No. 76091-2-I

No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

REBECCA A. RUFIN,

Plaintiff/Petitioner,

v.

CITY OF SEATTLE and JORGE CARRASCO

Defendants/Respondents,

PETITION FOR REVIEW

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

Attorneys for Plaintiff/Petitioner

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A. IDENTITY OF PETITIONER

The Petitioner is Rebecca Rufin, the plaintiff/appellant below, who asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Ms. Rufin seeks review of the opinion of the Court of Appeals entered on August 21, 2017 ("the Opinion" or "Op.").[1] A copy of the Opinion is in the Appendix attached hereto at pages A1-A20.

C. ISSUES PRESENTED FOR REVIEW

Issue No. 1 Is an issue of substantial public interest presented when the Court of Appeals holds "[t]he City's failure to retain copies of the e-mails under its retention policy" mandated by RCW 40.14.070(2)(a)[2] "does not provide clear and convincing evidence of misconduct," Op., at A11-A12?

Issue No. 2 Is the Court of Appeals statement that "[t]he April 18, 2012 e-mail does not appear to meet [the] definition … of [a] nonexecutive communication" set out in the Local Government Common Records Retention Schedule, because such records "must be made or received in connection with the transaction of *public business*" and the "e-mail did not purport to transact *business with the public*," in conflict with the Supreme

[1] Rufin has separately filed a petition for review that is currently pending with regard to the opinion issued in *Rufin v. City of Seattle*, 199 Wn. App. 348, 352-53, _ P.2d _ (2017) (*Rufin II*), regarding the related Public Records Act case.

[2] *See* CP 644 ("This records retention schedule was approved by the Local Records Committee in accordance with RCW 40.14.070")

Court's use of the phrase "public business" for purposes of public records laws in *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 357 P.3d 45 (2015)?

Issue No. 3 Is the Court of Appeals statement, "It is immaterial whether the misrepresentation was willful or innocent, since the effect is the same," *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989), inconsistent with the holding in the Opinion that "[t]he April 18, 2012 e-mail does not provide clear and convincing evidence of misrepresentation by the City," in part because "while Johnson's statement that she had already provided all responsive e-mails was factually untrue, she believed it to be true." Op., at A15?

Issue No. 4 Is an issue of substantial public interest presented when the Court of Appeals finds no violation of the discovery rules, despite acknowledging that Defendant's manager "Maehara 'could have and, perhaps should have, realized he had received e[-]mail correspondence relating to Rufin in April 2012, when he received copies of the discovery motion." Op., at A7.

D. STATEMENT OF THE CASE

1. Factual Background

This case involves claims of retaliation under RCW 49.60, *et seq*. It concerns Seattle City Light's repeated failure to rehire Rebecca Rufin for a vacant Civil Mechanical Engineer Manager (CMEM) job, in a chain

of command leading to Defendant Superintendent Jorge Carrasco, years after Rufin was a witness in an investigation and lawsuit alleging discrimination by Carrasco. *See* Op., at A1, *citing Rufin v. City of Seattle*, No. 72012-1-1, slip op. at 2 (Wash Ct. App. Aug. 17, 2015) (unpublished), https://www.courts.wa.gov/opinions/pdf/720121.pdf (*Rufin I*).

Rufin claims that when she sought an explanation for the failure to rehire her, Carrasco's H.R. Officer, DaVonna Johnson, told her she had "burned her bridges" and would never be considered for any future management positions at the utility. CP 447-48. At trial, "Johnson says [that] didn't happen." CP 832.

Johnson also testified at trial that she "never spoke to Mr. Haynes [the CMEM hiring manager] about Ms. Rufin's candidacy for this position," nor any other matter regarding Rufin; and testified she "**had no information about the hiring process**" and "**was not aware of Ms. Rufin's candidacy for the job at all**," until Rufin contacted Carrasco about her non-selection in June 2012. CP 563-64. Johnson further testified that the hiring process for the CMEM job was one of "three or four hundred" hiring processes conducted each year in which "I [Johnson] don't have a role," claiming she oversaw H.R.'s Talent Acquisition unit only from a "policy level." CP 558. In closing, the City argued Rufin's allegations of retaliation were "simply not credible"; stating that there was

"no evidence" that Johnson "had anything to do with" Rufin being rejected when she reapplied for the CMEM job; that "[t]his is something that occurred … three levels down below Ms. Johnson"; and that there is "not one shred of paper that supports this vast conspiracy." *See* CP 811-12, 818-19. The jury returned a defense verdict. Op., at A4.

Following the retaliation trial, Rufin filed suit under the Public Records Act due to the City's "delayed disclosure of comparator hiring files." CP 1098, ¶ 12. In discovery in the PRA case, Rufin learned that the City failed to produce what she refers to as "smoking gun" evidence contradicting Johnson and other witnesses' testimony that Johnson had no information about the CMEM hiring process or Rufin's candidacy and allegedly had no contact with Hiring Manager Haynes about Rufin. CP 1097-98; Op., at A4-A5; *compare* CP 96 (smoking gun email that Johnson received in April 2012, notifying her Rufin had written to the hiring manager, Haynes, "Is there any point in applying for this [CMEM posting]? I still don't understand how I failed to measure up with the last lengthy process") *with* CP 563-64, 558 (Johnson's trial testimony). "[I]t is undisputed that the City failed to produce the April 18, 2012 email" in the retaliation case, "even though it was responsive both to Rufin's discovery requests and the trial court's discovery order." Op., at A8.

Before the discovery order was entered in the retaliation case, Johnson filed a sworn declaration opposing Rufin's motion to compel, in which Johnson testified, "Any of my email communications that are not privileged and relate to Ms. Rufin's recent attempts to be rehired by Seattle City Light, in 2011 and 2012, have already been provided to Ms. Rufin…." CP 264, ¶ 10. "Johnson's statement that she had already provided all responsive e-mails was factually untrue." Op., at A15.

2. Procedural Background

Based on the smoking gun email, Rufin filed a CR 60(b)(4) motion to vacate the judgment and motion for default judgment or to reset the trial date as a discovery sanction in the WLAD retaliation case. Op., at A4-A5; CP 1. The trial court issued an order (a copy of which is attached as part of the Appendix, A21-A30), denying the motion and finding, "Rufin did not prove by clear, cogent, and convincing evidence that the City committed fraud, misrepresentation, or misconduct in the retaliation lawsuit," and that the City "did not willfully or deliberately violate the discovery rules or the court's discovery order." Op., at A5; *accord* Order, at A27-A29.

The trial court's order did not discuss or evaluate Johnson's prior testimony that Rufin had argued was directly contradicted by the "smoking gun." *See* A27-A29. The order also failed to discuss the CR

26(g) standard that Rufin argued provided a basis for relief,[3] and made no findings as to whether the City conducted a "reasonable inquiry," although the trial court did find that the City "conducted a reasonable search … and had no reason to search Maehara's archived emails [where the smoking gun was ultimately found] until Rufin filed a public records act lawsuit in 2015." *See* A27. On appeal, Rufin argued this finding was "not supported by the evidence, as the City failed to search Maehara's records knowing that he was involved in the rejection of Rufin's application." Appellant's Br., at 3, citing CP 996. The trial court in denying the motion wrote:

> While **Maehara could have and, perhaps should have, realized he had received email correspondence relating to Rufin** in April 2012, … **his failure to remember**[4] **does not prove fraud or *intentional withholding*** of evidence by the City. … The City's failure to realize that Maehara's email archives should have been included in the City's search is not misconduct under CR 60(b)(4).

CP 1354 (emphasis added).

Rufin also requested relief based on the destruction of evidence. Op., at A10. She presented evidence showing that Johnson and Haynes knew how to "archive" emails and in fact archived tens of thousands of emails each, but that they allowed their copies of the email from the hiring manager (Haynes) to City Light's top H.R. Officer (Johnson) and to Carrasco's Legal Affairs advisor (Maehara) about Rufin contacting the

[3] *See* CP 29-30; RP 52-53; CP 1342.
[4] The record contains no testimony or declaration by Maehara, and thus no basis for the trial court to find Maehara "failed to remember" receiving the email. *See* CP 1357-58.

hiring manager regarding her applications and prior non-selection, to be destroyed. *See* CP 668 (¶ 6); CP 652-54, 658-59. Rufin argued that this communication should have been retained by them for a minimum of two years under the Local Government Common Records Retention Schedule ("CORE"), GS2010-001, Rev. 2. CP 25-26, citing CP 646. The trial court made no ruling on whether a violation of the Records Retention Act's duty to preserve public records may result in sanctionable spoliation or whether the Act was violated in this case, but found that the "negligent failure of Haynes or Johnson to preserve potentially relevant evidence in foreseeable litigation is not sanctionable spoliation." CP 1354.

The Court of Appeals affirmed the trial court's order. On the records retention issue, it held that the smoking gun email did not come within the category of "non-executive communications" Rufin cited, as such records "must be made or received in connection with the transaction of public business," and the smoking gun "e-mail did not purport to transact business with the public." Op., at A11-A12 (emphasis added). The Opinion also stated, "The City's failure to retain copies of the e-mails under its retention policy does not provide clear and convincing evidence of misconduct."

The Court of Appeals also affirmed the trial court's finding that the City's search for responsive records was reasonable, noting "multiple City

employees testified that they had no reason to look for responsive documents in Maehara's accounts" and that the paralegal who conducted the searches testified he did so "in good faith." *See* Op., at A9-A10. While the Opinion acknowledged the trial court's finding that Maehara "could have and, perhaps should have, realized he had received e[-]mail correspondence relating to Rufin in April 2012, when he received copies of the discovery motion," Op., at A7, and recognized that in June 2012 he "approved the letter" informing Rufin that City Light would not be considering her application, *id*., at A3, the Opinion otherwise made no discussion of the evidence showing Maehara was tracking the course of Rufin's retaliation litigation,[5] nor did it attempt to explain, given such facts, what reasonable excuse existed for Maehara's apparent failure to inform City Light's litigation team of the need to search his email account for responsive records. *See Op.*, *generally*.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. An Issue of Substantial Public Interest Is Presented by the Court of Appeals Stating that Failure to Retain Records Under the Retention Policy Mandated by Law Does Not Provide Clear and Convincing Evidence of Misconduct

The enforcement of laws protecting and preserving public records is a fundamental and urgent issue of broad public import. "The purpose of

[5] *See, e.g.,* CP 123-242 (Aug. 2012 receipt of tort claim); CP 250, 253 (Jan. 2013 receipt of Rufin's civil complaint and discovery); CP 255; CP 260 (May 2013 receipt of motion to compel); CP 267 (June 2013 receipt of City discovery answers); CP 300 (July 2013 receipt of City's summary judgment motion).

the [PRA] is 'nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus*., 185 Wn.2d 270, 277, 372 P.3d 97 (2016). The PRA requires agencies to "adopt and enforce reasonable rules and regulations … consonant with the intent of this chapter to provide full public access to public records, [and] to protect public records from damage or disorganization." RCW 42.56.100 ("Protection of public records – public access"). The Records Retention Act, RCW 40.14.070(2)(a), similarly provides that "no public records shall be destroyed until approved for destruction by the local records committee," which promulgates the Local Government Common Records Retention Schedule ("CORE"). *Id.*; *see* CP 644.

It is well known that the "[i]mposition of unduly light sanctions [for discovery violations] will only encourage litigants to employ tactics of evasion … in contravention of the spirit and letter of the discovery rules."[6] The Opinion here presents a matter of substantial public interest, as it does not impose light sanctions on the government for unlawfully destroying records, but even worse, in one of the few opinions to apply RCW 40.14.070, it states "[t]he City's failure to retain copies of the e-mails

[6] *Taylor v. Cessna Aircraft Co., Inc.*, 39 Wn. App. 828, 836, 696 P.2d 28 (1985).

under [the] retention policy" mandated by law "does not provide clear and convincing evidence of misconduct." Op., at A11-A12; footnote 2, *supra*.

As the comment in the Washington State Bar Association's *Public Records Act Deskbook* notes, "[u]nless courts can punish agencies for failure to comply with records retention laws, agencies could easily circumvent the PRA by improperly destroying records, thus rendering the disclosure statute useless." Wash. State Bar Ass'n, Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws § 19.3(1) (2d ed. 2014) (stating the "court in *[Bldg. Indus. Ass'n of Wash. v. Mccarthy*, 152 Wn.App. 720, 741, 218 P.2d 196 (2009)] found 'the logic of this argument is compelling,' albeit in dicta in a case involving no unlawful destruction"). Decisions of the Court of Appeals have so far been uniform in their reluctance to provide any teeth to the preservation duties established by the Records Retention Act. *See BIAW*, 152 Wn. App. at 741-42; *see also West v. Wash. State Dep't of Nat. Res*., 163 Wn. App. 235, 245, 258 P.3d 78 (2011) (rejecting argument that "unless courts apply [RCW 40.14], agencies will circumvent the PRA and improperly destroy records"); *and Daines v. Spokane Cty.*, 111 Wn. App. 342, 350, 44 P.3d 909 (2002) (holding "Daines has no right under chapter 40.14 RCW that a declaratory judgment would secure."), *overruled on other grounds by Neighborhood All. of Spokane Cty. v. Cty. of Spokane*,

172 Wn.2d 702, 261 P.3d 119 (2011). Unless it is corrected, the Opinion in this case, stating that the "failure to retain copies of the e-mails under [the] retention policy" mandated by law "does not provide clear and convincing evidence of misconduct," Op., at A11-A12, will only provide governmental actors further encouragement to disregard their duty to abide by the retention schedules that the local records committee approve. *See BIAW*, 152 Wn. App. at 741-42; *Taylor*, 39 Wn. App. at 836.

For such reason, this Court should grant review and make clear that violation of the Records Retention Act is misconduct that can result in findings of sanctionable spoliation, otherwise governmental employees will continue to destroy records with impunity, as happened here.

2. The Opinion's Interpretation of the Term "Public Business" Conflicts with *Nissen's* Use of the Term "Public Business" in the Context of Public Records Law

In declining to find that the definition of "non-executive communications" found in GS2010-001, Rev. 2 (*see* CP 646) applies to the smoking gun, the Court of Appeals equated records "made or received in connection with the transaction of public business" with records that "purport to transact business with the public." *See* Op., at A11-A12. Such interpretation of the term "public business" by the Court of Appeals is significantly narrower than the interpretation of the term previously applied by this Court and the legislature in the context of public records

law. Ordinarily the term has been synonymous with "agency business," as opposed to "personal" or "private" business.

For example, in defining the phrase "public record" for purposes of the Records Retention Act, the legislature wrote in relevant part:

> As used in this chapter, the term 'public records' shall include any paper, correspondence, … or other document, regardless of physical form or characteristics, and including such copies thereof, that have been made by or received by any agency of the state of Washington in connection with the transaction of public business….

RCW 40.14.010.

In *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 357 P.3d 45 (2015), a case in which the Court "consider[ed] if the PRA … applies when a public employee uses a private cell phone to conduct government business," the term "*public business*" was used four times by the Court, which freely interchanged the phrase with several synonymous terms (i.*e.*, "agency business," "government business," "city business," and "county business"). *See generally, id*. (*e.g.*, "I. THE PRA REACHES EMPLOYEE–OWNED CELL PHONES WHEN USED FOR **AGENCY BUSINESS** …. [W]e must interpret the statutory definitions to decide if records of **public business** an employee conducts on his or her private cell phone are public records."). It would eviscerate the scope of the Records Retention Act if the Court of Appeals' narrow interpretation of the phrase—requiring an actual "transact[ion] [of] business *with the public*"—

was left unchecked to narrowly define the scope of public records protected by the Records Retention Act. *See* RCW 40.14.010 (defining covered records as "documents …made by or received by any agency of the state of Washington **in connection with the transaction of public business**"). The Court should grant review to hold that its broad interpretation of the phrase "public business" in *Nissen* controls and to mandate a much broader protection of public records than the Opinion demands.

3. The Holding That Johnson's Untrue Statement She Believed Was Not a Misrepresentation Conflicts With Prior Precedent

In *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989), the Court of Appeals stated that "It is immaterial whether [a] misrepresentation was willful or innocent, since the effect is the same." *Id*. The Court of Appeals restates this precedent in its Opinion, at A6, but fails to follow it.[7] Specifically, the Opinion states, "[W]hile Johnson's statement that she had already provided all responsive e-mails was factually untrue, *she believed it to be true*." Op., at A15.[8] The clear

[7] The trial court, for its part, declined to evaluate any of Johnson's prior testimony that Rufin argued was directly contradicted by the "smoking gun." *See* A27-A29.

[8] The Court of Appeals also went to great pains in an effort to portray Johnson's other statements as not contradicted by the smoking gun, writing for example that the email between Johnson and Haynes was not evidence that she "spoke" with Haynes regarding Rufin. *See Op.*, at A14-A15. The fact remains that Johnson's claims that she had "**no information**" about the hiring process and "was **not aware of Ms. Rufin's candidacy for the job *at all*,**" until Rufin contacted Carrasco about her non-selection in June 2012, is flatly contradicted by the smoking gun. *Compare* CP 96 with CP 563-64, 558.

implication is that Johnson's misrepresentation was innocently made; however, under *Peoples State Bank* that fact is "immaterial… since the effect is the same." 55 Wn. App. at 372. Nevertheless, without further explanation, the Opinion concludes that Rufin failed to present "clear and convincing evidence of misrepresentation by the City." Given the Opinion's admission that Johnson's statement was untrue, this holding cannot be squared with the standard for proving misrepresentation set forth in *Peoples State Bank.* The Court should grant review to resolve the conflict between *Peoples State Bank* and the standard applied in the Opinion.

4. An Issue of Substantial Public Interest Is Presented by the Court of Appeals Finding No Violation of the Discovery Rules In Spite of the Finding That Maehara "Should Have Realized" He Had Email Responsive to Plaintiff's Motion to Compel

The trial court's order contains no reference to *Fisons*, CR 26(g)'s "reasonably inquiry" standard," or *Magaña*'s definition of willful violations as including actions "done without a reasonable excuse," in spite of Rufin having argued each to the court. *See* A21-30; RP 52-53; CP 31; CP 1089; CP 1344. The trial court did make a finding that the City "conducted a reasonable search … and had no reason to search Maehara's archived emails [where the smoking gun was ultimately found] until Rufin filed a public records act lawsuit in 2015." CP 1370. However, that finding was not supported by the evidence, since the City failed to search

Maehara's records knowing that, as Director of the Talent Acquisition unit, CP 115, CP 990, Maehara was involved in the rejection of Rufin's application.[9] He was the manager who reviewed and approved the letter sent to Ms. Rufin to inform her of the termination of her candidacy for the CME position in June 2012." *See* CP 996; Op., at A3. Maehara, who is an attorney, was also tasked with tracking for City Light the progress of Rufin's WLAD retaliation claim, beginning two months later in August 2012 – at the same time he was supervising the City's response to the public records request that Rufin made for emails referencing her name or the Civil Mechanical Engineering Manager position for which Maehara's office sent her the rejection letter in June. *See* CP 590, CP 117, CP 119, CP 123, CP 108, CP 1322.

Any reasonable inquiry would have resulted in the search of Maehara's records. There was no reasonable excuse for failing to search his records. In its order, the trial court found, in part:

> **While Maehara could have and, perhaps should have, realized he had received email** correspondence relating to Rufin in April 2012, … his failure to remember[10] **does not prove *fraud or intentional withholding*** of evidence by the City. … The City's failure to realize that Maehara's email archives should have been included in the City's search is not misconduct under CR 60(b)(4).

[9] "Knowledge of … employees of a corporation relative to the subject matter of litigation is imputed to the corporation" for purposes of discovery." *Diaz v. Wash. State Migrant Council,* 165 Wn. App. 59, 80, 265 P.3d 956 (2011).

[10] The record contains no testimony or declaration by Mr. Maehara, and thus no basis for the Court to find Mr. Maehara "failed to remember" receiving the email. *See* CP 1357-58.

Op., at A7; *accord* Order, at A28 (CP 1354).

The trial court's focus on "intentional withholding" was misplaced, since "intent need not be shown before sanctions are mandated" under CR 26(g) and *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp*., 122 Wn.2d 299, 342, 858 P.2d 1054 (1993).

The discovery rules did not require Rufin to know what the City knew about who had been involved, or to "specify the exact file in which certain records are held," in order for the defendant to be obliged to produce its responsive documentation. *See Fellows v. Moynihan*, 175 Wn.2d 641, 657, 285 P.3d 864 (2012). The knowledge of Maehara and other "employees of a corporation relative to the subject matter of litigation is imputed to the corporation" for purposes of discovery. *Diaz*, 165 Wn. App. at 80; *cf.* CP 899 (in opposing Rufin's CR 60 motion, the City claimed, "no one had any knowledge of a communication between anyone and Mr. Maehara regarding Ms. Rufin's candidacy"). The Court of Appeals has allowed the City's attorneys and paralegals to simply aver that they had "no reason to look in Maehara's account," Op., at A7, A9-A10, whistling past the fact that Maehara himself "should have known" and that the record leaves no dispute that he was constantly kept apprised of the status of Rufin's litigation and her discovery requests. *See* footnote 5, *supra.*

This case offers an inverse scenario from *Magaña*. While in *Magaña* the defendant failed to conduct a reasonable search in part based on the fact that it "failed to search outside its legal department in responding to Magana's requests," Op., at A18, here the defendant retained the sole remaining copy of the impeaching email in the inbox of Gary Maehara, the Legal Affairs administrator / Public Records Officer / Director of Talent Acquisition, where it failed to look for responsive records. Under the circumstances presented, there was no reasonable excuse for such failure. Permitting such grossly negligent conduct in discovery to go unremedied will only encourage more bad behavior from litigants. The Court should instead grant review and reaffirm its holding from *Fisons* that no intent need be shown before sanctions are mandated in order to deter similar misconduct in future cases. *Fisons*, 122 Wn.2d at 342; *Taylor*, 39 Wn. App. at 836.

F. CONCLUSION

For the foregoing reasons, the Court should grant review.

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RESPECTFULLY SUBMITTED this 20th day of September, 2017.

THE SHERIDAN LAW FIRM, P.S.

By: s/John P. Sheridan

John P. Sheridan, WSBA # 21473
Mark W. Rose, WSBA #41916
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
Tel: 206-381-5949 Fax: 206-447-9206

Attorneys for Plaintiff/Appellant

DECLARATION OF SERVICE

I, Melanie Kent, state and declare as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am a legal assistant employed by the Sheridan Law Firm, P.S., and I make this declaration based on my personal knowledge and belief.

2. On September 20, 2017, I caused a copy of the Petition for Review to be delivered via the Court's electronic filing system to:

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

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

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

DATED this 20th day of September, 2017 at Seattle, King County, Washington.

s/Melanie Kent
Melanie Kent

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

REBECCA A. RUFIN, an individual, Appellant, v. CITY OF SEATTLE, a municipality, and JORGE CARRASCO, an individual, Respondents.	No. 76091-2-I DIVISION ONE UNPUBLISHED OPINION FILED: August 21, 2017

APPELWICK, J. — Rufin appeals the denial of her CR 60(b)(4) motion to vacate judgment in favor of the City of Seattle in her employment retaliation lawsuit. The motion was based on an e-mail produced in a later lawsuit under the Public Records Act.[1] Rufin claims the e-mail contradicts witness testimony at the retaliation trial and, though responsive to her discovery requests, it was not produced in that lawsuit. She argues that the court misapplied the law and made findings not supported by the evidence. We affirm.

FACTS

Rebecca Rufin worked for Seattle City Light from 1990 through 2006. Rufin v. City of Seattle, No. 72012-1-I, slip op. at 2 (Wash Ct. App. Aug. 17, 2015) (unpublished), http://www.courts.wa.gov/opinions/pdf/720121.pdf (Rufin I). While there and shortly after leaving, she was involved as a potential witness in an investigation and lawsuit related to gender discrimination allegations by City Light employees against Jorge Carrasco. Id. at 2, 8-9. Carrasco is City Light's general manager and chief executive officer. Id. at 2.

[1] Chapter 42.56 RCW.

In 2011 and 2012, Rufin applied for an open position as a civil and mechanical engineer manager (CME) at City Light. Id. at 2-3. She first applied in August 2011. Id. at 3. She was interviewed three times for the position. Id. Ultimately, City Light terminated the hiring process without filling the position. Id.

In April 2012, City Light relisted the CME position. Id. Rufin saw the opening. Id. On April 10, 2012, she e-mailed Mike Haynes, who was the hiring manager for the CME position. She asked, "So Mike, is there any point in applying for this? I still don't understand how I failed to measure up with the last lengthy process." On April 19, Haynes responded, informing Rufin, "As you know, this is an active process and I need to divert you to HR for questions. Susan McClure is running this process." Rufin reapplied for the CME position. Rufin I, slip op. at 3.

Then, on June 11, 2012, Rufin e-mailed Carrasco about her applications for the CME position. She informed him that she applied for the position in August 2011 and was turned down after three interviews. She noted that City Light had begun a new selection process for the position. Rufin said, "I cannot help but wonder why I was turned down for the position with the prior hiring process." Carrasco replied, copying the human resources officer DaVonna Johnson. Carrasco told Rufin that he was not involved with the selection process, but that Johnson would look into the situation.

Meanwhile, Haynes spoke with Heather Hartley, who was a personnel specialist in City Light's Talent Acquisition Unit. Hartley determined that under City Light policy, a candidate who has previously been considered for a position will not

be considered again.[2] On June 12, 2012, Hartley sent Rufin a letter to inform her that they would not be considering Rufin's application. Hartley's supervisor, Gary Maehara, approved the letter before she sent it.

After receiving this rejection letter, Rufin contacted Johnson to set up a meeting. They met on June 20, 2012. Rufin sought to understand why she was turned down for the CME position. Johnson communicated to Rufin that when she left City Light in 2006, she conveyed her dissatisfaction in a divisive manner. And, Johnson noted that Rufin's interest in rejoining City Light seemed focused on her own personal gain, rather than how she could benefit the utility.

Rufin filed a complaint against City Light and its director, Carrasco, under chapter 49.60 RCW. Rufin I, slip op. at 3. She claimed gender discrimination and retaliation for taking part in a protected activity. Id. Rufin alleged that her participation in the earlier investigations was a substantial factor in City Light's decision not to hire her for the CME position. In connection with the retaliation lawsuit, Rufin made numerous Public Records Act (PRA) requests. Rufin v. City of Seattle, 199 Wn. App. 348, 352-53, ___ P.2d ___ (2017) (Rufin II).

Rufin served interrogatories and requests for production on the City of Seattle (City). She requested all e-mails or communications to or from City Light employees Haynes, Johnson, or Darnell Cola[3] that referred to Rufin. The City

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[2] The record does not contain an ordinance or formal policy statement as to this practice.

[3] Cola was a member of the hiring team who interviewed Rufin for the CME position.

objected to these requests as overly broad and not reasonably calculated to lead to the discovery of admissible evidence.

Rufin moved to compel the City to respond to her first set of interrogatories and requests for production. On July 3, 2013, the trial court granted Rufin's motion to compel. It ordered the City to search for e-mails relating to Rufin "in places they are most logically likely to reside and places easily accessible and searchable, including personnel files, any paper files, [and] any electronic files" maintained by Carrasco, Johnson, Haynes, and Cola.

Rufin's retaliation claim was tried before a jury in April 2014. Her theory at trial was that Carrasco had intervened in the hiring process to make sure Haynes did not hire Rufin, due to her allegations of gender discrimination by Carrasco in 2006. The jury found in favor of City Light. Rufin I, slip op. at 3. This court affirmed the verdict in an unpublished opinion. Id. at 1.

In November 2014, Rufin filed a claim alleging PRA violations. Rufin II, 199 Wn. App. at 353. In discovery, she requested e-mails mentioning her name that may exist among public disclosure officers. Id. In response to this request, the City produced the e-mail that Rufin now refers to as a "smoking gun." Id. This e-mail related to Rufin's April 10, 2012, e-mail to Haynes about the relisting of the CME position. On April 18, 2012, Haynes forwarded Rufin's e-mail to Maehara, Johnson, and Steve Kern, Haynes's supervisor, with the message, "I am just getting caught up after being out for a week. I have not replied."

On January 8, 2016, Rufin filed a CR 60(b)(4) motion to vacate the judgment in the retaliation case. She asserted that the City withheld Haynes's April 18, 2012

e-mail, which could have changed the outcome of the case. Rufin argued that the e-mail directly contradicted the version of events that defense witnesses gave in declarations, depositions, and at trial. Specifically, she contended that the e-mail showed that Johnson and Maehara were notified of Rufin's complaint about her nonselection during the 2011 hiring process, whereas the witnesses claimed that Johnson had no information about Rufin's application for the job.

The trial court denied Rufin's CR 60(B)(4) motion to vacate the judgment. The court found that Rufin did not prove by clear, cogent, and convincing evidence that the City committed fraud, misrepresentation, or misconduct in the retaliation lawsuit. And, the trial court denied Rufin's CR 37 motion for a default judgment or a new trial. It found that the City did not willfully or deliberately violate the discovery rules or the court's discovery order.

Rufin appeals.

DISCUSSION

Rufin argues that the trial court erred in denying her CR 60(b)(4) motion. She contends that the City committed misconduct by failing to produce the April 18, 2012 e-mail in the retaliation lawsuit and by instituting an automatic deletion policy that resulted in other copies of the e-mail being destroyed. She argues that the content of the e-mail revealed the City's misrepresentations at trial. And, she contends that under CR 37, harsh sanctions are warranted for the City's discovery violations.

CR 60(b)(4) provides that the court may relieve a party from a final judgment for "[f]raud (whether heretofore denominated intrinsic or extrinsic),

misrepresentation, or other misconduct of an adverse party." The party asserting that a judgment has been obtained through fraud, misrepresentation, or other misconduct has the burden of proving the assertion by clear and convincing evidence. Peoples State Bank v. Hickey, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989). It is immaterial whether the misrepresentation was willful or innocent, since the effect is the same. Id. at 371. The party requesting relief must show that the misconduct prevented a full and fair presentation of its case. Dalton v. State, 130 Wn. App. 653, 665, 124 P.3d 305 (2005).

We review a trial court's decision on a motion to vacate under CR 60(b) for an abuse of discretion. Mitchell v. Wash. State Inst. of Pub. Policy, 153 Wn. App. 803, 821, 225 P.3d 280 (2009). The trial court abuses its discretion only when there is a clear showing that the trial court's decision was manifestly unreasonable or based on untenable grounds or untenable reasons. Id.

Where the trial court's findings of fact are challenged, we review whether substantial evidence supports the findings. In re Marriage of Schweitzer, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997). Where the standard of proof in the trial court is clear, cogent, and convincing evidence, substantial evidence must be "highly probable." Id.

I. Misconduct

Rufin argues that the City committed misconduct by failing to produce the April 18, 2012 e-mail. Rufin alleges that the City had an affirmative duty to search Maehara's e-mail account for responsive records, yet failed to do so. And, she

contends that the City destroyed evidence of the April 18, 2012 e-mail through its automatic deletion policy.

The trial court found that while the City admitted it did not produce the April 18, 2012 e-mail and that e-mail was responsive to Rufin's discovery requests, this failure to produce did not constitute misconduct. It found that the City conducted a reasonable search for all responsive e-mails. It found that the paralegal who conducted the search had no reason to look in Maehara's account. And, the court found that although Maehara "could have and, perhaps should have, realized he had received e[-]mail correspondence relating to Rufin in April 2012, when he received copies of the discovery motion, his failure to remember does not prove fraud or intentional withholding of evidence by the City." The court also found that the City's retention policy did not constitute misconduct.

CR 26(g) pertains to responses to discovery requests. Under this rule, an attorney signing a response to a discovery request must certify that he or she has read the response and, after a reasonable inquiry, believes it is:

> (1) consistent with the discovery rules and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; (2) not interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had, the amount in controversy, and the importance of the issues at stake in the litigation.

Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 343, 858 P.2d 1054 (1993); see also CR 26(g). Whether the attorney performed a reasonable inquiry is determined by an objective standard. Fisons Corp., 122

Wn.2d at 343. An attorney's subjective belief or good faith alone is not enough to shield the attorney from sanctions.[4] Id.

Here, it is undisputed that the City failed to produce the April 18, 2012 e-mail, even though it was responsive both to Rufin's discovery requests and the trial court's discovery order. The e-mail was sent by Haynes to Johnson, Maehara, and Kern. It concerned Rufin's application for the CME position. Rufin's requests for production asked for every e-mail to or from Johnson, Haynes, and Cola regarding Rufin. The City objected to these requests as overly broad. Rufin moved to compel the City to respond. The trial court's discovery order narrowed these requests. It required the City to look for e-mails "in places they are most logically likely to reside." It specifically required the City to search the e-mail accounts and archives of Carrasco, Johnson, Haynes, and Cola. That search was executed. Yet, the City did not produce the April 18, 2012 e-mail.

Rufin asserts that the City should have known to search Maehara's e-mail account. She points to the fact that Maehara reviewed the letter that Hartley sent to Rufin to inform her that City Light would not be considering her second application. She also points to the fact that Maehara received copies of the documents in the retaliation litigation, and should have known that he possessed e-mails regarding Rufin.

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[4] Rufin contends that the trial court failed to analyze whether the City's attorneys performed a "reasonable inquiry" in responding to Rufin's discovery requests. She contends that instead, the trial court required Rufin to show that the City had committed fraud or intentionally withheld evidence. But, the trial court's order does not support Rufin's contentions. The court specifically found that the City had performed a "reasonable search." We can discern no meaningful distinction between a "reasonable inquiry" and a "reasonable search."

Whether the City conducted a reasonable search for records was a factual question best resolved by the trial court. Several witnesses submitted sworn declarations about their responses to the trial court's order to compel. Assistant City Attorney Carolyn Boies Nitta stated in a declaration, "I did not direct that any document responsive to this Court's order be withheld from production; I am not aware of any such direction from anyone else; and I am aware of no withholding of any such document." She confirmed that she had no reason to believe that Maehara would have any responsive documents. Assistant City Attorney Erin Overbey stated in a declaration that she had no reason to believe that responsive documents would be contained in Maehara's e-mail account or archive. She further stated that Maehara's e-mail account would have been searched if she had reason to believe it contained responsive documents. And, she confirmed that she did not direct that any responsive document be withheld, and was not aware of any document that was withheld.

Paralegal DC Bryan, who searched for responsive documents, also submitted a declaration. He stated that he searched for documents "in the places that such documents most logically would be kept." He searched Johnson's, Haynes's, Carrasco's, and Cola's e-mail accounts and archives. Bryan did not search Maehara's e-mail accounts or archives, because he had no reason to believe responsive documents would be found there. Bryan further confirmed that he "conducted the above searches in good faith, and all responsive documents returned from those searches were produced to Plaintiff." No one instructed him

to withhold records, and he did not know of any records that were withheld from Rufin.

Hartley did not testify that Maehara had any involvement in Rufin's hiring process other than approving the June 12, 2012 letter. No one did. And, Rufin presented no evidence that Maehara saw the April 18, 2012 e-mail. She did not show that he remembered receiving this e-mail. Haynes stated in a deposition that he did not believe that he spoke directly to Maehara about Rufin's concerns. And, multiple City employees testified that they had no reason to look for responsive documents in Maehara's accounts. On this evidence the trial court could find that the City conducted a reasonable search for responsive e-mails and that it would have produced the e-mail in response to Rufin's discovery requests, if it had found it. These facts are do not provide clear and convincing evidence of misconduct.

Rufin also asserts that the City committed misconduct by destroying the copies of the April 18, 2012 e-mail that resided in Haynes's and Johnson's e-mail accounts. She contends that the destruction of this evidence constituted misconduct. And, she argues that the trial court incorrectly applied the law of spoliation.

Spoliation is " '[t]he intentional destruction of evidence.' " Henderson v. Tyrrell, 80 Wn. App. 592, 605, 910 P.2d 522 (1996) (alteration in original) (quoting BLACK'S LAW DICTIONARY 1401 (6th ed. 1990). To determine when spoliation requires a sanction, the trial court weighs "(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party."

Homeworks Constr., Inc. v. Wells, 133 Wn. App. 892, 899, 138 P.3d 654 (2006). The court then uses its discretion to decide upon an appropriate sanction. Id.

For a party to be culpable, "the party must do more than disregard the importance of the evidence; the party must also have a duty to preserve the evidence." Id. at 900. Whether a duty to preserve evidence exists is a question of law reviewed de novo. Cook v. Tarbet Logging, Inc., 190 Wn. App. 448, 461, 360 P.3d 855 (2015). No general duty to preserve evidence exists in Washington. See id. at 470. But, other sources may create a duty to preserve evidence. Homeworks, 133 Wn. App. at 901; Henderson, 80 Wn. App. at 610. Consequently, a party's negligent failure to preserve evidence relevant to foreseeable litigation is not sanctionable spoliation. Cook, 190 Wn. App. at 464. Instead, in assessing fault courts examine whether the party acted in bad faith or conscious disregard for the importance of the evidence. Id.

Rufin alleges that under RCW 40.14.070(2)(a), the City had a statutory duty to preserve the April 18, 2012 e-mail. RCW 40.14.070(2)(a) states, "Except as otherwise provided by law, no public records shall be destroyed until approved for destruction by the local records committee." The Local Government Common Records Retention Schedule applies to public records of local government agencies. It sets out retention schedules for different categories of records.

Rufin contends that the April 18, 2012 e-mail fits under two categories: non-executive communications or recruitment files. The first category, non-executive communications, applies to "internal and external communications to or from employees (includes contractors and volunteers) that are made or received in

connection with the transaction of public business." These records must be retained for two years. The second category, recruitment files, applies to documents from the "recruitment and selection process for each advertised position, including newspaper announcement, job description, working papers/notes, applicant list, interview questions and notes, selection documents, and employee applications." These records must be retained for three years.

The April 18, 2012 e-mail does not appear to meet either definition. A non-executive communication must be "made or received in connection with the transaction of public business." But, the April 18, 2012 e-mail did not purport to transact business with the public. It was a forwarded e-mail from Haynes to Johnson, Maehara, and Kern. It did not provide or solicit advice regarding Rufin's concerns. Nor does the e-mail qualify as a recruitment file. The message informed other personnel of a former candidate for employment's question about a job posting. It contained no information about Rufin's recruitment application or hiring process. And, it did not reveal any information about the decision not to hire Rufin.

Rufin cites no case law interpreting RCW 40.14.070(2)(a) or these retention schedules in the context of a spoliation claim. We cannot conclude that the trial court abused its discretion in concluding no sanctionable spoliation occurred here. The City's failure to retain copies of the e-mails under its retention policy does not provide clear and convincing evidence of misconduct.

Therefore, the City did not commit misconduct for purposes of CR 60(b)(4) by failing to produce the April 18, 2012 e-mail.

II. Misrepresentation

Rufin alleges that the content of the withheld e-mail demonstrates that the City misrepresented facts in the retaliation lawsuit. She claims that the April 18, 2012 e-mail directly contradicts Johnson's testimony. Specifically, Rufin points to Johnson's testimony that she was not involved in or aware of Rufin's CME application.

Rufin's misrepresentation argument relates to her communications with City Light employees in 2012 about the CME position. After learning that the CME position had been reposted in April 2012, Rufin reached out to multiple individuals at City Light for more information about the previous hiring process. She e-mailed Haynes on April 10, 2012 to ask whether she should reapply for the position. Haynes responded on April 19, 2012. He told Rufin that he could not discuss the active hiring process, and referred her to McClure.

On June 11, 2012, Rufin e-mailed Carrasco directly. She asked why she was turned down for the position in August 2011, given the fact that City Light did not fill the position. Carrasco responded that day, and copied Johnson. He directed Johnson to look into Rufin's situation.

Meanwhile, Haynes spoke to Hartley. On June 12, 2012, one day after Rufin's correspondence with Carrasco, Hartley sent Rufin a letter. The letter informed Rufin that City Light would not be considering her application for the CME position. Hartley believed that the letter was consistent with City Light's policy that a candidate who has previously been considered for a position will not be

considered again for the same position. On June 20, 2012, Rufin met with Johnson to discuss Rufin's concerns with the previous hiring process.

Rufin asserts that the April 18, 2012 e-mail contradicts several facts elicited at the discrimination trial. First, Johnson testified that she did not speak to Haynes about Rufin or her candidacy for the CME position. Second, Johnson stated that she had no information about the hiring process for this position until she received the June 11, 2012 e-mail from Carrasco. Third, Johnson stated that before June 11, 2012, she did not know that Rufin was being considered in another hiring process. Fourth, in a declaration in response to Rufin's motion to compel discovery, Johnson stated that all of her responsive e-mails had already been provided to Rufin.

The substance of the April 18, 2012 e-mail does not contradict these statements. First, the e-mail establishes that Haynes forwarded Rufin's question about the 2012 opening and concerns about "the last lengthy process" to Johnson, as well as Maehara and Kern. Assuming that the April 18, 2012 e-mail was received by Johnson, without more, it does not show that Johnson read the e-mail. Johnson testified in a later deposition that she did not remember receiving the e-mail or discussing it with Haynes. Nor does the fact of the e-mail establish that Johnson ever spoke with Haynes about Rufin in the 2011 process.

Second, the e-mail does not show that Johnson knew about Rufin's 2011 candidacy for the CME position while it was ongoing. Rufin referred only to "the last lengthy process" in her original e-mail to Haynes. She did not specify what that lengthy process entailed.

Third, the e-mail does not establish that Johnson knew that Rufin had applied in 2012 for the CME position. Rufin's question in the e-mail was, "[I]s there any point in applying for this?" In fact Rufin had not yet applied for the position. To the extent Rufin means Johnson knew of her interest in applying, the e-mail does not contradict Johnson's trial testimony. Rufin had evidence at trial that she met with Johnson after her e-mail to Carrasco.

Fourth, the e-mail was a responsive document that the City did not produce. But, Johnson spoke about the April 18, 2012 e-mail in her deposition on October 21, 2015. She testified that she did not remember receiving the April 18 e-mail. She stated that she did not remember having any conversation with Haynes about the e-mail. No e-mail responding to Haynes's forwarded e-mail was ever identified. Therefore, while Johnson's statement that she had already provided all responsive e-mails was factually untrue, she believed it to be true.

The April 18, 2012 e-mail does not provide clear and convincing evidence of misrepresentation by the City. We hold that the trial court did not err in finding that the City did not commit misconduct or misrepresentation as is necessary to vacate a judgment under CR 60(b)(4). Therefore, we conclude that the trial court did not abuse its discretion in denying Rufin's CR 60(b)(4) motion.

III. CR 37 Sanctions

Rufin contends that CR 37 provided a basis for the trial court to vacate the judgment and enter a default judgment in her favor, or alternatively order a new trial. She asserts that under CR 37, the trial court should have determined whether the City had a reasonable excuse for its failure to comply with the court's order to

produce documents. She also argues that the trial court erred in discussing Rufin's opportunities to investigate the issue before trial.

Under CR 37(b), the trial court has discretion to impose sanctions for a violation of the discovery rules. The discovery rules are intended to make trial a fair contest, with the issues and facts disclosed to the extent possible. Taylor v. Cessna Aircraft Co., Inc., 39 Wn. App. 828, 835, 696 P.2d 28 (1985). The trial court's discretion to impose sanctions for discovery violations must be exercised in such a way as to discourage litigants from employing tactics of evasion and delay. Id. at 836. We review discovery sanctions imposed under CR 37 for an abuse of discretion. Roberson v. Perez, 123 Wn. App. 320, 332-33, 96 P.3d 420 (2004). The trial court has wide latitude in fashioning an appropriate sanction for discovery violations. Id. at 333.

The trial court is authorized to impose harsh sanctions, such as a default judgment, for the failure to comply with a discovery order. CR 37(b)(2)(C). For the trial court to impose such a harsh sanction, the record must clearly show: "(1) one party willfully or deliberately violated the discovery rules and orders, (2) the opposing party was substantially prejudiced in its ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would have sufficed." Magaña v. Hyundai Motor Am., 167 Wn.2d 570, 584, 220 P.3d 191 (2009). A violation is willful if done without a reasonable excuse. Taylor, 39 Wn. App. at 836.

Here, the trial court denied Rufin's CR 37 motion for a default judgment or a new trial. It found that the City did not willfully or deliberately violate the discovery rules or the court's discovery order. This was so, for two reasons. First, the court's

order compelling discovery did not require the City to search Maehara's archived e-mails, because Maehara had not been identified as someone who might have responsive documents. Second, Rufin knew of Maehara's involvement in the human resources department before trial, and she had ample opportunity to investigate this issue before trial.

Rufin argues that the trial court relied on an incorrect legal standard in its first reason. She contends that the trial court should have examined whether the City disregarded the court order without reasonable excuse or justification. She cites to Magaña and Taylor to support her argument.

In Magaña, a passenger in a 1996 Hyundai Accent was severely injured in a car accident. 167 Wn.2d at 576-77. He sued Hyundai, arguing his injuries were caused by a design defect in the car. Id. at 577. During discovery, Magaña requested Hyundai to produce any documents related to similar complaints or lawsuits, and to identify all Hyundai models with the same or similar design. Id. at 577-78. Magaña prevailed at trial, but due to an evidentiary error, the Court of Appeals remanded for a new trial. Id. at 578. Magaña asked Hyundai to update its responses to his discovery requests. Id. at 579. Ultimately, the trial court ordered Hyundai to produce all complaints involving a similar design. Id. at 580. After that, Hyundai produced numerous documents relating to such complaints, which it had not previously provided. Id. Magaña moved for a default judgment due to Hyundai's discovery violations. Id. The trial court imposed a default judgment against Hyundai due to the serious discovery violations Hyundai had committed. Id. at 581-82.

The Washington Supreme Court held that the trial court did not abuse its discretion in imposing such a severe sanction. Id. at 594. It noted that reasonable grounds and evidence in the record supported the trial court's finding that Hyundai willfully violated the discovery rules. Id. at 587. This was so, because Hyundai had failed to inform Magaña that there were multiple claims of similar failures, it falsely represented to Magaña that there were no claims involving this design, and it failed to supplement its incorrect responses. Id. at 585. And, Hyundai failed to search outside its legal department in responding to Magaña's requests. Id .

Similarly, in Taylor, the Court of Appeals reversed the trial court's denial of a motion for a new trial. 39 Wn. App. at 829. In that case, a plane crash killed all aboard, and the decedents' estates sued the fuel selector valve manufacturer. Id. at 829-30. At trial, the estates' theory was that the accident was caused by a faulty fuel selector valve. Id. at 830. The jury found in favor of the manufacturer. Id. at 830-31. The trial court denied the estates' motions for a new trial or relief from judgment. Id. at 831.

The Court of Appeals held that the trial court erred in not granting a new trial under CR 60(b)(4). Id. at 833. This was so, because the manufacturer failed to disclose tests that demonstrated a potential fuel vapor problem. Id. at 833-34. The manufacturer did not produce this information, because it interpreted the estates' discovery requests to be limited to documents about the specific valve or model at issue. Id. at 834-35. But, the Court of Appeals determined that information about the tests fell within the scope of the estates' discovery requests.

Id. at 836. Therefore, the manufacturer's withholding of this information was not reasonable. Id.

The trial court did not misapply Magaña and Taylor. It found that the City did not willfully or deliberately violate the discovery rules or the court's order. This is unlike Magaña and Taylor, where the defendants knew of the responsive documents and withheld them without a reasonable excuse. The City looked in the places where responsive documents were most likely to be found, including the e-mail accounts and archives of Carrasco, Haynes, Johnson, and Cola. It did not search Maehara's e-mail account or archive, but nothing in the record suggests that the City was aware of the e-mail and withheld it from Rufin. The trial court was satisfied that the City followed its order. Therefore, the trial court did not misapply the law.

Rufin also argues that the trial court erred in examining whether Rufin acted diligently. She points to Roberson to support this argument. In Roberson, several individuals who were accused of child sexual abuse sued the City of Wenatchee. 123 Wn. App. at 325. They claimed that the City negligently investigated the allegations of sexual abuse. Id. Juries returned verdicts in favor of the City. Id. at 327. Afterward, the plaintiffs moved to vacate the verdicts, arguing that the City had failed to produce documents in discovery which contained material evidence. Id. at 327-28. The trial court granted the motion, finding that the City had intentionally failed to produce material records that the plaintiffs had legitimately requested. Id. at 330. The court ordered a new trial as a remedy for violation of the discovery order. Id. at 332.

On appeal, the Court of Appeals rejected the City's argument that the plaintiffs did not exercise due diligence. Id. at 334. The Court of Appeals noted that "[d]iligence is not a consideration in determining whether a new trial is an appropriate remedy for a discovery violation." Id. at 334.

Roberson supports Rufin's contention that the trial court should not have considered her opportunities to investigate Maehara's involvement in deciding her CR 37 motion. But, we may affirm on any basis supported by the record. West v. Dep't of Licensing, 182 Wn. App. 500, 517, 331 P.3d 72 (2014). The trial court's other basis for the denial of the CR 37 motion is supported by the record.

The trial court properly applied the law in determining that the harsh sanctions of a default judgment or a new trial were not warranted. Therefore, we conclude that the trial court did not abuse its discretion in denying Rufin's CR 37 motion.

IV. Appellate Attorney Fees

Rufin requests attorney fees and costs on appeal. We deny Rufin's request, because she is not the prevailing party on appeal.

We affirm.

Appelwick, J.

WE CONCUR:

Trickey, ACJ

Dwyer, J.

Hon. Beth M. Andrus
Hearing Date: February 5, 2016
Without Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

REBECCA A. RUFIN, an individual,

Plaintiff,

v.

CITY OF SEATTLE, a municipality, and JORGE CARRASCO, an individual,

Defendants.

No. 12-2-38848-2 SEA

ORDER
1. DENYING CR 60 MOTION
2. DENYING CR 37 MOTION FOR DEFAULT JUDGMENT OR NEW TRIAL

THIS MATTER came before the Court on Plaintiff's CR 60(B)(4) motion to vacate judgment and CR 37 motion for default judgment, or alternatively, motion to re-set trial date. The Court considered the pleadings identified in Appendix A and argument of counsel. The Court DENIES Plaintiff's motions for the following reasons:

Factual Background

Rebecca Rufin worked for Seattle City Light from 1990 through 2006. In 2005, Seattle City Light underwent a reorganization under Jorge Carrasco, the general manager and chief executive officer. Rufin applied for four director positions as a part of the reorganization. She was not hired for any of these positions. In January of 2006, while still employed at City Light, Rufin submitted a statement to and was interviewed by an independent investigator, Lawton Humphrey, regarding gender discrimination allegations asserted by Betty Tobin, another City Light employee, against Mr. Carrasco. Humphrey found no support for those allegations.

In October of 2006, after Rufin left Seattle City Light to work with the Seattle Parks and Recreation Department, she was deposed by Wanda Davis in a gender discrimination lawsuit that Davis had filed against City Light. The focus of the deposition was Rufin's 2006 statement in the Tobin investigation. The Davis suit was unsuccessful.

In 2010, 2011, and 2012, Rufin applied for employment back at City Light for two open positions: a civil and mechanical engineer manager (CME), and a large projects senior manager (LPSM). Rufin applied for the CME position in August of 2011, was interviewed on three separate occasions, but not hired. Rufin presented evidence at trial that in August 2011, Rufin was interviewed by Mike Haynes and two other evaluators for the CME manager position and that she was rated "high" by each panelist. She then underwent a second interview where, again, she was rated "high" by the panel. Haynes then asked Rufin and two other applicants to meet with him and Steve Kern, Hayne's supervisor, for a third interview. Haynes Tr. at 86-88. Haynes testified he chose to conduct third interviews because he had a sense that all of the applicants needed more leadership experience. *Id.* at 89. After this round of interviews, both he and Kern ranked a different candidate as their number 1 choice and ranked Rufin as number 2. *Id*. at 95-96. Haynes concluded that Rufin did not exhibit the leadership qualities he and Kern were looking for in the position and offered the position to the other candidate, who turned the job offer down. *Id*. at 96-97. Haynes decided not to offer the job to Rufin, citing concerns with her leadership qualities. *Id*. Haynes denied that either Kern or Carrasco counseled him on this hiring decision. *Id.* at 84. He also testified that he had not had any conversations with DaVaonna Johnson about Rufin. *Id.* at 152. Rufin presented no evidence at trial to contradict Haynes' testimony.

In the spring of 2012, Seattle City Light re-posted the CMA manager job opening. Rufin saw the posting and on April 10, 2012, wrote an email to Mike Haynes:

> So Mike, is there any point in applying for this? I still don't understand how I failed to measure up with the last lengthy process.

On April 19, 2012, Haynes responded to this email indicating that he had been away on vacation and had been unable to respond earlier. He wrote "As you know, this is an active process and I need to divert you to HR for questions. Susan McClure is running this process." Tr. Ex. 148. Rufin answered this email with the following inquiry:

> I guess I'm more curious about the prior process, which is no longer active. In prior hiring processes I've been involved with, usually it has been the hiring authority that has knowledge about why a candidate, especially a finalist, was not selected. That's why I was asking you. Should I talk to Susan about that instead?

Id.

Haynes testified that he asked a city personnel specialist, Heather Hartley, if it was necessary to consider Rufin again knowing that he had already decided not to hire her. Haynes Tr. 98. Hartley testified that she researched City Light practice and subsequently informed Haynes that if a candidate has been considered in a prior hiring process for the same position, the candidate generally would not proceed to an interview. Hartley Tr. at 55. She conveyed this information to her supervisor, Gary Maehara, *id.* at 56, after which she sent a letter to Rufin, dated June 12, 2012, informing her that the city would not consider her for the position. Sheridan Decl., Ex. 9.

Rufin filed a complaint against City Light and its director, Jorge Carrasco, under chapter 49.60 RCW, claiming gender discrimination and retaliation for taking part in a protected activity approximately four years prior to her application for employment. This Court dismissed on summary judgment Rufin's claims for discrimination and disparate treatment for events occurring before October 5, 2009 and disparate treatment retaliation claims relating to her application for the LPSM position.

Rufin's retaliation claim, relating to the 2011 and 2012 decisions not to hire her for the CME position, was tried before a jury in April 2014. Rufin's theory at trial was that Carrasco had intervened to ensure that Mike Haynes did not hire Rufin because she had alleged sex discrimination by Carrasco in 2006.

The jury found for the defendants from which one can assume they found either that Carrasco was not involved in the decision regarding Rufin, or if Carrasco had been involved, Rufin's participation in prior the sex discrimination investigation or lawsuit was not a substantially motivating factor for the decision not to rehire her in 2011 or 2012. The jury's verdict was affirmed on appeal by Division One of the Court of Appeals, 189 Wash. App. 1034 (2015). Rufin has a petition for review pending with the Washington Supreme Court.

The parties are before this Court now because Rufin subsequently learned that the City of Seattle did not produce a copy of an email dated April 18, 2012 from hiring manager Mike Haynes to DaVonna Johnson and Gary Maehara, a city public records officer, regarding Rufin's interest in the CME manager position in April 2012. The document, admittedly not produced during the litigation, is as follows:

From: Haynes, Mike
Sent: Wednesday, April 18, 2012 8:46 AM
To: Maehara, Gary; Johnson, DaVonna
Cc: Kern, Steve
Subject: FW: City of Seattle Job Interest Card Notification

I am just getting caught up after being out for a week. I have not replied.

From: Rufin, Becky
Sent: Tuesday, April 10, 2012 8:33 AM
To: Haynes, Mike
Subject: FW: City of Seattle Job Interest Card Notification

So Mike, is there any point in applying for this? I still don't understand how I failed to measure up with the last lengthy process.

Regards,
Becky

Rufin contends that this email is a "smoking gun" because it demonstrates that Maehara, an employee who reported directly to Carrasco, knew about Rufin's interest in the CME manager position—circumstantial evidence that Maehara may have informed Carrasco of Rufin's interest in the job. Rufin asks the Court to vacate the judgment based on "misconduct and material misrepresentations in this litigation," Motion at p. 1, and to either enter a default judgment in favor of Rufin or to order a new trial as a sanction under CR 37.

The City denies any misconduct or misrepresentations occurred during this litigation and challenges the timeliness of this motion. The City also contends that while this Court has

jurisdiction to address Rufin's CR 60 motion, it lacks jurisdiction to address any motion for discovery sanctions under CR 37. Finally, the City contends that discovery sanctions are not appropriate because the City conducted a reasonable search for responsive documents and inadvertently missed this one.

STANDARD

CR 60 Standard

This Court has the discretion to vacate a judgment under CR 60(b). *Lindgren v. Lindgren*, 58 Wash. App. 588, 595, 794 P.2d 526 (1990). Rufin relies on CR 60(b)(4) which allows a court to vacate a judgment upon a showing of fraud, misrepresentation, or misconduct by an adverse party. The moving party bears the burden of proving the alleged misconduct by clear, cogent, and convincing evidence. *Dalton v. State*, 130 Wash. App. 653, 665, 124 P.3d 305 (2005). The moving party must also prove that the alleged misconduct was significant enough that the losing party was prevented from fully and fairly presenting her case. *Lindgren*, 58 Wash. App. at 596.

A CR 60(b)(4) motion need not be brought within one year of the entry of judgment but a party must seek to vacate a judgment within a reasonable time. What constitutes a reasonable time depends on the facts and circumstances of each case. A court will evaluate the length of time between when the moving party becomes aware of the grounds for vacating a judgment and when relief is sought. *Luckett v. Boeing Co.*, 98 Wash. App. 307, 312, 989 P.2d 1144 (1999).

RAP 7.2(e) Standard

Once a party has filed an appeal, a trial court's authority to act is limited to specifically identified situations. RAP 7.2(e) provides that a trial court may hear and decide on post-trial motions "authorized by the civil rules." If, however, the post-trial motion will change a decision then being reviewed by an appellate court, "the permission of the appellate court must be obtained prior to the formal entry of the trial court decision. A party should seek the required permission by motion." There is no reported case law in Washington on whether a party may

seek discovery sanctions in a case after that party has filed an appeal. Courts in other jurisdictions have concluded that "[w]here the issues raised in a posttrial motion for discovery sanctions are directly intertwined with the issues raised in the main appeal, the trial court lacks jurisdiction to entertain the posttrial motion after the appeal has been filed." *Publix Super Markets, Inc. v. Griffin*, 837 So.2d 1139, 1142 (Fla. App. 2003). However, there is some Washington case law suggesting that if a party seeks to modify a judgment while the case is on appeal, the party need not seek leave of the appeals court if the modification relates to later events not before the appellate court during the first appeal. *Alpine Indus., Inc. v. Gohl*, 101 Wash.2d 252, 256-57, 676 P.2d 488 (1984).

CR 37 Standard

This Court has broad discretion in determining whether to impose discovery sanctions under CR 26(g) or CR 37(b). *Magana v. Hyundai Motor Corp.*, 167 Wash.2d 570, 582, 220 P.3d 191 (2009). CR 37 sets forth the rules regarding sanctions when a party fails to make discovery. CR 37(d) authorizes a court to impose the sanctions in CR 37(b)(2), which range from exclusion of evidence to granting default judgment when a party fails to respond to interrogatories and requests for production. *Id.* at 583-84. If a trial court imposes the harsh remedy of a default judgment under CR 37(b), the record must clearly show (1) one party willfully or deliberately violated the discovery rules and orders, (2) the opposing party was substantially prejudiced in its ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would have sufficed. *Burnet v. Spokane Ambulance,* 131 Wash.2d 484, 494, 933 P.2d 1036 (1997).

A trial court abuses its discretion in imposing discovery sanctions when its order is manifestly unreasonable or based on untenable grounds. *Magana*, 167 Wash.2d at 582. A discretionary decision rests on untenable grounds or is based on untenable reasons if the trial court relies on unsupported facts or applies the wrong legal standard. *Id.* at 583. The court's

decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. *Id.*

ANALYSIS

1. Rufin has not proved by clear, cogent and convincing evidence that the City committed fraud, misrepresentation, or misconduct in this lawsuit.

The Court does not find this motion to be untimely. Rufin brought the motion as soon as she and her counsel could do so. The Court rejects the City's timeliness objection.

However, the Court finds persuasive the City's evidence that it did not commit fraud, misrepresentation, or misconduct in this lawsuit. The City of Seattle admits it did not produce the April 18, 2012 email and that the email was responsive to a discovery request. The City, however, has demonstrated to the Court's satisfaction that it conducted a reasonable search for all responsive emails and had no reason to search Maehara's archived emails until Rufin filed a public records act lawsuit in 2015.

On June 7, 2013, this Court entered an order compelling the City to look for emails relating to Rufin "in places they are most logically likely to reside and places easily accessible and searchable, including personnel files, any paper files, and any electronic files" maintained by specified individuals—DaVonna Johnson, Jorge Carrasco, Mike Haynes, and Darnell Cola. The Court also ordered the City to search the City's email server or "wherever it is most logical that [these specified employees'] email will reside." The Court did not order the City to conduct a city-wide computer search for all emails relating to Rufin. It left to the City to determine the most likely location of responsive documents. The City has presented evidence, uncontroverted by Rufin, that it conducted the ordered email search. It searched the email files of these designated employees. By the time the search was conducted, however, the email had already been automatically deleted pursuant to the City's 45-day retention policy. They searched

archived files for these individuals, but again, this email was not found. It was only when the City searched Maehara's archived emails in 2015 during a PRA lawsuit that they uncovered the April 18, 2012 email.

At the time the City's paralegal, D.C. Bryan, conducted the search ordered by this Court, neither he nor the city's attorneys, had cause to believe that any responsive emails would be found in Maehara's email archives. Rufin contends this explanation is not credible because between May and July 2013, Maehara was receiving copies of pleadings relating to this lawsuit from Carrasco's attorney, including pleadings relating to Rufin's motion to compel. While Maehara could have and, perhaps should have, realized he had received email correspondence relating to Rufin in April 2012, when he received copies of the discovery motion, his failure to remember does not prove fraud or intentional withholding of evidence by the City. The history of the case demonstrates to this Court's satisfaction that the City was responding to multiple document production requests and Public Record Act requests from Rufin all at the same time in 2012 and 2013. The Court finds that had the City found this email at the time, it would have produced it. The Court does not find credible the contention that the City withheld the email to foreclose Rufin from drawing a link between Carrasco and the decision not to re-interview Rufin in 2012. The City's failure to realize that Maehara's email archives should have been included in the City's search is not misconduct under CR 60(b)(4).

Nor does the Court accept Rufin's argument that the routine destruction of emails constitutes misconduct. The City's retention policy provides for the automatic destruction of email communications after 45 days unless the employee actively transfers the email into an archive folder. Maehara apparently archived the email but Haynes and Johnson did not. Thus, when Haynes' and Johnson's files were searched long after the 45-day retention period lapsed, the City did not find the April 18, 2012 email. The negligent failure of Haynes or Johnson to preserve potentially relevant evidence in foreseeable litigation is not sanctionable spoliation. *Cook v. Tarbert Logging, Inc.*, 190 Wash. App. 448, 468-69, 360 P.3d 855 (2015).

Because the Court does not find fraud, misrepresentation, or misconduct, the Court need not address the remaining CR 60 arguments raised by the parties.

2. This Court has the authority under RAP 7.2(e) to address Rufin's CR 37 motion.

Although Washington case law is not clear, this Court concludes it has the authority to address Rufin's CR 37 motion without first obtaining leave of our appellate courts because the motion is based on post-trial events that are not a part of the record before the Court of Appeals or Supreme Court.

3. The sanction of vacating the judgment and entering a default judgment is unwarranted under CR 37.

The Court finds that the City did not willfully or deliberately violate the discovery rules or the Court's discovery order in this case. First, the Court's order did not require the City to search Maehara's archived email files because neither party identified Maehara as someone who might have responsive documents.

Second, Rufin knew of Maehara's involvement in the human resources department well before trial. Rufin had sent Maehara a public records act request in August 2012. Johnson testified in her deposition that Maehara had filled in as interim human resources director for a time. Heather Hartley testified in her deposition that she consulted with Maehara about Rufin's 2012 inquiry before sending the June 12, 2012 rejection letter to her. This testimony arguably could have alerted both Rufin and the City to the possibility that Maehara's email archives might contain documents relating to Rufin. Rufin even identified Maehara as a potential trial witness. Had there been any question as to whether the City's email search had been adequately inclusive, Rufin had ample opportunity to investigate this issue before trial.

It is easy in hindsight to assert that a party or their attorney should have cast a wider net when searching for responsive documents. But Rufin's contention that the City hid this email from her in discovery as a way to protect Carrasco from possible liability is not credible. Rufin

has not convinced this Court that the City's representatives deliberately hid any document from Rufin or her counsel. Thus, the sanction of vacating the jury's verdict and entering a default judgment is not warranted under *Burnet* or *Magana.* Nor does the Court find a basis for vacating the jury's verdict and resetting the case for a new trial.

For these reasons, Rufin's motion to set aside the jury's verdict under CR 60 or to impose sanctions under CR 37 is denied.

DATED this 19th day of February, 2016.

Electronic signature attached

_____
The Honorable Beth M. Andrus

APPENDIX A

1. Plaintiff's CR 60(B)(4) Motion to Vacate Judgment and CR 37 Motion for Default Judgement or Alternatively, Motion to Re-Set Trial Date;

2. Declaration of John P. Sheridan in Support of Plaintiff's CR 60(B)(4) Motion to Vacate Judgment and CR 37 Motion for Default Judgement or Alternatively, Motion to Re-Set Trial Date;

3. Defendants' Response to Plaintiff's Motion to Vacate Judgment and for Discovery Sanctions;

4. Declaration of Matthew H. Rice in Support of Defendants' Response to Plaintiff's Motion to Vacate Judgment and for Discovery Sanctions;

5. Declaration of Erin L. Overbey in Support of Defendants' Response to Plaintiff's Motion to Vacate Judgment and for Discovery Sanctions;

6. Declaration of Carolyn Boies Nitta Defendants' Response to Plaintiff's Motion to Vacate Judgment and for Discovery Sanctions;

7. Declaration of DC Bryan Defendants' Response to Plaintiff's Motion to Vacate Judgment and for Discovery Sanctions;

8. Defendants' Appendix of Non-Washington Authorities Defendants' Response to Plaintiff's Motion to Vacate Judgment and for Discovery Sanctions;

9. Plaintiff's Reply to Defendants' Response to Motion to Vacate Judgment and for Discovery Sanctions;

10. Supplemental Declaration of John P. Sheridan in Support of Plaintiff's Reply to Defendants' Response to Motion to Vacate Judgment and for Discovery Sanctions;

11. Plaintiff's Memorandum re: Findings of Fact and Conclusions of Law from the Parties' PRA Case;

12. Defendants' Response to Plaintiff's Memorandum re: Findings of Fact and Conclusions of Law from the Parties' PRA Case, if any;

13. Plaintiff's Reply to Defendants' Response to Plaintiff's Memorandum re: Findings of Fact and Conclusions of Law from the Parties' PRA Case;

14. The Trial Testimony of Heather Hartley; and

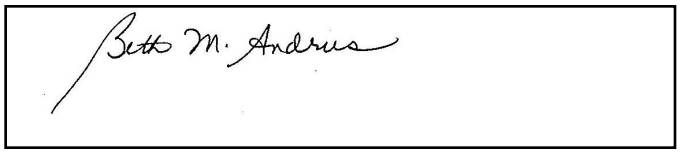
15. The pleadings and records herein.

King County Superior Court
Judicial Electronic Signature Page

Case Number: 12-2-38848-2
Case Title: RUFIN VS SEATTLE CITY OF ET ANO

Document Title: ORDER ORDER ON POST TRIAL MOTIONS

Signed by: Beth Andrus
Date: 2/19/2016 3:38:19 PM



Judge/Commissioner: Beth Andrus

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THE SHERIDAN LAW FIRM, P.S.

September 20, 2017 - 4:15 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76091-2
Appellate Court Case Title:	Rebecca A. Rufin, Appellant v. City of Seattle, et. al., Respondents
Superior Court Case Number:	12-2-38848-2

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