffs have a cause of action for wrongful termination in violation of public policy .....	20
	2. Plaintiffs Have a Cause of Action For Negligent Supervision and/or Retention.....	27
	3. Plaintiffs Have a Cause of Action For Retaliation.....	29
<b>IV.</b>	<b>CONCLUSION</b> .....	31
	<b>CERTIFICATE OF SERVICE</b> .....	322

## TABLE OF AUTHORITIES

### Cases

<i>Atlantic-Pacific Construction Co. v. NLRB</i> , 52 F.3d 260, 263-264 (9 <sup>th</sup> Cir. 1995) .....	24
<i>Bravo v. Dolsen Cos.</i> , 125 Wn.2d 745, 888 P.2d 147 (1995).....	22, 23
<i>Butler v. Joy</i> , 116 Wn.App. 291, 63 P.3d 671 (2003).....	11, 12, 14
<i>City of Seattle v. Mighty Movers, Inc.</i> , 152 Wn.2d 343, 348, 96 P.3d 979 (2004).....	20
<i>Clements v. Travelers Indem. Co.</i> , 121 Wn.2d 243, 850 P.2d 1298 (1993) .....	20
<i>Coggle v. Snow</i> , 56 Wn. App. 499, 784 P. 2d 554 (1990).....	12, 13, 14, 15, 18
<i>Farnam v. CRISTA Ministries</i> . 116 Wn.2d 659, 668, 807 P.2d 830 (1991) .....	20, 28
<i>Francom v. Costco Wholesale Corp.</i> , 98 Wn.App. 854, 991 P.2d 1182 (2000).....	17, 29
<i>Gardner v. Loomis Armored Inc.</i> , 128 Wn.2d 931, 913 P.2d 377 (1996) .....	20, 21, 22, 25, 26
<i>Garrett v. City &amp; Cy. of San Francisco</i> , 818 F.2d 1515, 1518-19 (9 <sup>th</sup> Cir. 1987).....	14
<i>Halstead Metal Products v. NLRB</i> , 940 F.2d 66, 69 (4 <sup>th</sup> Cir. 1991).....	23
<i>Hayes v. Trulock</i> , 51 Wn.App 795, 755 P.2d 830 (1988).....	22
<i>Joanna Cotton Mills Co. v. NLRB</i> , 176 F.2d 749, 752-53 (4 <sup>th</sup> Cir. 1949) .....	23
<i>LaPlante v. State</i> , 85 Wn.2d 154, 158, 531 P.2d 299 (1975) .....	20
<i>Lindblad v. The Boeing Company</i> , 108 Wn.App. 198, 207, 31 P.3d 1 (2001).....	18
<i>Malnar v. Carlson</i> , 128 Wn.2d 521, 534, 910 P.2d 455 (1996) .....	18, 19

<i>McConiga v. Riches</i> , 40 Wn.App. 532, 536, 700 P.2d 331 (1985).....	18, 19
<i>Meadows v. Grant's Auto Brokers, Inc.</i> , 71 Wn.2d 874, 431 P.2d 216 (1967).....	19
<i>Money Savers Pharmacy, Inc. v. Koffler Stores (Western), Ltd.</i> , 37 Wn.App. 602, 608, 682 P.2d 960 (1984).....	19
<i>Mostrom v. Pettibon</i> , 25 Wn.App. 158, 162, 607 P.2d 864 (1980).....	19
<i>Niece v. Elmview Group Home</i> , 131 Wn.2d 39, 929 P.2d 420 (1997) .....	17, 28
<i>Olympic Fish Products, Inc. v. Boyd</i> , 23 Wn.App. 499, 597 P.2d 436 (1979), <i>aff'd</i> 93 Wn.2d 596, 611 P.2d 737 (1980).....	21
<i>Parnar v. Americana Hotels, Inc.</i> , 65 Hawaii 370, 652 P.2d 625, 631 (1982).....	22
<i>Preston v. Duncan</i> , 55 Wn.2d 678, 681-82, 349 P.2d 605 (1960).....	19
<i>Sedlacek v. Hillis</i> , 145 Wn.2d 379, 390, 36 P.3d 1014 (2001).....	22
<i>Sewick v. Gwinn</i> , 73 Wn.App. 879, 873 P.2d 528 (1994) .....	19
<i>Tellevik v. Real Property</i> , 120 Wn.2d 68, 89-91, 845 P.2d 1325 (1992)..	14
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 232, 685 P.2d 1081 (1984).....	21
<i>Turner v. Kohler</i> , 54 Wn.App. 688, 694, 775 P.2d 474 (1989).....	14
<i>Wilmot v. Kaiser Aluminum &amp; Chem Corp.</i> , 118 Wn.2d 46, 821 P.2d 18 (1991).....	22
<u>Rules</u>	
CR 56(f).....	11
Fed.R.Civ. P 56(f).....	15
<u>Statutes</u>	
29 U.S.C. §157.....	23
29 U.S.C. §158(a)(1).....	23
RCW 49.32.020 .....	23
RCW 49.32.020 .....	23, 27

## **ASSIGNMENTS OF ERROR**

### **ASSIGNMENTS OF ERROR.**

1. The trial court's denial of plaintiffs' CR 56(f) Motion to Continue the Summary Judgment Hearing was an abuse of discretion.

2. The trial court's refusal to grant plaintiffs' Motion Compelling Discovery, allowing plaintiffs to obtain the requested discovery prior to the hearing on the defendants' Motion for Summary Judgment was an abuse of discretion.

3. The court erred in granting defendants' Motion for Summary Judgment on plaintiffs' claims of Wrongful Termination, Negligent Supervision and Retaliation.

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

1. On February 11, 2005, defendants' Motion to continue trial date was granted based on defendants' representation to the court that extensive discovery (i.e., "up to 30 depositions") needed to be done by all parties. On March 17, 2005, 24 working days after the continuance had been granted, defendants, without either party taking any discovery, filed a Motion for Summary Judgment which required plaintiffs' response to be filed by April 11, 2005. At the Summary Judgment Motion hearing, plaintiffs made a CR 56(f) Motion for Continuance in order to conduct necessary discovery. Plaintiffs' motion was denied. Did the Trial court abuse its discretion in denying plaintiffs' CR 56(f) Motion?

2. Plaintiffs' Motion Compelling Discovery was filed prior to but heard by the trial court on the same date as the defendants' Motion for Summary Judgment, but after the court had granted defendants' Summary Judgment as to all plaintiffs and all claims but one. Thereafter, the Court granted defendants' Summary Judgment as to the remaining claim and held that plaintiffs' Motion Compelling Discovery was therefore moot. Did the trial court abuse its discretion in not granting plaintiffs' Motion Compelling Discovery and allowing plaintiffs to complete the record before ruling on defendants' Motion for Summary Judgment?

3. Plaintiffs collectively complained to defendants' Board of Directors about numerous issues related to management of the organization, the Executive Director's behavior and performance, and other terms and conditions of their employment. All but one of the plaintiffs were terminated for doing so. The Board of Directors failed or refused to exercise its duty to supervise and discipline the Executive Director. Did the trial court err in granting summary judgment and dismissing plaintiffs' claims of wrongful termination, negligent supervision and retaliation?

## **II. STATEMENT OF THE CASE**

### **A. BACKGROUND FACTS.**

Plaintiffs were all employees of Nova Services. Judy Robertson was employed at Nova for nine years, much of that time as Associate

Director. CP 168:203. Mark Johnson, who was the Production Manager at the time of his termination, was employed at Nova for 11 years. CP 181:24-25.

All of the employees were extensively involved in the day-to-day operations at Nova. Over the years Judy Robertson had heard numerous concerns expressed by these and other employees about the Executive Director's inadequate leadership and management skills, decision-making which jeopardized clients, biased and arbitrary decisions with regard to employees, poor work habits and questionable financial practices. CP 168:2-7; 170:9-22; 171:19-25; 173:9-20; 174:8-10; 182:21-22.

Six employees – Robertson, Briggs, Nunn, Smith, Bader and Johnson - after discussing for several months how to bring their concerns forward, having been ignored for years by the Executive Director, wrote a letter in April, 2004, to defendant's Board of Directors. CP 167:24-28; 168:1-8. They suspected the Board was unaware of the organization's challenges, since by employment policy only Linda Brennan was permitted to communicate with the Board. CP 159:11-14; 169:19-26; 182:2-3, 7-12.

Within a week after the letter was sent, the managers started seeing Ms. Brennan removing boxes of organizational documents from the premises. CP 165:3-6.

The employees also contacted the U. S. Department of Labor about the wage and hour concerns; made contact with the Washington Protection and Advocacy System, an advocacy group for disabled persons, and contacted the Internal Revenue Service about how to request an investigation. CP 165:12-16.

Other than a letter and several emails to the employees' attorney, the Board made no contact with employees until the end of June, 2004. CP 168:23-26; 183:23-27; 184:1.

The Board hired Spokane attorney Mike Love to do an investigation. CP 164:23; 183:23-24.

After Mr. Love's investigation was complete, the Board hired Ellen Flanigan, though the Board had indicated it would hire a mediator. CP 164:15-17; 183:4-26.

The first time Ms. Flanigan met with the six employees she told them "this is Linda's company", "Nova is not a democracy", "we don't need to like Linda, just learn to work with her", and that dismissal of Ms. Brennan was not an option. CP 166:3-5; 171:3-4. The Board had never communicated with the employees about Ms. Flanigan's credentials or role, or the Board's expectations of her, and the employees' perception, based on her actions and attitudes, was that Ms. Flanigan worked for Ms. Brennan, and was not receptive to their concerns. CP 164:15-21; 172:13-16.

After numerous requests by the employees, Ms. Flanigan finally agreed to set up a meeting for them to meet with the Board. CP 168:27; 184:2-7. Though they had sent their concerns to the Board in their April 6, 2004 letter, Ms. Flanigan insisted they set out their concerns again in writing to submit to the Board. CP 184:6-8. The employees met with the Board on or about June 29, 2004 for approximately one hour – to the surprise of the employees, the Board had virtually no questions of them. CP 184:4-6.

On July 12, 2004, Ms. Flanigan and Ms. Brennan met with Bev Nunn, Shirley Bader, Mark Johnson and Jami Smith, told them they needed to put aside their concerns and agree to try to work with Ms. Brennan. CP:178:22-27. Fearful that refusing to do so would mean being fired, they each agreed. CP 184:12-14. Ms. Brennan and Ms. Flanigan then fired Briggs and Robertson for insubordination, disloyalty to Ms. Brennan, and violation of a company policy. CP 165:23-24; 169:7-8. At the end of the day Ms. Brennan and Ms. Flanigan held an all-company meeting announcing that Briggs and Robertson had been fired, and that the rest of the employees were now expected to stop complaining and move ahead, and told not to consult with their attorney. CP 184:12-15.

The remaining plaintiffs drafted and signed the letter attached to Defendants' Motion as Exhibit 2 to Darlene Fogal's Affidavit, objecting to the firings and demanding the Board refusal to their concerns. CP 184:16-

20. The Board did not respond. CP 184:20. Johnson, Smith, Nunn, Clark, Bruck and Castillo were notified approximately July 21, 2004 they were considered to have resigned their employment. CP 176:26. Meanwhile, on Monday, July 19, and Tuesday, July 20, 2004, the managers visited the State Department of Social and Health Services and the Spokane County Department of Community Services to explain their concerns and request assistance in evaluating Nova and Ms. Brennan. CP 165:15-16; 310:22-26.

On September 17, 2004, ten plaintiffs filed their Complaint for damages for wrongful termination in violation of public policy, unlawful retaliation – wrongful discharge, negligent infliction of emotional distress, intention infliction of emotion distress/outrage and negligent supervision/retention against Nova Services and their Executive Director, Linda Brennan. CP 1-15. Since then Plaintiff Odalys Castillo resolved her claims and Plaintiff Pam Zeller abandoned her claims and became employed elsewhere. CP 7:12-13; CP 25:16-17. Defendants filed their Answer on October 7, 2004. CP 21-26. On December 17, 2004, the court entered a Scheduling Order which provided for discovery to be completed on or before May 9, 2005 and for trial on July 11, 2005. CP 28-29.

On February 11, 2005, Counsel appeared before Judge Sypolt on defendant's motion for continuance. RP (2/11/05) 1-3; 3-7. Counsel for Defendants, Mr. Rukavina, represented to the court "...We have ten

plaintiffs, Mary does, and at least 15 to 20 depositions in this thing ... so we are going to need more time". RP (2/11/05) 3:21-24. Mr. Rukavina had submitted an affidavit in support of the Motion for Continuance in which he stated there were 10 plaintiffs, two defendants, and at least twelve to fifteen witnesses expected to testify; and that up to thirty depositions were anticipated. CP 30-31. Counsel for plaintiffs, Ms. Giannini, agreed with and supported defense counsel's comments. RP (2/11/05) 4:2-3. The court found there was good cause to grant the Motion. RP (2/11/05) 4:12-16. The court reset the trial for November 28, 2005, with discovery to be completed by September 26, 2005. RP (2/11/05) 5:7-8; CP 40.

On March 17, 2005, 24 working days after the continuance had been granted, defense counsel filed a Motion for Summary Judgment without either party taking any depositions or conducting any discovery. CP 42-43. The hearing on the Motion was set for April 22, 2005, allowing plaintiffs' counsel 17 working days in which to file her response. CP 127-128. Plaintiff's counsel then filed a Motion Compelling Discovery on March 21, 2005, seeking to compel Defendant to provide documents in response to Requests for Production that had previously been served on Defendants on December 11, 2004. CP 129-154. Because the Defendant filed the Motion for Summary Judgment on March 17, 2005, Plaintiff's counsel was required to devote her energy to responding to the Summary

Judgment motion and did not have the opportunity to conduct her own depositions of Defendant's board of Directors, executive director or any others prior to the Summary Judgment hearing. RP (4/22/05) 9:25-10:5;31:17-32:5. At the time of the hearing on the Motion for Summary Judgment and plaintiffs' Motion Compelling Discovery, defendant's counsel had filed no response to Plaintiffs' Motion.

Prior to the commencement of the hearing on Defendants' Motion for Summary Judgment, plaintiffs' counsel advised the court she hadn't had an opportunity for discovery because the case had been continued only two months prior on the basis that substantial discovery needed to be done, and approximately 3-4 weeks later the Summary Judgment motion was filed by defendants' attorney. RP (4/22/05) 9:20-10:5. Plaintiffs' counsel, prior to the beginning of the Summary Judgment hearing, moved for a continuance under CR 56(f). RP (4/22/05) 11:15-19. The court proceeded with the Summary Judgment hearing without ruling on plaintiffs' Motion for Continuance. RP (4/22/05) 13:1-2.

Plaintiffs' counsel, being unsure of whether she had previously made a motion for continuance under CR 56(f) again made such a motion. RP (4/22/05) 31:3-4. Plaintiffs' counsel informed the court there was information in discovery that would be critical to her clients' position, that she hadn't had the opportunity to do discovery and that the discovery cutoff wasn't until mid-September, another four and one-half months. RP

(4/22/05) 31:2-11. Plaintiffs' counsel further informed the court that she wanted to depose the board of directors to learn what the board knew about the organization, the mission of the organization, what the executive director had told the board about the employees' complaints, whether the board had made any effort to determine the truthfulness of the employees' complaints, whether the board gave the executive director authority to fire two of the plaintiffs who were managers without any lawful reason for doing so and whether their termination was retaliation. RP (4/22/05) 31:17-32:3. Defense counsel characterized plaintiffs' request for "additional discovery" as a "fishing expedition", even though there had been no discovery since Defendants' Motion for Continuance was granted on February 11, 2005. RP (4/22/05) 32:25-33:7.

The court did not rule immediately on plaintiffs' Motion for Continuance, but continued with the Summary Judgment hearing. RP 32:6-35:16. The court then asked defense counsel if he had anything further to say about plaintiffs' request for a continuance "so she might marshal some other information that would effectively rebut defendants' assertions". RP 35:17-22. Defense counsel provided further argument basically to support his Motion for Summary Judgment. RP 35:23-36:17. The court denied plaintiffs' Motion for Continuance on the ground that plaintiffs could have obtained the requested discovery prior to the Summary Judgment motion. RP (4/22/05) 37:5-10.

The court provided its oral decision on Defendant's Motion for Summary Judgment and granted the motion as to all plaintiffs on all claims except one. RP (4/22/05) 37:11-41:5.

Plaintiff's Motion to Compel related to refusal to produce documents pursuant to Requests for Production of the Board of Directors meeting's minutes to determine how the board was carrying on its business, how it developed policies, and to what extent the Board of Directors knew, given its disconnection from employees, what was actually going on in the organization. RP (4/22/05) 41:8-15. There was also a Request for Production of Documents related to expenditure of company funds by credit card to determine the appropriateness of such expenditures, which the defendant also refused to produce. RP (4/22/05) 41:16-19. Defendant's counsel, without filing any written response, argued to the court that such information was not relevant and was privileged. RP (4/22/05) 41:24-42:6.

On April 27, 2005 the Court issued a letter ruling granting summary judgment as to Plaintiffs' remaining cause of action, and ruled that Plaintiff's Motion to Compel was moot because the Motion for Summary Judgment had been granted as to all plaintiffs and all claims. CP 350-351. The Court entered an Order granting Defendant's Motion for Summary Judgment and Denying Plaintiffs' Motion for Continuance on May 16, 2005. CP 352-354. The Court also entered on the same date an

Order of Dismissal of all of the Plaintiffs' claims. CP 357-358. Plaintiffs filed a Motion for Reconsideration, Affidavit and Memorandum in Support on May 26, 2005. CP 359-379. The Court entered an Order Denying Plaintiffs' Motion to Reconsider on July 14, 2005. CP 385-386. Plaintiffs filed their Notice of Appeal on August 5, 2005. CP 387-393.

### III. ARGUMENT

#### A. PLAINTIFFS' CR 56(F) MOTION FOR CONTINUANCE SHOULD HAVE BEEN GRANTED

CR 56(f) provides as follows:

**"When Affidavits Are Available.** Should it appear from the affidavits of a party opposing a motion 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."

Under CR 56(f) a trial court may continue a motion for summary judgment if affidavits of the non-moving party show a need for additional time to obtain affidavits, take depositions or conduct other discovery. *Butler v. Joy*, 116, Wn. App. 291,299, 65 P3d. 671(2003). A motion for continuance may be denied if the requesting party 1) does not have a good reason for the delay in obtaining the evidence or 2) does not indicate what evidence would be established by further discovery; or 3) the new evidence does not raise a genuine issue of material fact. *Id.*

In *Butler v. Joy*, a medical negligence action, the plaintiff's attorney was retained just before the summary judgment hearing, and submitted his motion for continuance orally and without supporting affidavits, presumably arguing, though there was no written record, that he needed time to prepare a response to the summary judgment motion. *Id.* The plaintiff's original attorney had withdrawn before the motion for summary judgment had been filed, and the plaintiff had in a little over a month obtained new counsel. *Id.* The trial court denied the continuance. *Id.*

The Court of Appeals noted that his motion did not, strictly speaking, fit within the guidelines of a CR 56(f) continuance, but also observed that the defendant had not argued that she would have been prejudiced by a continuance. *Id.*

The court concluded, "However, 'the primary consideration on the motion for a continuance should have been justice'", and held that the denial of the continuance constituted an abuse of discretion. *Id. citing Coggle v. Snow*, 56 Wn.App. 499, 508, 784 P. 2d 554(1990).

In *Coggle*, the Court of Appeals reviewed the trial court's denial of a motion for continuance where several days before hearing on a motion for summary judgment Coggle's new attorney, recently associated with Coggle's original attorney who was retiring, filed a motion for continuance so he could obtain an affidavit from a medical expert

rebutting medical testimony submitted by the moving party. *Coggle v. Snow*, 56 Wn. App. 499, 503, 784 P. 2d 554 (1990). After the continuance was denied, Coggle's attorney filed a motion for reconsideration, along with the expert's affidavit, which motion for reconsideration was also denied. *Id.* The Court of Appeals stated that a trial court's ruling on a continuance is reversible only for a manifest abuse of discretion, then analyzed the standard by which a trial court properly exercises its discretion, concluding that a trial court must base its decision making on principle and reason, and to do otherwise constitutes an abuse of discretion. *Id. at 505.* The Court of Appeals delineated the three reasons a trial court may deny a continuance, but noted that "the trend of modern law is to interpret court rules and statutes to allow decision on the merits of the case." *Id. at 507.* The trial court's primary consideration should have been justice. *Id. At 508.* The case had, the Court noted, been filed two years earlier, and little discovery had been pursued. *Id.* Defendant Snow had not argued that he would have suffered prejudice if the court had granted a continuance. *Id.* The Court of Appeals concluded that justice was not served by the "draconian application of time limitations" and that they could not discern a tenable ground or reason for the trial court's decision and held that the trial court improperly exercised its discretion in denying the motion for continuance. *Id.*

In *Tellevik v. Real Property*, 120 Wn.2d 68, 89-91, 845 P.2d 1325 (1992), the Washington Supreme Court held that the trial court abused its discretion in not granting the State a continuance pursuant to its CR 56(f) motion to complete discovery where the necessary information was not obtained because defendant's counsel did not provide requested documents when asked informally nor when served with requests for production.

In *Turner v. Kohler*, 54 Wn.App. 688, 694, 775 P.2d 474 (1989), the court stated that in limited situations, the federal courts have shown leniency to parties who have not formally complied with Fed.R.Civ. P 56(f); and that these included situations in which the party opposing the motion for summary judgment moved to compel production of certain documents before the motion for summary judgment was heard, citing *Garrett v. City & Cy. of San Francisco*, 818 F.2d 1515, 1518-19 (9<sup>th</sup> Cir. 1987).

Strictly speaking, plaintiffs' motion here does not fit within the guidelines of a CR 56(f) continuance; however, the primary consideration and the trial court's decision on the Motion for Continuance should have been justice. *Butler v. Joy*, 116 Wn.App. 291, 299, 63 P.3d 671 (2003). Defendants did not argue they would have been prejudiced by a continuance. *Id.*

An appellate court reviews a denial of a CR 56(f) motion for continuance for abuse of discretion. *Coggle v. Snow*, 56 Wn.App. 499,

507, 784 P.2d 544 (1990). The proper standard is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion. *Id.*

Here, after defendants' Motion for Continuance was heard on February 11, 2005, the court entered an Amended Scheduling Order providing for trial on November 28, 2005, and a discovery cutoff date of September 26, 2005. CP 40. The initial scheduling order had provided a trial date of July 11, 2005 and a discovery cutoff date of May 9, 2005. CP 28. Defendants' Motion for Continuance was based on extensive discovery that was to take place by all parties subsequent to February 11, 2005. Without taking any discovery, defendants thereafter filed their Motion for Summary Judgment 24 working days after the Amended Case Schedule Order had been entered. The hearing on the Summary Judgment motion was held on April 22, 2005, and even though plaintiffs requested a continuance in order to conduct discovery and advised the court of the discovery to be conducted and what plaintiffs expected the discovery would reveal, the court denied plaintiffs' CR 56(f) motion. On that date of April 22, 2005, there remained five months until the discovery cutoff under the Amended Scheduling Order and plaintiffs had filed a Motion Compelling Discovery because defendants had not sufficiently answered interrogatories or produced documents requested. In fact, defendants filed nothing in response to the Motion Compelling Discovery. Defendants did

not claim a continuance to allow plaintiffs to conduct discovery would prejudice them and could not show prejudice where the discovery cutoff date was still five months away. The trial court's assertion that plaintiffs could have conducted the necessary depositions prior to the hearing on the Summary Judgment motion is unrealistic and not a tenable ground or reason for the court's decision. The defendants filed a Summary Judgment motion 24 work days after the Amended Scheduling Order had been entered and plaintiffs then had 17 work days in which to prepare their response to the Summary Judgment motion. It was unrealistic and unreasonable for the court to hold that the discovery represented to the court in the Motion for Continuance by defendants and agreed to by plaintiffs could have been accomplished in that period of time. It was also unreasonable to require that discovery be accomplished in that period of time in view of the Amended Scheduling Order cutoff date for discovery of September 26, 2005. The trial court abused its discretion in denying plaintiffs' Motion for Continuance under CR 56(f).

The primary consideration on the motion should have been justice, not the draconian application of time limitations and the court should have followed the trend of modern law in interpreting court rules and statutes to allow a decision on the merits.

**B. THE MOTION COMPELLING DISCOVERY SHOULD HAVE BEEN GRANTED.**

This Motion was directed to several Requests for Production by plaintiffs seeking, in particular, the minutes of Board of Directors' meetings, and based on a number of allegations by plaintiffs of financial mismanagement by defendant's executive director and failure of oversight by the board, financial statements, budgets and credit cards of defendant. CP 129-148. This information was relevant in establishing whether the executive director acted outside the scope of her employment; whether she presented a risk of harm to employees and clients; whether the board knew, or in the exercise of reasonable care should have known, the executive director posed a risk; and to prove whether the board's failure to supervise executive director adequately was a proximate cause of injury to any of the plaintiffs. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997); *Francom v. Costco Wholesale Corp.*, 98 Wn.App. 854, 865-66, 991 P.2d 1182 (2000).

The Motion to Compel gave timely notice to defendants and complied with the requirements of CR 37. CP 129-154. Plaintiffs' counsel informed the Court that the board meeting minutes which were sought by the Motion to Compel would establish how the board was carrying out its business, developed policies and to what extent the board knew what was going on in the organization. RP (2/11/05) 41:8-15. Further, plaintiffs sought to compel production of company credit card

expenditures by the executive director to determine whether there had been inappropriate expenditures. RP (2/17/05) 41:16-19.

The Court, in granting the Summary Judgment as to all plaintiffs on all claims and holding that the Motion compelling discovery was moot, denied plaintiffs discovery to which they were entitled before a court ruling on the Summary Judgment motion, and denied plaintiffs an opportunity to complete the record before hearing the Motion for Summary Judgment. *Coggle v. Snow*, 56 Wn.App. 499, 507, 784 P.2d 554 (1990). The primary consideration in the trial court's decision on this motion should have been justice. *Id. at 508*. A trial court's ruling on a discovery motion is reviewed for abuse of discretion, which occurs where a decision is manifestly unreasonable or based on untenable grounds. *Lindblad v. The Boeing Company*, 108 Wn.App. 198, 207, 31 P.3d 1 (2001).

**C. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS OF WRONGFUL TERMINATION, NEGLIGENT SUPERVISION AND RETALIATION SHOULD NOT HAVE BEEN GRANTED.**

Summary judgment should be granted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Malnar v. Carlson*, 128 Wn.2d 521, 534, 910 P.2d 455 (1996); CR 56. The task of the trial court is to identify any genuine issue of material fact, not to resolve factual disputes. *McConiga v. Riches*, 40 Wn.App. 532, 536, 700 P.2d 331 (1985). The court must consider the

material evidence and all reasonable inferences therefrom most favorably to the non-moving party; when so considered, if reasonable men might reach different conclusions, the motion should be denied. *Id.* The burden of demonstrating the absence of a material factual dispute is on the party moving for summary judgment. *Malnar*, 128 Wn.2d at 535. Even if evidentiary facts are not in dispute, if different inferences or conclusions may be drawn from them as to the ultimate facts, such as intent, knowledge, good faith, or negligence, summary judgment is not warranted. *Preston v. Duncan*, 55 Wn.2d 678, 681-82, 349 P.2d 605 (1960); *Money Savers Pharmacy, Inc. v. Koffler Stores (Western), Ltd.*, 37 Wn.App. 602, 608, 682 P.2d 960 (1984). Mere surmise that the plaintiff may not prevail at trial is not a sufficient basis to grant the defendant's motion for summary judgment. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 431 P.2d 216 (1967). A court must deny a motion for summary judgment if the record shows any reasonable hypotheses that entitles the non-moving party to the relief sought. *Mostrom v. Pettibon*, 25 Wn.App. 158, 162, 607 P.2d 864 (1980).

Summary judgment is seldom available in cases raising material issues as to a person's state of mind; e.g. cases raising issues of intent or involving facts peculiarly within the knowledge of the moving party. Such matters are normally resolved only after cross-examination and rebuttal. See e.g. *Sewick v. Gwinn*, 73 Wn.App. 879, 873 P.2d 528 (1994)

(intent to defraud); *Olympic Fish Products, Inc. v. Boyd*, 23 Wn.App. 499, 597 P.2d 436 (1979), *aff'd* 93 Wn.2d 596, 611 P.2d 737 (1980) (good-faith intent). A trial is absolutely necessary if there is a genuine issue as to any material fact. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). A "material fact" precluding summary judgment is one upon which the outcome of the litigation depends. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 850 P.2d 1298 (1993).

An appellate court reviews a granting of summary judgment *de novo*, applying the same standard as the trial court. *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 348, 96 P.3d 979 (2004).

**1. PLAINTIFFS HAVE A CAUSE OF ACTION FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY.**

At common law, employees can quit or be fired for any reason or no reason at all. *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 935, 913 P.2d 377 (1996). Almost every state, however, has recognized an exception to this common law doctrine and allows some form of tort liability for terminations that contravene public policy. *Id.* When construed narrowly, this public policy exception properly balances an employer's need for autonomy in business decisions and protection from frivolous lawsuits with an employee's right to be protected from action that contravenes clear public policy. *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 668, 807 P.2d 830 (1991).

In order to establish a claim for wrongful termination in violation of public policy:

(1) The plaintiffs must prove the existence of a clear public policy (the clarity element);

(2) The plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the jeopardy element);

(3) The plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the causation element); and

(4) The defendant cannot offer an overriding justification for the dismissal (the absence of justification element).

*Gardner*, 128 Wn.2d at 941.

The first element, identifying a qualifying mandate of public policy, is a question of law and requires the court to inquire "whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme." *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984) (quoting *Parnar v. Americana Hotels, Inc.*, 65 Hawaii 370, 652 P.2d 625, 631 (1982)). Prior judicial decisions may also be relied upon when determining whether an employer's action violates public policy, though courts are expected to proceed cautiously and avoid the temptation to create public policy, a task

best left to the legislature. *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001).

Traditionally, wrongful termination cases tend to fall into four categories:

- (1) where employees are fired for refusing to commit an illegal act;
- (2) where the employees are fired for performing a public duty or obligation, such as serving jury duty;
- (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and
- (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing.

*Gardner*, 128 Wn.2d at 936.

The Court in *Gardner* identifies the statutory right of nonunion employees to engage in concerted action as a basis for claim of wrongful termination as a matter of public policy, category three above. *Gardner*, 128 Wn.2d at 931, citing *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 888 P.2d 147 (1995); *Wilmot v. Kaiser Aluminum & Chem Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991); and *Hayes v. Trulock*, 51 Wn.App 795, 755 P.2d 830 (1988).

In *Bravo v. Dolsen*, non-unionized dairy employees joined together in "concerted activity" to demand better wages, medical coverage, better

treatment from supervisors and lunch and rest breaks. After being terminated, employees brought suit under RCW 49.32.020, which prohibits employers from interfering with, restraining or coercing employees in self-organization or other "concerted activities for the purpose of collective bargaining or other mutual aid or protections." *Bravo v. Dolsen*, 125 Wn.2d at 745, 748. The fact that employees are not unionized does not mean they are without recourse to federal and state labor laws, specifically the National Labor Relations Act, 29 U.S.C. §157 and RCW 49.32.020. *Id.* at 752-753. The court stated "We hold the term 'concerted activities' encompasses the collective action of non-unionized employees." *Id.* at 748.

The Court acknowledged the body of federal law under 29 U.S.C. §157, noting that while federal authority is not controlling in interpreting state statutes, it can be persuasive where the texts of both federal and state laws are similar. *Id.* at 754. Several federal courts, the Court noted, have held the NLRA "effectively insulate[s] employees from discharge, refusal to hire, other employer retaliation for engaging in concerted activities for mutual aid or protection, even though no union activity be involved . . . ." *Id.*, citing *Halstead Metal Products v. NLRB*, 940 F.2d 66, 69 (4<sup>th</sup> Circ. 1991) (quoting *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 752-53 (4<sup>th</sup> Circ. 1949). See also *National Labor Relations Act*, 29 U.S.C. §158(a)(1).

In *Atlantic-Pacific Construction Co. v. NLRB*, 52 F.3d 260, 263-264 (9<sup>th</sup> Circ 1995), the Court of Appeals concluded that a non-union employee's discharge was unlawful where the employee, Mr. Davis, unhappy about the promotion of a disliked coworker, collected other employees' signatures on a letter opposing the promotion and sent it to the company president. *Id.* Several other employees had expressed concerns to Davis about the promotion and had agreed they would sign the letter if he wrote it. *Id.* at 264. Atlantic Pacific argued that Davis sent the letter in furtherance of a long-standing grudge against the coworker, and issues about working conditions were simply a pretext. *Id.* at 263. The Court of Appeals stated that whether the letter was directly related to the terms and conditions of employment is a factual question and "the nexus between the activity and working conditions must be gleaned from the totality of the circumstances, as even wholly inarticulate activity, like walkouts or work slowdowns, may be protected activity." *Id.* Protests and complaints about the hiring, discharge and promotion of other employees fall within protected activity. *Id.* at 264.

Plaintiffs in the instant action joined together to complain to the Board of Directors of Nova about their working conditions – responsibilities, finances and budgets for client care, potential wage violations, treatment by their supervisor – and also the treatment of their disabled clients, and the expenditure of the agency's public funds. CP

155:25-27; 156:1-9, 14-19; 158:25-28; 159:15-24; 164:1-7; 167:24-26; 171:18-27; 178:2-6; 182:27-28; 183:1-8, 13-19; 188:8-28; 189:1-7; 306:5-16; 307:21-28; 308:1-6; 309:18-21. Defendants characterize the issues as simply that the Plaintiffs don't like the manager, but that contradicts the premise that employees, even non-unionized ones, have the right to collectively complain to their employer and they have the right not to be retaliated against by being terminated or harassed because they complained. RP (4/22/05) 36:9-17. In the instant case, ultimately all but one of the plaintiffs lost their jobs for either complaining to the Board of Directors in a letter signed by six employees; for objecting to the eventual firing of two of the six employees and demanding in a second letter to the Board that the Board acknowledge their concerns; or for walking out when the Board disregarded their second letter. CP 156:17-19; 160:6-15; 165:23-24; 169:7-8; 176:25-28; 177:1; 184:16-25.

In *Gardner v. Loomis*, an armored car driver got out of his vehicle in order to save a woman who was being held hostage in a bank. *Gardner*, 128 Wn.2d at 934-35. The driver was terminated for violating the company rule that requires drivers to remain in the vehicle at all times. *Id.* In an action alleging his termination was in violation of public policy, the court determined that there does exist a clear public policy that citizens help one another avoid death or serious bodily injury, and then the court considered the causation element; that is, whether the public policy linked

conduct caused dismissal. *Id. at 946*. The employer in *Gardner* argued that regardless of any other element, the plaintiff's case should fail because he was terminated for violating a company rule and not because he saved someone's life. *Id. at 947*. The court, however, found that the reason the employee violated the rule was "inextricably intertwined" with saving the woman's life, and, therefore, the causation element was met. *Id.*

In the instant case, Plaintiffs Briggs and Robertson were fired for violating company policy (insubordination), which was, according to Executive Director Linda Brennan, for "forg[ing] alliances with other staff members against me." – in other words, organizing with other employees to complain to the Board of Directors about terms and conditions of employment, particularly as affected by Ms. Brennan. CP 67, 68. An employer may not, however, argue that the employee was fired merely for violating a rule, where the act of promoting public policy and the act of breaking the rule were so intertwined as to be indistinguishable. *Id.* Here the act of breaking the rule was the very right – concerted activity among employees, even non-unionized ones – that RCW 49.32.020 was enacted to protect.

Despite the facts presented by Plaintiffs, the trial court dismissed Plaintiffs' claim for wrong termination in violation of public policy, stating that Plaintiffs did not identify the existence of a clear public policy, and there was no competent evidence or legal argument to suggest a clear

public policy exists. RP (4/22/05) 37:19-25; 38:1-22. The trial court, however, failed to consider the facts showing plaintiffs' protected right to engage in concerted activity, specifically their complaints to the Board of Directors, about terms and conditions of their employment.

Plaintiffs did identify the existence of a clear public policy and there was competent evidence and legal argument to suggest a clear public policy exists. Therefore, summary judgment of plaintiffs' claims for wrongful termination in violation of public policy should not have been granted.

**2. PLAINTIFFS HAVE A CAUSE OF ACTION FOR NEGLIGENT SUPERVISION AND/OR RETENTION**

As set forth in the Court's analysis dated April 27, 2005, in order to establish a claim for negligent supervision against Nova Services, plaintiffs must establish that:

1. the Executive Director acted outside the scope of her employment;
2. she presented a risk of harm to one or more of the plaintiffs;
3. the Board of Directors of Nova knew, or in the exercise of reasonable care should have known, that Defendant Brennan posed such a risk; and
4. the Board of Directors' failure to supervise Defendant Brennan in an adequate manner was the proximate cause of one or more of the plaintiffs' injuries. CP 350-351.

See *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997); *Farnum v. Costco Wholesale Corp.*, 98 Wn.App. 845, 991 P.2d 1182 (2000).

The trial court then stated that plaintiffs must also prove that the Board did not act to correct the situation, but that plaintiffs had presented only the assertion, supporting element number 3 of the analysis, that the Board's authorization of a policy, implemented by the executive director, prohibited employees from bringing complaints to the Board. CP 351. The court then concluded that this presented only an inference not sufficient to raise a genuine issue of material fact and to defeat summary judgment. CP 351.

Nevertheless, plaintiffs' affidavits set out each affiant's personal factual observations and factual information, including the information they heard and from other employees and a former Board member, and in good faith believed was relevant to the well-being of the organization. For example, another employee told Plaintiff Beverly Nunn that Brennan misappropriated Nova funds for her own use. CP 179:14-18. A former Board member, who had resigned about the time plaintiffs were fired, told Plaintiff Mark Johnson that the Board was ineffective and had no idea how to deal with Brennan. CP 186:5-16. Those statements are not hearsay and beg for further investigation. Those statements, if true, are material facts that support of a cause of action for negligent supervision. Plaintiffs

needed to depose the persons who made the statements, but were unable to do so before defendants filed their Motion for Summary Judgment.

The trial court failed to resolve all reasonable inferences from the evidence on this claim in favor of the plaintiffs. Had it done so, it would have concluded plaintiffs raised a genuine issue of material fact. Summary judgment as to plaintiffs' claim for negligent supervision and/or retention was improper.

### **3. PLAINTIFFS HAVE A CAUSE OF ACTION FOR RETALIATION**

To establish a prima facie case of retaliation, a plaintiff must show that (1) he or she engaged in statutorily protected activity; (2) an adverse employment action was taken; and (3) there was a causal link between the employee's activities and the employer's adverse action. *Francom v. Costco Wholesale*, 98 Wn.App. 845, 862, 991 P.2d 1182 (2000). Plaintiff need not show that retaliation was the only or "but for" cause of the adverse employment action, but he or she must establish that it was at least a substantial factor. *Id.*

Plaintiffs Judy Robertson and Ken Briggs were terminated on July 12, 2004 for "violation of company policy: insubordination" specifically, as stated by Executive Director Linda Brennan, "working in a disruptive manner to forge alliances with other staff members against me." CP 67, 68. In other words, Briggs and Robertson were fired for organizing with their fellow employees to complain about working conditions. Plaintiff

Shirley Bader was told by Brennan that her services were no longer needed if she was unwilling to be personally loyal to her. CP 160:9-15. Plaintiffs Mark Johnson, Beverly Nunn and Jami Smith who had joined with Robertson and Briggs to write to the Board of Directors, were terminated the next week, along with three other employees, Peggy Clark, Valerie Bruck and Odalys Castillo (Castillo was dismissed from the case pursuant to settlement prior to summary judgment) after writing a second letter to the Board protesting the firing of Robertson and Briggs and the failure of the Board to seriously consider their concerns, and refusing to return to work until their concerns were addressed. CP 156:17-19; 179:26-27; 184:16-27; 320:12-15; 323:9-10. Plaintiffs engaged in a protected activity; all but Odalys Castillo and Pam Zeller were terminated; and there is unquestionably a causal connection between each employee's involvement in organized activity around working terms and conditions and their terminations.

The trial court dismissed plaintiffs' cause of action for retaliation with respect to all the employees except Briggs and Robertson, on the grounds none of them showed evidence that they did not voluntarily resign. RP (4/22/05) 39:5-13. The trial court dismissed the cause of action for retaliation as to Briggs and Robertson on the grounds that they failed to show they had engaged in protected activity. RP (4/22/05) 39:17-25, 40:1-7. The trial court erred in failing to consider the facts supporting a

cause of action for retaliation against the employees for exercising the statutorily protected right to organize together and complain. Therefore, summary judgment dismissing this cause of action should not have been granted.

#### IV. CONCLUSION

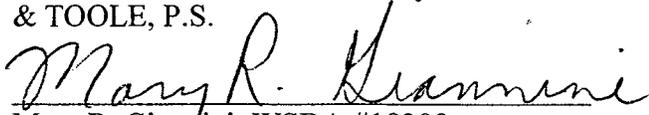
For the following reasons, the Court of Appeals should reverse the order granting defendants' Motion for Summary Judgment, Order of Dismissal as to all of plaintiffs' claims and Order Denying plaintiffs' Motion for Reconsideration:

1. The trial court's denial of plaintiffs' CR 56(f) Motion for Continuance was an abuse of discretion;
2. The trial court's refusal to grant plaintiffs' Motion Compelling Discovery was an abuse of discretion;
3. The trial court erred in granting defendants' Motion for Summary Judgment, Order of Dismissal of All Claims and Order Denying Plaintiffs' Motion for Reconsideration.

This case should be remanded for further proceedings.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of January, 2006.

WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.

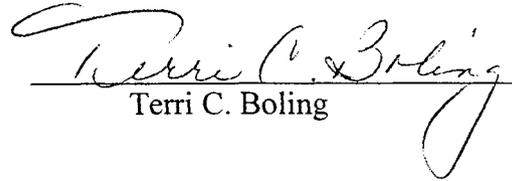
  
Mary R. Gianfani, WSBA #18308  
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**CERTIFICATE OF SERVICE**

On the 27<sup>th</sup> day of January, 2006, I caused to be served a true and correct copy of the within document described as APPELLANTS' OPENING BRIEF to be served on all interested parties to this action as follows:

Lou Rukavina, P.S.  
Attorney at Law  
421 West Riverside, Suite 1015  
Spokane, Washington 99201  
Attorney for Defendant Nova Services

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile Transmission

  
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Terri C. Boling