No. 92349-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

REBECCA A. RUFIN,

Plaintiff/Petitioner,

v.

CITY OF SEATTLE and JORGE CARRASCO,

Defendants/Respondents.

# NOTICE OF RELATED CASE AND MOTION TO CONSOLIDATE CASES FOR REVIEW

THE SHERIDAN LAW FIRM, P.S.

John P. Sheridan, WSBA #21473
Mark W. Rose, WSBA #41916
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
(206) 381-5949

Attorneys for Plaintiff/Petitioner

## IDENTITY OF MOVING PARTY

Petitioner Rebecca Rufin seeks the relief requested below.

## RELIEF SOUGHT

Ms. Rufin respectfully requests that the Court consolidate the above-captioned case, Supreme Court No. 92349-3, with Supreme Court No. 92915-7, the related appeal arising from the trial court's recent Order Denying CR 60 Motion and Denying CR 37 Motion for Default Judgment or New Trial.

## FACTS RELEVANT TO MOTION

### 1. Ms. Rufin's petition for review is pending consideration.

This case involves claims for retaliation in employment brought under RCW 49.60, *et seq*. Ms. Rufin filed a petition for review, which is "tentatively set for consideration by a Department of the Court on the March 29, 2016 Motion Calendar." Jan. 11, 2016 Letter of Deputy Clerk. The subject of the petition is the trial court's rulings on summary judgment and its exclusion of evidence at trial. *See* Pet., generally. It presents for review the issue of what claimants must show to survive summary judgment in cases alleging retaliation under RCW 49.60.210. Id.

The trial court denied summary judgment as to a claim for retaliation based on the City's non-selection of Ms. Rufin for one position (the "CMEM" job), yet granted summary judgment as to the claim related

to her non-selection for a second position (the "LPSM" job), which occurred during the same time period. CP 3131-32.

In the oral ruling on summary judgment, the trial court repeatedly stated that it analyzed the evidence of the CMEM and LPSM hiring processes "separately." RP (Feb. 27, 2014), at 58. The trial court subsequently granted a motion in limine excluding from trial all evidence and testimony about the failure to hire Ms. Rufin for the LPSM job during the same period the City refused to hire her for the CMEM job. CP 3519.

In the petition, Ms. Rufin argues, *inter alia*, that the trial court erred in granting summary judgment, as it failed to "review the record 'taken as a whole'"; failed to consider Rufin's circumstantial evidence of unlawful motive "cumulatively"; and in essence applied the stray remarks doctrine. Pet., at 17-18. The petition claims the ruling on summary judgment was error, as the "evidence supporting the CMEM and LPSM claims overlap, and the fact that Plaintiff was shut out of a hiring process twice, under similar, irregular circumstances is itself evidence of retaliatory intent." Id., at 18. The petition argues: "Under Scrivener v. Clark College, the statements of H.R. Officer [DaVonna] Johnson and Hiring Manager Cola, stating Rufin 'burned her bridges' and that a hiring decision rejecting her was 'political,' are circumstantial evidence probative of retaliatory intent, even when 'not made directly in the context

of an employment decision or uttered by a non-decisionmaker.'" Pet., at 13. As such, the trial court should have considered DaVonna Johnson and Darnell Cola's remarks in evaluating the City's failure to hire Rufin for the LPSM job, and should not have considered Rufin's evidence of retaliation in the two jobs "separately." *See* RP (Feb. 27, 2014), at 58.

**2. Ms. Rufin filed a CR 60 motion based on the City's failure to produce smoking gun evidence of DaVonna Johnson's mendacity, which the trial court denied and is pending appeal.**

On January 8, 2016, in this same litigation Ms. Rufin filed a motion for post-judgment relief in the trial court, alleging discovery violations and other misconduct under CR 60(b)(4) and CR 37.[1] Upon filing the motion with the trial court, Rufin simultaneously filed a Motion to Stay Consideration of Petition for Review with this Court. *See* Mot. filed Jan. 8, 2016. On January 11, 2016, the motion for stay was "granted only to the extent that the case will not be sent on an earlier Department Motion Calendar" than the March 29, 2016 Motion Calendar. Letter of Deputy Clerk dated Jan. 11, 2016.

In the motion seeking CR 60 relief, Ms. Rufin argues, *inter alia*, that the City withheld evidence that "directly contradicts the version of events defense witnesses told in declarations, depositions, and testimony

[1] *See* Exhibit 1 to Dec. of John P. Sheridan In Support of Motion to Stay Consideration of Petition for Review filed with this Court on Jan. 8, 2016 (hereafter "**Ex. 1 to Sheridan Dec. filed 1/8/16**"), attaching a copy of the CR 60 motion Rufin filed on January 8, 2016.

at trial," enabling its managers to testify falsely, unimpeached. *Compare* Ex. 1 to Sheridan Dec. filed 1/8/16, at 1 (citing, for example, testimony by HR Officer DaVonna Johnson that "I had no information about the hiring process"; and "I was not aware of Ms. Rufin's candidacy for the job at all."); *with* Ex. 1 to Sheridan Dec. filed 1/8/16, at "Appendix B" (April 18, 2012 email received by DaVonna Johnson, notifying her that Ms. Rufin had written Hiring Manager Haynes about her non-selection for the CMEM job, "Is there any point in applying for this? I still don't understand how I failed to measure up with the last lengthy process."). Rufin's CR 60 motion asserts that, in the absence of her possessing the impeaching document that the City failed to produce prior to trial, HR Officer Johnson and others were "able to testify with 'plausible deniability' of Ms. Johnson's knowledge of Rufin's applications for rehire." Id., at 3-4. The motion contends Rufin was substantially prejudiced by the withholding of evidence, as the City's counsel in closing argument focused on the credibility of the City's witnesses, claiming that Rufin's allegations were "simply not credible," and that there was "not one shred of paper that supports this vast conspiracy." Id., at 2. The motion argues that the evidence the City withheld was the missing link to contradict such arguments, which would have shown that DaVonna Johnson had the knowledge and involvement that the City's witnesses

uniformly denied. *See* id. In closing, counsel for the City stated that when the CMEM hiring manager learned that Rufin "resubmitted her application [again], he went and spoke with a woman named Heather Hartley" (rather than DaVonna Johnson), and that the City's refusal to consider Ms. Rufin's application occurred "several levels down in the organization, I think *three levels down below Ms.* [*DaVonna*] *Johnson.*" *See* id., at 4 (emphasis added). As stated in the CR 60 motion, "[t]he truth is that when Hiring Manager Haynes first learned that Rebecca Rufin was planning to resubmit her application ... Haynes contacted DaVonna Johnson and Gary Maehara, (and copied his boss, Steve Kern) three individuals who reported directly to Superintendent Jorge Carrasco." Id.

On February 19, 2016, the trial court entered the Order Denying CR 60 Motion and Denying CR 37 Motion for Default Judgment or New Trial; a decision that Ms. Rufin has appealed. *See* Ex. A to Notice of Appeal, Supreme Court No. 92915-7.

## GROUNDS FOR RELIEF AND ARGUMENT

RAP 3.3(b) allows this Court to consolidate cases for purposes of review where it would save time and expense and provide for a fair review of the cases. RAP 7.3 likewise authorizes the Court to "to perform all acts necessary or appropriate to secure the fair and orderly review of a case." Id. A "fair review" of the petition for review supports consolidating it with

the appeal of the CR 60 motion. The impeachment evidence that the City failed to disclose was further circumstantial evidence supporting the denial of summary judgment (the subject of the petition). "[T]he factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *See* Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 184, 23 P.3d 440 (2001), *quoting* Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147-48, 120 S. Ct. 2097, 2108-09, 147 L. Ed. 2d 105 (2000). "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." Id. Viewing the evidence in the light most favorable to Ms. Rufin, the nonmoving party, that is how the Court should view Davonna Johnson's denial of any knowledge of Ms. Rufin's candidacy for re-employment at City Light. The withheld evidence impeached Ms. Johnson's denials, are "affirmative evidence of guilt," and circumstantial evidence of retaliatory intent relevant to the determination of the City's motion for summary judgment.

Additionally, RAP 7.2(e) provides that "[i]f review of a postjudgment motion is accepted while the appellate court is reviewing another decision in the same case, the appellate court may on its own initiative or on motion of a party consolidate the separate reviews as

provided in rule 3.3(b)." Id.; see 15A Wash. Prac., Handbook Civil Procedure § 86.4 (2015-2016 ed.) ("In a case where multiple separate review proceedings have been commenced, consolidation of the separate proceedings is authorized by RAP 3.3(b) and RAP 7.2(e). Ordinarily, the appellate court will on its own initiative set a motion for consolidation. *See* RAP 3.3.").

## CONCLUSION

For the foregoing reasons, to provide a fair review of the cases, to avoid piecemeal litigation, and for the sake of judicial economy, the Court should enter an order consolidating Supreme Court No. 92349-3 and Supreme Court No. 92915-7.

Respectfully submitted this 24th day of March, 2016.

THE SHERIDAN LAW FIRM, P.S.

By: s/ John P. Sheridan
John P. Sheridan, WSBA # 21473
Mark Rose, WSBA# 41916
Attorneys for Petitioner

## DECLARATION OF SERVICE

Mark Rose states and declares as follows:

1. I am over the age of 18. I am competent to testify in this matter, and am one of Petitioner's attorneys of record. I make this declaration based on my personal knowledge and belief.

2. On March 24, 2016, I emailed to the following attorneys:

Carolyn Boies Nitta
Molly Daily
City of Seattle Attorneys Office
600 Fourth Avenue, 4th Floor
Seattle, WA 98104

David Bruce
Matthew Rice
Savitt Bruce & Willey
1425 Fourth Avenue, Suite 800
Seattle, WA 98101

a copy of the NOTICE OF RELATED CASE AND MOTION TO CONSOLIDATE CASES FOR REVIEW.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of March, 2016, at Seattle, King County, Washington.

s/ Mark Rose
Mark Rose, WSBA #41916

## OFFICE RECEPTIONIST, CLERK

**To:** Mark Rose
**Subject:** RE: Case No. 92349-3 - Rebecca A. Rufin v. City of Seattle, et. al.

Received 3-24-16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

-----Original Message-----
From: Mark Rose [mailto:mark@sheridanlawfirm.com]
Sent: Thursday, March 24, 2016 10:08 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Jack Sheridan <jack@sheridanlawfirm.com>; dbruce@sbwllp.com; mrice@sbwllp.com; Carolyn.BoiesNitta@seattle.gov; molly.daily@seattle.gov
Subject: Case No. 92349-3 - Rebecca A. Rufin v. City of Seattle, et. al.
Importance: High

Washington Supreme Court
Attention: Clerk of the Court

Re: Rebecca A. Rufin v. City of Seattle, et. al.
Supreme Court Case No. 92349-3

Attached please find for filing with the Court the Notice of Related Case and Motion to Consolidate Cases for Review.

Respectfully submitted this 24th day of March 2016,

Mark Rose
Sheridan Law Firm, P.S.
705 2nd Ave., Suite 1200
Seattle, WA 98104
Tel: (206) 381-5949