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Court of Appeals, Division 1

Respondent's Brief in the Matter of

Audley Becker, Respondent, v. Darren Varnado, et al, Appellants

No. 66468-9-I

Gregory D. Karp, WSBA #20769  
Attorney for Respondent  
4026 NE 55<sup>th</sup> Street, Suite E-215  
Seattle, Washington  
(206) 234-9800  
fax (206) 260-3093  
email karp.law@comcast.net

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## **I. INTRODUCTION**

This matter arises as an appeal by the Defendant/Appellants seeking to overturn the judgment entered by the King County Superior Court finding liability under RCW 49.42.070. Plaintiff/Respondent filed and served on Defendants a Request for Admissions to which the Defendants did not respond. After a hearing on the Plaintiff/Respondent's Motion for Summary Judgment, Superior Court Judge Gregory Canova found sufficient facts established as a matter of law to enter judgment in favor of the Plaintiff. Defendants' Motion for Reconsideration was denied by the trial court.

## **II. ISSUES PRESENTED**

1. Did the trial court properly apply the relevant civil rules in granting Plaintiff's Motion for Summary Judgment?
2. Does a trial court commit reversible error when it fails to grant a continuance where no

motion for continuance or affidavit in support of continuance is found in the record?

3. Does a trial court abuse its discretion by failing to set aside its judgment because of a mere allegation of medical disability by a party where no evidence in the record supports such a finding and the allegation of medical disability is presented only after the entry of judgment?

4. Is a trial court required to consider documents presented for the first time to the court and the party opponent at a hearing on the opponent's motion for summary judgment?

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

Plaintiff Audley Becker filed suit in King County Superior Court against his former employer for recovery of unpaid wages under RCW 49.42.070 and breach of contract. Defendant/Appellants answered claiming lack of knowledge and therefore denial of all the allegations contained in the complaint. Plaintiff filed and served a Request

for Admissions pursuant to CR 36. Plaintiff also filed and served a Request for Production of Documents pursuant to CR 34. Clerk's Papers 11, 12, 13, pgs. 95-104. Defendant/Appellants failed to respond to either discovery request. Defendants did not object to the discovery requests or seek more time to comply. Defendants failed to respond from the time the discovery requests were filed in May, 2010, until the day of the hearing on Plaintiff's Motion for Summary Judgment in October.

After a hearing on Plaintiff's Motion for Summary Judgment, King County Superior Court Judge Gregory Canova found that under CR 36 the matters contained in the Request for Admissions were admitted and conclusively established as the facts of the case. The court found the facts of the case sufficient for a finding of liability and the granted Plaintiff's Motion for Summary Judgment. Appellants raise on appeal the issue

of whether the court should have granted an unrequested continuance with respect to the CR 56 summary judgment hearing and whether "excusable neglect" by the Defendant should compel the appellate court to vacate the trial court's order granting Plaintiff's summary judgment motion.

#### **IV. ARGUMENT**

**1. The trial court properly granted the Plaintiff's motion for summary judgment.**

A motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The trial court in this matter relied on CR 36 in finding that sufficient admissions were made by the Defendants to establish liability as a matter of law. CR 36 provides that a matter raised in a

request for admission "is admitted" and is "conclusively established" unless the party to whom the request is directed answers or objects in writing to the request within 30 days after service. CR 36 (a), (b). Defendants in this matter neither answered nor objected to the CR 36 Request for Admissions nor did they ask the court for additional time. The judge found the matters contained therein to be admitted by straightforward operation of CR 36 as the facts of the case. The court then found the admissions sufficient that no genuine issue of material fact remained. The court properly applied the civil rules in granting the motion for summary judgment.

**2. The trial court acted properly in holding the summary judgment hearing because the hearing was properly conducted in accord with the court rules.**

Appellants contend that the trial court committed reversible error by failing to continue the summary judgment hearing. Appellants' Brief, pg. 4. Appellants cite CR 56(f) as the basis for their contention that the trial court should have held the matter over to give Defendants additional time to prepare. *Ibid.* Appellants claim must fail on the facts of the case and the applicable law.

The minimum requirements of a motion under CR 56(f) are plainly stated within the rule: the moving party must show by affidavit and with specificity the facts sought to be established by continuance of the case. Civil Rule 56(f) allows that a court "may" grant continuance for further discovery if "it appear[s] from the affidavits of a party opposing the [summary judgment] motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition." A court's denial of a CR 56(f)

motion is reviewed for abuse of discretion. MRC Recievables v. Almitra Zion, 152 Wn. App.625, 218 P.3d 621,622(2009); Mossman v. Rowley, 154 Wn.App. 735, 229 P.3d 812 (2009).

In the present case, Appellants present no evidence from the record that 1) a motion to continue was made to the trial court; 2) that affidavits supporting such a motion were filed; or 3) that any particular piece of admissible evidence or discovery required additional time for presentation. Appellants would have the Court find a yet undiscovered right to waiver of the plain requirements of 56(f) to be binding on trial courts so as to require reversal of otherwise proper lower court judgments even in the absence of a 56(f) motion. Appellants urge adoption of this proposed new rule apparently on the basis of no principle other than their dissatisfaction with an outcome arrived at by the application of the rules as written.

Appellants would have the appellate court find the trial court abused its discretion by failing to grant a non-existent motion. The Court of Appeals is now asked to review not a trial court's denial of a 56(f) motion, but, apparently, the trial court's failure to make such a motion on its own behalf. A rule stating that a court "may" grant continuance in some circumstances is to be misshapen into a previously unimagined requirement that a court must do so even where it is not asked to do so and in the absence of any stated reason why it should.

Appellants' claim to a right to a continuance where no motion for continuance appears in the record finds no support in case law. Appellants cite Lewis v. Bell, 45 Wash.App. 192, 724 P.2d 425 (1986), in support of their claim to a right to continuance under CR 56(f). Appellants' Brief, pg. 4. The Courts of

Washington read the law and the Lewis holding far more narrowly as applicable only where specific evidence is sought but cannot be reasonably be obtained in the time prescribed:

CR 56(f) provides a remedy for parties **who know of the existence of a material witness and show good reason why they cannot obtain the witness' affidavits in time** for the summary judgment proceeding. In such a case, the trial court has a duty to give the party a reasonable opportunity to complete the record before ruling on the motion. Turner v. Kohler, 54 Wn.App. 688, 693, 775 P.2d 474 (Wash.App. Div. 1 1989), citing Lewis v. Bell, 45 Wash.App. at 196, and Cofer v. County of Pierce, 8 Wash.App. 258, 262-63, 505 P.2d 476 (1973) (emphasis added).

In contrast, Appellants here raise no issue regarding any evidence not already in their possession at the time of the summary judgment hearing.

In the event that a motion for continuance is made and denied, "[t]he trial court's grant or denial of a motion for continuance will not be disturbed absent a showing of manifest abuse of

discretion.” Turner v. Kohler, 54 Wn.App. 688, 693, 775 P.2d 474 (1989). Appellants fail to show any reasonable basis for finding manifest abuse of discretion. Indeed, as the trial court in the present case had no opportunity to decide on a motion for continuance, the court logically could not have abused its discretion by denying it. Far from making the case that the trial court must be reversed, Appellants fail even to state a basis on which the relief sought could be granted.

Appellants point to language in Turner regarding “leniency” toward *pro se* litigants. Appellants’ Brief, pg. 5. Appellants represent that “[c]ase law ...clearly supports an exception to CR 56(f) for *pro se* litigants.” *Ibid*, pg. 13. This statement is unsupported. Appellants’ effort to conflate leniency, as the courts would have it, with exemption, as Appellants would prefer, must fail. Appellants’ claim to support

in case law for a 56(f) "exemption" ignores the facts and misrepresents the holding of the case on which they rely.

As Appellants note, the Turner court approvingly cites a federal case, Garrett v. San Francisco, 818 F.2d 1515 (9th Cir. 1987), as suggesting leniency for *pro se* litigants in some circumstances involving the application of CR 56(f). Turner, 54 Wn. App at 694; Appellants' Brief at 5. The Garrett court found the *pro se* party had a pending motion sufficient to raise and preserve the 56(f) issue and that the motion should have been considered by the court on the merits. The written motion "made clear the information sought, did not seek broad additional discovery, but rather sought only the personnel records of 16 named firefighters and indicated the purpose for which this information was sought." Garrett, 818 F.2d at 1518. Moreover, "[t]he motion was timely made under the

scheduling order and was set for hearing before the discovery cut-off date." Ibid, at 1519.

The record in the present matter is devoid of any circumstance of Appellants' remotely comparable to Garrett apart from their common *pro se* status. Appellants made no motion, written or otherwise, seeking continuance, made no representation as to what facts they sought to adduce through prolonged discovery, failed to file anything within the timeline set by the court, and can point to nothing in the record the trial court had before it but refused to consider. On any fair review of the facts, the Garrett case cannot reasonably be read as supporting the exemption claimed by Appellants.

In contrast to the *pro se* litigant in Garrett, who sought discoverable information in the possession of another party, Appellants assert a right to additional time for discovery of material they admit to possessing at the time

of the summary judgment hearing. Appellants tell us, "Defendant Varnado had the written employment contract in his possession at the summary judgment hearing". Appellants' Brief, pg. 8. Appellants would have the Court find that CR 56(f) provides a mandatory remedy to litigants who fail to comply with the time for filing requirements of CR 56(c). Appellants would, in effect, have compliance with CR 56(c) be considered voluntary while mandating continuance under 56(f) for those who do not comply with the earlier paragraph of the same rule. Any *pro se* litigant seeking to delay a summary judgment hearing could ignore 56(c) in favor of the continuance they would know they must be granted under 56(f) by presenting material in their possession only at the hearing itself. Such a result would render CR 56(c) meaningless and would quickly become practicably untenable for the administration of justice. The trial court

cannot rationally be said to have abused its discretion on this record with respect to Appellants' claim for relief under CR 56(f).

**3. The trial court acted properly in refusing to consider documents produced by Appellants for the first time at the hearing on Plaintiff's Motion for Summary Judgment.**

Appellants contend that the trial court erred by refusing to consider "evidence" presented to the court and to Mr. Becker for the first time at the summary judgment hearing. Appellant's Brief, pg. 5. Appellants complain that the court "rel[ie]d solely on what was already in the record." *Ibid.* The trial court's refusal to admit documents presented only at the summary judgment hearing was reasonable and proper under the rules and in the interest of justice.

Civil Rule 56 provides a clear timeline for summary judgments hearings in order to preserve

the orderly administration of justice: "The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. **The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing.**" CR 56(c). (emphasis added).

Appellants point to no rule, as indeed none exists, requiring a trial court to consider untimely and improperly filed documents.

Appellants would have a *pro se* litigant exempted from the most basic rules of procedure provided in post-judgment proceedings he claims to have suffered some undocumented illness during some part of the litigation. Appellants would have court hearings degenerate into document review sessions or be subject to endless delays as litigants produced materials piecemeal, each time demanding continuance. Either procedure would be

incompatible with basic fairness to all parties and the efficient administration of justice.

Appellants have had every opportunity allowed by law to present any documentation they believe relevant to their case. That they chose to ignore the matter until well past the expiration of the time period prescribed by the Rules cannot form the basis for reversible error.

Moreover, Appellants were under a legal obligation to present any documents relating to Plaintiff's employment well before the summary judgment hearing. Plaintiff/Respondent filed and served on Defendant/Appellants a Request for the Production of Documents dated April 25, 2010 pursuant to CR 34. CP 11, pgs. 95-96; CP 13, pgs. 103-4. Plaintiff's CR 34 Request includes the following: "Plaintiff requests Defendants produce for inspection and duplication any and all employment records, personnel files, contracts of employment, records of compensation, performance

reviews, and/or any other documents regarding the employment of Plaintiff Audley Becker at the defendant company, whether retained pursuant to the employer obligations described in WAC 296-126-050 or otherwise." CP 11, pgs. 95-96.

Appellants made no response to Plaintiff's CR 34 filing until they brought what they describe as a document which would have been responsive to Plaintiff's CR 34 Request to court for a summary judgment hearing.

Appellants would have their failure to comply with both a CR 34 discovery request and with the procedural requirements of CR 56(c) used to overturn a judgment against them. Appellants urge a rule which would inevitably lead to chaos, delay and game playing by litigants which would make the administration of the justice system impossible.

4. **The trial court acted properly in not considering evidence of Defendant/Appellant Varnado's medical condition because no such evidence appears anywhere in the record.**

Appellant Varnado presented no evidence of medical disability to the trial court. As the record is devoid of any evidence to support such a claim, the trial court cannot have abused its discretion by failing to consider it. Appellant Varnado's claim to medical disability appears only as an unsupported allegation and for the first time in his post-judgment Motion for Reconsideration. The trial court reasonably decided not to overturn a proper judgment on the basis of a mere allegation without factual basis in the record.

Appellant's claim to medical disability cannot have led the trial court into reversible error as no actual evidence of *bona fide* disability was before it. In fact the record

reflects Appellant Varnado's ability to participate in the proceedings. Mr. Varnado must have been well enough to file his Answer, appear at the summary judgment hearing, and file a motion for reconsideration as well as the present appeal. Mr. Varnado has demonstrated his ability to seek and retain legal counsel in this matter. Whatever disability afflicts Mr. Varnado, there is no evidence of its nature in the record except for the inescapable conclusion that his condition has presented a less than comprehensive bar to his participation.

The record contains no reasonable basis on which the Court could conclude that Appellants have met their burden of proof in seeking to overrule a trial court's judgment. If the Court were to allow a mere allegation of disability made post-judgment to overturn the results of an otherwise proper proceeding, then no litigant could reasonably rely on the finality of any

court decision. The trial court's judgment is entirely reasonable and should stand.

**5. The Court must reject Appellants' claim that there is no "reasonable inference" to justify the trial court's judgment because of the substantial evidence supporting that decision.**

Appellants cite CR 59(a)(7) in support of their claim for relief. Appellant's Brief, pg. 6. The rule allows for a new trial or reconsideration if "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law." However, Defendant/Appellants' admissions by operation of the plain language and meaning of CR 36 provide ample evidence on which the trial court could and did rely in reaching its judgment. Appellants make no representation that any element of liability under RCW 49.42.070 cannot be found in the admissions established as the facts of the case through the operation of CR

36. Rather, Appellants argue, without basis in law, that facts admitted under CR 36 ought not form the basis for a finding of liability in any case.

Similarly, as the overwhelming evidence in the record supports the court's judgment, there is no reasonable basis for a claim that substantial injustice has been done under CR 59(a)(9).

**6. The Court must reject Appellant's claim to relief due to "inadvertence" or "excusable neglect" because of the absence of any evidence supporting Appellants' claim.**

Appellants seek dispensation from the normal rules of court by claiming inadvertence and excusable neglect. Appellants' Brief, pg. 6. The record contains no factual evidence to support their claim. Appellants can point to no case in which any court has held an analogous fact pattern to be inadvertence or excusable

neglect<sup>1</sup>.

Appellants would have the Court find those litigants willing to make unsupported post-judgment claims of disability retroactively exempt from those parts of litigation they find cumbersome or inconvenient. Likewise, Appellants would have the Court find litigants in multiple lawsuits exempt from participation in those they prefer not to defend. Litigants would be incentivized to involve themselves in multiple legal disputes in order to shield themselves from those they find most troubling. A plaintiff's right to legal redress would be conditional on a defendant's legal issues with other litigants in other forums.

Appellants present no reason to believe the trial court abused its discretion in denying Appellants motion for reconsideration on the

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<sup>1</sup> Appellants cite Rinke v. Johns-Manville, 47 Wn. App. 222, 734 P.2d 533 (1987), for its dicta regarding procedure. Rinke addresses issues of joinder under CR 17 and has no bearing on the present matter.

basis of inadvertence or excusable neglect.

**7. The Court must reject Appellants' claim to have responded to a CR 36 Request by prior filing of an entirely different document.**

Appellants would have the Court conflate Defendants' Answer with their non-existent response to a CR 36 Request for Admissions<sup>2</sup>. Appellants' Brief, pg. 8. Appellants' would have the Court deem certain filings to have been made when they plainly have not and would substitute by *post-hoc* fiat one document for another. The rule urged by Appellants would 1) render CR 36 superfluous and thereby moot, and 2) prevent any litigant from knowing with any certainty what filings have been made and which have not at any point in the litigation. The rule of law would not long survive the adoption of such a rule.

Appellants urge the Court to find that "Defendants denied the same allegations in their

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<sup>2</sup> Appellants can reasonably be held to have waived this argument as no Answer appears in the record on appeal.

complaint [sic] and therefore, the Requests for Admissions were essentially answered already<sup>3</sup>." Appellants' Brief, pg. 8. Appellants would have the Court deem a CR 36 request for admission inconsequential with respect to any defendant who has previously denied a plaintiff's allegations provided that request is relevant to those allegations. Appellants would have a discovery request's relevance to the plaintiff's case serve as a bar to its enforcement.

The Court cannot reasonably conclude that Appellants have met their burden of proving the trial court erred in applying the terms of CR 36 as written and ordinarily understood rather than reading the rule out of existence as Appellants would prefer. The trial court reasonably and rightly denied Appellants' effort to rewrite the rules of procedure when the court rejected this

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<sup>3</sup> Also, "Plaintiff relied primarily on unanswered Requests for Admission in support of the motion for summary judgment, even though Defendants had denied the same by way of their answer and affirmative defenses." Appellant's Brief, pg. 7.

argument in Appellants' Motion for Reconsideration. The appellate court should reject it as well.

**8. Appellants' objections to the CR 36 Request for Admissions must fail procedurally and substantively and should be rejected by the Court.**

The trial court rightly rejected Appellants' post-judgment objections to the scope of the CR 36 Request, which they repeat here. Appellants' claims are untimely on appeal, as they were at the time of the Motion for Reconsideration, as they ignore the time for objection constraints contained in the plain text of CR 36(a). The rule provides that absent answer, objection or request for extended time, the matters put forward for admission are conclusively admitted<sup>4</sup>. Defendants'

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<sup>4</sup> "The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter" CR 36(a).

objections should have been brought to the trial court within the time frame allowed by the rule. Appellants' objections are therefore not properly before the Court on appeal.

Appellants' objections also fail substantively. Appellants make no specific reference to any allegedly objectionable part of the CR 36 document. Any matter that is discoverable or may lead to discoverable material under CR 26(b) may be properly included in a Request for Admissions through the incorporation by reference of Rule 26(b) into Rule 36. Defendants rely on Brust v. Newton, 70 Wn. App. 286, 852 P.2d 1092 (1993), but ignore the substance of the case. The Brust court found objectionable requests for admissions concerning a litigant's state of mind and calling for the legal conclusion regarding the proximate cause of

the plaintiff's damages<sup>5</sup>. Brust, 70 WnApp. at 294. In the present matter, Appellants' refer to no specific portion of the CR 36 document, preferring a more general objection to its scope. Appellants' objection seems to be that the scope of the Request is objectionable in that it tends to establish liability and is detrimental to their interests.

No court has held an untimely objection to unspecified portions of a CR 36 Request to be supportable on anything remotely like the record now before the Court. Appellants' objection amounts to no more than a complaint that having failed to respond to Plaintiff's CR 36 discovery request, they do not care for the result. The trial court's rejection of this argument is reasonable and should not be disturbed on appeal.

**9. Appellants' reference to documents not**

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<sup>5</sup> Appellants' reliance on Santos v. Dean, 96 Wn. App. 849 (1999), is misplaced. The court in Santos addresses the issue of extension of time to respond to a Rule 36 Request, a situation inapposite to the current circumstances.

**included in the record on appeal cannot form the basis for overturning the trial court's judgment.**

Appellants quote extensively from a document they describe as an employment contract. Appellants' Brief, pg. 12. Under RAP 9.1(a), (c) and 9.12, these materials are not in the record and cannot form the basis for appellate review in this matter.

RAP 9.12 provides, "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." Under the law, "[i]t is the appellate court's task to review a ruling on a motion for summary judgment based solely on the record before the trial court." Green v. Normandy Park Riviera Section Cmty. Club, Inc., 137 Wn. App. 665, 678(2007). Appellants say of the documents they would proffer through their brief, "[t]his evidence was not considered by the trial court."

Appellants' Brief, pg. 12.

The document quoted by Appellants forms no part of the record as described by RAP 9.1, being neither an exhibit nor filed with the court as clerk's papers. Additional evidence may be submitted for appellate review only under narrowly limited exigent circumstances, conditions which do not pertain to the present case. RAP 9.11(a); See also Fed'n of State Employees v. State, 99 Wn.2d 878, 882, 665 P.2d 1337 (1983) ("It appears quite reasonable to excuse respondents' failure to present this evidence to the trial court because of the emergency circumstances of this case.")

If the document quoted is indeed relevant to the terms of Respondent's employment and in Appellants' possession, Appellants have failed to comply with Respondent's CR 34 Request for Production of Documents. See CP 11, 95-96. Appellants seek to have the Court consider

extraneous material outside the record on appeal in order to compensate for their prior failure to produce any documents as required by CR 34 and subsequent failure to file any documents as required by CR 56(c). Appellants have had every opportunity allowed by law to introduce any materials they believed would support their position to the trial court. Their failure to do so cannot result in reversible error by the court hearing the matter.

#### **V. CONCLUSION**

Appellants have abjectly failed to meet their burden of proof that the trial judge abused his discretion and should be overruled. Judge Canova properly found the matters described in Plaintiff's CR 36 Request for Admissions to be admitted by application of the plain text of the rule. The judge properly found sufficient facts admitted to establish liability at a summary judgment hearing. The judge properly held the

summary judgment hearing in accordance with all relevant and applicable rules of court. The judge properly refused to consider documents that were untimely presented and improperly filed, indeed not filed at all. The judge did not consider, in fact could not have considered, evidence of Mr. Varnado's alleged disability as this convenient and self-serving allegation, unsupported by any evidence, appears in the record only after entry of judgment. The judge acted properly and reasonably in considering Mr. Varnado's other pending legal matters, whatever they may specifically be, to be insufficient basis for excusing his failure to participate consistently in the present matter. The judge properly and reasonably denied Appellants' post-judgment Motion for Reconsideration based on much the same allegations now put forward on appeal. Appellants' claim for relief must be denied.

THEREFORE, Respondent respectfully moves that the Court dismiss the review of this matter and to impose any other remedy as the Court finds proper and in the interests of justice

Dated this 15<sup>th</sup> day of July, 2011



Gregory Karp, WSBA #20769

Gregory D. Karp, Attorney at Law  
4026 NE 55<sup>th</sup> Street, Suite E-215  
Seattle, Washington 98115  
(206)234-9800  
fax (206)269-3093  
karp.law@comcast.net