69691-2

69691-2

No. 69691-2-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON DIV. I

DEANDRA GRANT,

Appellant

v.

NATIONAL COLLEGE FOR DUI DEFENSE, INC.,

Respondent

King County Superior Court No. 12-2-20411-0 SEA
The Honorable Theresa B. Doyle

RESPONDENT'S BRIEF
ANSWERING BRIEF OF APPELLANT DEANDRA GRANT

Sarah Jung Evans, WSBA No. 37409
Alexandra A. Bodnar, Pro Hac Vice
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Two Union Square
601 Union Street, Suite 4200
Seattle, WA 98101
Telephone (206) 652-3585
Counsel for Respondent

TABLE OF CONTENTS

Page

I. INTRODUCTION 7

II. STATEMENT OF ISSUES 7

III. STATEMENT OF THE CASE 8

A. The Parties 8

B. The Complaint 8

C. NCDD's Motion to Dismiss 9

D. The Court's Grant of NCDD's Motion to Dismiss 10

E. The Court Denies Grant's Motion for Reconsideration 10

IV. ARGUMENT 12

A. NCDD's Alleged Forum Selection Clause Governing Membership Disputes Is Not Properly Before this Court 12

B. The Trial Court Properly Granted Dismissal on the Basis of Forum Non Conveniens 13

C. The Trial Court Did Not Err in Denying Grant's Motion for Reconsideration 15

1. The Trial Court Properly Denied Grant's Motion for Reconsideration which was Based upon a New Issue and New Facts 17

2. There was No Irregularity Consistent with CR 59(a)(1) Requiring Reconsideration 18

3. NCDD Did Not Commit Misconduct Consistent with CR 59 (a)(2). 18

TABLE OF CONTENTS (continued)

Page

4. Grant Failed to Demonstrate that "Substantial Justice" Had Not Been Done 20

5. Because The Membership Forum Selection Clause Has No Relevance to the Certification Dispute Upon Which Grant's Lawsuit is Based, the Trial Court's Denial of the Motion for Reconsideration was not an Abuse of Discretion 21

D. The Trial Court Did Not Err in Dismissing Grant's Claims Based Upon Failure To State a Claim Upon Which Relief Could be Granted 22

1. Grant Cannot Plead Any Set of Facts Consistent with the Complaint Which Would Entitle Her to Relief on Her WLAD Claim 23

2. Grant Cannot Plead Any Set of Facts Consistent with the Complaint Which Would Entitle Her to Relief on her CPA Claim 26

IV. CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Akiyama v. United States Judo Incorporated,
181 F.Supp.2d 1179 (W.D. Wash. 2002) 24

Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.,
140 Wn.2d 517, 998 P.2d 856 (2000) 20

August v. U.S. Bancorp,
146 Wn.App. 328, 190 P.3d 86 (2008) 17

Brinnon Grp. v. Jefferson County,
159 Wn.App. 446, 245 P.3d 789 (2011) 15

Contreras v. Crown Zellerbach Corp.,
88 Wash.2d 735, 565 P.2d 1173 (1977) 23

Cowiche Canyon Conservancy v. Bosley,
118 Wash.2d 801, 828 P.2d 549 (1992) 15, 22

Cutler v. Phillips Petroleum Co.,
124 Wash.2d 749, 881 P.2d 216 (1994) 22, 23

Ellingson v. Spokane Mortg. Co.,
19 Wash.App. 48, 573 P.2d 389 (1978) 25

Gulf Oil v. Gilbert,
330 U.S. 501 (1947) 14

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,
105 Wn.2d 778 (1986) 26, 28, 29

Hinton v. Carmody,
186 Wash. 242, 60 P.2d 1108 (1936) 21

Johnson v. Camp Auto., Inc.,
148 Wash.App. 181, 199 P.3d 491 (2009) 26

TABLE OF AUTHORITIES (continued)

Page(s)

Johnson v. Spider Staging Corp.,
87 Wn. 2d 577 (Wash. 1976) 14

Keenan v. Allan,
889 F. Supp. 1320 (E.D. Wash. 1995) 28

Keithly v. Intelius Inc.,
764 F. Supp. 2d 1257 (W.D. Wash. 2011) 27

Klotz v. Dehkhoda,
134 Wash. App. 261, 141 P.3d 67 (Div. 1 2006) 13, 14

Lightfoot v. MacDonald,
86 Wash. 2d 331, 544 P.2d 88 (1976) (en banc) 28, 29

Lilly v. Lynch,
88 Wn.App. 306, 945 P.2d 727 (1997) 16

Marquis v. City of Spokane,
130 Wash.2d 97, 922 P.2d 43 (1996) 25

McCurry v. Chevy Chase Bank, FSB,
169 Wash.2d 96, 233 P.3d 861 (2010) 23

Nearing v. Golden State Foods Corp.,
114 Wash.2d 817, 792 P.2d 500 (1990) 15

Newcomer v. Masini,
45 Wash.App. 284, 724 P.2d 1122 (1986) 12

Reed v. Whitacre,
2008 WL 4635914 (Wash.Ct.App. Oct. 21, 2008) 26

Reitz v. Knight,
62 Wash.App. 575, 814 P.2d 1212 (1991) 12

River House Development Inc. v. Integrus Architecture, P.S.
272 P.3d 289 (2012) 15

Schnall v. AT&T Wireless Servs., Inc.,
168 Wash.2d 125, 225 P.3d 929 (2010) 27

TABLE OF AUTHORITIES (continued)

Page(s)

Smith v. King,
106 Wash.2d 443, 722 P.2d 796 (1986) 22

Tonning v. Northern Pac. Ry. Co.,
180 Wash. 374, 39 P.2d 1002 (1935) 21

Washington Water Jet Workers Ass'n v. Yarbrough,
151 Wash.2d 470, 90 P.3d 42 (2004) 21

Wilcox v. Lexington Eye Inst.,
130 Wn.App. 234, 122 P.3d 729 (2005) 17

STATUTES

RCW 19.86.010(2) 27

RCW 19.86.090 26

RCW 49.60.030(f) 23

RULES

Civil Rule 59 16

Civil Rule 59(a)(1) 17, 18, 20, 21, 31

Civil Rule 59(a)(2) 17, 18, 20, 21, 31

Civil Rule 59(a)(9) 17, 20, 21, 31

I. INTRODUCTION

The only issues Appellant Deandra Grant ("Grant") raises for consideration by this Court relate to the trial court's dismissal of her claims against the National College of DUI Defense ("NCDD") on the grounds of *forum non conveniens* and its denial of her motion for reconsideration. Grant does not dispute the propriety of the trial court's dismissal pursuant to CR 12(b)(6) of her claims under the Washington Law Against Discrimination or the Consumer Protection Act, and in fact, does not once refer to those statutes or CR 12(b)(6) in her appeal. Thus, the dismissal of her case on those grounds stands. Furthermore, as is articulated below, none of the issues raised by Grant are properly before this Court.

II. STATEMENT OF ISSUES

1. Whether this Court can properly consider a forum selection clause allegedly governing membership disputes, which Grant: (1) raised for the first time in her motion for reconsideration, and (2) which lacked evidentiary support of its relevance to her certification dispute.
2. Whether the trial court abused its discretion in granting dismissal of Grant's claims on the basis of *forum non conveniens*.

3. Whether the trial court abused its discretion in denying Grant's Motion for Reconsideration challenging the dismissal of her claims on the basis of *forum non conveniens*.

III. STATEMENT OF THE CASE

A. The Parties.

NCDD is a voluntary bar association for DUI defense lawyers. CP 2; 42-43. NCDD administers a certification program allowing DUI defense lawyers to earn the designation of "Board Certified" by NCDD. CP 2; 42.

Grant is an attorney in Texas who practices DUI defense. CP 2; 42. Grant applied for certification by NCDD and was informed that she did not pass NCDD's certification test. CP 4. Although Grant was a member of NCDD, membership is not a requirement for certification. CP 63-64.

NCDD is incorporated in Washington, but Grant did not take the certification exam in Washington, and the witnesses and documents relevant to this certification dispute are not in Washington. CP 48.

B. The Complaint.

On June 13, 2012, Grant filed her Complaint in Washington. CP 1. In the Complaint, Grant alleged the following two causes of action against NCDD: (1) Gender Discrimination in Violation of R.C.W. section 49.60.030(1)(g)(2), Freedom from Discrimination and Declaration of Civil

Rights; and (2) Violation of the Washington Unfair Business Practices Act Pursuant to R.C.W. Chapter 19.86 - Unfair and Illegal Business Practices. CP 1-11.

She alleged that NCDD discriminated against her because of her gender when it did not grant her board certification. CP 4. In her Complaint, she conceded that NCDD has certification requirements which include passing a test. CP 10. She conceded that although she failed the test, women have passed the test. CP 3. She did not allege that women currently seeking certification are required to take a test, but men currently seeking certification are not. CP 3. The basis of her claim, rather, was that although a test is *now* required, this was not always the case, and therefore the longstanding members of NCDD, to whom she refers pejoratively as "good ol' boys", were treated differently than current applicants. CP 3.

C. NCDD's Motion to Dismiss.

NCDD filed its motion to dismiss on August 27, 2012. CP 61. NCDD's motion was based upon Civil Rule 12(b)(6) for failure to state a claim for which relief could be granted under the Washington Law Against Discrimination (RCW 49.60.030(f)) and the Washington Consumer Protection Act (RCW 19.86.020), *forum non conveniens*, and Grant's waiver of her claims against NCDD. CP 42; 44-45. Although

Grant discusses personal and subject matter jurisdiction at great length in her Opening Brief, NCDD did not make its motion pursuant to CR 12(b)(1) (lack of jurisdiction over the subject matter); or CR 12(b)(2) (lack of jurisdiction over the person).

D. The Court's Grant of NCDD's Motion to Dismiss.

On November 15, 2012, following oral argument by the parties, the trial court granted NCDD's motion to dismiss. CP 380-381. The Court properly granted the motion on two grounds: (1) *forum non conveniens*; and (2) failure to state a claim upon which relief could be granted under either the Washington Law Against Discrimination or the Consumer Protection Act. RP 15-16.

E. The Court Denies Grant's Motion for Reconsideration.

On November 20, 2012, Grant filed a motion for reconsideration of the trial court's grant of NCDD's motion to dismiss, in which she challenged the court's dismissal of her case on the grounds of *forum non conveniens*, but not the dismissal of her case on Civil Rule 12(b)(6) grounds. CP 383-399.

In that motion, Grant alleged that she first discovered an alleged membership forum selection clause after "receiving this Court's November 16, 2012 order granting Defendant's motion to dismiss for *forum non conveniens*." CP 385. Grant also admitted that the membership

forum selection clause had been available on NCDD's website since at least December 2010. CP 411-418.

Grant referred to this alleged membership forum selection clause in her motion for reconsideration, and requested judicial notice of it, but failed to provide any admissible evidence of the relevance of such a forum selection clause to the certification dispute upon which her lawsuit is based. CP 388, CP 402-410. No testimony demonstrating that the forum selection clause for membership disputes would be used in a dispute regarding certification accompanied her motion for reconsideration. Her purported quotation from the alleged forum selection clause relating to membership makes no reference to any supporting evidence relating to the certification dispute upon which her lawsuit is based. What Grant's motion for reconsideration makes clear, however, is that the alleged forum selection clause is applicable to "any dispute arising from or related to membership in" NCDD. CP 388. Grant does not allege that it is applicable to certification disputes. CP 383-399. Nor does the purported language so say.

Grant alleged that the new issue of the membership dispute forum selection clause, based upon a new fact (the existence of the clause) first discovered after the trial court's dismissal of her case, compelled reconsideration by the trial court pursuant to Civil Rule 59(a)(1) an

irregularity in the proceeding of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial; (2) misconduct of a prevailing party or jury ... (9) that substantial justice has not been done. CP 385-386. On December 4, 2012, the trial court properly denied Grant's motion for reconsideration. CP 424.

IV. ARGUMENT

A. NCDD's Alleged Forum Selection Clause Governing Membership Disputes Is Not Properly Before this Court.

For the first time, in her motion for reconsideration challenging the trial court's dismissal of her claims on the ground of *forum non conveniens*, Grant argued that NCDD has a forum selection clause governing membership disputes. CP 388. Grant argued that the forum selection clause was valid and enforceable and that a grant of dismissal on the basis of *forum non conveniens* was improper as a matter of law. CP 384; 387-392. Grant's argument was, and continues to be, without merit.

New issues may be raised for the first time in a motion for reconsideration, thereby preserving them for review, only where they are not dependent upon new facts and are closely related to and part of the original theory. Reitz v. Knight, 62 Wash.App. 575, 581, 814 P.2d 1212 n .4, 62 Wash.App. 575, 814 P.2d 1212 (1991) (citing Newcomer v. Masini,

45 Wash.App. 284, 287, 724 P.2d 1122 (1986)). Grant's argument regarding NCDD's membership dispute forum selection clause was an entirely new argument, based upon an entirely new, irrelevant fact, raised for the first time in her motion for reconsideration. As such, this issue was not preserved for review.

Accordingly, Grant's claim that the alleged forum selection clause compels a denial of NCDD's motion to dismiss for *forum non conveniens* was not preserved for appeal and is not properly considered by this Court. Grant does not raise any other grounds as the basis for her appeal of the trial court's dismissal for *forum non conveniens*. On this basis alone, Grant's appeal must be dismissed.

B. The Trial Court Properly Granted Dismissal on the Basis of Forum Non Conveniens.

The only basis upon which Grant alleges that the dismissal of her claims for *forum non conveniens* was improper is the alleged forum selection clause governing membership disputes. Because that argument is not properly before this Court on appeal, and she raises no other grounds, Grant cannot demonstrate that the dismissal on *forum non conveniens* grounds was an abuse of discretion. Klotz v. Dehkhoda, 134 Wash. App. 261, 141 P.3d 67 (Div. 1 2006) (trial court dismissed case so action could be filed in Canada; affirmed on appeal). Reversal is only

appropriate if the trial court's decision is "manifestly unfair, unreasonable, or untenable." Id.

The doctrine of *forum non conveniens* "refers to the discretionary power of a court to decline jurisdiction when the convenience of parties and the ends of justice would be better served if the action were brought and tried in another forum." Johnson v. Spider Staging Corp., 87 Wn. 2d 577, 579 (Wash. 1976). In determining whether dismissal is appropriate on the basis of *forum non conveniens*, Washington courts consider the relative ease of access to sources of proof; the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; and all other practical problems that make trial of a case easy, expeditious and inexpensive. Johnson, 87 Wn. 2d at 579; citing Gulf Oil v. Gilbert, 330 U.S. 501, 509 (1947).

Based upon the evidence before the trial court as of the date of the November 15, 2012 oral argument by the parties, the trial court granted dismissal of Grant's claims on the basis of *forum non conveniens*, as well as CR 12(b)(6). The Court stated that it was dismissing on the ground of *forum non conveniens* because "all the factors clearly weighs in favor of finding that Washington is not the appropriate forum. Aside from the defendant being incorporated here, there's just no other connection whatsoever. They – nobody lives here; no injury occurred here; plaintiff

doesn't live here; the defendant organization doesn't seem to maintain any presence here beyond just having been incorporated here." RP 15. Grant does not challenge the trial court's findings of fact. An unchallenged finding of fact is a verity upon appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wash.2d 801, 808, 828 P.2d 549, 553 (1992), citing Nearing v. Golden State Foods Corp., 114 Wash.2d 817, 818, 792 P.2d 500 (1990). Based upon the foregoing verities, the trial court's dismissal on the grounds of *forum non conveniens* was well within its discretion and not manifestly unfair, unreasonable or untenable. Consequently, this Court should uphold the trial court's dismissal on *forum non conveniens* grounds. Finally, as is set forth below, the court's decision to dismiss on 12(b)(6) grounds has not been challenged, and therefore, regardless of the outcome of this Appeal, the trial court's decision to dismiss the case must stand.

C. The Trial Court Did Not Err in Denying Grant's Motion for Reconsideration.

A trial court's denial of a motion for reconsideration is reviewed for abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. River House Development Inc. v. Integrus Architecture, P.S. 272 P.3d 289 (2012); see also, Brinnon Grp. v. Jefferson County, 159 Wn.App. 446, 485, 245 P.3d

789 (2011) (citing Lilly v. Lynch, 88 Wn.App. 306, 321, 945 P.2d 727 (1997)).

Civil Rule 59 sets forth the grounds upon which a motion for reconsideration may be granted. The rule states in relevant part:

> (a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:
>
> (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;
>
> (2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;
>
> ...
>
> (9) That substantial justice has not been done.

Grant's motion for reconsideration was properly denied because (1) she improperly based the motion upon a new issue of the enforceability of the membership forum selection clause based upon a new fact (the existence

of that clause) which she could have raised prior to the Court's dismissal of her case, (2) she failed to demonstrate that any of the grounds of CR 59(a)(1), (2) or (9) were satisfied, and (3) she failed to provide any admissible, competent evidence of the relevance of the membership forum selection clause to the certification claims upon which her lawsuit is based. The trial Court's denial of her motion for reconsideration was not an abuse of discretion.

1. The Trial Court Properly Denied Grant's Motion for Reconsideration which was Based upon a New Issue and New Facts.

In general, an issue may be raised in a motion for reconsideration when the issue is closely related to an issue previously raised and no new evidence is required. August v. U.S. Bancorp, 146 Wn.App. 328, 347, 190 P.3d 86 (2008). Nonetheless, in a motion for reconsideration, a plaintiff cannot propose new case theories that could have been raised before entry of an adverse decision. Wilcox v. Lexington Eye Inst., 130 Wn.App. 234, 241, 122 P.3d 729 (2005). Here, there is no evidence that Grant could not have raised the membership dispute forum selection clause before the trial Court's grant of NCDD's motion to dismiss. In fact, the evidence is to the contrary as Grant admits that the membership dispute forum selection clause was available to her on NCDD's website for the entire period that this lawsuit was pending, including from December 2010 to the date of

Grant's request for judicial notice accompanying her motion for reconsideration. CP 388; 411-417. Accordingly, the trial court did not abuse its discretion in denying Grant's motion for reconsideration which she improperly based upon a new case theory and new evidence which could have been raised before the trial court's November 16, 2012 dismissal.

2. There was No Irregularity Consistent with CR 59(a)(1) Requiring Reconsideration.

In her motion for reconsideration, Grant did not allege any specific "irregularity" of the court or of NCDD other than an alleged failure to "disclose" the forum selection clause relating to membership disputes, even though this dispute is a certification dispute, not a membership dispute. CP 387-389. As articulated below at section A.3., that argument fails as a matter of law. Accordingly, the trial court properly denied Plaintiff's motion for reconsideration pursuant to CR 59(a)(1), and its decision to do so was not an abuse of discretion.

3. NCDD Did Not Commit Misconduct Consistent with CR 59 (a)(2).

In her motion for reconsideration, Grant raised for the first time a new "fact" unsupported by any evidentiary support as to its relevance, that NCDD's website at some point in time allegedly stated that any "dispute

arising from or related to membership in the College shall be resolved by litigation under the laws of the State of Washington, in the King County Superior Court..." CP 388. Grant claimed in her motion that despite the clause being available on NCDD's website, she learned of the clause only after the trial court had issued its order granting dismissal. Id.; CP 411-417. She articulated no justification why her reasonable diligence had not resulted in her obtaining this information prior to the Court's ruling, although she had quoted repeatedly from NCDD's website in her Complaint and was therefore familiar with it from the outset of this action. CP 7.

Grant is a member of NCDD. CP 64. She has not been denied membership, but rather, has not been granted certification to become "Board Certified" by NCDD due to her failure to pass NCDD's certification exam. CP 63-64. Grant's dispute with NCDD is therefore not a dispute relating to her "membership," but rather her dispute relating to NCDD's failure to grant her certification following her examination. CP 4. Furthermore, an individual is not even required to become a member in order to take the certification exam. CP 63-64. Accordingly, NCDD was not required to disclose to the trial court any forum selection clause relating to membership disputes. Given the lack of relevance of the forum selection clause for membership disputes to Grant's certification dispute, it

would not have been misconduct for NCDD to "fail to disclose" such a clause. Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 539, 998 P.2d 856 (2000) (holding that in order to obtain a new trial "the movant must establish that the conduct complained of constituted misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record ...") Grant utterly failed to meet her burden and the trial court properly denied her motion for reconsideration pursuant to CR 59(a)(2), and its decision to do so was not an abuse of discretion.

4. Grant Failed to Demonstrate that "Substantial Justice" Had Not Been Done.

Grant's third and final basis for her motion for reconsideration is pursuant to CR 59(a)(9), that "substantial justice has not been done." The sole basis for this claim are the reasons articulated in support of her claims under CR 59(a)(1) and (a)(2). Because those fail as a matter of law, so also does her claim under CR 59(a)(9). The trial court's denial of her motion for reconsideration based on an irrelevant forum selection clause about which Grant argued without presenting any evidentiary support as to its relevance to the certification dispute before the trial court was not an abuse of discretion. Furthermore, her case was *also* dismissed on 12(b)(6) grounds, a decision which she does not appeal.

5. Because The Membership Forum Selection Clause Has No Relevance to the Certification Dispute Upon Which Grant's Lawsuit is Based, the Trial Court's Denial of the Motion for Reconsideration was not an Abuse of Discretion.

Grant's motion for reconsideration based upon the membership forum selection clause was properly denied not only because she failed to satisfy her burden to prove that any of the grounds set forth in Civil Rule 59(a)(1), (2) or (9) were met (as articulated above), but also for another reason: her failure to put it before the trial court with competent, admissible, evidence of its *relevance* to the certification claims upon which her lawsuit is based. To support a motion for reconsideration, the new evidence must be material to the merits of the case and must be evidence that would be admissible under the usual rules of evidence. Hinton v. Carmody, 186 Wash. 242, 60 P.2d 1108 (1936); Tonning v. Northern Pac. Ry. Co., 180 Wash. 374, 39 P.2d 1002 (1935). Here, although Grant requested judicial notice of the membership forum selection clause on NCDD's website,[1] she provided no evidence that the clause was material to the merits of her certification dispute, and her motion for reconsideration was properly denied.

---

[1] Although the Court made no specific ruling on Grant's Request for Judicial Notice, given the membership forum selection clause's lack of relevance to the certification dispute upon which Grant's lawsuit was based, it would have been proper to deny it. Washington Water Jet Workers Ass'n v. Yarbrough, 151 Wash.2d 470, 476, 90 P.3d 42, 45 (2004) (citing ER 201(b)) (Denying request for judicial notice of newspaper article because it was not relevant to the disposition of the question before the court.)

D. The Trial Court Did Not Err in Dismissing Grant's Claims Based Upon Failure To State a Claim Upon Which Relief Could be Granted.

Grant does not dispute on appeal the propriety of the trial court's grant of NCDD's motion to dismiss on the grounds of 12(b)(6) with regard to her Washington Law Against Discrimination and Consumer Protection Act claims, and has therefore waived any such argument on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wash.2d 801, 808-809, 828 P.2d 549, 553 (1992), citing Smith v. King, 106 Wash.2d 443, 451–52, 722 P.2d 796 (1986) (holding that plaintiffs who presented no argument in their opening brief regarding trespass waived any assignment of error regarding the trespass issue.) Thus, the outcome of this appeal changes nothing about the outcome of Grant's case at the trial court level; her claims have been dismissed on multiple grounds and she appealed only one ground.

Even assuming that Grant properly challenged the trial court's dismissal of her WLAD and CPA claims pursuant to CR 12(b)(6), this Court must uphold the trial court's dismissal because even under de novo review, there is no set of facts under which Grant would be entitled to relief for either of those claims. Cutler v. Phillips Petroleum Co., 124 Wash.2d 749, 755, 881 P.2d 216 (1994).

1. Grant Cannot Plead Any Set of Facts Consistent with the Complaint Which Would Entitle Her to Relief on Her WLAD Claim.

A trial court's ruling on a motion to dismiss under CR 12(b)(6) is a question of law that is reviewed de novo. Cutler v. Phillips Petroleum Co., 124 Wash.2d 749, 755, 881 P.2d 216 (1994). A CR 12(b)(6) motion questions only the legal sufficiency of the allegations in a pleading, asking whether there is an insuperable bar to relief. Contreras v. Crown Zellerbach Corp., 88 Wash.2d 735, 742, 565 P.2d 1173 (1977). The purpose of CR 12(b)(6) is to weed out complaints where, even if that which the plaintiff alleges is true, the law does not provide a remedy. McCurry v. Chevy Chase Bank, FSB, 169 Wash.2d 96, 101, 233 P.3d 861 (2010). A motion to dismiss under CR 12(b)(6) should be granted only if the plaintiff is not entitled to relief on a claim under any set of facts. Cutler, 124 Wash.2d at 755, 881 P.2d 216.

Grant's Complaint alleges that she is entitled to relief under RCW 49.60.030(f), which states in relevant part:

> (f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either

> directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, honorably discharged veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, or national origin or lawful business relationship ...

Grant cannot plead any facts, consistent with her complaint, which would entitle her to relief under RCW 49.60.030(f). Importantly, the certification process to become certified by NCDD is not "commerce." Like the plaintiffs in Akiyama v. United States Judo Incorporated, 181 F.Supp.2d 1179 (W.D. Wash. 2002), who were judo competitors, Grant's attempt to obtain a certification offered by a voluntary bar association is not "commerce" within the plain meaning of the statute. In Akiyama, the plaintiffs were members of the public seeking to participate in judo competitions and alleged that the competition's bowing requirement was illegal discrimination within the meaning of RCW 49.60.030(1)(f). The Court dismissed the plaintiffs' claims because their participation in judo competitions was not "commerce" within the meaning of the statute. Likewise, Grant's participation in a voluntary certification exam is not "commerce" within the meaning of the statute, and her WLAD claim was properly dismissed pursuant to Civil Rule 12(b)(6).

Because her claim under RCW 49.60.030(f) fails for lack of "commerce," Grant cannot sustain a cause of action under the WLAD section she brings her claims under. Grant is not, and does not allege in her Complaint that she is entitled to relief under any other section of the WLAD.[2]

Furthermore, to succeed in a gender discrimination claim based on disparate treatment, a plaintiff must demonstrate that he or she was treated differently than persons of the opposite sex who are otherwise similarly situated. Marquis v. City of Spokane, 130 Wash.2d 97, 113, 922 P.2d 43 (1996) (citing Ellingson v. Spokane Mortg. Co., 19 Wash.App. 48, 54, 573 P.2d 389 (1978)). Grant's complaint failed to do this. She alleged that she (and all other women) were not granted certification; and then she simultaneously alleged that, in fact, some women were granted certification. See CP 3 (alleging that "one female a decade ago" was granted certification.) She made no comparison to her situation and similarly situated males, i.e. those currently seeking certification, but complained that she is required to take a test but that longstanding members of NCDD, to whom she pejoratively refers as "good ol' boys" did not. CP 3.

[2] Plaintiff did cite RCW 49.60.030(1)(g)(2) which applies to breastfeeding mothers, but this appears to be an error in light of the articulation of her claim in the "causes of action" section of her Complaint. CP 1; 8.

Although Grant does not challenge the trial court's dismissal of her WLAD claim pursuant to CR 12(b)(6), based on the above, it is clear that the Court's order was correct.

2. Grant Cannot Plead Any Set of Facts Consistent with the Complaint Which Would Entitle Her to Relief on her CPA Claim.

Any person who is injured in his or her business or property by a violation of RCW 19.86.020 ("unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce") ... may bring a civil action." RCW 19.86.090. The elements of a private CPA violation are (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public interest; (4) and causes injury to the plaintiff in his or her business or property; and (5) such injury is causally linked to the unfair or deceptive act. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780 (1986). "A plaintiff alleging injury under the CPA must establish all five elements." Id. at 780; see also Johnson v. Camp Auto., Inc., 148 Wash.App. 181, 199 P.3d 491, 493 (2009) ("The failure to establish any of the elements is fatal to a CPA claim."). See also Reed v. Whitacre, 2008 WL 4635914, at *3 (Wash.Ct.App. Oct. 21, 2008) (reversing the trial court's denial of the defendant's summary judgment motion because the trial court permitted

the case to proceed even though the plaintiff had not provided sufficient evidence to prove all five elements of a CPA claim).

As an initial matter, Grant's CPA claim fails because she lacks standing. Grant is a resident of Texas, practicing law in Texas. She cannot show that the alleged deceptive acts she asserts affect the people of Washington. See RCW 19.86.010(2) (defining "trade" or "commerce" as "the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington"). Although Grant's allegations may support a finding that NCDD's conduct may hypothetically affect a resident of Washington, that "does not satisfy the statutory or jurisdictional limits of the CPA." Keithly v. Intelius Inc., 764 F. Supp. 2d 1257, 1271 (W.D. Wash. 2011). Because "nothing in [the law of Washington] indicates that CPA claims by nonresidents for acts occurring outside of Washington can be entertained under the statute," Grant's CPA claim must be dismissed. Keithly v. Intelius Inc., 764 F. Supp. 2d 1257, 1271 (W.D. Wash. 2011), citing Schnall v. AT&T Wireless Servs., Inc., 168 Wash.2d 125, 142, 225 P.3d 929 (2010).

Regarding the second element, "trade" and "commerce" is defined as "including the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2). In Keenan v. Allan, the Court dismissed the CPA claim

because the claims could not establish the trade and/or commerce element. The alleged withholding of plaintiff's positions at the district court based on sex discrimination was not "committed in the course of trade or commerce." Keenan v. Allan, 889 F. Supp. 1320, 1382-1383 (E.D. Wash. 1995). The Court reasoned that because the district court provides services to people in Washington but does not sell these services, no sex discrimination could have been committed in the course of trade or commerce. Keenan, 889 F. Supp. at 1382-1383. Here, there is no trade or commerce involved, because there is no sale of assets or services involved. Applying Keenan, Grant cannot establish the trade and/or commerce element because, while NCDD provides certification to certain qualified people, it does not sell certifications. Instead, certification through NCDD must be earned by meeting certain qualifications and passing a certification exam, which Grant has been unable to do thus far. CP 63-64.

Grant's claim also fails because she cannot establish the third element of a CPA claim. This element, public interest, depends on "the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion." Lightfoot v. MacDonald, 86 Wash. 2d 331, 334, 544 P.2d 88 (1976) (en banc) (citing Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wash. 2d 778, 790 (1986) (en banc)). An act or

practice of which a private individual may complain must be one which also would be vulnerable to a Complaint by the Attorney General under the act. Lightfoot, 86 Wash. 2d at 334.

Grant cannot show that additional plaintiffs in Washington have been or will be injured in exactly the same fashion for three independent reasons: (1) Grant was not injured under the CPA because she lacks standing as a non-inhabitant of Washington (as is discussed above); (2) Grant has not pled, nor can she plead, that any other inhabitant of the state of Washington has suffered her purported injury "in exactly the same fashion" – i.e. by applying for and being denied certification with NCDD based on gender; and (3) Grant cannot show how her application for certification (a private contract between her and NCDD) can affect anyone outside the private contract. See Lightfoot, 86 Wash. 2d at 334 (breach of a private contract affecting no one but the parties to the contract, whether the breach be negligent or intentional, is not an act or practice affecting the public interest). It is well established that ordinarily a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest. Hangman Ridge Training Stables, Inc. at 790. Her dispute is a private dispute regarding her failure to receive certification following her failure of an examination. This is not a matter of public interest.

Grant does not challenge the trial court's dismissal of her CPA claim pursuant to CR 12(b)(6), but it is clear based on the foregoing reasons, that the dismissal pursuant to CR 12(b)(6) was proper.

IV. CONCLUSION

Grant does not appeal the trial court's dismissal of her claims based on CR 12(b)(6), and therefore the dismissal based on those grounds stands. Grant appeals only the trial court's dismissal of her claims on the basis of *forum non conveniens*. The sole basis for her challenge is an alleged forum selection clause. This forum selection clause was a new fact argued for the first time on a motion for reconsideration and was therefore not preserved on appeal. Additionally, although argued at the motion for reconsideration stage, the alleged forum selection clause was not placed before the court with any testimony regarding its relevance to this dispute – much less competent and admissible testimony. Furthermore, the language of the alleged forum selection clause demonstrates it is applicable to membership disputes, not certification disputes. Finally, Grant did not at the trial court level or before this Court challenge the trial court's findings of fact: that this case has no connection to Washington other than Washington being the state of NCDD's incorporation, and unchallenged findings of fact become a verity upon appeal.

In failing to challenge the court's factual findings regarding the convenience factors, Grant has failed to demonstrate that the trial court abused its discretion in dismissing her case on the grounds of *forum non conveniens*. Similarly, she has failed to show that the trial court abused its discretion when it failed to grant her motion for reconsideration when her motion failed to meet the requirements of CR 59(a)(1), (2) or (9). Grant's appeal fails and this Court should uphold the trial court's dismissal for *forum non conveniens* and its denial of Grant's motion for reconsideration because neither of these decisions were an abuse of discretion. Additionally, because Grant has failed to appeal the court's decision to dismiss her case on Civil Rule 12(b)(6) grounds, regardless of the outcome of this appeal, her case must remain dismissed.

DATED this 17th day of May, 2013.

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

BY: _____

Sarah Jung Evans, WSBA No. 37409
Alexandra A. Bodnar, Pro Hac Vice
Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on May 17, 2013, I caused the foregoing to be filed via legal messenger with:

Clerk of the Court
Court of Appeals, Division I
600 University Street
One Union Square
Seattle, WA 98101-1176

and a true and correct copy of the same to be mailed via U.S. Postal Service to:

Attorneys for Petitioner:

Keith Lynch, Esq.
The Law Office of Keith Lynch
3780 Kilroy Airport Way, Suite 200-220
Long Beach, CA 90806

Okorie Okorocha, Esq.
California Legal Team
117 E. Colorado Blvd., Suite 465
Pasadena, CA 91105

Tarla Moore

14594727.6