NO. 48284-3-II

COURT OF APPEALS, DIVISION II
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.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Respondents, the Tacoma Mall Partnership, LLC, Simon Property Group, and U.S. Security Associates/Andrews International, LLC (collectively "the Mall"), respectfully submit this brief in support of the trial court's ruling below and ask that it be affirmed.

Mr. and Mrs. Cook (collectively "Cook") are proposing one of the most dramatic intrusions into trial court authority in decades. It is well-recognized—in this and virtually every other jurisdiction—that the trial court judge is in the best position to evaluate case development, as well as the respective needs of the parties, and apply the procedural standards accordingly. That is precisely what Judge Sorensen did, over the course of several hearings, after Cook abruptly named a new party on the eve of trial. The trial court—perhaps too generously—granted leave, but declined to rewrite the case schedule to effectively begin anew. There is no per se rule mandating that discovery be reopened[1] with every amendment; nor should there be. It is uniquely the role of the trial court to determine whether that is appropriate in a given case. And here, it was not.

Judge Sorensen did not abuse his discretion. Indeed, his ruling reflected the unchallenged facts: (a) U.S. Security was undisputedly a

[1] Cook repeatedly claims that discovery was "closed." This is objectively false. Discovery had in fact been closed due to the passage of time, and Cook's request was to *reopen* it.

known party since the outset; (b) Cook had already obtained substantial discovery from them; (c) Cook's decision not to name this party sooner was willful; and (d) the Mall—which was ready for trial, and did nothing wrong—would be "substantially prejudiced" by a do-over.

The trial court's order should stand.

II. COUNTERSTATEMENT OF THE CASE

A. The Lawsuit

This case arises out of a purse-snatching, by an unknown criminal. It occurred in broad daylight at the Nordstrom parking lot of the Tacoma Mall on May 28, 2012.[2] At the time of the incident, the Mall contracted with U.S. Security/Andrews International (collectively "U.S. Security"),[3] a licensed security guard company in the State of Washington, to provide security services for the Tacoma Mall.[4] That day, the Mall had a full staff of U.S. Security public safety officers present and on duty.[5] Public safety officer, John Waldron, an 11+ year licensed officer, was in full uniform and on patrol that afternoon, in the parking lot areas via a marked T-3 Patroller.[6]

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[2] CP at 36-42.
[3] The companies merged during the life of the contract, and were both identified as Defendants in Petitioners' recent Fourth Amended Complaint. CP at 672; CP at 784-793.
[4] CP at 153.
[5] CP at 154.
[6] CP at 154; 163-64.

At approximately 1:25 p.m., Officer Waldron was traveling on the T-3 past Nordstrom when he noticed a young slender African American female sitting quietly on a small wall outside of the entrance of Nordstrom.[7] There was nothing especially unusual about this, as that location is a place where people frequently sit while waiting for someone inside of the Mall. It was not known to be a hot spot for criminal activity, especially not of this particular nature.[8]

The woman was dressed in upper-business class clothing.[9] Officer Waldron passed by about 5-10 feet away from the woman, making eye contact with her as she waved and smiled at him.[10] To Officer Waldron, she appeared to be waiting for someone or taking a break, and did not appear suspicious.[11]

Approximately twenty (20) minutes later Officer Waldron returned on the T-3 and passed the same woman who was sitting on the wall outside of Nordstrom.[12] This time, Officer Waldron traveled approximately 10-15 feet away from her, and noticed that she was on her cell phone.[13]

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[7] CP at 154.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] CP at 155.
[13] *Id.*

According to Cook, approximately 15 minutes after the second encounter, the same woman "suddenly ran after" Cook as she exited the west side of Nordstrom. The unknown woman attempted to take Cook's purse, but in the process knocked Cook to the ground and caused her to sustain personal injuries.[14]

Short of preemptively detaining a young African American woman for sitting quietly and talking on her phone—both of which she had a right to do—it is unclear what the Mall was supposed to do.

Cook nonetheless filed suit on October 9, 2014. Thus far, it has been based on more buzz words and sympathy-pleas than substance.[15] She blamed the Mall for failing to protect her against the "foreseeable" criminal conduct of the "loitering assailant."[16]

B. Procedural Background and Discovery.

1. Cook's Counsel Was Aware of U.S. Security's Role As Security Contractor at the Inception of This Lawsuit And Well Before The Statute of Limitations Ran.

The record reflects that, at the inception of this lawsuit, Cook's original counsel, Donald Cook[17], was aware of U.S. Security's role as the Tacoma Mall security contractor and was aware that its contract with the

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[14] CP at 36-37.
[15] Cook's brief provides a good illustration. In taking issue with Judge Sorensen's characterization of this matter as factually straightforward, she protests that the injuries are "severe," and that the defendants are large "corporations," with "skilled attorneys." Appellants' Opening Brief, at pg. 19.
[16] *Id.*
[17] Donald Cook is an attorney, and Ms. Cook's brother-in-law.

Tacoma Mall included an indemnity agreement.[18] Nonetheless, he made a conscious decision early in the lawsuit *not* to add U.S. Security as a defendant.[19] As defense counsel declared to the trial court:

> In my early telephone discussions with [Cook's counsel] that occurred in the late Fall of 2014 and early Winter of 2015 (before Defendants answered the Complaint), [Cook's counsel] indicated to me that he wanted to be sure that he identified all the parties to this litigation...[Cook's counsel] and I discussed...that the security company contracted with the Tacoma Mall Partnership at the time of the subject incident was Andrews International, who is now U.S. Security Associates/Andrews International (hereinafter "Andrews")...I also explained to [Cook's counsel] that Tacoma Mall Partnership had an indemnity agreement with Andrews.
>
> Also during those same discussions at the outset of this case, [Cook's counsel] told me that he was considering adding Andrews to the lawsuit...He then explained that he would discuss the issue with his clients, and that if he decided to add Andrews as a party to the lawsuit he would do so when he amended the Complaint.
>
> Thereafter, [Cook's counsel] amended the Complaint three times, filing the Third Amended Complaint on January 20, 2015. None of the amendments added Andrews as a party.
>
> On February 5, 2015, Plaintiffs filed their Confirmation of Joinder, indicating that no additional parties would be joined. [Cook's counsel] drafted the Confirmation of

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[18] CP at 672-723at ¶¶ 4-7.

[19] *See* CP at 196-98 at ¶¶ 4-14. Cook filed three amended complaints without adding the security entities. See CP 36-42; CP 43-51; CP 52-60. On February 5, 2015, Cook then filed a Confirmation of Joinder, indicating that no additional parties would be joined, and communicated to defense counsel that no additional parties would be identified. CP at 69; 197 at ¶ 10.

> Joinder, and when we communicated about the document before it was filed, he indicated to me that no additional parties were going to be identified.[20]

Cook goes on to imply—but in no way explain or prove—that the Mall did something wrong in discovery. This is categorically false, a fact borne out in the record. Cook filed suit, and sought no discovery for over six months. When she finally did propound requests in April 2015—which were timely responded to—the statute of limitations was only one month away. But this was something of a moot point anyway, as the Mall had already discussed the identity of U.S. Security with Cook's counsel several times, and it timely provided Cook with Primary Witness Disclosures well before the statute of limitations ran, which clearly identified U.S. Security three separate times as the company that contracted with the Mall to provide security services.[21] Cook's vague claims about "aggressive discovery tactics" and "games," purportedly played by the Mall[22] simply ring hollow.

As Judge Sorensen rightly concluded, Cook's failure to name U.S. Security was a conscious choice, not the product of sandbagging. To the

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[20] CP 672-673, at ¶ 25.
[21] CP at 199 at ¶ 17; CP 213-214 at ¶¶ 5, 6, 7; CP 224. The Mall does not allege negligence on the part of U.S. Security. In fact, all of the defendant-entities are jointly represented by the same counsel, and the documents produced and depositions conducted in this matter included U.S. Security documents and depositions. See CP 2119-2135; CP 201-02, at ¶ 25; CP 914; CP 937; CP 587-589.
[22] *See* Appellants' Opening Brief, at pg. 25.

extent it created problems in the run-up to trial, Cook was simply burdened by her own legal strategy.

2. Cook Obtained The Relevant Discovery From U.S. Security Before the Discovery Cutoff.

The record also undisputedly demonstrates that by the time the relevant motions were brought, Cook was already in possession of the pertinent discovery. The voluminous documentation included: (1) the full security services contract and indemnity agreement between Tacoma Mall and U.S. Security; and (2) Tacoma Mall and U.S. Security written security policies and procedures.[23]

Tellingly, Cook identifies no particular information or facts from which she was foreclosed. Her brief deals exclusively in generalities—*i.e.*, "broad discovery is allowed under CR 26"[24] and she needed to "understand [her] adversary's trial position."[25] This is because she had already secured documents, taken depositions of U.S. Security's key personnel, and knew exactly who the witnesses were, as well as what their policies were.

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[23] *See* CP at 201-02 at ¶ 25. This is in addition to the lengthy police report that Petitioners had since 2012, which included interviews with all of the witnesses, including security personnel, and all contact information. CP 960-980.
[24] *See* Appellants' Brief at pg. 17.
[25] *Id.* at pg. 19.

On July 16, 2015, the deadline for adjusting the trial date passed, and the parties were preparing for trial to begin on October 8, 2015.[26]

3. Cook Associated New Counsel in July 2015 After the Tacoma Mall Noted a Motion for Summary Judgment.

On July 9, 2015, the Mall notified Cook's counsel that they planned to file a Motion for Summary Judgment, and the hearing was being set for September 4, 2015.[27] On July 20, 2015, exactly one month before the August 20, 2015 discovery cutoff, Cook associated new counsel.[28]

However, even Cook's new counsel did not conduct or request any additional discovery before the discovery cutoff.[29] Instead, new counsel scheduled a hearing for August 21, 2015 (the day *after* the discovery cutoff), requesting that the trial court move the trial date and reopen discovery.[30] In support of their request to effectively start the case over, Cook accused the Mall of taking advantage of Cook's original attorney, whom Cook called an "elderly, solo-practitioner that simply lacks the resources to effectively battle in discovery," and alleged factors such as

[26] CP at 200.
[27] CP at 205, at ¶ 37; CP at 226.
[28] CP at 100 – 102.
[29] VTP (Vol. I) at 11:1-4.
[30] See VTP (Vol. I) at 1-26.

the attorney's age, health, lack of litigation experience, home office, and lack of staff (all issues never mentioned or apparent to defense counsel).[31]

Cook's dilatory approach to the case, unfortunately, led to a frenetic series of hearings.

C. Cook's New Counsel's Motions and Subsequent Hearings.

1. August 21, 2015 Hearing: The trial court denied Cook's motion for a continuance and declined to issue a new case schedule reopening discovery. But it granted Cook's CR 56(f) request to postpone summary judgment almost two months, to October 2, 2015.[32] The trial court explained:

> ... I guess what I'm inclined to do is move the summary judgment motion closer to our trial date, and leave the trial date as set and then see where we're at after the summary judgment motion...[33]
>
> I'm allowing them [Cook's new counsel] to gather whatever materials and analyze whatever materials. If they think there's a need for something else, they will have to get leave from the Court to inquire further of you [defense counsel].[34]
>
> ...if the discovery requests that have been made currently, you believe have been insufficiently complied with...bring your motions to compel, and we will find out if there's anything else to be provided, and if there's not, I guess you are left with the discovery that you've got.[35]

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[31] *Id.*; CP 204-05 at ¶¶ 32-36.
[32] CP 246-247.
[33] VTP (Vol. I) at 19:16-20.
[34] VTP (Vol. I) at 21:9-13.
[35] VTP (Vol. I) at 21:17-20; 21:22-25; see also CP 246-247.

2. September 11, 2015 Hearing: Cook then moved to compel and for an even longer extension, which the trial court denied. But again, in the process, it granted her substantial relief. Cook was permitted to conduct depositions of the U.S. Security safety officer who was on patrol the day of the incident; the U.S. Security director; *and* the Tacoma Mall Manager/Corporate Designee—all after the discovery cutoff.[36]

The trial court noted in its ruling the extreme lenience from which Cook was benefitting:

> I'm not sure what to say. You have got - - you got into this thing three weeks ago. I allowed the motion [for summary judgment] to be continued to give you the opportunity to take over for Mr. Cook...and now it sounds like Mr. Cook didn't put forth many efforts, if any efforts, and maybe my rationale for giving the Cook family more time to investigate this case was misplaced. So, I mean, I think it is what it is at this point. I am not giving any more time.[37]

3. September 18, 2015 Hearing: Nearly two months later, Cook's new counsel filed a motion for leave to amend the complaint under CR 10(a) to substitute U.S. Security for one of the "John Doe" defendants in this matter, as well as an additional motion for CR 56(f) relief and a continuance of the trial.[38] The trial court reluctantly granted Cook's

[36] CP at 587-589; VTP (Vol. II) at 1-23.
[37] VTP (Vol. II) at 19:25 – 20:9.
[38] CP at 733-734.

motion to amend, but again denied her Motion for more time.[39] In doing so, the trial court stated:

> Depending on which argument we're – this is like the fourth time we've met together on this thing, and depending on what the motion is, Mr. Cook is either heroic, dilatory, or making reasonable efforts. So I guess I'm - - I mean, that's how this thing has sort of progressed, and so now we're - - last week Mr. Cook couldn't get anything right. He was, you know, not the world's best lawyer, and now it's - - he asked the appropriate questions and didn't get the appropriate answers, despite the fact that [defense] counsel has put in a declaration that says, hey, we've - - I'm not sure what his problem is. We've talked about this over the course of the last eight months. He's amended his complaint three different times. Every time, I mean, my sense is, every time he's making an amendment I'm expecting U.S. Securities to be in there. I'm not asking - - I don't know, maybe Ms. Loucks [defense counsel] even asked, why isn't U.S. Securities in your amended complaint. That's sort of the gist that I'm getting as this is moving along. What does the defense - - do they have to write the complaint for Mr. Cook in order to get it right? I guess I'm just wondering at what point does the - - and I understand you folks just got into this thing, so this is not directed at you. But I'm just, at what point does the plaintiff bear a responsibility for due diligence, and even just minimal diligence in terms of making sure they're suing the right people?[40]

With respect to Cook's further request for an additional CR 56(f) continuance, the trial court acknowledged that it had to be fair to both parties:

> I am concerned that for 10 months, this thing proceeded on one track and all of the sudden somebody new jumps in,

[39] CP at 733-734; VTP (Vol. III) at 1-41.
[40] VTP (Vol. III) at 10:6 – 11:7.

> and now the defense, which has been preparing one way for 10 months, is now put in a position of having to completely revamp what they're doing, and you know, yes, I do need to be fair to Ms. Cook, and I want to be fair to Ms. Cook. I also want to respect the civil rules that are in place to protect defendants who have the lawful right to defend their case as they see fit.[41]

4. October 2, 2015 Hearing: The trial court denied summary judgment; denied Cook's additional motion for more time under CR 56(f); and denied Cook's motion for a continuance and to reopen discovery. But it did move the trial date to March 16, 2015.[42] With respect to discovery, the trial court explained:

> Defense Counsel: ...I just wonder where this is going to go at this point. Is discovery going to be reopened?
>
> Court: No...As a matter of fact...And Mr. Hastings [Cook's new counsel], I have just got to tell you, okay, as far as I'm concerned, the facts in this case are the facts in this case. I'm – if you've got discovery requests out at this point in time and they're being complied with or not, I guess that is a different issue. But in terms of ongoing, continued discovery, no, that's not my intention. If U.S. Security is an appropriate party that should have been pled originally, I am allowing you the ability to do that, but that's the extent of what I am granting at this point in time.[43]

The trial court then invited Cook to bring a motion to reopen discovery, explaining:

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[41] VTP (Vol. III) at 35:15 – 36:2.
[42] CP at 1862-1864; VTP (Vol. V) at 1- 50.
[43] VTP (Vol. V) at 37:4-20.

> I'm not disagreeing with you [defense counsel], but in terms of their - - I don't know that the expectation should be that they [Cook] would walk into today's hearing believing that discovery was going to be forever terminated with regard to a new party. So, it's my intention that that be the case, but I think that there ought to be some rationale articulated why that's happening. So my expectation is that for the next two weeks, no new discovery requests will be made and no new discovery will be engaged in.[44]
> I think we are past the discovery cutoff, and that's why I directed however long ago, two, three weeks ago, that we were done. So I guess, and I am declaring today that we are still done, so I guess I haven't changed my mind. So if you want me to change my mind, Mr. Hastings [Cook's new counsel], I guess you need to tell me why I need to do that.
>
> Cook's Counsel: Need to allow discovery on U.S. Security?
>
> Court: Yes.
>
> Cook's Counsel: Okay, we will note that motion, your Honor.[45]

The court set the hearing for that motion for October 16, 2015.[46] Instead of bringing a motion to reopen discovery, however, Cook brought a "motion for reconsideration" of the trial court's October 2, 2015 case scheduling order.[47]

5. October 16, 2015 Hearing: After hearing argument and reviewing the submitted briefing on Cook's reconsideration motion, the trial court again denied Cook's motion:

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[44] VTP (Vol. V) at 45:14-23.
[45] VTP (Vol. V) at 47:2-13.
[46] VTP (Vol. V) at 43:12-16.
[47] VTP (Vol. IV) at 1 – 29.

> Well, it's a simple case with simple facts. It has a terrible outcome, I will grant you that, but it's a simple case with simple facts, and the problem that I had when I didn't grant the defense motion for summary judgment, whenever that was, two weeks ago, three weeks ago, I mean, it was all I could do to admit that you have even a simple case. So, I guess that's kind of where I'm coming from.[48]

When pressed to perform a *Burnet* analysis—which governs exclusion of evidence and discovery sanctions—the trial court did so:

> You sort of told me about the Burnet factors and how I didn't consider lesser sanctions, I didn't consider your lack of willfulness and the violation, I didn't articulate that there's any kind of prejudice to the defense, and there is none. Well, you know, it seems to me that I could have granted [the] motion for summary judgment. I could have denied your amendment [of U.S. Security]. I could have done these things, and that would have been a different sanction than simply declaring that in my view the discovery that has been completed and that closed five weeks ago, or whenever it was when it closed, wasn't subject to being reopened.
>
> It does seem to me that, by all accounts, Don Cook, either the dilatory Don Cook or the heroic Don Cook knew about U.S. Security and has known about them for months, and for whatever reason, opted not to add them. They were added by you later on. It seems to me that he was willful in his decision about how to prosecute his case.
>
> And the defense has articulated a substantial prejudice. There is a substantial prejudice in being ready for trial and not being able to go to trial at a time when everybody has made arrangements for the trial to take place. You completed all your discovery, you think you know what the

[48] VTP (Vol. IV) at 11:5 – 12.

> case is, and then at the last minute, the judge changes things on you, and I think it is prejudicial to push their case four months downstream. So, I think that when I – when I did decline, when I have declined to reopen discovery, I'm taking all of those things into account as I'm doing it.
>
> I think that U.S. Security is somebody who's been known about and could have been discovered on. I don't know that any discovery that you obtained from them is going to change the fact that your case is there was some female, either a teen or young adult, sitting in a particular place using a phone for 20 to 40 minutes in a public area outside the Tacoma Mall that was observed by people sitting and talking on her phone, and she was dressed apparently comfortably enough for her that she was able to sit in one place for an extended period of time. I'm not even convinced that that's the person who is the same person that your security guard saw multiple times, but the two of you seem to be convinced of that, so I am willing to go with it.
>
> But I think that I've been more than generous in allowing this case to be prosecuted the way you want it to be prosecuted, but I'm limiting the discovery at this point in time. It is closed, and I'm not reopening it.[49]

Even if *Burnet* governed whether to amend a case schedule, Judge Sorensen explained in plain terms why the test would be met here.[50]

Cook appealed.

III. ARGUMENT

A. Standard of Review and Statement of the Issue

As a threshold matter, Cook's brief is based upon the unstated but faulty premise that it was incumbent upon the trial court to justify its

[49] VTP (Vol. IV) at 11:5 – 13:10.
[50] *Id.*

unwillingness to rewrite the case schedule at Cook's request. The Local Rules do not support the premise:

> The court, either on motion of a party or on its own initiative, may modify any date in the Order Setting Case Schedule for good cause...

PCLR 4(d). It is for the trial court to determine whether Cook carried *her* burden to establish "good cause" to change settled deadlines. *See City of Bellevue v. Vigil*, 66 Wn. App. 891, 892, 833 P.2d 445 (1992) (decision to grant or deny a continuance reviewed for manifest abuse of discretion); *Doehne v. EmpRes Healthcare Management, LLC,* 190 Wn. App. 274, 280 (2015) (discovery orders reviewed for abuse of discretion). Breskin, 10 Washington Practice § 40.53 (3d ed. 2015) (trial court has considerable discretion in determining terms if granting a continuance) (citing *State v. Ralph Williams*, 87 Wn.2d 298, 553 P.2d 423 (1976)). This is an arena in which, by design, the trial court's discretion is at its broadest. "A decision is manifestly unreasonable if the trial court takes a view that no reasonable person would take." *Clipse v. Commercial Driver Servs., Inc.*, 189 Wn. App. 776, 787, 358 P.3d 464, 470 (2015) (affirming denial of motion to enlarge time).

And this makes sense as a practical matter. The trial court *should* have broad authority to manage the development of civil litigation. The court is, after all, in the best position to evaluate the needs of the case, the

diligence of counsel, the prejudice flowing from various rulings, and a multiplicity of other real-time considerations. Especially here, where the parties were regularly before the trial court, Judge Sorensen was uniquely familiar with the nuances of the litigation, and in a position to rule accordingly.

The issue, then, framed properly, is:

Whether Judge Sorensen manifestly abused his discretion by declining a request to modify the case scheduling order and reopen discovery when: (1) Cook made no showing of good cause or due diligence; (2) Cook failed to articulate any specific factual or investigatory need; and (3) the Mall had already undergone—and complied with—one lengthy period of discovery leading up to trial.

B. The Trial Court did Not Abuse its Discretion by Denying Further Discovery Related to U.S. Security.

1. The Trial Court Did Not Abuse Its Discretion When It Found No "Good Cause" To Rewrite The Case Scheduling Order In Response To Cook's Self-Created Hardship

Cook cannot show any error on the part of the trial court with respect to declining to reopen discovery, let alone, an abuse of discretion. This action was commenced when Cook filed the lawsuit on October 9, 2014, nearly two years ago. Cook filed her Motion for Leave to Amend *less than three weeks* before trial.

It has been said—rightly—that "[a] scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril... Disregard of the order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992).

Washington generally adheres to this notion. The cases interpreting good cause have "specifically rejected" self-created hardship as a basis. *State v. Luvene*, 127 Wn.2d 690, 718, 903 P.2d 960, 975 (1995); *see also State v. Mack,* 89 Wn.2d 788, 794, 576 P.2d 44 (1978) ("[s]elf-created hardship is not an excuse for violating mandatory rules"); *State v. Dearbone*, 125 Wn.2d 173, 181, 883 P.2d 303 (1994) (good cause "required an unavoidable and unusual delay which was outside the State's control."); *In re Kirby,* 65 Wn. App. 862, 868–69, 829 P.2d 1139 (1992) (same). Some of these cases involve criminal procedure, to be sure. But that context—which involves liberty, not money—if anything, makes the point more compelling in this context. Parties must be able to point to something other than a self-inflicted wound.

Here, Cook did not even step over that hurdle. She had the duration of the lawsuit to comply with the August 20, 2015 discovery cutoff date. And then—contrary to her claim about being denied "sufficient time" to

establish good cause[51]—the trial court indulged her with a special hearing date (October 16, 2015) for that sole purpose; namely, an opportunity to show why discovery should be reopened. This was an appropriate vehicle to determine something explicitly within the trial court's authority. *See* CR 26(b)(1) ("frequency or extent of use of the discovery methods set forth in section... shall be limited by the court if it determines that... the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought").

However, at the hearing, Cook failed to set forth any evidence she could not have discovered before, nor what she hopes to find with additional discovery. Indeed, even now, Cook remains entirely nonspecific about what information, exactly, she was foreclosed from obtaining. Perhaps her most specific claim is that she does not know what "lay and expert witnesses U.S. Security would rely upon at trial."[52] This late-stage grievance is neither factually, nor legally, tenable. Factually, Cook knew exactly who the witnesses would be from previous witness disclosures and responses to written discovery. By operation of the Local Rules, U.S. Security would not be allowed to show up to trial with a raft of undisclosed witnesses. Legally, as the Washington Supreme Court held over 50 years ago, "it is improper to ask a party to state evidence upon

[51] *See* Appellants' Opening Brief, at pp. 14, 15.
[52] *Id.* at pg. 17.

which he intends to rely to prove any fact or facts." *Weber v. Biddle*, 72 Wn.2d 22, 29, 431 P.2d 705 (1967).

Cook also laments that "[d]ue to the circumstances, the amendment [of U.S. Security] did not occur until September 24, 2015, or 14 days before trial."[53] But, in doing so, she conveniently glosses over *why* U.S. Security was not substituted until 14 days before trial. This is because the "circumstances" were that Cook's counsel undeniably knew about U.S. Security—since the inception of the lawsuit—but decided not to add it as a party (despite three previous amendments of the Complaint).

As the trial court found, Cook knew of U.S. Security early in the case, and made a conscious decision not to name them. Whether this was a strategy failure or something else, it does not operate as a hall pass to ignore existing deadlines, which are relied upon by all parties.

Parenthetically, the Mall would add that it is wholly irrelevant whether new counsel saw something that previous counsel did not. Parties do not get do-overs with the addition of new counsel. The mistakes of the first attorney are, at most, an issue between he and the Cooks. But they do not—and cannot—furnish grounds for good cause:

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely

[53] Appellants' Opening Brief, at pg. 16.

> selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'

Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 396-97 (1994); *see also U.S. v. 7108 West Grand Ave.*, 15 F.3d 632 (7th Cir. 1994) (gross negligence of attorney redounds to the detriment of the client rather than to an adversary; no right to re-litigate).

The substitution of U.S. Security under CR 10 for a "John Doe," at the eleventh hour, did not require a new case schedule. Indeed, given the manifest *absence* of good cause, it would have been error and a violation of PCLR 3(d) to revise the case scheduling order. The trial court did not abuse its discretion.

2. The Trial Court Did Not Abuse Its Discretion By Declining Cook's Proposed Per Se Rule Of Restarting Discovery With Every Late-Stage Substitution

The trial court did not "close" discovery, and no amount of repetition by Cook can change that. Discovery was closed because the case scheduling order set a discovery cutoff date of August 20, 2015. And that date came and went. The issue in this case is whether the trial court was required to *reopen* it.

Cook certainly cites no authority in that regard. "Where no authorities are cited in support of a proposition, the court is not required to

search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193, 195 (1962). This is not by accident. Courts have been appropriately cautious about binding the trial court's hands with per se rules and mandates in matters of pretrial case management.

Yet Cook advocates exactly that: a per se rule that, regardless of need or showing, she had an unfettered right to a complete reopening of discovery upon substituting a John Doe late in the case. By this logic, parties could forestall litigations indefinitely. Every time the trial date approaches, they could identify a new party and effectively restart the lawsuit.

A trial court may very well elect to reopen discovery. But it might, as here, have good reasons not to. The appellate court should honor that discretion and permit the trial court freedom to manage the pretrial litigation before it.

3. The Trial Court Did Not Abuse Its Discretion By Declining A Prejudicial Extension Of Discovery

Discovery is costly, stressful, and otherwise burdensome. There has already been an extensive discovery process here. Requiring the parties to undergo a second one, because Cook failed to take full advantage of the first, is unfair on its face. As courts recognize, this is

itself prejudicial. *See Smith v. Behr Process Corp.*, 113 Wn. App. 306, 329, 54 P.3d 665 (2002) (noting that a continuance would be unfair to the opposing party); *Zivkovic v. S. Calif. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (additional discovery and expense as source of prejudice); *Leachman v. Beech Aircraft Corp.*, 694 F.2d 1301, 1309 (D.C. Cir. 1982) (defendants have an interest in repose).

The Mall did everything right. It disclosed U.S. Security and its role early in the case. It disclosed its personnel, in writing, through witness disclosures. It produced over a hundred documents and made personnel available for depositions. And then it utilized the time allotted by the case schedule to conduct its own discovery, retain experts, and be ready to go at the agreed-upon trial date of October 8, 2015—which was upended by Cook's neglect.

The trial court agreed that the Tacoma Mall should not be further prejudiced. Issuing a new case schedule with a new discovery cutoff would have needlessly increased the cost of litigation and required a significant amount of resources to rewrite its defense, hire new and/or additional experts, and conduct additional discovery. Indeed, *this* would

have been "manifestly unreasonable" and created a substantial *injustice* for the Mall.[54]

Being that Cook is asserting the same cause of action against the Mall and U.S. Security—and given that both will be evaluated under the same standards—Cook will be able to present her case with the discovery previously obtained.

The trial court reasonably exercised its discretion to postpone the trial date (while ensuring compliance with existing discovery), while declining a complete and costly do-over of the entire litigation. This type of evenhanded and thoughtful Order is exactly what one would hope of a trial court. It is plainly not an abuse of discretion.

4. The Court Was Not Required To Analyze The *Burnet* Factors, But Nevertheless Did.

Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1033 (1997), is a standard governing **discovery sanctions**, not modifications to the case scheduling order. *See, e.g., Jones v. City of Seattle*, 179 Wn.2d 322, 338, 314 P.3d 380 (2013) ("in *Burnet,* th[e] court held that *before imposing one of the harsher remedies allowable under CR 37(b)*, the trial

[54] As the trial court recognized, if Cook sought additional discovery from U.S. Security beyond that which had already been obtained, there was absolutely *no good reason* why they could not have done so earlier, especially given that both are represented by the same counsel. CR 30 provides that "any party may take the testimony of any person, including a party, by deposition upon oral examination," and under CR 45(a)(1)(C), parties can secure seek testimony or documents as well.

court must explicitly consider whether a lesser sanction would probably suffice, whether the violation at issue was willful or deliberate, and whether the violation substantially prejudiced the opponent's ability to prepare for trial.") (emphasis added) (internal citations omitted).[55]

Here, there is no indication that Judge Sorensen was punishing Cook for discovery noncompliance. Nor was the refusal to reopen discovery a dismissal of Cook's case; it was not a default judgment; it did not exclude the testimony of witnesses.[56] The issue was whether Cook had demonstrated good cause for relief from an elapsed deadline. And she had not. *Burnet* is, by definition, inapplicable.

Indeed, the enormity (and absurdity) of Cook's claim to the contrary bears emphasis as well. Trial dates and deadlines are routinely moved and argued about, for any number of reasons, in courts across Washington. The implications of mandating that all trial courts conduct a *Burnet* analysis, every time, are breathtaking—both in terms of substance and judicial economy. Such a sweeping change should come from the

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[55] *See also Mayer v. Sto Indus., Inc.*, 156 Wn.2d 577, 688, 132 P.3d 115 (2006)) ("the 'harsher remedies allowable under CR 37(b)' applies to such remedies as dismissal, default, and the exclusion of testimony).

[56] In fact, ironically and to the contrary, despite the fact that Cook continuously violated the civil rules and the trial court's case scheduling order, in the weeks before trial, the trial court utilized its discretion to *permit* Cook to do far more than she ever would have been entitled to do under the existing case scheduling order. She *did* conduct discovery beyond the cutoff, received substantial additional time to respond to summary judgment, and her grossly-untimely witnesses' testimony was considered. *See* CP at 1802 -1840; VTP (Vol. V) at 17:18-19. Even the amendment itself constituted extreme leniency.

drafters of the Civil Rules or Legislature—both of which are familiar with *Burnet* and, to date, have declined to extend it beyond its existing context. *See Snohomish Cty. v. Anderson*, 123 Wn.2d 151, 156, 868 P.2d 116, 118 (1994) (legislature presumed familiar with existing case law and statutory interpretations).

Leaving that aside, even if *Burnet* were applicable—though, it is not—the trial court's ruling would be well-within its "broad discretion to fashion remedies." *Blair v. TA-Seattle E. No. 176*, 171 Wn.2d 342, 348, 254 P.3d 797 (2011). The trial court, at Cook's request, included an analysis of the *Burnet* factors.[57] This included a specific finding of willfulness, prejudice, and no lesser remedy. While the Mall would submit that the findings are objectively correct, the issue is only whether "any reasonable person" could render them. *Clipse v. Commercial Driver Servs., Inc.*, 189 Wn. App. 776, 787, 358 P.3d 464 (2015). That low standard is easily met.

By any measure, the trial court's ruling should be affirmed.

[57] VTP (Vol. IV) at 11:5 – 13:10.

C. Cook's Request for a New Judge Is Beyond the Permissible Scope of Discretionary Review And Is In Any Event Unsupportable

RAP 2.3(e) mandates that "[u]pon accepting discretionary review, the appellate court may specify the issue or issues as to which review is granted." Here, the Ruling Granting Review states:

> Cherie Cook seeks discretionary review of the trial court's order denying her motion for reconsideration of the court's order refusing to reopen discovery. Concluding that Cook demonstrates review is appropriate under RAP 2.3(b)(1), this court grants review.[58]

There is nothing about bias or the need for a new trial court judge who is unfamiliar with this case.

Indeed, this is a point Cook herself makes when preemptively attacking the Mall for "arguing about amendment being improper."[59] It is true that the Mall disagrees with the trial court's decision to grant leave to a late-stage fourth amendment. But this is not the forum to have that dispute because, as Cook points out, "it is not an issue that is before the court [and] at this point... it is law of the case." *Id.* The same reasoning applies to Cook's last-minute attack on Judge Sorensen. This was not an issue raised before Judge Sorensen. *See* RAP 2.5(a). This was not an issue raised in Cook's motion for discretionary review. And this was not an

[58] Ruling Granting Review, at pg. 1.
[59] Appellants' Opening Brief, at pg. 20, n. 57.

issue within the Commissioner's Order. It should be disregarded on that basis alone.

Even assuming the question were properly before the Court, Cook presents *no evidence* of "actual or apparent bias"—only conclusory statements and accusation. "Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit." *Santos v. Dean*, 96 Wn. App. 849, 857 (1999) (citing *State v. Post*, 118 Wn.2d 596, 619 (1992) (denying request for new judge where "Post has not shown how the judge at his sentencing hearing was biased.").

In *Santos*, the Court of Appeals denied the petitioner's request for a new judge on remand where the trial judge had granted summary judgment against the petitioner. *Santos,* 96 Wn. App. at 857. The court reasoned, "[w]e have concluded differently than the trial court, but that does not establish evidence of actual or potential bias," and found that the trial court specifically explained its decision to the petitioner. *Id.* The court held that "[b]ecause this record does not disclose actual or potential bias, we leave the matter of disqualification to the trial judge." *Id.*

Here, the trial court not only ruled in Cook's favor by denying the summary judgment motion, but the trial judge also articulated his reasons for granting or denying each Order. Like in *Santos,* Cook has presented no

specific evidence of bias, and any such motion should be left to the determination of the trial court.

Furthermore, this motion must typically be made to the trial court first. *See Magana v. Hyundai Motor Am.*, 141 Wn. App. 495, 523, 170 P.3d 1165 (2007) ("Hyundai never sought to disqualify the trial court judge nor asked her to recuse herself. We think it prudent to allow the trial court to consider Hyundai's arguments in the first instance on remand."). Cook's claim fails on this basis as well. Her request for a new trial judge should be denied.

IV. CONCLUSION

For the foregoing reasons, the trial court's rulings should be affirmed.

RESPECTFULLY SUBMITTED this 12th day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 17th day of August, 2016, I caused a true and correct copy of the forgoing document, "BRIEF OF RESPONDENTS," to be delivered to the following counsel of record as indicated:

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Dated this 12th day of August, 2016, at Seattle, Washington.

Paula Polet
Paula Polet, Legal Assistant

WILLIAMS KASTNER™

August 12, 2016

29465.0101

Mr. David C. Ponzoha
Clerk of Court/Administrator
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Re: *Cherie and Clark Cook v. Simon Property Group/Tacoma Mall Partnership*
Court of Appeals No. 48284-3-II

Dear Mr. Ponzoha:

Pursuant to RAP 18.23, enclosed for filing in the above-referenced matter please find the original plus one copy of "Brief of Respondents." An extra copy of the cover page is enclosed to be conformed and returned in the self-addressed stamped envelope provided.

Thank you for your assistance in this matter.

Very truly yours,

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