

FILED
July 22, 2016
Court of Appeals
Division I
State of Washington

No. 74545-0-1

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

PUGET SOUND SECURITY PATROL, INC.,
A Washington corporation,

Petitioner,

vs.

KATHRYN BATES, an individual,

Respondent.

RESPONDENT'S BRIEF

Richard R. Beresford, WSBA No. 3873
Jonathan P. McQuade, WSBA No. 37214
Beresford Booth PLLC
145 Third Avenue S., Suite 200
Edmonds, Washington 98020-3593
(425) 776-4100
Attorneys for Respondent Kathryn Bates

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ASSIGNMENTS OF ERROR..... 2

III. STATEMENT OF THE CASE..... 3

 A. Underlying Facts..... 3

 B. Procedural Posture..... 4

IV. ARGUMENT 6

 A. The Court Reviews Summary Judgment Orders De Novo. 6

 B. The Trial Court Properly Struck Puget Sound’s Late-Filed Brief, Declarations, and Other Inadmissible Evidence. 7

 1. Puget Sound’s Supplemental Brief and Three Declarations Attached to the Response to the Motion to Strike Were Properly Excluded Because They Were Filed Late. 8

 2. The Trial Court Properly Considered the Kirby and Davis Declarations as Support for the Opposition to the Motion to Strike. Puget Sound Did Not Include the Declarations in its Opposition to Kathryn’s Motion for Summary Judgment. 10

 3. Even if this Court Applied the Burnet Factors, the Trial Court Properly Excluded the Evidence. 10

 C. The Trial Court Properly Dismissed the Claim for Unjust Enrichment..... 13

 D. The Trial Court Properly Dismissed the Conspiracy Claim. 14

 a. Kathryn Assisted William by Reviewing his Puget Sound Employment Agreement. 18

| | |
|--|----|
| b. Kathryn Advised William to Discuss Indemnification with U.S. Security | 18 |
| c. Kathryn Witnessed William’s Signature on the U.S. Security Employment Agreement. | 22 |
| d. William Used Kathryn’s Email Address to Contact U.S. Security. | 23 |
| e. William’s Contributions to Kate’s Separate Estate Increased. | 23 |
| V. CONCLUSION..... | 24 |

TABLE OF AUTHORITIES

CASES

All Star Gas, Inc., of Washington v. Bechard,
100 Wn. App. 732, 740, 998 P.2d 367, 372 (2000) -----15, 16

Chen v. State of Washington,
86 Wn. App. 183, 191, 937 P.2d 612 (1997) ----- 13

Coggle v. Snow,
56 Wn. App. 499, 507, 784 P.2d 554 (1990) -----9

Dewey v. Tacoma Sch. Dist. No. 10,
95 Wn. App. 18, 26, 974 P.2d 847 (1999) ----- 14

Kahn v. Salerno,
90 Wn. App. 110, 951 P.2d 321 (1998)----- 13

Mahoney v. Shinpoch,
107 Wn.2d 679, 683, 732 P.2d 510 (1987)-----7

Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.,
114 Wn. App. 151, 157, 52 P.3d 30 (2002)----- 8, 15

Pacific Northwest Shooting Park Ass'n v. City of Sequim,
158 Wn.2d 342, 352, 144 P.3d 276 (2006)----- 14

Rice v. Offshore Sys., Inc.,
167 Wn. App. 77, 85, 272 P.3d 865 (2012) -----8

State v. Hill,
123 Wn.2d 641, 644, 870 P.2d 313 (1994)----- 15

Sterling Business Forms, Inc. v. Thorpe,
82 Wn. App. 446, 451, 918 P.2d 531 (1996) ----- 15

White v. State,
131 Wn.2d 1, 9, 929 P.2d 396 (1997) -----8

Young v. Key Pharm., Inc.,
112 Wn.2d 216, 225, 770 P.2d 182 (1989)-----7

RULES

CR 56----- 5, 7

I. INTRODUCTION

This lawsuit began as an action to enforce a noncompete agreement against William Bates, the husband of Respondent, Kathryn Bates.¹ Specifically, Appellant Puget Sound Security Patrol, Inc. claimed William violated a noncompete he executed while an employee at Puget Sound.

Nearly two years into the litigation, Puget Sound attempted to shoehorn a civil conspiracy action against Kathryn, claiming that (1) Kathryn's knowledge of the Puget Sound noncompete; (2) Kathryn's act of witnessing William's signature when he agreed to work for a Puget Sound competitor; and (3) William's reimbursement to Kathryn for expenses pursuant to their premarital agreement sufficiently evidenced a conspiracy between the married couple. Puget Sound inexplicably also added a separate cause of action for "constructive trust," an equitable remedy that is not a legal cause of action in Washington.

Kathryn moved for summary judgment on Puget Sound's claims, including the claim for "constructive trust."

In its opposition, Puget Sound argued for the first time, in a footnote no less, that the constructive trust claim put Kathryn on notice of an unjust enrichment claim Puget Sound had never pled.

¹ To avoid confusion, William Bates and Kathryn Bates will be referred to throughout as "William" and "Kathryn" respectively.

Several days after its response was due, and with no justification or CR 56(f) factors argued, Puget Sound filed supplemental briefing opposing Kathryn's summary judgment. Puget Sound attached an unauthenticated email directly to the supplemental brief. When Kathryn moved to strike the late-filed brief and unauthenticated email, Puget Sound doubled down by filing three *additional* declarations (with exhibits) two days before the hearing and after Kathryn had filed her summary judgment reply brief.

The trial court struck the supplemental briefing, the unauthenticated email, and the three declarations, and did not consider them in deciding the motion for summary judgment. The trial court also granted Kathryn's motion for summary judgment.

Puget Sound appeals both decisions.²

II. ASSIGNMENTS OF ERROR

Kathryn assigns no error to the trial court's proper decision to grant summary judgment in her favor or to strike the late-filed briefing and declarations.

² Puget Sound continues its trend of disregarding procedure – in this case, RAP 9.12 and RAP 10.3 - by including evidence and issues that was not before the trial court before the order on summary judgment was entered. Puget Sound also attaches appendices to its Appellant's Brief without this Court's approval. Kathryn has filed a motion to strike concurrently with this Respondent's brief.

III. STATEMENT OF THE CASE

A. Underlying Facts.

Kathryn Bates married William Bates in 2005. Prior to marriage, Kathryn and William entered into a premarital agreement to evidence their intent to keep their finances separate. CP 610-11.

In July of 2009, William Bates began working as a business development manager for Puget Sound. CP 283. On September 9, 2009, two months after William commenced work, William signed an offer letter and executed an “Employee Intellectual Property Agreement (Including Confidentiality, Invention Assignment, Nonraiding and Noncompetition) (the “Noncompetition Agreement”).” CP 8; CP 126-131. In this Noncompetition Agreement, William agreed that for twenty-four months after his employment terminated, William would not directly or indirectly compete with Puget Sound or work for an entity that competes with Puget Sound. CP 13 at ¶7.

Other than suggesting edits to the Noncompetition Agreement before William signed it, Puget Sound proffered no evidence that Kathryn reviewed the final, executed, Noncompetition Agreement. Further, the uncontroverted evidence shows that Kathryn did not read the finalized Noncompetition Agreement at any time until after Puget Sound commenced this suit. CP 570.

In October of 2010, William resigned from Puget Sound. CP 94. On November 16, 2010, William executed an employment agreement with U.S. Security Associates, Inc., a national security firm with an office in Federal Way, Washington. CP 307-11; CP 247. Kathryn witnessed William's signature on the U.S. Security employment agreement. CP 311. William notified U.S. Security of the Noncompetition Agreement he executed with Puget Sound before signing the U.S. Security employment agreement. CP 322.

B. Procedural Posture.

Puget Sound initially filed suit against William Bates, only, on August 24, 2011 alleging claims of Violation of the Uniform Trade Secrets Act, breach of contract, and tortious interference with business relationships due to his U.S. Security employment. CP 1-15. Puget Sound amended its complaint three different times over the next two years, adding both parties and claims up to the eve of trial. CP 514 – 524. The trial court denied Puget Sound's fourth attempt to amend as Puget Sound sought to introduce additional claims only ten days before trial. CP 634 – 663; CP 671 – 72.

Puget Sound did not add Kathryn Bates as a defendant, or make the claims of "civil conspiracy" and "constructive trust" until Puget Sound

filed its Third Amended Complaint on May 1, 2013, nearly two years after commencing this lawsuit. CP 514 – 524.

Kathryn moved for summary judgment, claiming that Puget Sound had proffered no evidence of a conspiracy between William and Kathryn, and that there is no cause of action for “constructive trust.” CP 528 – 542. Kathryn noted the hearing for September 30, 2013. Accordingly, and as required by CR 56(c), Puget Sound’s response motion was due by August 19, 2013.

Puget Sound filed its initial response on August 16th. CP 586-592. As to the constructive trust claim, Puget Sound didn’t even refer to it by name, calling it the “other claim.” CP 592. In a footnote, and without explanation for its inclusion, Puget Sound included legal authority concerning “unjust enrichment.” Id. at fn. 1.

Several days later, and without leave of court or justification for its tardiness, Puget Sound filed a “Supplemental Brief Opposing K. Bates’s Summary Judgment.” CP 628-33. This late-filed brief added additional argument not set forth in Puget Sound’s initial response. Puget Sound also attached an *unauthenticated* email to the brief as an exhibit. CP 633.³

Kathryn moved to strike the late-filed brief and the attached unauthenticated exhibit. CP 664-70.

³ At the same time, Puget Sound also filed a motion for leave to file a fourth amended complaint. CP 634 – 663.

In response, Puget Sound filed an opposition to the motion to strike. Puget Sound also attached three declarations: (1) the declaration of George Schaeffer with exhibits (CP 692 – 701); (2) the declaration of D. James Davis with exhibits (CP 702 – 750); and (3) the declaration of Jeff Kirby (CP 751 – 52) in support of its opposition.

On August 30, 2013, the trial court granted Bates' motion for summary judgment, finding that Puget Sound failed to establish a genuine issue of material fact concerning the claims for civil conspiracy and constructive trust. CP 768-69.

On September 20, 2013, the trial court also granted in part, and denied in part, Kathryn's motion to strike the inadmissible evidence Puget Sound offered in Puget Sound to Kathryn's motion for summary judgment. CP 770-72. Specifically, the trial court struck the late-filed supplemental briefing and unauthenticated exhibit, the three declarations and attached exhibits, as well as inadmissible evidence offered in Puget Sound's initial response motion.⁴

IV. ARGUMENT

A. The Court Reviews Summary Judgment Orders De Novo.

⁴ Puget Sound does not assign error to the trial court's striking of inadmissible evidence in Puget Sound's response brief. See CP 771 at ¶1 – 3.

“The standard of review on appeal of a summary judgment order is de novo; that is, the appellate court conducts the same inquiry as the trial court.” Mahoney v. Shinpoch, 107 Wn.2d 679, 683, 732 P.2d 510 (1987).

Courts grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56. “The moving party bears the initial burden of showing the absence of an issue of material fact.” Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Next, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Id.

The nonmoving party cannot rely solely on the allegations in his or her pleadings, on speculation, or on argumentative assertions that unresolved factual issues remain. White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Such assertions must be supported by evidence, and that evidence must be admissible at trial. Meyer v. Univ. of Wash., 105 Wn.2d 847, 852, 719 P.2d 98 (1986). Absent such facts, the moving party prevails merely by pointing out the lack of evidence to support the non-moving party’s case. Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc., 114 Wn. App. 151, 157, 52 P.3d 30 (2002).

B. The Trial Court Properly Struck Puget Sound’s Late-Filed Brief, Declarations, and Other Inadmissible Evidence.

Puget Sound first assigns error to the trial court's exclusion of its late-filed supplemental brief and three declarations. This Court reviews a trial court's decision not to exclude untimely evidence for abuse of discretion. Keck v. Collins, 184 Wn.2d 358, 362, 357 P.3d 1080 (2015). However, this Court reviews a ruling on a motion to strike evidence made in conjunction with a summary judgment motion *de novo*. Rice v. Offshore Sys., Inc., 167 Wn. App. 77, 85, 272 P.3d 865 (2012).

1. Puget Sound's Supplemental Brief and Three Declarations Attached to the Response to the Motion to Strike Were Properly Excluded Because They Were Filed Late.

CR 56(c) requires responding parties to "file and serve opposing affidavits, memoranda of law or other documentation not later than 5 calendar days prior to the hearing."

When a party moves for summary judgment, the opposing party may request a continuance if it needs additional time to obtain affidavits that will justify its opposition to summary judgment. CR 56(f). The party should support its motion for a continuance with affidavits that provide a reason why the party is unable to obtain the witness's affidavit in time for summary judgment. CR 56(f). "[T]he court has a duty to give the party a reasonable opportunity to complete the record before ruling on the case." Cogle v. Snow, 56 Wn. App. 499, 507, 784 P.2d 554 (1990). But it "may deny a motion for a continuance when (1) the moving party does not offer

a good reason for the delay in obtaining the evidence; (2) the moving party does not state what evidence would be established through the additional discovery; or (3) the evidence sought will not raise a genuine issue of fact.” Coggle, 56 Wn. App. at 507.

Here, Puget Sound’s response brief was due on August 19, 2013. Puget Sound filed a supplemental brief on August 22nd, several days after the CR 56(c) deadline. Puget Sound filed the supplemental briefing without justification and without seeking a continuance as required by CR 56(f).

After Kathryn had filed her reply brief, Puget Sound then filed three declarations two days before the summary judgment hearing. The three declarations were all attached to Puget Sound’s response to Kathryn’s motion to strike Puget Sound’s supplemental briefing.

Puget Sound never offered any reason why the information contained in the untimely materials were not available, why the materials could not have been presented in a timely fashion, and how Puget Sound acted in a diligent manner as required by CR 56(f). In fact, Puget Sound admits that the Supplemental Brief, unauthenticated exhibit, and the three declarations were “after Puget Sound Security’s opposition materials were due.” App. Br. at 13. Accordingly, the trial court’s decision to strike the materials was proper.

2. The Trial Court Properly Considered the Schaeffer, Kirby and Davis Declarations as Support for the Opposition to the Motion to Strike. Puget Sound Did Not Include the Declarations in its Opposition to Kathryn's Motion for Summary Judgment.

Puget Sound claims the declarations of George Schaeffer, Jeff Kirby, and D. James Davis should have been considered as part of its summary judgment response. Not only were these filed after Kathryn filed her reply, they were filed *only* as declarations in opposition to the motion to strike. Puget Sound chose not to amend its summary judgment response and include the three declarations. Accordingly, the trial court properly declined to consider these declarations when ruling on summary judgment.

3. Even if this Court Applied the Burnet Factors, the Trial Court Properly Excluded the Evidence.

Puget Sound relies on Keck v. Collins, 184 Wn.2d 358, 325 P.3d 306 (2015) for the proposition that a trial court must consider the factors from Burnet on the record before excluding untimely disclosed evidence in the context of a summary judgment hearing. See App. Br. at 22 (“Trial courts must consider the factors from *Burnet v. Spokane Ambulance*, 131 Wn.2d 484 (1997), before excluding untimely disclosed evidence.”) In other words, Puget Sound argues that the trial court should have considered (1) a lesser sanction; (2) willfulness of the violation; and (3)

substantial prejudice arising from the violation. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

As a threshold matter, the summary judgment hearing and ruling in this case occurred on August 30, 2013. The Keck decision upon which Puget Sound so heavily relies was issued on September 24, 2015 - more than two years after the hearing at issue in this case. Neither the parties nor the court could have known that the Supreme Court would change the trial court's guidelines for excluding untimely evidence. No case law pre-dating August 30, 2013 (the date of the summary judgment hearing) would have notified either the court or the parties that the Burnet analysis might apply to untimely evidence a litigant never files but simply brings to a summary judgment hearing. Puget Sound's plea for application of case law that post-dates the hearing in this case should be rejected.

Further, even if the Keck rule were in place at the time of the summary judgment hearing in this case, application of the Burnet factors here would have yielded the same result - exclusion of the documents and/or disregarding them in the summary judgment analysis.

First, Puget Sound presents no evidence that the trial court did not consider a lesser sanction. The trial court did, however, allow a separate hearing on the motion to strike, and provided Puget Sound an opportunity

to show good cause as would be required under CR 56(f). Puget Sound failed to do so.

Second, Puget Sound's actions were willful or intentional. Contrary to Puget Sound's claim, "willful or intentional" in discovery abuse claims means only "without a reasonable excuse." See Carlson v. Lake Chelan Comm. Hosp., 116 Wn. App. 718, 75 P.3d 533 (2003).

Here, Puget Sound offered no reasonable excuse, whether before the trial court or in this appeal, for filing the briefing and declarations late. Puget Sound's defense is not a defense; it claims it "could have coordinated its timing better." App. Br. at 24. Without a reasonable excuse, this Court may find Puget Sound's actions were willful and intentional.

Finally, Kathryn would be prejudiced if the supplemental brief and declarations were considered for summary judgment purposes. The supplemental brief, filed several days late, attempted to add a cause of action that Puget Sound had never pled. The three declarations were filed only two days before the summary judgment hearing and *after* Kathryn had filed her reply brief. In other words, Puget Sound sought consideration of both allegations, facts, declarations, and exhibits that Kathryn never had a chance to respond to.

C. The Trial Court Properly Dismissed the Claim for Unjust Enrichment.

Puget Sound claims that pleading “constructive trust” was sufficient notice of its unjust enrichment claim. Or as Puget Sound inartfully stated in its motion for leave to file a fourth amended complaint: “Although the complaint fairly put her on notice, Puget Sound requests leave to amend its complaint to clarify that it claims unjust enrichment by William and Kathryn Bates and offers that constructive trust is a possible remedy for that claim.” CP 634.

“Complaints that fail to give the opposing party fair notice of the claim asserted are insufficient.” Pacific Northwest Shooting Park Ass’n v. City of Sequim, 158 Wn.2d 342, 352, 144 P.3d 276 (2006). If a party fails to plead a cause of action, that party “cannot finesse the issue by later inserting the theory into trial briefs and contend it was in the case all along.” Dewey v. Tacoma Sch. Dist. No. 10, 95 Wn. App. 18, 26, 974 P.2d 847 (1999).

Puget Sound never pled a claim for unjust enrichment. To state that “constructive trust” and “unjust enrichment” are the same thing is spurious, especially since Puget Sound included a claim of unjust enrichment against U.S. Security in its second amended complaint.⁵

⁵ Puget Sound did not include the Second Amended Complaint in the Clerk’s Papers.

Further, the trial court denied its motion to amend its complaint for a fourth time to add an unjust enrichment claim. Puget Sound does not assign error to this ruling. Accordingly, this Court need not consider the argument on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

D. The Trial Court Properly Dismissed the Conspiracy Claim.

To establish a civil conspiracy, a plaintiff must prove by clear, cogent, and convincing evidence that:

- (1) two or more people combined to accomplish an unlawful purpose or combined to accomplish a lawful purpose by unlawful means; and
- (2) the conspirators entered into an agreement to accomplish the conspiracy.

Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc., 114 Wn. App. 151, 160, 52 P.3d 30 (2002).

“Mere suspicion or commonality of interests is insufficient to prove a conspiracy. **When the facts and circumstances relied upon to establish a conspiracy are as consistent with a lawful or honest purpose as with an unlawful undertaking, they are insufficient.**” All Star Gas, Inc., of Washington v. Bechard, 100 Wn. App. 732, 740, 998 P.2d 367, 372 (2000) (citations omitted) (emphasis added).

Similarly, circumstantial evidence may evidence a conspiracy claim only if the circumstances are “inconsistent with a lawful or honest purpose and reasonably consistent *only* with [the] existence of the

conspiracy.” Sterling Business Forms, Inc. v. Thorpe, 82 Wn. App. 446, 451, 918 P.2d 531 (1996) (citation omitted) (emphasis added).

All Star Gas, cited above, is instructive. In All Star Gas, the defendant, Randy Bechard, was a former retail manager of All Star Gas, a propane fuel seller. Randy Bechard executed a three-year noncompetition agreement that prevented Randy from directly or indirectly competing with his employer. Id. at 734.

Prior to Randy’s resignation, Randy and Rick Bechard, Randy’s brother, formed YES, a company that would also sell propane. Id. When All Star learned of YES, All Star filed a civil conspiracy claim against the brothers, claiming the two had conspired to violate Randy’s non-competition agreement. All Star also sought and received a preliminary injunction against the two brothers.

At summary judgment, however, the trial court dismissed the action, finding “[n]othing in the record [that] suggests Rich had an unlawful motive or used unlawful means when he agreed to form YES with Randy. There is also no evidence of any agreement between Randy and Rick to conspire.” Id. at 741.

Division Three upheld the trial court’s summary judgment dismissal, determining that “All Star presented no facts or evidence showing Rick and Randy agreed to violate the injunction simply by transferring Randy’s interest in YES to Rick. The transfer alone is insufficient to establish a conspiracy.” Id. at 741-42. Further, the court held that Rick’s rehiring of Randy, without evidence that Rick knew

Randy would violate the noncompete, did not “establish an agreement between Rick and Randy to violate the injunction.” Id. at 742.

Here, and despite having conducted extensive discovery over two years of litigation, Puget Sound offered no evidence that Kathryn conspired with William in any manner to accomplish an unlawful purpose. Puget Sound never offered any direct evidence of an agreement (written or otherwise) to accomplish a conspiracy. Further, Puget Sound never offered direct evidence that the two worked together to accomplish an unlawful purpose or for unlawful means. Instead, Puget Sound claims that circumstantial evidence, in and of itself, is enough to raise an issue of material fact here. This is simply not the case.

1. Puget Sound’s Circumstantial Evidence Does Not Raise an Issue of Fact.

Puget Sound relies heavily on Sterling Bus. Forms, Inc. v. Thorpe, 82 Wn. App. 446, 918 P.2d 531 (1996) to claim that circumstantial evidence, in itself, is enough to find a civil conspiracy. See App. Br. at 18. Puget Sound misstates both the facts and court’s holding in Sterling.

In that case, Sterling’s two highest-ranking employees decided to leave Sterling and form a competing business called “Liberty.” Sterling, 82 Wn. App. at 449. The two employees contacted Schumacher, a 50% shareholder of one of Sterling’s most valuable clients, for assistance. Schumacher agreed to loan the new corporation \$150,000.00, help Liberty get bank financing, and become majority shareholder of Liberty once financing was secured. Id. Significantly, there was evidence that Sterling

clients were being solicited by Liberty, and that Schumacher used Sterling's business operations model – as provided by the two former employees – to secure bank financing for Liberty. Id. at 451-52. The trial court, however, dismissed Sterling's civil conspiracy claims against Schumacher on summary judgment.

The Sterling court reversed. First, the Sterling court noted that the formation of Liberty, in and of itself, was not unlawful. Id. at 453. However, there was evidence that Schumacher knew of the two employees' misconduct and more importantly, that he used Sterling's confidential information to secure bank financing for Liberty. Id. The Sterling court noted that “[w]ithout Mr. Schumacher's participation, a jury might infer that financing would not have been obtained and Sterling would not have been damaged by the loss of its customers, employees and goodwill.” Id.

Puget Sound claims that it offered circumstantial evidence sufficient to overcome summary judgment. None of the evidence before the trial court, however, indicates Kathryn and William worked together to accomplish an unlawful purpose or a lawful purpose by unlawful means. Further, none of the evidence before the trial court shows Kathryn and William entered into an agreement to accomplish the conspiracy.

a. Kathryn Assisted William by Reviewing his Puget Sound Employment Agreement.

Puget Sound first claims that by suggesting edits to Puget Sound's noncompete agreement, Kathryn first became complicit in the purported conspiracy.

Washington does not allow a party to point to the commonality of interest between alleged co-conspirators to prove the conspiracy. Corbit v. J.I. Case Co., 70 Wn.2d 522, 424 P.2d 290 (1967). Circumstantial evidence may evidence a conspiracy claim only if the circumstances are "inconsistent with a lawful or honest purpose and reasonably consistent *only* with [the] existence of the conspiracy." Sterling, 82 Wn. App. at 451. (citation omitted) (emphasis added).

Accordingly, the fact that a spouse assisted her husband with negotiating a contract, without more, is not evidence of a conspiracy.

b. Kathryn Advised William to Discuss Indemnification with U.S. Security

A civil conspiracy does not necessarily encompass or apply as to all of the verbal or physical actions of parties who, by happenstance, are interested in the same general subject matter. Corbit, 70 Wn.2d at 529.

When Kathryn learned her husband had been approached by U.S.

Security about a job, she suggested he obtain written confirmation that U.S. Security would support him if there were any issues regarding the non-compete contract:

- 14 "QUESTION: Well, you knew that William had a
15 non-compete with Puget Sound, and you knew he was
16 agreeing to be employed with U.S. Security Associates.
17 Did you ever have a conversation with William about
18 whether or not his employment with U.S. Security
19 Associates would violate his non-compete agreement with
20 Puget Sound Security?"
21 A Yes.
22 Q Please tell me about that.
23 A I told him if he was going to go work for USSA, he
24 better get something in writing that says that they
25 will support him if anything happens.

CP 564.

Kathryn clarified the above testimony later in the deposition:

- 3 QUESTION: When you suggested that you get
something from
4 U.S. Security in writing that they would support him,
5 was that because you thought there was a chance that
6 his employment with U.S. Security Associates would
7 violate the non-compete with Puget Sound Security?
8 A No.
9 Q What do you mean?
10 A I mean, no, that's not why I suggested it.
11 Q Why did you suggest it?
12 A I think it's good practice to do for any salesperson
13 when entering in an employment agreement.
14 Q It's good practice for any salesperson who's switching
15 employers to get something in writing from the new
16 employer that the new employer will support the
17 salesperson if there is a question about whether the
18 new employment violates a non-compete agreement?
19 A That's what I said, correct.

20 Q Has any of your companies ever given written
assurances
21 to a salesperson that it hired that it would support
22 them in that way?
23 A I have had companies give new employees written
24 statements clarifying in what cases they would
support
25 them.

CP 568-69.

Kathryn also testified that she did not even review the terms of the Puget Sound non-compete contract before William accepted the position at U.S. Security and that she was unaware of the details of his new positions at U.S. Security.

Further, William testified in his deposition that he disclosed on multiple occasions the existence of the Puget Sound non-compete contract to USSA employees and principals, and U.S. Security nonetheless hired him:

13 QUESTION: So before you were ever offered a job
at U.S. Security,
14 Mike Grossman, Leo Flury and Soames Navorrow
all
15 understood that there was a non-compete and all
three of
16 them expressed no reservation about your working
for them?
17 A Yes.

William also testified that his new employer, U.S. Security, did not believe the Puget Sound non-compete contract was enforceable.

The above undisputed evidence unequivocally establishes Kathryn did not conspire with William to accomplish an unlawful purpose. Kathryn merely told her husband he should discuss the Puget Sound non-compete contract terms with his new employer, which he did repeatedly. Kathryn then merely witnessed his signature on the U.S. Security employment contract *two days after* William signed the contract. These facts cannot, as a matter of law, establish that two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means. Neither of these acts constitute an unlawful purpose or unlawful act. There exists no evidence that Kathryn combined her actions with William to further any unlawful purpose.

If these facts *do* establish a conspiracy, Puget Sound's claim begs the larger question, which asks if a spouse is liable for conspiracy if the husband is hired by a new employer, despite the husband repeatedly disclosing the existence of a non-compete to a potential new employer? Or, stated another way, what more could Kathryn have done, as a wife, to not be labeled a co-conspirator? To what lengths was she supposed to go? Because there is no evidence of Kathryn and William operating in concert to unlawfully violate the Puget Sound non-compete contract, the conspiracy claim must fail.

c. Kathryn Witnessed William's Signature on the U.S. Security Employment Agreement.

Puget Sound claims the act of witnessing William's signature on the U.S. Security employment agreement two days after the fact is the conspiracy agreement itself: "The signing and witnessing of the employment agreement with U.S. Security constitutes an agreement to accomplish the conspiracy."⁶ But the U.S. Security employment agreement is not an agreement between alleged co-conspirators, Kathryn and William, to do anything illegal; it is only a contractual agreement between U.S. Security and William.

The simple, lawful act of attesting to and recognizing William's signature is *not an illegal act* and therefore not a fact which proves a civil conspiracy. Washington law on this point supports Kate Bates: "When the facts and circumstances relied upon to establish a conspiracy are as consistent with a lawful or honest purpose as with an unlawful undertaking, they are insufficient." All Star Gas, Inc. v. Bechard, 100 Wn. App. 732, 740, 998 P.2d 367, 372 (2000). Witnessing a signature, without evidence of more nefarious actions, cannot be deemed the actions of a co-conspirator.

⁶ CP 522.

d. William Used Kathryn's Email Address to Contact U.S. Security.

Here, Puget Sound is grasping at straws to find a combination of action between Kathryn and William to support the conspiracy, going so far as to attach an unauthenticated email between William and his-then current employer, U.S. Security, to its brief and to the late-filed supplemental materials. See Appendix E; CP 633.

William's email, dated August 31, 2011, is 317 days after William resigned from Puget Sound, and purportedly supports the misguided argument that Kathryn "allowed William to set up an email address through her company, which he used to correspond with US Security." App. Br. at 1. Even if this email were authenticated, and had been properly before the trial court, an email sent 317 days after William left Puget Sound does not evidence Kathryn and William's agreement to accomplish an alleged unlawful act.

e. William's Contributions to Kate's Separate Estate Increased.

Puget Sound attempts to prove an agreement to conspire by arguing Kathryn and William shared alleged community assets and bills. However, the law is not in Puget Sound's favor. Puget Sound must present more than just their suspicion of a conspiracy agreement to avoid summary judgment. Wilson v. State, 84 Wn. App. 332, 350-51, 929 P.2d 448 (1996).

A spousal agreement to reimburse the other for expenses is not an agreement to accomplish a conspiracy - it is just an agreement to keep the lights on and the mortgage paid at Kate's home. William's payment of his portion of living expenses does not prove Kathryn either combined with William to accomplish an unlawful act or entered into an agreement to accomplish the conspiracy. It also ignores the fact that William's obligation to pay his portion of living expenses arose from his premarital agreement with Kathryn years earlier, and there is no evidence Kathryn gained financially or otherwise because of William's actions.

V. CONCLUSION

For the foregoing reasons, Respondent Kathryn Bates respectfully requests that this Court uphold the trial court's summary judgment dismissal of Puget Sound's claims.

Dated this 22nd day of July, 2016.

Respectfully submitted,



Richard R. Beresford, WSBA No. 3873
Jonathan P. McQuade, WSBA No. 37214
Beresford Booth PLLC
145 Third Avenue S., Suite 200
Edmonds, Washington 98020-3593
(425) 776-4100
Attorneys for Respondent Kathryn Bates

Certificate of Service

I caused a copy of the foregoing Respondent's Brief to be served on the following interested attorneys in the manner indicated below:

Via Email and First Class U.S. Mail to:

Aaron V. Roche
Holly A. Williams
Roche Law Group, PLLC
101 Yesler Way, Suite 603
Seattle Washington 98104-2580

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my belief.

Signed this 22nd day of July, 2016, at Edmonds, Washington.



Tiffany Hansen, Paralegal