No. 94974-3

SUPREME COURT
OF THE STATE OF WASHINGTON

Snohomish County Case No. 13-2-09173-7

HARMONY NASON,

Petitioner,

v.

HOBAN AND ASSOCIATES, INC. d/b/a COAST REAL ESTATE SERVICES, HARMONY HOUSE EAST, ASSOCIATION, COMPASS HEALTH, as successors to Family Counseling Services of Snohomish County

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Harmony Nason appeals dismissal of her claims on summary judgment. She assigned error to the trial court's ruling that Respondents had met their burden on summary judgment and that Nason had failed to raise a genuine issue of material fact precluding entry of summary judgment. The Court of Appeals affirmed.

Nason now seek discretionary review arguing that the Court of Appeal's decision conflicts with this Court's decisions in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), and *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015), which require the trial court to consider lesser sanctions before striking evidence or witnesses. The Court of Appeals decision does not conflict with this Court's precedents as the trial court did not make discretionary rulings striking witnesses or evidence; the trial court's order was in no way a sanctions order. Nason invites this court to extend the *Burnet/Keck* analysis to summary judgment orders generally, effectively treating the grant of summary judgment as a sanction against the non-moving party to be reviewed under an abuse of discretion standard. This Court should decline that invitation and decline discretionary review.

Nason also seeks to characterize the issue on appeal as whether the trial court correct properly denied her oral motion for a continuance under

Civil Rule 56(f). But she did not assign error to this decision and it was not the basis upon which she sought reversal of the trial court's order. Moreover, this Court has already articulated standards to guide the trial courts' exercise of discretion under CR 56(f), and there is no basis under RAP 13.4(b) to revisit those standards.

II. NATURE OF THE CASE AND DECISION

Harmony House East Association (HHEA) is a non-profit organization which owns Harmony House, a three-bedroom single family "group home" located at 514 Powell Street, Monroe, Washington and known as Harmony House East Apartments. CP 420. HHEA rents each of its three bedrooms separately to "qualifying" individuals under HUD Section 811. *Id.* The co-residents of Harmony House share several common areas including the kitchen, living room, den area, and bathrooms. *Id.* HUD provides a subsidy for each of the residents for each room rented in the house. *Id.*

Nason became a resident of the property in August 2007. CP 490. Subsequently, on June 30, 2008, Nason, entered into a written lease with HHEA as landlord. CP 428. The lease provides for an initial term from August 1, 2008 to July 31, 2009, and renews automatically for succeeding one year periods. *Id.* at ¶8.

The Lease provides, in part, that Nason, as tenant, agrees as follows:

> To permit the LANDLORD, or his/her agents, or any representative of any holder of a mortgage on the property, or when authorized by the LANDLORD, the employees of any contractor, utility company, municipal agency or others to enter the premises for the purpose of making reasonable inspections and repairs and replacements.

CP 431.

Coast Real Estate (Coast) is a real estate management company that provides property management services for office, retail, medical offices, multi-family, and other properties throughout the northwest. CP 420. Coast resigned as property manager in 2014. CP 76-78. Coast does not own Harmony House. Coast likewise has no contractual obligations to Nason, HUD, or any other entity to provide case management or support services to Nason. CP 420.

Within months of taking occupancy, Nason began to engage in what would become a pattern of alleging that she failed to receive reasonable accommodation with respect to the type and amount of notice given prior to entry into the property for routine inspections and periodic maintenance. CP 420-427. For example, through a letter from counsel dated October 29, 2010, Nason alleged that Coast had violated the Washington Residential Landlord Tenant Act by failing to accommodate

her by refusing her request to reschedule a Department of Commerce mandated inspection. CP 421. Nason also complained about a notification she received which provided that Coast intended to clean the garage. CP 436. As a general matter, Nason has consistently insisted that Coast conduct inspections at times which were convenient for her, even if proper notice had been provided in accordance with the applicable statutory requirements set forth in the Lease. CP 424-425.

In the ensuing years, Nason repeatedly complained that Coast had failed to provide her with reasonable accommodation with respect to notice for and scheduling of maintenance calls, inspection and other necessary visits to the property. CP 426. Throughout the process, Coast continually and took steps necessary to reasonably accommodate Nason's disability while performing the property management services and duties that are required of Coast. *Id.*

On May 4, 2012, and after Coast had worked with Nason and her then counsel for a number of years to accommodate her many notice-related requests, Nason filed a Housing Discrimination complaint with the Washington Human Rights Commission (HRC) claiming that Coast and HHEA failed to provide her with written 48-hour notice before entering Harmony House for required maintenance and inspection visits. CP 437. On May 23, 2012, the HRC submitted detailed findings and conclusions in

response to Nason's allegations of discrimination. CP 437-443. The Commission ultimately found that Nason did not demonstrate the elements of proof necessary to show that she was denied a reasonable accommodation. CP 443.

Since the issuance of the HRC's decision until Coast's property management responsibility ended in December 2014, Coast continued to provide Nason with the requested 48-hour notice prior to each entry to Harmony House for inspections or maintenance. CP 426. Despite these accommodations, Nason has on various occasions denied Coasts employees and representatives entry into Harmony House. CP 425. Nason's conduct has resulted in a significant financial burden to Coast and HHEA from cancellation fees charged by its contractors and has imposed a substantial hardship to prospective residents who make arrangement to visit Harmony House, only to be turned away. CP 423-424, CP 427.

This action was filed on December 18, 2013. The 19-page Complaint alleges nine causes of action arising from Nason's factual allegations that Defendants had failed to reasonably accommodate her disabilities. CP 487-505. Subsequently, Nason filed a motion for a Temporary Restraining Order, CP 459-461, a motion for default, CP 368-370, a motion for contempt, CP 358-366, a motion for continuance of a summary judgment motion filed by former defendant Compass Health,

(this motion is on the trial court docket but was not included in the clerk's papers); and a motion for reconsideration of the granting of summary judgment to Compass Health. CP 192-313.

On July 11, 2014, Defendants took Nason's deposition. CP 79-91. Nason testified that through this lawsuit, she sought "some form of reasonable accommodation" in her "living situation" because of her disability. CP 85 (21:15-21). Specifically, Nason stated she sought reasonable accommodation in the form of "proper, legal notice" of entry into Harmony House per the Landlord-Tenant Act. CP 86 (22:12-14, 23:4-7). Second, in addition to the above request for "reasonable accommodation," Nason testified that she seeks "assistance with program" and the "program needs to be revisited, and then parties need to be acknowledged of who they are [sic] and what their function is." CP 88 (30:11-12, 36:16-17).

On July 30, 2015, Defendants filed their motion for summary judgment. CP 100-120. Nason filed a request for a continuance on August 17, 2015, CP 56-58, apparently under an incorrect cause number. The motion was not noted for consideration. The only basis articulated in support of the motion was that Defendants had not answered Nason's interrogatories. *Id*. Specifically, she claimed she needed a copy of the

contract between HUD and HHEA.[1] No affidavit or declaration accompanied the motion.

Nason appeared at the summary judgment hearing for the purpose of making an oral request for a continuance of the motion. Transcript of proceedings, *passim*. Despite Nason's failure to file a declaration, the trial judge questioned her regarding the elements of Civil Rule 56(f) and concluded that they had not been satisfied. Transcript of Proceedings at 14. Accordingly, the court entered an order granting Defendants' motion for summary judgment. CP 59-60.

On September 8, 2015, eleven days after the summary judgment hearing, Nason filed an affidavit in support of her motion for a continuance of the summary judgment motion and a request for reconsideration accompanied by a declaration. CP 39-43; CP 44-50; CP 39-43. The trial court docket does not reflect that the court considered or decided the motion for reconsideration.

In this appeal, Nason assigned error to the trial court's grant of summary judgment, arguing that Respondents did not make a sufficient showing to warrant entry of summary judgment. She does

[1] Nason apparently obtained copies of the contract directly from HUD in 2010. See CP 306-307 ("The contracts that were provided to you in our September 12, 2101 [sic] FOIA response are the only existing contracts between HUD and Harmony House East Association."

not assign error to the trial court's denial of her request for a continuance. See Appellant's Brief at 1-2.

The Court of Appeals affirmed. It found Respondents had met their burden of proof on summary judgment. *Nason v. Hoban and Assoc., Inc*., Slip Op. No 74011-3-1 (June 12, 2017) at 8. The Court found Nason's reference to the allegations in her complaint were insufficient to raise an issue of material fact. *Id*. Similarly, her reference to voluminous documents she had filed in the trial court over the course of the litigation would not be considered as they were not called to the attention of the trial court. *Id*. at 9. Finally, the Court found Nason's factual contentions on appeal were not supported by accurate references to the appellate record. *Id*.

III. ARGUMENT IN OPPOSITION TO DESCRETIONARY REVIEW

Discretionary review under RAP 13.4(b) is unwarranted because Appellant has failed to show that the Court of Appeals' unpublished decision is in conflict with a decision of the Supreme Court

A. The *Burnet* and *Keck* "lesser sanctions" analysis applies where the trial court decision amounts to a "sanction."

In *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), this Court, reviewing the procedure that the trial court had followed in issuing a CR 37(b)(2)(B) order, stated the following rule:

> When the trial court "chooses one of the harsher remedies allowable under CR 37(b), ... it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed," and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial.

Id. at 494, 933 P.2d 1036 (*quoting Snedigar v. Hodderson*, 53 Wash.App. 476, 487, 768 P.2d 1 (1989), *rev'd in part*, 114 Wash.2d 153, 786 P.2d 781 (1990)). The Court held that the trial court's sanctions order for violation of a discovery order is reviewed for an abuse of discretion. *Id*.

Subsequently, in *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015), this Court reviewed a Court of Appeals decision reversing the grant of summary judgment where the trial court had granted a motion to strike an untimely affidavit submitted by the non-moving party. This Court affirmed, holding that when the trial court excludes untimely evidence submitted in response to a summary judgment motion, it must apply the factors set forth in *Burnet.* *Id*. at 369. The court noted that the stricken affidavit would have created an issue of fact precluding summary judgment, *id.* at 369 n.7, and it was stricken solely because it was untimely. *Id.* at 369. Because "the decision to exclude evidence that would affect a party's ability to present its case amounts to a severe sanction," *id*. at 368, the trial court erred by not engaging in a *Burnet* analysis. The court again applied an abuse of discretions standard. *Id*.

B. The trial court was not required to engage in a *Burnet* analysis when it granted summary judgment.

The trial court's grant of summary judgment did not involve a sanctions order, nor did the trial court did strike evidence offered by appellant in opposition to summary judgment. Appellant framed her argument on appeal in terms of whether the trial court correctly concluded that Respondents were entitled to judgment as a matter of law under Civil Rule 56(c). In this context, the *Burnet/Kecker* analysis has no place; it is axiomatic that compared with summary judgment dismissal, there will always be a less severe "sanction." Moreover, application of *Burnet* and *Keck* would require application of an abuse of discretion standard to the core issue of whether "there is a genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). To do so would be contrary to the well-established principle that summary judgment rulings are reviewed de novo. *Allen v. State*, 118 Wn.2d 753, 757, 826 P.3d 200 (1992).

C. This court should not reach the issue of whether a *Burnet* analysis is required when ruling on a motion under CR 56(f).

This court generally does not review claims that were not raised in the court of appeals. *See Peoples National Bank of Washington v. Peterson*, 82 Wn.2d 822, 829, 514 P.2d 159 (1973). Appellant did not assign error to the trial court's denial of her oral motion for a continuance

under CR 56 (f) and the issue was not addressed by the Court of Appeals. This court should not review an issue that was not raised in the Court of Appeals.

D. The *Burnet* analysis should not be applied to rulings under CR 56(f).

Even if the court were to consider an issue that was not raised in the Court of Appeals, discretionary review is not warranted in this case. In *Burnet*, the trial court ruled that one of plaintiff's claims had "not been sufficiently pleaded nor have responses to discovery given sufficient notice of any such claim." *Id*. at 491. Accordingly, the court imposed a sanction under CR 37(b)(2) disallowing further discovery on the issue and the claim was not presented at trial. The only guidance provided by the rule is the admonition that the trial court "make such orders in regard to the failure as are just." In *Keck*, the trial court relied on the timing requirements in CR 56(c) to strike plaintiff's late-filed declaration. *Keck*, 184 Wn. 2d, at 366.

In both of these cases, the applicable rule did not supply any guidance to trial court in exercising its discretion. Application of the *Burnet* factors in these cases provided standards to guide the trial court's exercise of discretion in applying the rules so that they would not amount to self-executing rules of exclusion.

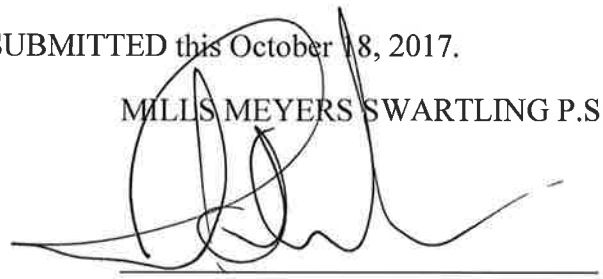
The purpose of Civil Rule 56(f) is avoid a bright-line rule of exclusion or "sanction" when the non-moving party cannot submit evidence in accordance with timing requirements. It allows the trial court to order a continuance or allow additional discovery to be had upon an appropriate showing by the non-moving party. This Court has articulated standards to guide the trial court's exercise of discretion in applying the rule. "A court may deny a motion for a continuance when '(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.'" *Tellevik v. Real Prop. Known as 31641 W. Rutherford St.*, 120 Wn.2d 68, 90, 838 P.2d 111 (1992) (quoting *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989)).

In any case in which a litigant contends the trial court abused its description in applying these standards, it can assign error and obtain appellate review. It is not necessary to engraft the *Burnet* standards to those already stated in the rule and articulated by the courts. Simply stated, if the trial court properly exercised its discretion in denying a CR 56(f) motion based upon the standards set forth in the rule and common law, it should not be reversed for failing to consider lesser sanctions under

Burnet. Such a rule would strip CR 56 of its efficacy and render CR 56(f) meaningless as in most cases there would likely be a less serious "sanction." Discretionary review should be denied.

RESPECTFULLY SUBMITTED this October 18, 2017.

MILLS MEYERS SWARTLING P.S.



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CERTIFICATE OF FILING AND SERVICE

I, Anna Armitage hereby certify that I filed the foregoing upon the following counsel of record:

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DATED this 18th day of October 2017.

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