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NO. 63687-1-I

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

ANGELA JU and FRANCES DU JU,

Appellants pro se,

vs.

THE UNIVERSITY OF WASHINGTON,
KIMA LEIGH CARGILL and SUSAN ELIZABETH JEFFORDS.,

Respondents.

RESPONDENTS BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ISSUES FOR REVIEW	3
III. STATEMENT OF THE CASE.....	4
A. PROCEDURE.....	4
B. FACTS	6
1. The Greece Program	6
2. Angela Prepares to Go to Cuba.....	8
3. The Cuba Program	9
4. Plaintiff's Attempts to Return to Cuba	12
5. The Rome Program	16
IV. ARGUMENT	16
A. Standard of Review	16
B. Frances Ju is Not a Proper Party to this Appeal.....	17
C. Plaintiff Should Be Sanctioned for Failing to Cite the Record in Violation of RAP 10.3(5).....	18
D. The Trial Court Correctly Dismissed Plaintiff's Contract Claim.....	19
1. Angela has not demonstrated any Specific or Definite Promise	19
2. Defendants' Express Promise to Return Angela to Cuba if She Could Meet the Health Requirements Trumps any Contrary Implied Contract	23

TABLE OF CONTENTS

	<u>Page</u>
3. Defendants Expressly Offered Angela Academic Credit, but not Numeric Grades for the Cuba Program	24
4. Defendants' Decision to Award Academic Credit in a Single Case does not Violate the University Handbook.....	26
5. There was No Independent Study Contract Apart from the Offer to Award Academic Credit	28
6. There Was No Contract to Override the University's Requirement for Medical Clearance for Rome	29
E. The Trial Court Correctly Struck Inadmissible Evidence.....	30
F. Plaintiff has failed to show that recusal was required.....	33
1. Appellants Failed to Support Allegations of Bias Against Judge McCarthy with Evidence of Actual or Potential Bias	33
2. Appellants Failed to Promptly Request that Judge McCarthy Recuse Himself from the Case	34
V. CONCLUSION.....	36
APPENDIX.....	37

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Allen v. Asbestos Corp., Ltd.</i> , 138 Wn. App. 564, 157 P.3d 406 (2007).....	30
<i>Bogle and Gates, P.L.L.C. v. Holly Mountain Resources</i> , 108 Wn. App. 557, 32 P.3d 1002 (2001).....	20
<i>Chandler v. Washington Toll Bridge Authority</i> , 17 Wn.2d 591, 137 P.2d 97 (1943).....	23, 27
<i>City of Everett v. Estate of Sumstad</i> , 95 Wn.2d 853, 631 P.2d 366 (1981).....	30
<i>Cooper v. City of Tacoma</i> , 47 Wn. App. 315, 734 P.2d 541 (1987).....	17
<i>Hizey v. Carpenter</i> , 119 Wn.2d 251, 830 P.2d 646 (1992).....	30
<i>Hollenback v. Shriners Hospitals for Children</i> , 149 Wn. App. 810, 206 P.3d 337 (2009).....	20
<i>Keystone Land & Development Co. v. Xerox Corp.</i> , 152 Wn.2d 171, 94 P.3d 945 (2004).....	20, 28
<i>Maas v. Corporation of Gonzaga Univ.</i> , 27 Wn. App. 397, 618 P.2d 106 (1980), <i>rev. denied</i> , 95 Wn.2d 1002 (1981)	19, 28
<i>Marquez v. University of Washington</i> , 32 Wn. App. 302, 648 P.2d 94, <i>rev. denied</i> 97 Wn.2d 1037 (1982), <i>cert. denied</i> , 460 U.S. 1013, 103 S. Ct. 1253 (1983).....	19, 26, 27, 30
<i>Otgen v. Clover Park Technical College</i> , 84 Wn. App. 214, 928 P.2d 1119 (1996).....	19, 20
<i>Polygon Northwest Co. v. American Nat. Fire Ins. Co.</i> , 143 Wn. App. 753, 189 P.3d 777 (2008).....	18
<i>Saluteen-Maschersky v. Countrywide</i> , 105 Wn. App. 846, 22 P.3d 804 (2001).....	22
<i>Sandeman v. Sayres</i> , 50 Wn.2d 539, 314 P.2d 428 (1957).....	29

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Spooner v. Reserve Life Ins. Co.</i> , 47 Wn.2d 454, 287 P.2d 735 (1955).....	29
<i>State v. Carlson</i> , 66 Wn. App. 909, 833 P.2d 463 (1992), <i>rev. denied</i> , 120 Wn.2d 1022, 844 P.2d 1017 (1993)	34, 35
<i>State v. Dominguez</i> , 81 Wn. App. 325, 914 P.2d 141 (1996).....	33
<i>Vallandigham v. Clover Park School Dist. No. 400</i> , 154 Wn.2d 16, 109 P.3d 805 (2005).....	16, 17
<i>Wolfkill Feed, and Fertilizer Corp. v. Martin</i> , 103 Wn. App. 836, 14 P.3d 877 (2000).....	33
 Other Authorities	
De Wolf & Allen, <i>Washington Practice: Contract Law and Practice</i> , Ch. 8 (2d ed. 2007), p.203	23
Rest. 2d Contracts, § 224	23
 Washington Statutes	
RCW 4.12.050	33
RCW 4.92	4
 Court Rules	
CR 56(c)	16
RAP 10.3(5).....	18
RAP 3.1.....	17

I. INTRODUCTION

Angela Ju, (“Angela”) an adult student at the University of Washington, along with her mother Frances Ju (“Frances”) (collectively, “plaintiffs”), brought a breach of contract claims against the University.¹ As detailed below, these claims arise out of Angela’s participation in study abroad programs offered by the University. There are, apparently, four aspects to these claims: first, Angela alleges that the University breached a contract with her when it returned her to the United States from Cuba after a series of incidents indicating that she was suffering from serious mental or physical health problems. Second, Angela alleges that the University breached a promise to allow her to complete an independent study program in lieu of completion of the Cuba program. Third, she claims that the University breached an alleged promise to provide her with a numeric grade, rather than academic credit, for participation in the Cuba program. Fourth, she says that the University reneged on a promise to allow her to participate in a subsequent study abroad program in Rome.

The trial court dismissed these claims on summary judgment based on the failure to show the existence of binding contracts and lack of admissible evidence sufficient to show breach, causation or damages. Specifically, the record establishes without dispute that the University

¹ They also brought other claims against the University and two of its faculty members, which are dismissed and are not the subject of this appeal.

returned Angela to the United States from Cuba based on a series of incidents indicating that she had a severe mental or physical illness and the unanimous recommendations of Cuban health professionals and University faculty that she should not stay in Cuba. Angela has not shown the existence of a contractual commitment to allow her to remain in Cuba under these circumstances.

Plaintiffs also assert that after Angela returned from Cuba, the Vice Provost for Global Affairs promised that she could return to Cuba and that the University breached that promise. The record shows, however, that Angela was told that she could return to Cuba only with appropriate medical clearance, which she never obtained. Angela also claimed that the University promised that she could undertake an independent study to obtain numeric grades, and that defendants breached that promise. The only evidence that the plaintiff offered of the “promise” were email exchanges discussing how she could receive academic credit, but not a numeric grade, for the Cuba program. The University acted consistently with these communications, because it awarded Angela full academic credit for Winter Quarter in spite of her incomplete attendance and participation. And, finally, as to Angela’s claim that the University breached a promise to allow her to participate in a subsequent program in

Rome, the record shows that participation in that program was conditioned upon medical clearance, which Angela never obtained.

Below, plaintiffs relied on inadmissible evidence and self-serving statements to resist summary judgment by the defendant. The trial court properly struck hearsay and other inadmissible evidence and granted defendants' motion. Plaintiffs accused Judge McCarthy of being biased in favor of the University because he served as an adjunct professor in the law school. They did not file an affidavit of prejudice, and an adverse ruling, without more, is insufficient to establish bias. Even if plaintiff could show bias on the part of Judge McCarthy, the outcome would be the same because plaintiff failed to raise any genuine issues of material fact for trial, and no reasonable trier of fact could have found for the plaintiffs. Accordingly, the Court should affirm summary judgment in favor of defendants.

II. ISSUES FOR REVIEW

1. Is Frances Ju a proper party to this appeal?
2. Was the trial judge required to recuse himself because he taught a trial advocacy course as an adjunct professor at the University of Washington Law School?
3. Did the trial court err when it dismissed appellants' breach of contract claims based on failure to produce admissible evidence of an enforceable contract or breach of contract?

4. Did the trial court abuse its discretion when it struck hearsay and unauthenticated documents submitted by the plaintiff in opposition to summary judgment?

III. STATEMENT OF THE CASE

A. PROCEDURE

Plaintiffs Angela Ju and her mother, Frances Ju, filed their complaint against the University of Washington, Professor Kima Cargill and Susan Jeffords on February 6, 2008. Supp CP___. After a series of dispositive motions, all of Plaintiffs' claims were dismissed as described below.

On June 13, 2008, Judge Robinson granted Defendants' Motion for Judgment on the Pleadings. That order, as amended on January 9, 2009, dismissed all claims of Frances Ju on the grounds that she was not the real party in interest to pursue claims of her adult daughter, and that defendants did not owe her any duty under any of the claims pled in the complaint. The trial court also dismissed the Sixth cause of action alleging HIPAA violations. Supp CP___.

On January 27, 2009, Judge Robinson granted Defendants Motion for Partial Summary Judgment and dismissed all of Angela Ju's tort claims (First, Second, Third, Fifth and Eighth Causes of Action) because the plaintiffs had failed to file a notice of tort claim pursuant to Ch. 4.92 RCW. Supp CP___.

Thereafter, the case was transferred from Judge Robinson to Judge McCarthy. On May 15, Judge McCarthy granted Defendants' Motion for Partial Summary Judgment and dismissed Angela's remaining claims for breach of contract and damages (Fourth and Seventh causes of action). Supp CP ___. An Amended Order Granting Defendants' Motion for Partial Summary Judgment was entered on May 18, 2009. CP 336. At the hearing on May 15, the court also entered an order granting Defendants' Motion to Strike Plaintiff's inadmissible evidence. CP 334-335.

Plaintiffs sought review of each dispositive ruling in the Court of Appeals. The Court of Appeals denied review of the June 13, 2008 Order granting the Motion for Judgment on the Pleadings. App. 1. The Court dismissed review of the January 27, 2009 Order Granting Defendants' Motion for Partial Summary Judgment on the tort claim as untimely. App. 2. Following unsuccessful motions to modify the commissioner's ruling in both cases, plaintiffs sought discretionary review in the Supreme Court. The Supreme Court unanimously denied review of both decisions on December 2, 2009 and February 10, 2010. App. 3 and 4.

On June 8, 2009, plaintiffs filed a notice of Discretionary Review in the Court of Appeals seeking review of the May 18 Amended Order Granting Defendants' Motion for Partial Summary Judgment and the May 15 Order Granting Defendants' Motion to Strike. CP 331-337. On

August 6, 2009, the Court commissioner converted the discretionary review to an appeal as of right by notation ruling. App. 5. The ruling noted that the May 18 Amended Order Granting Defendants' Motion for Partial Summary Judgment, having dismissed Angela's claim for breach of contract, resolved all claims as to all parties. *Id.* Because the plaintiffs have not appealed the June 13 or January 27 orders, the only claim on appeal is Angela's breach of contract claim.

B. FACTS

Angela Ju is a former student at the University of Washington. Supp CP___. Angela and her mother, Frances Ju, initiated this lawsuit against the University of Washington and the two individual defendants as a result of Angela's participation in and removal from a study abroad program in Cuba during winter quarter, 2005-2006, and her subsequent inability to participate in an international program in Rome. *Id.* The Jus' story begins with Angela's study abroad in Greece in August 2005, and ends with her inability to participate in the Rome program in August 2006.

1. The Greece Program.

In the fall of 2005, Angela participated in an international study program in Athens, Greece. CP 343. During that one-month program, Angela reported a host of physical and emotional problems ranging from depression to a kidney infection to fainting to the program leader, Taso

Lagos. CP 349-353, 355-357. During one weekend, she fainted on Friday night while at dinner, and then went to the hospital. CP 354-356. The following day, Saturday, she inexplicably lost her balance and fell to the floor two separate times. CP 352-353, 356. On Sunday, Angela traveled to Syntagma Square by herself (against the program rules) and again collapsed. While she was on the ground, her cash, traveler's checks and telephone card were stolen. CP 356-357, 360-362.

Angela made multiple telephone calls to Professor Lagos over the weekend to report her episodes of fainting. CP 359. Professor Lagos met with her to express his concern about her health, and to discuss whether her needs would be better served at home. CP 357, 359; 444-447. Although Professor Lagos considered sending Angela home, he ultimately permitted her to complete the program. CP 363. He prepared a report of the health problems that Angela had encountered during the Athens program, however, and emailed it to both Angela and David Fenner, the Assistant Vice Provost for International Education. CP 344; 444-447; 468-469. When Angela returned to the United States, she made a complaint of sexual harassment against Professor Lagos with the UW Ombudsman's office. CP 367-368. Through mediation, that complaint was resolved to her satisfaction. CP 367-369.

2. Angela Prepares to Go to Cuba.

After she returned from Athens, Angela signed up to go to Cuba for Winter Quarter to participate in another international study program. CP 373. The co-directors of the Cuba program were Dr. Kima Cargill and Professor Cynthia Duncan. CP 40 and 47. Dr. Cargill learned about some of the difficulties that Angela had experienced while she was in Greece and met with Angela to discuss the problems that she had experienced in Athens, as well as other issues. CP 47-48; 373, 374. During the meeting, Angela stated that she had been sexually harassed by the director of the Greece program and that she had made a complaint to the University's Ombudsman. CP 48.

Angela continued to communicate informally with Dr. Cargill. CP 377. A few days after their first meeting, Angela visited Dr. Cargill at her office and volunteered that she suffered from depression. CP 48. Dr. Cargill encouraged Angela to obtain treatment. CP 48; 376, 379. Angela said that she would like to get treatment, but she was concerned that there was a stigma associated with depression and mental illness among certain Asian cultures. CP 380-381. Dr. Cargill urged Angela to get an appointment right away so that she could begin treatment before she left for Cuba. CP 48. When Angela reported that she was unable to get an appointment right away, Dr. Cargill helped arrange for Angela to see Dr. Lisa Erlanger at the University's Hall Health clinic on an expedited basis. CP 48. When Angela went to Hall Health,

Dr. Erlanger recommended that Angela obtain mental health treatment. CP 380. Dr. Erlanger also warned Angela that if Angela asked her to provide the health clearance that is required of all students participating in international programs; she would not clear Angela for international study. CP 382-383.

Angela subsequently reported Dr. Erlanger's findings to Dr. Cargill. CP 48; 378-379, 384-386. Dr. Cargill encouraged Angela to follow up with Dr. Erlanger's recommendations for treatment. CP 48. Angela had one follow-up visit with Dr. Erlanger, but knowing that Dr. Erlanger would not clear her for travel to Cuba, Angela sought an independent doctor in Vancouver to complete the health screening form. CP 383-384. Angela did not inform her doctor of Dr. Erlanger's evaluation, nor did she pursue further mental health treatment. *Id.*

3. The Cuba Program.

The Cuba program began January 5, 2006. CP 387. The Cuba program consisted of three components: (1) Spanish language; (2) Cuban culture; and (3) a research paper to be done partly in the United States and partly in Cuba. CP 41. The language and culture classes were taught by Cuban professors at the University of Cienfuegos. *Id.* The students were supposed to develop their research topic in the fall quarter and conduct the preliminary research in the United States before leaving for Cuba. *Id.* The students were expected to continue their work in Cuba, to reflect on

how their approach to the research topic changed after they had spent seven or eight weeks in Cuba, and to write about that. *Id.* During the last week of the program, the students were required to give a substantial oral report on their research findings. *Id.*

Within the first two weeks of arriving in Cuba, Angela repeatedly reported to her professors and to other students that she was suffering from many of the same physical ailments that she reported in Athens, i.e., pain and burning during urination, fever and chills, nausea and vomiting, blood in her urine, and shooting, crippling pain in her mid-section and legs. CP 48-49; 388-399. Angela made two separate visits to the International Clinic in the first month of the program. CP 399, 405-406. On more than one occasion, Angela reported that she had suddenly collapsed and fallen to the floor. CP 407-408. After making these complaints, and at times seeking medical attention, Angela suddenly recovered and reported that she felt fine. CP 392-394, 400-404; 49.

Angela's myriad of emergent complaints aroused great concern among other students and the directors. CP 48-49. In an effort to ensure Angela's well-being and to minimize disruptions to the other students, the directors met with Angela to create a plan for dealing with the health emergencies. *Id.* On January 27, 2006, Dr. Cargill and Professor Cynthia Duncan met with Angela to present her with an agreement outlining their

expectations for her behavior related to medical issues and treatment. *Id.*; CP 407. The agreement, which Angela signed, warned that failure to abide by its conditions would result in dismissal from the program. *Id.*; CP 59-60. Within a week of agreeing to the terms of the contract, Angela complained of crippling pain that caused her to pass out at a party. CP 49; 400-402, 404. Other students helped put her to bed. *Id.* Later that evening, she left her room and went out to nightclubs until 4:00 a.m. CP 403-404; 49.

On February 6, 2006, Dr. Cargill met with Angela and gave her a contract identifying her unacceptable behavior surrounding her medical issues. CP 50. The agreement warned Angela that her failure to correct the behavior could result in dismissal from the program. CP 59-60. That night, Angela went to the International Clinic and reported that she had a fever and nausea. CP 408. The clinic admitted her and performed a battery of tests, but the doctors determined that Angela's symptoms did not equate to a known medical condition. CP 409-410, 412; 50.

When all of Angela's test results came back normal, the Cuban doctors viewed Angela's case as a psychiatric case rather than a medical case. CP 50. They determined that the clinic could not provide the treatment that Angela required. CP 411, 412, 414-415; CP 50, 52, 68-71. They recommended that Angela return home for appropriate care and treatment. *Id.* They also warned that she presented a risk of suicide and

recommended that her behavior be monitored. Dr. Cargill consulted with David Fenner at the University of Washington, the Associate Director of Hall Health Mary Watts, the Chancellor of the University of Cienfuegos and the director of the academic program in Cienfuegos. CP 50. Everyone agreed that Angela should be returned home. CP 50. Based on the Cuban doctors' assessment, and in consultation with the academic program directors and the international studies director, a decision was made to return Angela to the United States so that she could get appropriate treatment. *Id.* Dr. Cargill then accompanied Angela on a flight to Miami, Florida, where she delivered Angela to her mother. CP 415; 51.

4. Plaintiff's Attempts to Return to Cuba.

Following her return to the United States, Angela insisted that the University return her to Cuba. CP 455-458. The University, through Vice Provost for Global Affairs Dr. Susan Jeffords, informed Angela that she could return to Cuba if she obtained medical clearance from a physician who had access to her records with Dr. Erlanger at Hall Health. *Id.*; CP 416-418; CP 469, 471-474. Dr. Jeffords even offered to pay for such an evaluation through Hall Health. CP 469-470 and 475-476. Angela did not return to Hall Health until six days before the program ended, however, and she never turned in the required health screening form. Without the

necessary medical clearance, Angela was not allowed to return to Cuba. CP 419; CP 469-470; 419-421.

Upon her return from Cuba, Angela expressed concern to both administrators and to the program directors about getting credit for her participation in the Cuba program. CP 42-43; 455-458. When it became apparent that Angela might not be able to return to Cuba, Dr. Jeffords offered to either refund the Cuba program fees or, in the alternative, permit her to obtain academic credit for the quarter. CP 253. Angela did not pursue a refund, but rather sought to obtain academic credit. CP 167-168. David Fenner had told her that she could work on an independent basis through one of the program directors to obtain the credit for the Cuba program, and Angela followed up by email with Professor Duncan. CP 250; CP 167-168. Angela told Professor Duncan about Mr. Fenner's offer and asked Professor Duncan if she would be willing to supervise her independent study:

David Fenner said that I could receive credit as long as I could work out an independent study agreement with you or Kima. Thus, I am writing to ask if you would be willing to work out an agreement with me so I can still receive credit for this quarter.

CP 167-168.

Because the Cuba program was heavily based on the immersion experience of being in Cuba for an extended period of time, Professor

Duncan felt that it did not lend itself to independent study outside of Cuba. CP 42-43. Neither Dr. Cargill nor Professor Duncan agreed to supervise an independent study that would satisfy the requirements of the Cuba program. *Id*; CP 52. Dr. Duncan suggested to Angela that if she wanted to do an independent study to make up for the lost credit in Cuba, she could ask one of the Latin American Studies professors or Spanish professors in Seattle to supervise her work. CP 42-43. Angela ignored Professor Duncan and submitted her final paper anyway. Professor Duncan was unwilling to accept or grade the paper because Angela's compromised participation in Cuba did not allow for adequate research and reflection in Cuba as required. CP 164-165.

Final grades for the language and culture components of the Cuba program were assigned by the professors in Cuba. CP 43. The Cuban professors transmitted the grades to Professor Duncan, who converted them into the 4.0 grading scale used by the University of Washington. *Id*. The Cuban professors initially assigned failing grades to Angela in the language and culture classes based on the limited work that she performed. CP 43-44. At Professor Duncan's urging, they agreed to assign her a numeric grade for her Spanish in recognition of her strong language skills. CP 43-44. They felt that she had not done enough work to merit any grade in the culture portion of the program, however.

Although the professors assigned failing grades for the culture component and the research paper, the University of Washington overrode the professors and awarded Angela all 15 academic credits associated with the Cuba program. She received a numeric grade only in the Spanish language class, however. CP 469-470; CP 43-44. After she received the credits, Angela insisted that the credits be converted to numeric grades for all three components of the program. CP 158-159,162. She did this notwithstanding the fact that the numeric grades originally assigned for her research and culture classes were failing grades CP 43-44. The University declined to convert Angela's 15 academic credit to numeric grades. CP 157. Even though she failed to complete the Cuba program, Angela received all 15 credits that were available. CP 469-470.

After returning from Cuba, Angela filed a complaint with the University Complaint, Investigation and Resolution Office ("UCIRO") alleging that the University discriminated against her and retaliated against her when it sent her home from Cuba. CP 435. UCIRO investigated the complaint and determined that it had no merit. *Id.* Angela also filed a complaint with the Department of Health against Dr. Cargill and practitioners from Hall Health. CP 432, 433-434. That complaint also was dismissed without merit. *Id.*

5. The Rome Program.

By the time Angela returned from Cuba, she already had applied for and had been accepted to a third international study program in Rome for the fall of 2006. CP 436-437; 470. The University, through Dr. Jeffords, informed Angela that before the UW would permit her to participate in the Rome program, she would be required to obtain medical clearance from a doctor who had access to her records with Dr. Erlanger at Hall Health. CP 437-438; 470. Angela never provided such clearance and therefore was not able to participate in the Rome program. *Id.*; CP 440.

IV. ARGUMENT

A. Standard of Review.

When reviewing a summary judgment, the appellate court engages in the same inquiry as the trial court. *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is affirmed if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no 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). All facts are considered in the light most favorable to the nonmoving party, and summary judgment is granted only if, from all of the evidence, reasonable persons could reach but one conclusion. *Id.* The burden is on the moving party to show that there is no

genuine issue as to any material fact. *Vanlandingham*, 154 Wn.2d at 26. “If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute.” *Id.* If the nonmoving party fails to do so, then summary judgment is proper. *Id.*

B. Frances Ju is Not a Proper Party to this Appeal.

Frances was dismissed as a party on June 13, 2008 on the ground that she was not the real party in interest and that defendants did not owe her a duty under any of the theories pled in the complaint. Supp CP___. Although she unsuccessfully challenged that ruling on an interlocutory basis, she did not challenge it in this appeal. CP 331.

Because the May 15 order resolved all claims as to all parties, Frances was entitled to appeal as of right from the earlier order dismissing her as a party. She did not. Instead, she simply joined with her daughter’s appeal of the May 15 order in a backdoor effort to continue litigating after her claims were dismissed. Since Frances was not a party when the May 15 Order was entered, and since the Order did not affect any of her rights or claims, she was not “aggrieved” by it and lacks standing to pursue this appeal. RAP 3.1. “Only an aggrieved party may seek review by the appellate court.” “An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected.” *Cooper v. City of Tacoma*, 47 Wn. App. 315, 316, 734 P.2d 541 (1987). *Polygon Northwest Co. v.*

American Nat. Fire Ins. Co., 143 Wn. App. 753, 768, 189 P.3d 777 (2008). Because the trial court dismissed Frances as a party in June 2008, and because Frances has not appealed that order, she is not a proper party to this appeal. Frances was not even a party when the May 2009 Order was entered. She could not be aggrieved by it.

C. Plaintiff Should Be Sanctioned for Failing to Cite the Record in Violation of RAP 10.3(5).

RAP 10.3(5) states that “Reference to the record must be included for each factual statement.” Plaintiffs’ opening brief contains a statement of the case, but almost no citations to the record. When distilled down to supported facts, plaintiffs’ statement of the case is limited to four main facts: 1) the amount plaintiffs paid for the Cuba program; 2) the plaintiffs wrote an email regarding credit for the Cuba program; 3) Dr. Fenner said that Angela could complete credits for the Cuba program through arrangements with Professor Duncan and Dr. Cargill; and 4) the University Handbook² provides that courses offered on a credit/no credit basis must be so designated in the course schedule. The remainder of the 4-page facts section of Appellants brief lacks citations to the record. Similarly, the argument section is lacking in record cites. Pages 6-7, 9, 13, 15-18 and 22 of Appellants’ Opening Brief (“App. Brief”) argue facts that

² Plaintiffs erroneously refer to the University Handbook as the “Faculty Senate Handbook.”

that are not supported by record cites, including inflammatory allegations against the defendants. Such assertions should not be considered, and plaintiffs should be sanctioned for their failure to comply with RAP 10.3.

D. The Trial Court Correctly Dismissed Plaintiff's Contract Claim.

1. Angela has not demonstrated any Specific or Definite Promise.

Washington recognizes that the relationship between a student and a university is essentially, but not rigidly, contractual in nature. *Maas v. Corporation of Gonzaga Univ.*, 27 Wn. App 397, 400, 618 P.2d 106 (1980), *rev. denied*, 95 Wn.2d 1002 (1981); *Marquez v. University of Washington*, 32 Wn. App. 302, 305, 648 P.2d 94, *rev. denied* 97 Wn.2d 1037 (1982), *cert. denied*, 460 U.S. 1013, 103 S. Ct. 1253 (1983). Because there is rarely an express formal educational contract, “the general nature and terms of the agreement are usually implied, with specific terms to be found in the university bulletin and other publications.” *Id.* Courts afford wide latitude and discretion to universities in academic matters, and “the University is entitled to some leeway in modifying its programs from time to time so as to properly exercise its educational responsibility.” *Id.* at 306. Because of this discretion, courts have afforded contract claims against Universities a very narrow scope. *Ottgen v. Clover Park Technical College*, 84 Wn. App. 214, 219 (n.7), 928 P.2d 1119 (1996).

A party asserting the existence of a contract bears the burden of establishing each essential element. *Hollenback v. Shriners Hospitals for Children*, 149 Wn. App. 810, 829, 206 P.3d 337 (2009); *Bogle and Gates, P.L.L.C. v. Holly Mountain Resources*, 108 Wn. App. 557, 560, 32 P.3d 1002 (2001) (quoting *Cahn v. Foster & Marshall, Inc.*, 33 Wn. App. 838, 840, 658 P.2d 42 (1983)). Mutual assent is an essential element. *Ottgen*, 84 Wn. App. at 219. Because Washington follows the objective manifestation test for contracts, the parties must objectively manifest their mutual assent and the terms assented to must be sufficiently definite. *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171, 177-78, 94 P.3d 945 (2004).

Here, Angela asserted that by sending her home from Cuba and not permitting her to go to Rome, the University breached a contract. But she has the burden of proving the contract, and that the University breached. *Id.*; *Ottgen*, 84 Wn. App. at 219, n.7. She has not done so. Neither the Complaint nor discovery responses evidence an agreement to sidestep the requirement that students pass health screenings for international study, or mutual assent to keep Angela in Cuba when serious health issues came to its attention. For example, Plaintiff's Fourth Cause of Action for Breach of Contract states only that there were "binding agreements":

There were binding agreements between plaintiff Angela Ju and defendants as a result of plaintiff's applications for the Cuba program and Rome Program and defendants'

approvals of her enrollment. Defendants failed their obligation without a legally valid excuse to live up to responsibilities under the contracts. Plaintiffs did not agree to the changes in the contracts' terms. The actions of the defendants who deviated from the terms of the contracts were not implicitly accepted or ratified by the action of non-action of the plaintiff. Defendants' non-performance or interference with plaintiff's performance resulted in breach of contract. The plaintiffs have been injured and suffered damages to be proven at the time of trial.

Supp CP___. Plaintiffs' answers to interrogatories regarding the "binding agreements" were similarly vague:

INTERROGATORY NO. 8: Identify the contracts that form the basis of your breach of contract claim as asserted in paragraph 7.1 of your Complaint.

ANSWER: The existence of a Contract, or Agreement, can be shown by words (either orally or in writing), conduct or prior dealings. There were binding agreements between plaintiff Angela Ju and defendants as a result of plaintiff's applications for the Cuba Program and Rome Program and defendants' approvals of her enrollment. The agreements were already established in words. The parties have agreed to a course of conduct by their actions. The defendants expected that the admitted students would show up at the onset of the Programs and study through the Programs. The admitted students, including plaintiff Angela Ju, expected that the defendants would carry out the Syllabus or Protocol of the Programs. The parents of the admitted students, including plaintiff Frances Ju, expected that their son or daughter will attend the program as planned, that they helped pay for the tuition, fees, and airline tickets required by the Programs, that the UW and the Programs' instructors would carry out their fiduciary duty and supervising duty, and that their son's or daughter's mind will be enriched by the Programs. In addition, prior dealings also existed in the UW study abroad Programs.

CP 461. Although Angela made vague references to the “syllabus,” “protocol” and “application,” she has failed to produce them or to identify language that could be construed as a guarantee that she remain in the Cuba program or go to Rome without medical clearance.

During her deposition, Angela suggested that her acceptance into the Cuba and Rome programs contractually bound the University to permit her to complete the program regardless of health problems or other unexpected circumstances. CP 424-426. But Angela has not pointed to any document or even an oral statement that would permit a trier of fact to find that the University made such a promise, and her bare conclusions cannot withstand summary judgment. *Saluteen-Maschersky v. Countrywide*, 105 Wn. App. 846, 852, 22 P.3d 804 (2001).

The record is clear that one of the University’s prerequisites to participation in international programs is that all students must present documentation from a health care provider that the students’ health allows them to safely live abroad and participate in the educational experience in the host country. CP 469. Angela obtained the necessary clearance to go to Cuba, but was sent home on medical advice. The University’s decision to return her was reasonable and consistent with its requirements for international study, and not in violation of any contrary “promise.”

2. Defendants' Express Promise to Return Angela to Cuba if She Could Meet the Health Requirements Trumps any Contrary Implied Contract.

After Angela was sent home from Cuba, Dr. Jeffords expressly promised her that the University would return her to Cuba if she obtained and submitted an updated health clearance form. *Id.*; CP 229-230. Dr. Jeffords's promise, while specific, was conditioned on Angela's ability to demonstrate her fitness to return. A conditional promise does not require performance on the part of the promisor until the condition is fulfilled. *See, e.g.*, Rest. 2d Contracts, § 224; De Wolf & Allen, Washington Practice: Contract Law and Practice, Ch. 8 (2d ed. 2007), p.203. Because Angela never submitted the required health clearance form, Dr. Jeffords was not obligated to return Angela to Cuba. Indeed, she could not send Angela back consistent with program requirements. *Id.*

Dr. Jeffords' express promise to return Angela to Cuba trumps any implied contract to the contrary. *See, Chandler v. Washington Toll Bridge Authority*, 17 Wn.2d 591, 604, 137 P.2d 97 (1943) (A party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract). Thus, to the extent that Angela is asserting that there was an implied contract that is inconsistent with this express conditional promise, her claim fails.

3. Defendants Expressly Offered Angela Academic Credit, but not Numeric Grades for the Cuba Program.

When Defendants moved for summary judgment to dismiss Angela's contract claims, plaintiff argued that there were two express contracts: 1) that she could engage in an independent study in lieu of completing the Cuba program, CP 78; and 2) that she would be given numeric grades for her efforts. But the record does not support the existence of either contract. CP 95.

Contrary to Angela's bald contention that defendants promised her numeric grades, the record unequivocally shows that defendants promised only that Angela could get full credit for the Cuba program if she could make appropriate arrangements through the co-directors of the program to complete the work. CP 167-168. Indeed, Angela demonstrated her understanding of the offer to earn credit in an email she sent to Professor Duncan immediately after her return:

Cynthia,

Kima told me to talk to David Fenner about receiving credit for this quarter, and ***he said that I could receive credit as long as I could work out an independent study agreement with either you or Kima.*** Thus, I am writing you to ask if you would be willing to work out an agreement with me.

(Emphasis added) CP 167-168. Everything in the record is consistent with Mr Fenner's offer. Academic credit was all that was ever requested, offered and delivered. When Angela initially returned from Cuba, her focus was on

obtaining full academic credits. *See*, CP 167-168. In her February 12 email to Professor Duncan, Angela gave a lengthy explanation about why she needed academic credit for the quarter, without once mentioning grades:

It is really important that I receive the **credit** for this quarter for three reasons:

- 1) Although I'm only in my third year at the UW, I've already overexceeded the 210-**credit** policy because of the number of college **credits** that I received from high school from classes like Spanish...it is imperative that these **credits** count toward at least one of my three majors. Thus it is imperative that I receive the **credits** for this quarter.
- 2) I'm going to lose my merit scholarship completely if I don't receive **credit** for this quarter...
- 3) I've already put a lot of effort and dedication into the program...With all this being said, I need to know as soon as possible about whether and how I will be receiving **credit** for this quarter.

Id. (Emphasis added). All of plaintiffs' subsequent communications with persons at the University discussed academic credit without reference to numeric grades:

- Feb 13, 2006 email from Frances to David Fenner: "When I asked Dr. Cargill about Angela's credits this quarterOn the phone you told me that Angela can work with either professor through independent study to complete the credits this quarter" CP 221.
- Feb. 21, 2006 email from David Fenner to Angela: "In any event, as you have been told, you will have the opportunity to complete the credits for the entire program

through arrangements with Professors Cargill and Duncan.” CP 250.

- Feb. 26, 2006 email from Susan Jeffords to Angela: “[e]ven if you do not return to Cuba, you can be given the full opportunity to complete all the course requirements and receive full credit for your work.” CP 253.
- April 5, 2006 email from David Fenner to Frances: “I have spoken to Dr. Cargill about Angela completing the credits for the program by independent study . . .” CP 220.

Indeed, the record shows that the subject of numeric grades never even came up until April 2007, a full year *after* Angela returned from Cuba and received credit for the program, when she tried to convert the credit to grades. *See*, CP 162. In the entire record before the court, there is not a single communication from anyone at the University of Washington that even discussed, much less promised, numeric grades to Angela before then.

4. Defendants’ Decision to Award Academic Credit in a Single Case does not Violate the University Handbook.

Angela challenged defendants’ decision to give her academic credit for winter quarter as violating a provision of the University Handbook. App. Brf. 15-18. That provision, which Angela describes as a “rule,” states that classes offered on a credit/no credit basis must be so designated in the course schedule. CP 302. Assuming *arguendo* that this provision could be construed to contain a promise, the binding effect is limited by the doctrine of reasonable expectations. *Marquez v. University of Washington*, 32 Wn. App. at 306-307. In *Marquez*, a law student

asserted that the University breached a contract to him when it dismissed him for substandard academic performance, based on a provision in the prelaw handbook. The court applied the standard of reasonable expectations and held that the handbook provision, which simply announced the availability of remedial programs, did not create “a right in the applicant to obtain a law degree absent his meeting and maintaining reasonable standards established by the Law School.” *Id.* at 307. Here too, the University Handbook cannot be said to create a right in Angela to obtain numeric grades absent satisfactory completion of program requirements.

Angela also has offered no evidence that defendants violated the requirement that credit courses be called out in the course schedule. The courses in the Cuba program were not offered generally on a credit/no credit basis. The fact that Angela was initially assigned failing numeric grades demonstrates this fact.. CP 43-44. It was simply as an accommodation to Angela that the University offered her the choice of receiving academic credit or a refund of her program fees. CP 253. Angela accepted the offer and chose to receive credit. In view of this express agreement, the benefits of which Angela accepted, she cannot turn around and assert that defendants breached some implied contract to the contrary guaranteeing her numeric grades. *See Chandler at 604.* Unless Angela can show that the University acted arbitrarily and capriciously when it offered her the credit option, the

court should not intervene in decisions that were arrived at honestly and in good faith. *See Maas*, 27 Wn. App. At 403.

5. There was No Independent Study Contract Apart from the Offer to Award Academic Credit.

While defendants clearly and expressly offered Angela the option of obtaining academic credit or a refund for the Cuba program, they did not spell out the method by which she would obtain the credit, other than to suggest that she could try to work out an independent study agreement or through other “arrangements with Professors Cargill and Duncan.” CP 167-168, CP 250. Clearly, the thrust of the University’s promise was that she could receive academic credit, but the details and means of completing the work were appropriately left to the instructors. Angela has nevertheless seized on the independent study idea and argues that the University promised her the opportunity to engage in an independent study in addition to academic credit. She further argues that the University breached that promise when Prof. Duncan and Dr. Cargill declined to supervise her work, notwithstanding the fact that the University awarded the credit. App. Brf, p. 18-20.

The open ended nature of the offer of academic credit in terms of how it was to be achieved renders Angela’s independent study “contract” unenforceable. Before a promise can be enforced, the terms assented to must be sufficiently definite. *See Keystone Land & Development Co. v.*

Xerox Corp., 152 Wn.2d at 178 (citing *Sandeman v. Sayres*, 50 Wn.2d 539, 541, 314 P.2d 428 (1957)). If a term is “so indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties,” there cannot be an enforceable agreement. *Sandeman*, 50 Wn.2d at 541. For example, an agreement to agree in the future is too indefinite to be enforced. *Spooner v. Reserve Life Ins. Co.*, 47 Wn.2d 454, 458, 287 P.2d 735 (1955). The University’s promise that Angela could obtain academic credit “through arrangements with either professor” is too indefinite for a court to find that the University committed to Angela that she could do an independent study. Her claim was properly dismissed.

6. There Was No Contract to Override the University’s Requirement for Medical Clearance for Rome.

As previously stated, the University requires that all students who wish to participate in international programs provide evidence of their health from a health care provider. CP 469. Angela, like every other student, was required to submit the required health screening form before she was approved for study in Rome. It is undisputed that Angela never submitted the form and therefore was not permitted to study in Rome. CP 470. The record contains no evidence of a contrary arrangement or agreement with the University, and the record is devoid of any facts that would permit a trier of fact to find that a different contract exists.

While Angela posits that the students and parents had certain “expectations,” she fails to show that those expectations arose out of any specific promise. Subjective expectations are not enforceable contracts. *See, e.g., City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981). Moreover, any expectations are subject to the reasonableness test recognized in *Marquez*. It was not reasonable to expect that the University would waive a health requirement for a student studying abroad.

E. The Trial Court Correctly Struck Inadmissible Evidence.

“Although the trial court has discretion to rule on a motion to strike, a court may not consider inadmissible evidence when ruling on summary judgment.” *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 157 P.3d 406 (2007) (quoting, *International Ultimate Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 745, 87 P.3d 774 (2004), *Hizey v. Carpenter*, 119 Wn.2d 251, 268, 830 P.2d 646 (1992)). Below, the trial court properly struck hearsay and other inadmissible evidence. Even if the evidence had been considered, however, it would not have changed the outcome, because none of it raised any genuine issue of material fact regarding the breach of contract claim.

Angela has challenged the trial court order striking the following exhibits to the Declaration of Angela Ju: Ex. 3, 4, 6, 7, 8, 10, 12, 14, 16, 22, 29 and 30. CP 151-258. Although the exhibits were clearly inadmissible under the rules of evidence, it is abundantly clear that the

exhibits, even if admitted, would not advance Angela's breach of contract claim, as explained below:

Emails from students. Exhibits 3, 4, 12, 14, 16 are all emails from students introduced "to impeach lies." App. Brf p. 11. Angela claims that Exhibits 3 (CP 151-153) 4 (CP 154-155), 12 (CP 196-202), 14 (CP 203-204) and 16 (CP 209-218) to the Declaration of Angela Ju proved that Professor Duncan and Dr. Cargill "lied" in their declarations. App. Brf, p. 11. But she fails to explain how any of the excluded emails from students, if admitted, raised a genuine issue of material fact regarding their breach of contract claims. The "lies" that Angela takes pains to identify relate to trivial matters: how often Professor Duncan sat in on classes in Cuba (Ex. 3 and 4), slightly different accounts of Angela Ju's health events in Cuba (Ex. 12 and 14), and the availability of internet access in Cuba (Ex. 16). All of these emails are obvious hearsay, and none advances plaintiffs' argument that there was a specific enforceable promise, that the defendants breached the promise or that the plaintiff was injured thereby.

UCIRO Interview Notes. Ex. 6, 7, 8 and 13 (CP 175-176; 178-183 ; CP 185-188 and CP 199-202). are notes of interviews of witnesses taken by UCIRO investigator, Kristi Johnson, during her investigation of Angela's discrimination and retaliation complaint. Angela introduced Ms. Johnson's notes purportedly to show that she "did not get a fair investigation" of her

internal discrimination complaint. App. Brf, p. 13. As such, it is difficult to see how they relate to Angela's breach of contract claim. The notes are hearsay on their face, in any event, and were properly excluded.

Other Ex. 29 (CP 255) contains a privileged communication between David Fenner and Assistant Attorney General Quentin Yerxa. It is unclear how or why this relates to the plaintiff's breach of contract claim. Ex. 10 (CP 193) is a set of unidentified handwritten notes which cannot be authenticated. Ex. 22 (CP 235) is an email from Dr. Anil Coumar at Hall Health to Angela Ju regarding a billing error and a phone message for Dr. Jeffords. It is hearsay and does not create a genuine issue of material fact. Ex. 30 (CP 258) is an email from David Fenner to Susan Jeffords regarding plaintiff's medical records. This exhibit contains several emails, including one between Susan Jeffords and Angela Ju, which technically was admissible, but the exhibit does not advance her claim.

Plaintiff has offered no persuasive argument or authority for overturning the trial court order granting Defendants' Motion to Strike inadmissible evidence. Even if the evidence had not been stricken, it would not and could not have changed the outcome of the motion for summary judgment, because none of it even remotely established the existence of a valid contract, breach or damage to the plaintiff.

F. Plaintiff has failed to show that recusal was required.

After having received an adverse ruling from the trial court, plaintiff asserts that the trial judge should have recused himself from considering a case involving the University of Washington because he served as an adjunct professor in the law school. Recusal lies within the sound discretion of the trial judge, whose decision will not be disturbed absent a clear showing of abuse of that discretion. *Wolfkill Feed, and Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 840, 14 P.3d 877 (2000). The court abuses its discretion only when its decision is “manifestly unreasonable or is exercised on untenable grounds or for untenable reasons.” *Id.*

1. Appellants Failed to Support Allegations of Bias Against Judge McCarthy with Evidence of Actual or Potential Bias.

A judge is required to disqualify him or herself if the judge is biased against a party or the judge's impartiality may reasonably be questioned. *State v. Dominguez*, 81 Wn. App. 325, 328, 914 P.2d 141 (1996). However, as Angela acknowledge, the trial court is presumed to perform its functions regularly and properly without bias or prejudice. *Wolfkill Feed*, 103 Wn. App. at 841. Therefore, a party claiming prejudice or bias must support the claim with evidence of a judge's actual or potential bias because prejudice is not presumed as it is under RCW 4.12.050. *Dominguez*, 81 Wn. App. at 328-29.

In support of her allegations of bias, Angela cites Judge McCarthy's several adverse rulings and asserts that Judge McCarthy's bias was "so obvious" during oral argument because he disregarded certain of Appellants' arguments. See Opening Brief of Appellants at 26-28, 31. She also submitted a n article and biographical statement stating that Judge McCarthy had taught in the Trial Advocacy program at the University of Washington Law. See App. Brf, Appendix B. Angela submitted no evidence that Judge McCarthy's stint at the University of Washington Law School actually prejudiced or otherwise influenced his decisions in this case. She has made no allegation or submitted any proof of any financial or other interest of Judge McCarthy in the outcome of this case. Angela has failed to submit any evidence that would suggest that Judge McCarthy is personally biased or partial to the University of Washington, or to the Law School for that matter.

2. Appellants Failed to Promptly Request that Judge McCarthy Recuse Himself from the Case.

A party must use due diligence in discovering possible grounds for recusal and then act upon this information by promptly seeking recusal. See *State v. Carlson*, 66 Wn. App. 909, 916, 833 P.2d 463 (1992), *rev. denied*, 120 Wn.2d 1022, 844 P.2d 1017 (1993). "It is manifestly unfair to the court and the opposing party, as well as wasteful of judicial resources to allow the

process to go forward in hopes of a favorable decision and then move for disqualification upon learning of an adverse decision.” *Id.* at 906. In *Carlson*, the defendant in a criminal case filed a motion to disqualify a member of the appellate panel after it had reinstated a jury verdict against the defendant, The Court of Appeals denied the motion, and found the defendant’s delay in seeking recusal to be “clearly unreasonable.” The court held that the defendant could not wait until he received an adverse ruling and then move for disqualification. *Id.* at 917.

Angela unreasonably delayed her challenge to Judge McCarthy’s impartiality. Judge McCarthy was assigned to this case on January 12, 2009. Angela waited until December 4, 2009, nearly twelve months, to challenge Judge McCarthy’s objectivity. *See* Opening Brief of Appellants at 31. Information relating to Judge McCarthy’s role as an adjunct trial advocacy professor at the University of Washington Law School has been publicly available to Appellants via the Internet since he was assigned to the case, which Appellants demonstrated by “googl[ing Judge McCarthy’s] background” after the May 15, 2009 oral argument. *See* Opening Brief of Appellants at 28. Appellants’ delay in challenging Judge McCarthy’s impartiality until December 2009 makes plain that Appellants were not actually concerned about Judge McCarthy’s past position at the

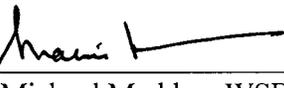
Law School until they learned that the Superior Court had dismissed their case. Her argument is without merit.

V. CONCLUSION

The absence of evidence to support Angela's breach of contract claim mandated dismissal of the claim. Even if all of plaintiffs' evidence had been considered, the outcome would be the same, because reasonable minds could not disagree that defendants did not breach any specific, enforceable contract. For these and all the foregoing reasons, defendants respectfully request that the Court affirm summary judgment in favor of defendants.

RESPECTFULLY SUBMITTED this 26th day of February, 2010.

BENNETT BIGELOW & LEEDOM, P.S.

By: 
Michael Madden, WSBA #8747
Marie Westermeier, WSBA #18623
Attorneys for Respondents

DECLARATION OF SERVICE
I hereby declare that I sent a copy of the document on which this declaration appears via first-class envelope sent to Angela on 12:00 PM August 26, 2010
Vancouver WA
I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.
Executed at Seattle, WA on 2-26-10
Signed by: Marie Westermeier

APPENDIX

- 1) Commissioner's Ruling Denying Discretionary Review Dated 5/12/09 (COA Case No. 62032-1-I)
- 2) Notation Ruling Dated 5/1/09 (COA Case No. 63133-1-I)
- 3) Ruling Denying Review Dated 11/13/09 (Supreme Ct Case No. 83601-9)
- 4) Order Denying Motion to Modify Dated 2/10/10 (Supreme Ct Case No. 83601-9)
- 5) Notation Ruling Dated 8/6/09 (COA Case No. 63687-1-I)

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Appendix 1

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

ANGELA JU and FRANCES DU JU,)	
)	No. 62032-1-I
Appellants,)	
)	
v.)	COMMISSIONER'S RULING
)	DENYING DISCRETIONARY
THE UNIVERSITY OF WASHINGTON,)	REVIEW
KIMA LEIGH CARGILL, and)	
SUSAN ELIZABETH JEFFORDS,)	
)	
Respondents.)	
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Angela Ju (Angela) and Frances Du Ju (Frances) seek discretionary review of a trial court order granting in part and denying in part a defense motion under CR 12 for judgment on the pleadings.¹ The order has the effect of dismissing all claims raised by Frances. Review is denied.

FACTS

Angela and Frances, as pro se plaintiffs, filed a "Complaint for Education Discrimination and Disability Discrimination and Breach of Contract and Negligence and Jury Demand" naming as defendants the University of Washington (UW), Kima Cargill and Susan Jeffords. It alleges that Angela, a Taiwanese American, was an undergraduate student at the UW, and that Frances is her mother. According to the complaint, while Angela was attending a program in Greece in August 2005, UW lecturer Dr. Taso Lagos made inappropriate remarks and unwelcome advances on her. Angela filed a complaint with the UW Office of the Ombudsman in November 2005. It is not clear what resolution was made as to this complaint. In February 2006, Angela was

¹ To avoid confusion, Frances and Angela will be referred to by their first names.

attending a UW program in Cuba. According to the complaint, the UW required Angela to undergo physical and mental examinations for the Cuba program that it did not require of students who were not of Taiwanese heritage, and its representative kept Angela in a Cuban medical clinic for two nights without contact with her classmates. According to the complaint, a UW representative lied to Frances about Angela's condition and, on February 9, 2006, demanded that Frances fly to Miami to pick Angela up. According to the complaint, the UW told Angela she would receive full credit for the Cuba program but that she learned in April 2006 that she did not receive such credit.

In February 2006, apparently after returning from Cuba, Angela filed a retaliation and discrimination complaint with the University Complaint Investigation and Resolution Office (UCIRO). Although it is not entirely clear, it appears that this complaint relates primarily to Angela's experience in the Cuba program, although it may also encompass an allegation that the UW retaliated against Angela because of the complaint she made to the Office of the Ombudsman based on her experience in the Greece program. UCIRO concluded its investigation and found no support for the allegations, notifying Angela of its decision in August 2006.

Angela apparently applied for another UW program in Rome. On August 1, 2006, the UW requested an additional examination from a UW doctor prior to Angela's participation in this program. The UW physician did not approve Angela for the program, so informing her two days prior to the day she was supposed to leave. Angela went to Rome anyway and was denied housing in the program. The complaint alleges that these events put Angela at a disadvantage in writing her senior thesis, and that she was subjected to different medical requirements and timelines than students who had

not filed a sexual harassment grievance, and who were not of Taiwanese heritage or who did not have a perceived disability.

Based on these factual allegations, the complaint alleges causes of action under RCW 28B.110 (prohibiting gender discrimination against any student) (first cause), RCW 49.60 (Washington Law Against Discrimination) (second cause), for retaliation (third cause), and for breach of the agreements between Angela and the UW for the Cuba and Rome programs (fourth cause). It also alleges a negligence action based on the UW's duty to supervise its faculty and subordinates (fifth cause), and a cause of action under the Health Insurance Portability and Accountability Act (HIPAA) (sixth cause). It further alleges the UW charged excessive fees for the Cuba program, that it failed to refund any portion of the fees paid for the program, and that it caused Frances a financial burden by requiring her to fly to Miami to pick up Angela (seventh cause). It finally alleges a cause of action for emotional distress (eighth cause).

The UW moved for a partial judgment on the pleadings, arguing that Frances did not have standing to bring claims based on Angela's injuries and that she failed to state cognizable claims. It moved for judgment on the pleadings as to all of Frances' claims and for judgment on the pleadings as to Angela's fourth, fifth, sixth, seventh and eighth causes of action. The court granted the motion in part, finding that Frances was not the real party in interest under CR 17, and that the defendants did not owe her a duty under any of the theories pled in the complaint. The court dismissed all the claims by Frances. It recited that the parties agreed there was no private cause of action under HIPAA and dismissed that claim (the sixth claim) as to both plaintiffs. It denied the motion to dismiss Angela's fourth, fifth, seventh and eighth causes of action. Frances

and Angela seek discretionary review. Trial on the remaining claims is set for July 20, 2009.²

DISCRETIONARY REVIEW CRITERIA

Discretionary review of an interlocutory decision may be accepted under RAP

2.3(b) only in the following circumstances:

(1) The superior court has committed an obvious error which would render further proceedings useless;

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

DECISION

In the motion for discretionary review, petitioners argue (1) that Frances is a real party in interest because Angela has not objected to her being in the suit, (2) that the trial court cannot rule under CR 12(c) because petitioners have requested a jury trial, (3) that the complaint is legally sufficient and there are material issues of fact, (4) that the eighth claim for emotional distress is legally sufficient, and (5) that the trial court “flip flopped” its decision on the emotional distress claim.

² The trial court subsequently entered a partial summary judgment dismissing some of Angela's claims. Although Angela and Frances filed a notice of discretionary review under cause number 63133-1-I, the notice was not timely and they did not move for an extension. Cause number 63133-1-I was dismissed as untimely on May 1, 2009.

As an initial matter, it does not appear that Angela is an aggrieved party. The only claim dismissed as to Angela is the HIPAA claim. Because the parties agreed there was no cause of action, Angela cannot claim this dismissal was error. Because none of Angela's other claims were dismissed in this order, she may not seek review of the dismissal of Frances's claims. RAP 3.1. Frances contends Angela became an "aggrieved party" after Frances was dismissed because Angela does not have any experience or training in the law. The essence of this argument is that Angela needs Frances to be part of the suit because Angela does not otherwise have the time or inclination to pursue it. This argument is specious. The fact that Frances has no claim to pursue and may not pursue Angela's claims does not make Angela aggrieved.

Issue 1: Frances argues that CR 17 prevents her dismissal absent objection by Angela. But there is no authority for this position and the plain language of the rule does not give Frances the right to pursue claims in which she has no interest merely because the party who does have an interest does not object. The lack of an objection does not make Frances a real party in interest.

Issue 2: Frances contends that the trial court cannot dismiss under CR 12(c) because she has requested a jury trial. But whether a duty exists is a question of law. Folsom v. Burger King, 135 Wn.2d 658, 671, 958 P.2d 301 (1998). As discussed below, duty is necessary to establish tort or contract claims. An emotional distress claim goes to a jury only if the court determines reasonable minds could differ on whether the alleged conduct is sufficiently extreme to result in liability. Robel v. Roundup Corp., 148 Wn.2d 35, 51, 59 P.3d 611 (2002). The mere fact that a party requests a jury does not bar the court from ruling on these issues as a matter of law.

Issue 3 and 4: Frances contends the complaint is legally sufficient. The question of whether the complaint is legally sufficient as to Angela is not before the Court because Angela's claims have not been dismissed. The question is whether the trial court committed obvious or probable error in finding that the complaint is not legally sufficient as to claims asserted by Frances.

In reviewing a CR 12(c) dismissal, the factual allegations contained in the complaint are accepted as true, the decision is reviewed de novo, and the question is whether the claimant can prove any set of facts, consistent with the complaint, that would entitle the claimant to relief. Parilla v. King County, 138 Wn. App. 427, 431-32, 157 P.3d 879 (2007). However, a motion under CR 12 admits only facts well pleaded, and not mere conclusions. Trumble v. Wasmer, 43 Wn.2d 592, 596, 262 P.2d 538 (1953). Frances alleges contract, tort and emotional distress claims. To establish a claim for breach of contract, the plaintiff must show the existence of a valid contract, a breach of the contractual duties, and resulting damage. Lehrer v. State, Dep't of Soc. & Health Servs., 101 Wn. App. 509, 516, 5 P.3d 722 (2000). To establish a claim for negligence, the plaintiff must show that the defendant owes the plaintiff a duty which has been breached, and a resulting injury. Reynolds v. Hicks, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). To establish a claim for emotional distress, or outrage, the plaintiff must show extreme or outrageous conduct that results in the intentional or reckless infliction of severe emotional distress. Strong v. Terrell, 147 Wn. App. 376, 385, 195 P.3d 977 (2008).

Frances contends that respondents "totally disregarded Vicarious Liability when they argued that Frances Ju did not have standing to bring any claims against the UW."³ But she does not explain what she means by this or how vicarious liability gives rise to any claim. She also contends respondents "disregarded the fact that contracts were established by words ..., conduct, and/or prior dealings."⁴ But she does not explain what words, conduct or dealings she is referring to or how they establish a contract. She contends the UW intentionally lied about the severity of Angela's illness and demanded that Frances fly to Miami to pick Angela up. The trial court must assume this allegation is true for the CR 12 motion. But, consistent with the pleadings, the trial court could have determined that this conduct is not so extreme or outrageous as to support an emotional distress claim. Frances contends the UW owed her a duty under Beal for Martinez v. City of Seattle, 134 Wn.2d 769, 954 P.2d 237 (1998). Beal discusses the liability of a municipality under the public duty doctrine when a special relationship gives rise to a duty to perform a mandated act for the benefit of a particular person. Assuming again that the UW did assure Frances that it would investigate Angela's grievances, the trial court could have determined that such assurances were not sufficient to create a special relationship, or that an assurance that the claim would be investigated (as it was) does not violate any duty to perform a mandated act. Relying on Galbraith v. TAPCO Credit Union, 88 Wn. App. 939, 946 P.2d 1242 (1997), Frances also suggests she has a discrimination claim. Galbraith supports the argument that one who assists another in pursuing a discrimination claim may be protected by Washington's Law Against Discrimination (WLAD). But the complaint alleges that

³ Petitioners' Motion for Discretionary Review at 9.

⁴ Petitioners' Motion for Discretionary Review at 10.

Angela filed a discrimination claim. It does not allege that Frances filed a claim, or that she assisted Angela in pursuing her claim, or that the UW had any reason to retaliate against Frances. The trial court could have also determined that Frances failed to allege sufficient facts showing that she actually suffered retaliatory action.

Angela is a competent adult. Frances may not pursue any of Angela's claims because Frances is not the real party in interest in those claims. The fact that Frances is Angela's mother, or that she provided Angela with funds to pursue her education, does not make Frances a party to Angela's claims. As to any claims that rest other than on Frances's status as Angela's mother, the trial court could have determined that Frances failed to adequately plead facts sufficient to support the causes of action she alleged. Frances admits she "did not plead facts in support of every arcane element of her claim."⁵ But this is the essence of a motion under CR 12, and failing to plead the elements of a claim is a basis for dismissal.

Issue 5: Frances contends the trial court flip-flopped on the dismissal of the eighth claim. The original order erroneously dismissed this claim but the corrected order remedied the problem. The trial court's correction of its initial mistake does not warrant discretionary review.

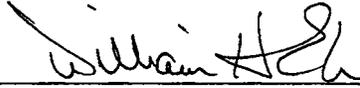
In order to obtain interlocutory review, Frances must show obvious or probable error. Because she has not done so, review is denied. All of her appellate issues may be pursued when the remaining claims are resolved in the trial court.

⁵ Petitioners' Motion for Discretionary Review at 17.

Now, therefore, it is hereby

ORDERED that the motion for discretionary review is denied.

Done this 12th day of May, 2009.



Court Commissioner

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 MAY 12 AM 10:21

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MAY 15 2009
BENNETT BIGELOW
& LEEDOM

Appendix 2

*The Court of Appeals
of the
State of Washington*

RICHARD D. JOHNSON,
Court Administrator/Clerk

DIVISION I
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May 1, 2009

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Bennett Bigelow & Leedom PS
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Frances D Ju
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Marie Renee Westermeier
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MAY 04 2009

**BENNETT BIGELOW
& LEEDOM**

CASE #: 63133-1-I

Angela Ju and Frances Du Ju, Petitioners v. The University of Washington, et al.,
Respondents

Counsel:

The following notation ruling by Commissioner William Ellis of the Court was entered on May 1, 2009, regarding Court's Motion to Dismiss:

On January 28, 2009, the trial court entered a partial summary judgment dismissing several, but not all, of Angela Ju's claims against the University of Washington. On March 12, 2009, Angela Ju and Frances Ju, Angela's mother, filed a notice for discretionary review. This court informed the parties that the notice appeared to be untimely, directed petitioners to file a motion to extend the time to file a notice for discretionary review, and set a court's motion to dismiss for May 1 in the event they failed to do so.

As a preliminary matter, Frances Ju is not permitted to pursue review of the dismissal of Angela Ju's claims, and, because Angela is a competent adult and Frances is not an attorney, Frances Ju may not appear on behalf of her daughter. Frances and Angela have separately sought review of the dismissal of other claims in this same matter in cause number 62032-1. A decision on that motion is pending.

In response to the court's letter, Frances Ju sent the Court a letter indicating that the notice for discretionary review was mailed on February 23, 2009, that King County had trouble finding it, and that it was filed on March 9, 2009. She indicated that she had no objection to the Court's dismissal of the March 12 notice for discretionary review (apparently a duplicate filing) and would not be filing a motion for an extension of time. Ju's letter seems to confuse the time for filing a motion for discretionary review with the time for filing a notice for

Page 2 of 2

May 1, 2009

CASE #: 63133-1-I

Angela Ju and Frances Du Ju, Petitioners v. The University of Washington, et al.,
Respondents

discretionary review. This letter was not sent to respondents, who appeared at the hearing on the court's motion.

A notice for discretionary review must be filed within 30 days of entry of the decision a party wants reviewed. RAP 5.2(b). The decision Angela Ju wants reviewed was filed on January 28 but the notice for discretionary review was not filed until March 12. Even if a notice was filed on March 9, it would be untimely. The test for granting an extension of time is set out in RAP 18.8(b). Because Angela Ju has not moved for an extension of time, there is no ground on which to grant one. Because the discretionary review is untimely on its face, the court's motion is granted and the case is dismissed. The hearing on the motion for discretionary review in this cause number, now scheduled for May 8, 2009, is stricken. Angela Ju retains the right to seek review as a matter of right after the proceedings in the trial court are concluded.

Now, therefore, it is hereby

ORDERED that this discretionary review is dismissed as untimely; and, it is further

ORDERED that the hearing set for May 8, 2009 is stricken.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

LLS

Appendix 3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ANGELA JU and FRANCES DU JU,
Petitioners,

v.

THE UNIVERSITY OF
WASHINGTON, KIMA LEIGH
CARGILL, and SUSAN ELIZABETH
JEFFORDS,
Respondents.

FILED
STATE OF WASHINGTON
2009 NOV 13 P 3:12
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NO. 83601-9

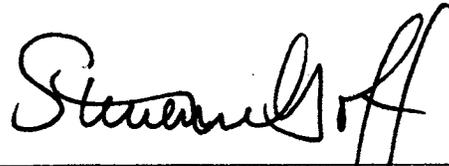
RULING DENYING REVIEW

Angela Ju and her mother Frances Ju filed a complaint against the University of Washington, Vice Provost Susan Jeffords, and Professor Kima Cargill for events arising out of Angela Ju's participation in study abroad programs offered by the university. The King County Superior Court partially granted the defendants' motion under CR 12 for judgment on the pleadings, effectively dismissing all of Frances Ju's claims. Angela and Frances Ju sought discretionary review of that decision by Division One of the Court of Appeals. But Commissioner Ellis denied review, and a panel of judges denied a motion to modify the commissioner's ruling. Angela and Frances Ju now seek this court's review of that decision. RAP 13.5.

Preliminarily, I agree with Commissioner Ellis that Angela Ju is not aggrieved of the trial court's decision, and thus may not seek appellate review. RAP 3.1. And there is no merit to Frances Ju's arguments that respondents' counsel should be sanctioned, that Angela Ju's consent to her mother's participation in the lawsuit somehow makes Frances Ju a real party in interest, or that a plaintiff's request for a jury trial precludes dismissal under CR 12. And having independently reviewed the

record and the parties' agreements, I agree with Commissioner Ellis that the superior court committed neither obvious nor probable error in dismissing Frances Ju's claims. RAP 2.3(b) (criteria for acceptance of review). As more fully explained in his ruling, Frances Ju had no standing to assert a discrimination claim under RCW 28B.110.010, which prohibits discrimination against higher education students; she failed to make out a cause of action under the Washington Law Against Discrimination; she failed to allege facts sufficient to maintain her breach of contract claims; and she failed to allege facts sufficient to maintain any other claim.

It follows that the Court of Appeals did not err or depart from accepted practice by denying discretionary review. RAP 13.5(b). Accordingly, the motion for discretionary review is denied.



COMMISSIONER

November 13, 2009

Appendix 4

THE SUPREME COURT OF WASHINGTON

ANGELA JU and FRANCES DU JU,

Petitioners,

v.

THE UNIVERSITY OF WASHINGTON,
KIMA LEIGH CARGILL, and SUSAN
ELIZABETH JEFFORDS,

Respondents.

NO. 83601-9

ORDER

C/A No. 62032-1-J

Department II of the Court, composed of Chief Justice Madsen and Justices Alexander, Chambers, Fairhurst and Stephens, considered this matter at its February 9, 2010, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify the Commissioner's Ruling is denied.

DATED at Olympia, Washington this 10th day of February, 2010.

For the Court

Madsen, C.J.
CHIEF JUSTICE

2010 FEB 10 A 9:59

STATE OF WASHINGTON
CLERK OF THE COURT

by h

Appendix 5

RICHARD D. JOHNSON,
Court Administrator/Clerk

*The Court of Appeals
of the
State of Washington*

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August 6, 2009

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AUG 07 2009

**BENNETT BIGELOW
& LEEDOM**

CASE #: 63687-1-I

Angela & Frances Ju, Petitioners v. The University of Washington, et al., Respondents

Counsel:

The following notation ruling by Commissioner James Verellen of the Court was entered on August 6, 2009 :

"After reviewing the motion for discretionary review, response, and reply three things are clear.

First, as clarified in the trial court's July 2, 2009 order striking trial date, the trial court's May 15, 2009 Order Granting Defendants' Motion for Partial Summary Judgment as amended by the May 18, 2009 Amended Order Granting Defendants' Motion for Partial Summary Judgment resolved all claims as to all parties.

Second, Angela Ju and Frances Du Ju timely filed a notice of discretionary review seeking review of the superior court May 18, 2009 Amended Order Granting Defendants' Motion for Partial Summary Judgment and the May 15, 2009 Order Granting Defendants' Motion to Strike.

Third, RAP 5.1(c) expressly provides that a "notice for discretionary review of a decision which is appealable will be given the same effect as a notice of appeal." The Ju's notice of discretionary review is given the same effect as a notice of appeal.

Therefore, the Ju's have an appeal as a matter of right of the May 18, 2009 and May 15, 2009 trial court orders designated in their notice, the criteria for discretionary review have no application, and the hearing noted for the August 7, 2009 motion calendar is stricken. The clerk shall set a perfection schedule for this appeal."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

ssd