No. 48284-3-II

COURT OF APPEALS, DIVISION TWO,
OF THE STATE OF WASHINGTON

CHERIE Y. COOK, individually, and CLARK T. COOK, individually and their marital community,

Appellants,

v.

TACOMA MALL PARTNERSHIP, LLC & SIMON PROPERTY GROUP, INC., a Delaware Corporation, and SIMON PROPERTY GROUP, L.P., a Delaware Limited Partnership; U.S. SECURITY ASSOCIATES, a Delaware Corporation; ANDREWS INTERNATIONAL, LLC; a Delaware Limited Liability Corporation; ANDREWS INTERNATIONAL, INC., a Delaware Corporation; and JOHN DOE 1 through 10,

Respondents.,

APPELLANTS' REPLY BRIEF

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I. REPLY

A. Cook did not create a hardship with regard to discovery as to U.S. Security.

Simon concedes that granting leave to add U.S. Security as a party is the law of the case and presumed proper for the purposes of this appeal. *See* Br. of Resp't at 27. Like the decision granting leave to amend, nothing about the timing of the request to add U.S. Security is at issue in this case. Consequently, this court should reject Simon's claim that Cook somehow created a hardship. It was not a "self-inflicted wound" for Cook to seek leave to amend. The decision to do so, as Cook explained in her opening brief, only manifested on September 4, 2015, once she learned from a discovery supplement from Simon that it had tendered the defense to U.S. Security almost immediately after being sued.[1] This was an important fact under the *Powers* case, which required Cook to show a lack of prejudice, such as when an entity like U.S. Security knew of potential liability exposure before the statute of limitations ran. The trial court agreed with Cook's position, at which point the question necessarily became how to manage the case after adding a completely new party who had never (1) responded with an Answer under CR 7, (2) appeared through counsel, or (3)

[1] Simon argues, "As the trial court found, Cook knew of U.S. Security early in the case, and made a conscious decision not to name them." Br. of Resp't. at 20. This concession highlights why the trial court's decision was an abuse of discretion. On one hand, the trial court necessarily found Cook to have exercised diligence in naming U.S. Security after the statute of limitations, most likely because of the undisputed fact that Simon did not tell anyone until September 4, 2015, that it tendered a defense to U.S. Security in the fall of 2014. In any event, Simon concedes that the order adding U.S. Security is the law of this case, presumed proper. Implicit in this is to necessarily recognize that Cook exercised diligence. For the trial court to take a different position regarding Cook's diligence in moving to add U.S. Security when it came to discovery as to the newly added party was untenable and unreasonable.

responded to any formal discovery requests.

B. The trial court closed discovery as to U.S. Security only days after adding it as a new party.

In Washington, discovery opens after service of the summons and complaint. Permissible discovery includes depositions, written interrogatories, production of documents or permission to enter upon land for inspection, physical and mental examinations, and requests for admission. CR 26(a). Here, the trial court closed discovery as to U.S. Security before it had even answered or appeared through counsel.[2] At this point in the process, Cook had not issued any discovery requests to U.S. Security, meaning that the necessary result of the trial court's decision was to deny her an ability learn about U.S. Security's role in the case, understand its defenses, or learn about its witnesses' knowledge and opinions.

Simon seeks to reframe the closure of discovery by claiming that the trial court did not "reopen" discovery. This argument falls short. It is undisputed that U.S. Security was never bound to any case schedule in this matter, meaning that the deadlines never applied to U.S. Security. Without ever being bound by a case schedule, the trial court had nothing to "reopen."[3]

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[2] Williams Kastner appeared for U.S. Security on October 23, 2015, CP 2101-2103, and answered on November 30, 2015. CP 2128-2135.

[3] In its brief, Simon admits that it is now represented by the same counsel as U.S. Security. Simon's counsel also contends that the trial court's decision was reasonable because it also would have deprived U.S. Security from calling experts or otherwise putting on a defense at trial. Aside from illustrating Respondents' counsel's conflict of interest, this argument highlights the absurdity of the status quo created by the trial court's closure of discovery for ***all*** parties despite allowing the amendment of a new party. Simon and the trial court expected both Appellants and U.S. Security to proceed to trial on their claims and defenses without ***any*** discovery.

C. Cook has been specific about the discovery she is seeking from U.S. Security.

To the extent possible at the very beginning of a lawsuit, Cook was specific about what discovery she intended to pursue as to U.S. Security. The trial court already understood from Cook's several motions to compel that, in her view, Simon was playing a "shell corporation" game by producing U.S. Security documents without any real accountability.[4] In other words, Simon would object on the basis that it did not possess any responsive information but then respond with just enough documents from U.S. Security to control the flow of information and shield a full and complete response.

In addition to these discovery games, which are rampant not only in the written discovery requests but also in the depositions, Cook also sought specific information such as the names of security guards at the time she was assaulted.[5] Cook was not successful. In fact, despite repeated efforts, she was not able to identify the name of the person patrolling the parking lot at the time of the assault (Waldron had already gone inside). This information is obtained in discovery by an interrogatory, which was never permitted in this case against U.S. Security.

Additionally, U.S. Security was entitled in its answer to bring affirmative defenses, which it ultimately did on November 30, 2015. Discovery allowed under the civil rules was the only means that Cook had to learn the basis for the affirmative defenses and engage in motion practice

[4] CP at 1-25, pp. 15-20 of Cook's Motion for Summary Judgment.

[5] CP at 1-25, p. 19 of Cook's Motion for Summary Judgment.

where necessary.

Finally, U.S. Security as a party had the right to bring witnesses and expert witnesses at trial. Without the right to discovery, Cook would be effectively denied the opportunity to discovery the knowledge of the lay witnesses and the opinions of any experts disclosed.

D. The civil rules presume discovery after the filing of a summons and complaint.

When read together, there is a presumption in the civil rules that discovery follows once a suit is filed. Built into the rules are the scope of discovery. CR 26. One avenue to facilitate and manage the scope of discovery is under CR 26(f), which allows a discovery conference after the commencement of an action to discuss a discovery plan. But the CR 26(f) procedure was not invoked here. Rather, Simon's approach was to ambush Cook after it lost summary judgment, requesting the trial court to close discovery as to U.S. Security. The trial court agreed and reasoned that the closure was necessary because of the prejudice Simon would suffer and because the case was "simple."

Cook is arguing that the trial court abused its discretion under the facts of this case, not advocating for a bright-line rule. To the extent that any "rule" is adopted, it is simply the well-recognized premise that discovery is presumed when a case is commenced against a party for the first time. Here, U.S. Security was a new party who had never before participated in this lawsuit. It was not even represented by counsel at the time Simon was arguing to close discovery as to U.S. Security. Cook has

serious questions about Simon's standing to even make those arguments, but with those set aside, the only reasonable conclusion is that the trial court abused its discretion under the present facts.

E. Simon has not and cannot show prejudice on behalf of U.S. Security.

At the time the trial court closed discovery, U.S. Security had been a party for eight days and had never responded to a single discovery request. There can be no prejudice in a new party responding to a lawsuit and discovery for the first time without some additional showing. In this case, U.S. Security had not even appeared to make a showing of prejudice. To conclude otherwise under the present facts would be tantamount to rendering large swaths of Washington's civil rules superfluous.

Similarly, Simon cannot show any prejudice in reopening discovery as to U.S. Security.[6] First, the trial court continued trial after closing discovery, which effectively mooted Simon's complaints of having to prepare for trial twice. Second, the case was not even a year old when the trial court added U.S. Security and had never before been continued. Third, duplicative discovery was not being sought.[7]

F. Discovery on remand should be reopened as to all parties.

If this court agrees that the trial court abused its discretion, another issue on remand will be whether discovery is open as to only U.S. Security

[6] This is not directly at issue on appeal, but may be considered by the court in fashioning a remedy, as explained in Section F of this reply.

[7] Even if discovery was also reopened as to Simon, no prejudice would flow provided that the discovery was not in violation of the civil rules, i.e., within the scope of what can be requested, not duplicative, et cetera. That issue never came before the trial court, though, because it simply closed all discovery.

or as to all parties. This is necessarily an issue within the greater context of this appeal because the discovery with regard to U.S. Security will likely have an impact as to Simon. For example, U.S. Security may produce records or witnesses who further implicate Simon's culpability as a defendant. Provided that the discovery is new, Simon necessarily cannot show any prejudice with having to respond. Cook therefore requests the court consider in its opinion whether Simon can improperly use it to shield itself from legitimate discovery on remand.

G. Request for a new judge is not beyond the scope of discretionary review and is supported by the record.

Cook requested that the case be remanded to a different trial judge because of the actual and apparent bias contained within the rulings at issue. This is ***not*** a situation where discretionary review was granted as to rulings separate from where the actual or apparent bias is claimed. Rather, it is the very rulings at the heart of discretionary review that form the basis as to why the case should be remanded to a new trial judge. This court should therefore reject Simon's RAP 2.3(e) argument.

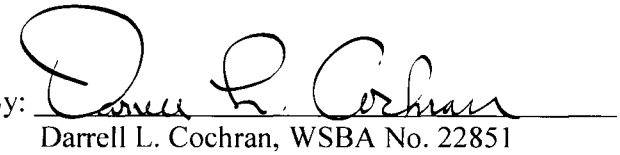
Cook does not need to repeat her analysis as to the actual and apparent bias. Suffice it to say that she has legitimate concerns with the scope of permissible discovery that would be allowed given the trial court's comments that this case is "simple" and that Cook should have been thankful the court did not dismiss her rather than seeking discovery. These type of comments have no place in a record, let alone in the reasoning employed in decision making.

II. CONCLUSION

For the foregoing reasons, Cook respectfully asks this court to reverse the trial court's decision closing discovery and to remand for trial to a new judge.

RESPECTFULLY SUBMITTED this 13th day of October, 2016.

PFAU COCHRAN VERTETIS AMALA, PLLC

By: 

Darrell L. Cochran, WSBA No. 22851
Kevin M. Hastings, WSBA No. 42316

CERTIFICATE OF SERVICE

Laura Neal, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on October 13, 2016, I served via Email, a true and correct copy of the above document, directed to:

Rodney Umberger and Anne Loucks
Williams, Kastner, & Gibbs PLLC
601 Union St., Ste. 4100
Seattle, WA 98101-2380

VIA EMAIL AND ABC LEGAL MESSENGER

DATED this 13th day of October 2016.

Laura Neal
Legal Assistant to Darrell Cochran

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