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STATE OF WASHINGTON

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

Cmm

DIANNA LYNN, Appellant,

v.

LABOR READY, INC., Appellee.

APPELLEE'S REPLY IN SUPPORT OF CROSS-APPEAL

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP

1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

Kelly P. Corr, WSBA No. 00555
Kelsey Joyce, WSBA No. 29280

Attorneys for Appellee Labor
Ready, Inc.

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I. INTRODUCTION

Plaintiff has apparently conceded that all of the testimony Labor Ready moved to strike was inadmissible hearsay, and that Labor Ready's cross-appeal on this issue should be granted. That testimony was Plaintiff's only evidence to suggest that Owens and Cordova met at the YWCA in 2004, rather than at the Jensonia where they both lived throughout the fall of 2003. Absent that testimony, Plaintiff has no evidence to support a finding that Labor Ready's placement of Owens as a temporary janitor at the YWCA caused him to murder Cordova. In other words, she has no evidence to support a finding of cause-in-fact.

The lack of cause-in-fact is just one of three bases on which the Court should affirm summary judgment. The Court should also affirm because: 1) As the trial court held, Labor Ready's allegedly negligent placement of Owens at the YWCA was not the legal cause of Cordova's death, as Owens intentionally shot and killed Cordova two miles away from, and five days after he last worked for, the YWCA; and 2) Labor Ready owed no duty to Cordova because Owens did not use the tasks, premises, or instrumentalities of his temporary janitorial job at the YWCA to murder Cordova. Each of these three fatal flaws alone requires affirming summary judgment for Labor Ready. Plaintiff's case cannot go

forward without a significant rewriting of Washington law, which, despite the tragic facts, is unwarranted.

Just as tragic facts cannot justify rewriting the law, they cannot justify improper litigation tactics. In 1993, the Washington Supreme Court made it clear that “[v]igorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate.” *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 354 (1993) (internal quotations omitted). Yet Plaintiff’s counsel has employed precisely such tactics throughout this litigation. Plaintiff apparently concedes that she knowingly gave a false response to a request for admission. Plaintiff also concedes that she included misrepresentations in her trial court and appellate court briefing. Plaintiff also does not deny that she failed to provide information and documents to Labor Ready despite discovery requests specifically asking for that information—a violation of the discovery rules that the trial court held warranted sanctions. Plaintiff’s latest brief to this Court, which again is rife with falsehoods, leaves no doubt that the trial court’s sanctions were insufficient to deter Plaintiff’s counsel from engaging in unjustifiable litigation tactics.

II. ARGUMENT

A. Plaintiff Misunderstands The Issues on Appeal and Standard of Review.

Although this brief focuses on Labor Ready's cross-appeal, a clarification of the issues raised by Plaintiff's appeal is required. Plaintiff argues that this Court is bound by the trial court's holding that Labor Ready owed a duty to Cordova, and that this holding requires this Court to hold that legal causation existed. Plaintiff also argues that the trial court's dismissal, which was based on legal cause, invaded the province of the jury. Plaintiff is wrong on all counts.

An appellate court can affirm a trial court's granting of summary judgment on any ground established by the pleadings and supported by the record; this is true even if the appellee did not cross-appeal the particular issue that provides an alternate basis for upholding the trial court's ruling. *See, e.g., State v. Michielli*, 132 Wn.2d 229, 242-43 (1997) ("Even if the trial court based its dismissal of the charges on the inappropriate grounds cited by [dissenting judge], this court can still affirm the lower court's judgment on any ground within the pleadings and proof"); *Laue v. Estate of Elder*, 106 Wn. App. 699, 710 (2001) ("In any event, it is well settled that the judgment of a trial court can be affirmed on any basis established by the pleadings and supported by the proof, even if the trial court did not

consider it”); *State v. Griswold*, 98 Wn. App. 817, 830 (2000) (“An appellate court may affirm on other grounds after rejecting a trial court’s reasoning”); *Powell v. Sphere Drake Ins. P.L.C.*, 97 Wn. App. 890, 899 (1999) (“We may affirm an order of dismissal on any basis within the pleadings and proof. Thus, [appellee’s] failure to cross-appeal this issue does not preclude our review of it”); *Déjà Vu-Everett-Federal Way, Inc. v. City of Federal Way*, 96 Wn. App. 255, 263 (1999) (“In reviewing an order of summary judgment, this court may affirm the order on any theory within the pleadings and the proof”). Specifically, in a negligence action, an appellate court can affirm a trial court’s granting of summary judgment if it determines that no duty existed, even though the trial court concluded otherwise. *See, e.g., Babcock v. Mason County Fire Dist. No. 6*, 101 Wn. App. 677, 692-93 (2000), *aff’d*, 144 Wn.2d 774 (2001) (disagreeing with trial court’s conclusion that duty existed, affirming summary judgment due to lack of duty, and declining to reach alternate arguments in support of summary judgment, including grounds for trial court’s decision).

Thus, this Court can indeed affirm summary judgment for Labor Ready by concluding that no duty exists—as the authorities cited in Labor Ready’s opening brief show that it should. *See, e.g., Betty Y. v. Al-Hellou*, 98 Wn. App. 146, 149 (1999) (quoting *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48 (1997) (“the employer’s duty is limited to foreseeable

victims and then only ‘to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others’”). There was no requirement for Labor Ready to cross-appeal the order granting it summary judgment, which, of course, is the very order Plaintiff has appealed. Further, not only is the trial court’s conclusion that a duty existed not binding on this Court, it is not entitled to any deference. To the contrary, the existence of duty is a question of law subject to *de novo* review. *Aba Sheikh v. Choe*, 156 Wn.2d 441, 448 (2006) (“Whether or not the duty element exists in the negligence context is a question of law that is reviewed *de novo*”).

Moreover, the existence of duty does not mandate the existence of legal cause. Legal cause and duty are distinct requirements, and Plaintiff must prove both to succeed. *Kim v. Budget Rent A Car Sys.*, 143 Wn.2d 190, 202 (2001) (“Even assuming a duty was owed here, we cannot find that Budget’s actions were the proximate cause of plaintiff’s injuries”); *Schooley v. Pinch’s Deli Mkt., Inc.*, 134 Wn.2d 468, 479 (1998) (“a court should not conclude that the existence of a duty automatically satisfies the requirement of legal causation. This would nullify the legal causation element and along with it decades of tort law”); *Hemmen v. Clark’s Rest. Enters.*, 72 Wn.2d 690, 694 (1967) (“Even if we were to assume that [. . .] such a condition was somehow a breach of the proprietor’s duty of care,

there was no causal relationship between that condition and the plaintiff's injuries"); *Joyce v. Dep't of Corr.*, 116 Wn. App. 569, 592 (2003), *rev'd in part on other grounds*, 155 Wn.2d 306 (2005) ("Finding a duty does not automatically satisfy the legal causation requirement"); *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 863 (2000) (quoting *Schooley*, 134 Wn.2d at 479) ("Issues of duty and legal causation are intertwined. 'However, a court should not conclude that the existence of a duty automatically satisfies the requirement of legal causation'").

Finally, legal cause, proximate cause, and cause-in-fact are not synonyms. Throughout her brief, Plaintiff confuses these terms, and, based on that confusion, argues that the trial court decided a question of fact. Proximate cause is a two-pronged element of negligence. *Kim*, 143 Wn.2d at 203-04; *Hartley v. State*, 103 Wn.2d 768, 777-78 (1985). A plaintiff must prove each of those two prongs, legal cause and cause-in-fact, to succeed. *Gall v. McDonald Indus.*, 84 Wn. App. 194, 207 (1996); *Johnson v. State*, 68 Wn. App. 294, 298-99 (1992). If either legal cause or cause-in-fact is lacking, proximate cause is lacking and the negligence claim cannot succeed. *Id.* Although Labor Ready's briefing shows that both legal cause and cause-in-fact are lacking here, the trial court's decision was based on legal cause. 9/9/05 RP 26. Like duty, legal cause is a pure question of law. *Kim*, 143 Wn.2d at 204. Thus, even if the Court

determines that a duty existed, the Court can affirm summary judgment for Labor Ready by concluding, as the trial court did and as the authorities cited in Labor Ready's opening brief show that it should, that legal cause is lacking. *See, e.g., Crisman v. Pierce County Fire Prot. Dist. No. 21*, 115 Wn. App. 16, 21 (2002) (holding employer cannot be held liable unless close nexus exists between employee's job and his or her contacts with victim); *Kim*, 143 Wn.2d at 204-05 (holding "remoteness in time" between defendant's alleged negligence in allowing theft of vehicle and victim's injury one day later was "dispositive of legal cause").

The Court can also uphold the trial court's ruling by finding that Plaintiff has presented no admissible evidence to support a finding of cause-in-fact. *Kim*, 143 Wn.2d at 203-04. As shown below, Plaintiff has now conceded that the evidence she offered in support of cause-in-fact was inadmissible hearsay. Summary judgment should thus be affirmed for three distinct reasons, all of which are explained in Labor Ready's opening brief and any one of which is alone sufficient to defeat Plaintiff's claim: 1) Labor Ready owed no duty to Cordova; 2) Labor Ready's alleged breach was not a legal cause of Cordova's murder; and 3) Plaintiff failed to produce admissible evidence to support a finding of cause-in-fact.

B. Plaintiff Concedes That The Testimony Labor Ready Moved to Strike—Plaintiff’s Only Evidence in Support of Cause-In-Fact—Is Inadmissible Hearsay.

Plaintiff makes no attempt to argue that any of the testimony Labor Ready moved to exclude, which is outlined at A8-A9 of the Appendix to Labor Ready’s opening brief, was admissible. Plaintiff apparently—and rightly—concedes that this testimony is hearsay, inadmissible under any exception. Given this admission, there can be no doubt that the trial court erred in considering some of this testimony.

Instead of defending the testimony she offered in support of her summary judgment response, Plaintiff argues that the trial court struck all of this testimony but found a question of fact remained, a finding she suggests this Court adopt. This is simply untrue. The trial court granted Labor Ready’s motion to strike *in part*, but *denied* it “as to the testimony which is admissible as set forth in plaintiff’s briefing.” CP 1409. Based on the unidentified testimony that the trial court held was admissible, it found that “material issues of disputed fact” remained regarding when and where Owens and Cordova met. *Id.* As Plaintiff now concedes, none of the testimony Labor Ready moved to strike—some of which formed the basis of the trial court’s conclusion that a question of fact remained—was admissible. Absent this testimony, there is no question of fact. Other than this hearsay testimony, Plaintiff never proffered any evidence that Owens

and Cordova met at the YWCA in 2004, rather than at the Jensonia where they were neighbors throughout the fall of 2003. There is thus no evidence to support a finding of cause-in-fact, and Plaintiff has failed to meet her burden of proof on this required element.¹

C. The Court Should Stiffen the Sanctions Against Plaintiff's Counsel to Deter The Use of The Egregious Litigation Tactics Used Here in Future Litigation.

1. Plaintiff tacitly admits that she knowingly falsely responded to a request for admission.

Plaintiff does not deny that she falsely responded to a request that she admit Cordova was not a resident of Opportunity Place; nor does she deny that she did so knowingly. Moreover, she makes no attempt to justify or explain her knowingly false denial. As explained in Labor Ready's opening brief, this knowing, false denial required Labor Ready to subpoena documents from numerous entities to prove that Cordova never lived at Opportunity Place, something Plaintiff knew all along.

¹ Plaintiff's only other response to Labor Ready's hearsay argument is that Labor Ready "hypocritically rel[ies], itself, on its own hearsay evidence[.]" Response/Reply Brief at 7. Plaintiff never raised this issue with the trial court, making it improper to raise here. *Herberg v. Swartz*, 89 Wn.2d 916, 925 (1978) ("An issue, theory or argument not presented at trial will not be considered on appeal"). Further, Plaintiff failed to indicate which testimony she thinks is hearsay, instead citing in mass every declaration Labor Ready filed in support of its summary judgment motion, making a response both impossible and unnecessary. See *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 338-39 (2002) (holding appellant failed to support its claim that the trial court considered unauthenticated hearsay when it "made sweeping objections [. . .] without explaining its specific objections to the trial court" and failed to provide specific argument or citation to legal authority as to any individual exhibit on appeal).

Knowingly giving a false response to a request for admission is a serious discovery violation. Plaintiff's failure to provide any excuse or even an apology for this violation reflects the general disregard Plaintiff's counsel has shown for the court rules, spirit of discovery, and truth throughout this litigation. It appears that nothing short of a significant, monetary sanction will prevent Plaintiff's counsel from engaging in similar tactics in the future.²

2. Plaintiff knew the names of people close to Dori Cordova when she filed suit but failed to provide them to Labor Ready despite an interrogatory requesting this precise information.

Plaintiff tacitly admits, as she must, that (1) she failed to provide witness names that Labor Ready directly requested in an interrogatory on March 17, 2005, six months before the summary judgment hearing, (2) she never supplemented her response, (3) she knew of each of these witnesses, and likely what they would say, before filing suit, and (4) most of the

² It is for this reason that Labor Ready sought—and won—sanctions at the trial court and seeks a more significant sanction from this Court. The motion was not brought out of “vindictiveness.”

The trial court denied Plaintiff's unfounded motion for sanctions against Labor Ready, reprimanded Plaintiff's counsel for bringing the motion without first attempting to resolve the dispute with Labor Ready's counsel, and adopted Labor Ready's proposal for requiring counsel to inform witnesses whom they represent. 8/19/05 RP 18-19. Plaintiff's unsuccessful motion did not motivate Labor Ready to file its successful motion. Nor did the sanctions motion Gordon Thomas Honeywell brought against Bogle and Gates, which, as the Court likely knows, dissolved over seven years ago. None of the attorneys involved in that case has ever worked for Labor Ready's firm or for Plaintiff's counsel's current office. 10/7/05 RP 21-22.

witnesses she failed to disclose are close to Plaintiff and her brother Michael Phillips (Troy Phillips' father and Cordova's ex-boyfriend, who was not the named plaintiff only because of his felony record). To the trial court, Plaintiff argued only that she "did not yet have a sufficient basis to supplement its [sic] initial response," and to this Court, Plaintiff argues that she responded "to the best of her knowledge and ability at that time." CP 2093; Response/Reply Brief at 16. This is not true. The witnesses Plaintiff failed to identify include her own sister, two life-long friends of Michael Phillips, the friend with whom Troy Phillips lived after Cordova's murder, Cordova's "best friend," and Michael Phillips' pastor. CP 1264-66; CP 1244-48; CP 1241-43; CP 1269-70; CP 1261-63; CP 1271-72.³

Plaintiff attempts to defend her violation of the discovery rules by pointing to the fact that she served witness disclosures before the deadline under the revised scheduling order. Plaintiff misses the point. First, the

³ Even if Plaintiff could plausibly argue that she did not know the identity of these witnesses when she filed suit (which she cannot), she knew them at some point during the course of the litigation and was obligated to supplement her interrogatory response. *See, e.g., Outley v. New York*, 837 F.2d 587, 589 (2d Cir. 1988) (holding plaintiff violated rule requiring supplementation of discovery responses when she provided witness addresses and phone numbers to defendant four or five weeks after learning of them). She never did. Further, even if Plaintiff had supplemented her interrogatory response, her failure to do so earlier would still have been sanctionable. *See, e.g., Roger Edwards, LLC v. Fiddes & Son, Ltd.*, 216 F.R.D. 18, 21 (D. Me. 2003), *aff'd*, 387 F.3d 90 (1st Cir. 2004) (sanctioning plaintiff for first identifying nine witnesses in its final pretrial memorandum, despite defendant's earlier interrogatory request asking plaintiff to identify potential witnesses).

changed deadline for witness disclosures is no excuse for failing to respond properly to a long-ago-served interrogatory. Labor Ready served this interrogatory on March 17, 2005. Plaintiff responded on May 20, 2005, but failed to identify anyone other than herself and Michael Phillips as close to Cordova. Plaintiff supplemented her response on July 12, 2005, and still failed to identify anyone other than herself and Michael Phillips as close to Cordova. Despite having this interrogatory for *six months* before the summary judgment hearing, Plaintiff *never* identified anyone other than herself and her brother in response to this interrogatory. Second, by disclosing approximately one hundred witnesses—and omitting nine of the most important witnesses upon whose testimony Plaintiff ultimately relied in her summary judgment response—Plaintiff created a wild goose chase for Labor Ready, forcing it to seek out the disclosed individuals and attempt to determine who was close to Cordova on its own. This costly folly could and should have been avoided had Plaintiff responded to the interrogatory as required.

To this Court, Plaintiff argues for the first time that the interrogatory was “realistically unanswerable” and “unintelligible.” Response/Reply Brief at 17. Plaintiff’s failure to object to this interrogatory and failure to make this argument to the trial court belie—and foreclose—her new protestations. Plaintiff apparently understood the

question when she identified herself and her brother and repeatedly promised to supplement that response.

3. Plaintiff withheld declarations as a tactical move to attempt to avoid summary judgment.

Plaintiff does not deny that, like the names of the witnesses discussed above, the declarations she submitted in response to Labor Ready's motion for summary judgment were responsive to a proper discovery request Labor Ready served in March 2005. Instead, she notes that she did eventually produce them, *after* filing her summary judgment response, in response to a different, later-served discovery request. Again, Plaintiff misses the point. Labor Ready never should have had to issue a second request for production to get documents that Plaintiff admits were responsive to a request for production Labor Ready served six months earlier. Plaintiff had most of these declarations well before Labor Ready moved for summary judgment, yet she waited to produce them until she filed her summary judgment response. CP 1261-63; CP 1271-72; CP 1267-68; CP 1269-70; CP 1213-35; CP 1273-74; CP 1275-76; CP 1264-66; CP 1241-43; CP 1210-12.

Plaintiff's argument that these declarations were privileged work product is belied by the fact that she requested (and received) similar declarations from Labor Ready. CP 1731-36. Her failure to cite any

authority for this argument is not surprising, for the declarations of non-party fact witnesses are not privileged work product. *See, e.g., Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306-07 (E.D. Mich. 2000) (refusing to grant work product protection to affidavit of non-party witness because “[a]n affidavit, after all, purports to be a statement of facts within the personal knowledge of the witness, and not an expression of the opinion of counsel,” and must be disclosed in order to avoid “trial by ambush”); *Milwaukee Concrete Studios, Ltd. v. Greeley Ornamental Concrete Products, Inc.*, 140 F.R.D. 373, 379 (E.D. Wis. 1991) (signed statements of non-party witnesses were not protected from disclosure under work product doctrine where they were predominantly factual in nature).

Plaintiff next argues that her failure to produce responsive documents should be excused by Labor Ready’s voluntary production of its declarations approximately two weeks after obtaining them.⁴ In her

⁴ Also in this vein is Plaintiff’s argument that Labor Ready “engaged in ‘litigation motion lotto’ by making three baseless motions to disrupt the trial date[.]” Response/Reply Brief at 10. None of this procedural background is in the Clerk’s Papers, making Plaintiff’s argument improper and a response difficult. Labor Ready in fact filed only two motions, one for a continuance based on Labor Ready’s substitution of counsel and the complexity of the case, which was granted, and one to change venue, which was not. Plaintiff’s case did unravel more quickly than Labor Ready expected at the time it moved for a continuance. Nonetheless, had the trial court not granted summary judgment, Labor Ready would have needed several more months of discovery to prepare for trial—if for nothing else than to depose the eighteen witnesses whose

attempts to portray Labor Ready negatively, Plaintiff insinuates that Labor Ready should have produced its declarations *five months before it had them*—an impossible feat. *See* Response/Reply Brief at 13-14 (arguing that Labor Ready “never produced any of these declarations,” which were signed in *late July*, “in the next 6 months after February 2, 2005”).⁵ Labor Ready produced its declarations unprompted in the midst of discovery while no motions were pending. Plaintiff, on the other hand, withheld declarations until filing her summary judgment response, hoping to prevent Labor Ready from addressing this new information in its reply. And, as noted above, *all* of these declarations were from individuals Plaintiff failed to identify in response to a proper interrogatory and nine were from individuals Plaintiff never disclosed in her witness disclosures. This was intentional sandbagging. The Court should significantly increase the amount of sanctions awarded to Labor Ready to dissuade Plaintiff’s counsel and others from engaging in such gamesmanship in future litigation. *See, e.g., Hancock v. Hobbs*, 967 F.2d 462, 468 (11th Cir. 1992) (upholding sanctions against plaintiff for failing to identify expert

declarations Plaintiff’s counsel sprang on defense counsel just prior to the summary judgment hearing.

⁵ Plaintiff’s statement that the Hayden declaration was not produced until August is wrong. Labor Ready gave this declaration to Plaintiff in April, five months before the summary judgment hearing. CP 1524-30. The YWCA again gave it to Plaintiff in July. CP 2102-06.

witness in response to defendants' interrogatories and instead waiting to identify him when responding to defendants' summary judgment motion).

4. Plaintiff cannot justify her reckless—and continued—misrepresentations to the court.

Plaintiff apparently admits that sanctions are appropriate for making misrepresentations to this Court and the trial court. *See, e.g., Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 305-06 (1999) (holding sanctions may be appropriate for violating RAP 10.3 and noting rules are intended “to enable the court and opposing counsel efficiently and expeditiously to review the accuracy of the factual statements made in the briefs”); *Cables & Accessories, Inc. v. Brewer*, 92 Fed. Appx. 435, 438 (9th Cir. 2004) (holding sanctions justified when attorney made factual misrepresentations in briefs); *Carr v. O’Leary*, 167 F.3d 1124, 1127-28 (7th Cir. 1999) (ordering defendant to show cause why it should not be sanctioned for including serious misrepresentation in brief); *Perkins v. General Motors Corp.*, 129 F.R.D. 655, 662-63 (W.D. Mo. 1990), *rev’d in part on other grounds*, 911 F.2d 22 (8th Cir. 1990) (sanctioning party for “factual misrepresentations” in brief).

Yet, of the nearly two dozen misstatements Labor Ready pointed out in Plaintiff’s trial court and appellate briefing, Plaintiff addresses just four. The most egregious falsehoods Plaintiff told the trial court are

among those she has chosen to ignore: that Owens was a bisexual and assaulted a boyfriend in 2000. Plaintiff used these complete untruths to sully the credibility of a disinterested lay witness, Roman Antioquia, who testified that he frequently saw Owens and Cordova together in the Fall of 2003, suggesting with no foundation that Antioquia and Owens were romantically involved. CP 339. Plaintiff made these bold misstatements despite the fact that it is well documented and alleged in Plaintiff's own Complaint that Owens was in prison from 1997 through September 2003, hundreds of miles from where the assault occurred, and despite the fact that the report of the 2000 assault unequivocally identifies a different perpetrator. CP 1778-81; CP 1211; CP 1500.

Plaintiff's attempt to destroy Antioquia's credibility did not stop there and continues in her latest brief to this Court. To the trial court, Plaintiff repeatedly stated as a fact, not a conclusion or inference, that Antioquia sold the murder weapon to Owens, citing a police report as proof. CP 339. That police report shows nothing other than that Antioquia reported his gun stolen. CP 1761-68. Plaintiff now argues that because no one witnessed the theft, there was no sign of forced entry, and there was apparently no police investigation into the theft, one can only conclude that Antioquia sold the gun to Owens. Response/Reply Brief at 20-21. This is a leap, not an inescapable conclusion. Moreover, it is not

justification for Plaintiff's earlier unqualified statements, citing a police theft report, that Antioquia sold the gun to Owens. Nor is it a justification for Plaintiff's latest lie about Antioquia, which appears for the first time in Plaintiff's Response/Reply to this Court and is supported by absolutely nothing: that "Antioquia admitted that he showed the gun off Owens [sic]." Response/Reply Brief at 21.

Plaintiff's attempt to justify her misstatement regarding an attachment to Margaret Balderama's declaration is no better. Purportedly relying on deposition testimony which appears nowhere in the Clerk's Papers, Plaintiff now says the document "triggered" Balderama's memory of when Cordova first mentioned Owens to her. Response/Reply Brief at 20. But Plaintiff's summary judgment response says something quite different—that the document itself shows when Cordova first mentioned Owens to Balderama. CP 310. It does not. CP 1739-41.

Plaintiff's defense of her misstatements regarding the Yoshidas is another string of misstatements. The Yoshidas testified that Cordova called them from Owens' phone in the fall of 2003. CP 69-97. Plaintiff has asserted that the Yoshidas were not in contact with Cordova in 2003 and that Cordova did not have their phone number. Response/Reply Brief at 20. CP 337-39. As proof, Plaintiff cites a social worker's notes from December 2003 indicating that Cordova and her aunt were "not getting

along well,” and from January 2004 indicating that Cordova “had lost” her aunt’s phone number. CP 1743-57; CP 337-38. This “proof” begs two questions: How could Cordova and Yoshida “not [be] getting along well” in December 2003 if they were not in contact in 2003? And how could Cordova have “lost” a phone number she never had?

Plaintiff admitted to the trial court that she included misstatements attributed to Gerald Ketchum in her summary judgment brief, and now admits that she repeated them to this Court. She makes no apologies or excuses for these misstatements, and instead brushes them off as “not exact,” “virtually the same” as the truth, “inadvertent,” and a “lack of exactness.” Response/Reply Brief at 17, 19. Inadvertent or not, the repetition of these misstatements, which went to a key fact at issue—where Owens and Cordova met—evidences an alarming callousness toward the truth. This disregard for the truth is further evidenced by Plaintiff’s latest brief to this Court, which again contains misrepresentations too numerous to list.⁶

What is most disturbing about Plaintiff’s counsel’s misstatements is that so many of them have been about non-party witnesses who have no interest in this lawsuit and no way to rebut Plaintiff’s counsel’s wild

⁶ Some of the misstatements contained in Plaintiff’s latest brief are summarized in the Appendix attached to this Brief.

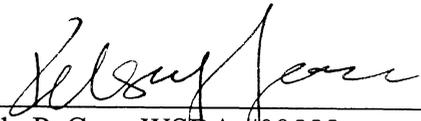
accusations. Plaintiff's counsel has stated these falsehoods in public briefs solely for Plaintiff's and Plaintiff's counsel's own financial benefit. Anyone can now access a public document stating, for example, that Antioquia sold a murder weapon and was likely romantically involved with the male murderer who used it. This is false, but no one reading Plaintiff's public briefing would know that. The Court should sanction Plaintiff's counsel for these repeated and continuing misrepresentations as a reminder that it is unacceptable for lawyers—officers of the court—to make reckless accusations about real people in a public forum.

III. CONCLUSION

Plaintiff has conceded that the testimony Labor Ready moved to strike was inadmissible hearsay. The Court should thus reverse the trial court's order allowing some of this testimony into the record. After this testimony is stricken, Plaintiff is left with no evidence to support a finding of cause-in-fact. Her case thus lacks three required elements—duty, legal cause, and cause-in-fact—and is legally deficient. Summary judgment should be affirmed. In addition, the Court should issue a significant sanction—and/or remand with instructions that the trial court do so—to deter Plaintiff's counsel and others from continuing to use the improper litigation tactics employed here.

Respectfully submitted this 8th day of July, 2006.

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP



Kelly P. Corr, WSBA #00555
Kelsey Joyce, WSBA #29280
Attorneys for Appellee/Cross-
Appellant Labor Ready, Inc.

APPENDIX

33848-3-II
DIANNA LYNN, Appellant,
v.
LABOR READY, INC., Appellee.

Plaintiff's Statement	Citation	Truth
"Respondent's 'star' witness Roman Antioquia was the legal owner of the gun used to murder Dori and he personally showed the gun off to the murderer." Pages 2-3	CP 669: Seattle Police Department Report	Antioquia contacted police to inform them of his belief that the gun Owens used to kill Cordova belonged to Antioquia and that Owens stole the gun out of his roommate's car. The record contains no support for the proposition that Antioquia "showed the gun off" to Owens.
"The assertion that Dori was not a YWCA client is completely false and misleading[.]" Page 3	CP 510-13: American Red Cross Disaster Registration and Case Review CP 1238: Ketchum Dec.	Cordova was not a YWCA client any time between 2002 and Owens' last day at the YWCA. CP 1436-37 (YWCA housing director testifying that Cordova was not a YWCA resident or client in 2004); CP 204 (2001 letter from YWCA to Cordova stating that involvement with YWCA project was ending); CP 76 (Cordova's aunt testifying that Cordova did not live at any YWCA facility or participate in any programs). Plaintiff has put forth evidence suggesting only that <i>after</i> the Jensonia fire, long <i>after</i> Cordova and Owens were acquainted, Cordova was considering temporary YWCA housing.

Plaintiff's Statement	Citation	Truth
<p>“The Respondent repeatedly characterizes Lawrence Owens as a former employee or a person ‘who had last worked for the YWCA’ as an agent for Labor Ready five days prior to murdering Dori Cordova. This representation is entirely false and completely inaccurate.” Page 5</p>	<p>CP 384-85: Rossio Dep.</p>	<p>This testimony does not address when Owens last worked for Labor Ready or the YWCA.</p> <p>Uncontested Labor Ready records show that March 12, 2004, five days before Cordova’s murder, was the last day that Owens worked for Labor Ready. CP 197-99; CP 1438-39.</p>
<p>“What Labor ready [sic] fails to tell this Court is it successfully moved to strike all inadmissible hearsay prior to the summary judgment and the trial court granted the motion and ruled that even after excluding hearsay, there remained material issues of fact that would survive summary judgment.” Page 6</p>	<p>CP 1409: Order Granting in part and Denying in part Labor Ready’s Motion to Strike</p>	<p>The trial court did not grant Labor Ready’s motion in full. Rather, the court granted Labor Ready’s motion to strike <i>in part</i>, stating that Labor Ready’s motion to strike was granted “as to the testimony which is inadmissible hearsay” and denied “as to the testimony which is admissible[.]” CP 1409. The trial court did not specify which testimony it found admissible.</p>
<p>After the Plaintiff’s motion for sanctions, “the Court ordered that the parties to [sic] specifically inform witnesses who they worked for prior to interviewing witnesses.” Page 9</p>	<p>8/19/05 RP 18-19: Sanctions Hearing Transcript</p>	<p>In making this ruling, the trial court adopted Labor Ready’s proposal: “this was an accommodation that Labor Ready actually suggested and I do prefer the language that Labor Ready indicated would be appropriate as it more closely tracks with the RPC.” 8/19/05 RP 18.</p> <p>Moreover, the court reprimanded Plaintiff’s counsel for moving for sanctions without first attempting to resolve the dispute with Labor Ready’s counsel. 8/19/05 RP 18-19.</p>

Plaintiff's Statement	Citation	Truth
Labor Ready filed "three baseless motions to disrupt the trial date, including a: (1) Motion to change the venue of this case, (2) Motion to continue the trial date, and a (3) Motion to Change the case to a 'Complex Track' case." Page 10	CP 1846: Page One, Labor Ready's Motion to Continue Trial Date	Labor Ready filed <i>two</i> , not <i>three</i> , motions: one for a continuance, which argued that the case was more appropriate for a complex track (CP 1846-51), which was granted, and one for a change of venue, which was not.
"The <u>very first time</u> that the Respondent ever asked Appellants [sic] for production of declarations that the Appellants [sic] had obtained was in a discovery request dated <u>August 19, 2005[.]</u> " Page 12 (emphasis in original)	CP 1954-55: Labor Ready's Second Set of Requests for Production to Plaintiff	These documents were responsive to a discovery request served in March 2005. CP 1608-52 (requesting Plaintiff to identify individuals closest to Cordova and every document that Plaintiff believed supported her claims).
Labor Ready waited six months to produce its declarations. Pages 13-14	CP 1916-40: P. Yoshida, R. Yoshida, Tysseland, Hayden, Antioquia, and Balderama Decs. CP 1948-50: 8/5/05 Letter from Mr. Corr to Mr. Martin	Labor Ready produced these declarations approximately two weeks after they were signed. <i>See</i> CP 1921, 1926, 1929, 1936, 1946 (showing the declarations, other than that of Hayden, which is addressed below, were signed in mid-July); CP 1948 (August 5, 2005, letter from Mr. Corr to Mr. Martin, stating "You have now seen the following materials," and listing the declarations at issue).
Labor Ready first produced the Declaration of Patricia Hayden on August 5, 2005. Page 14	CP 1938-40: Hayden Dec.	Labor Ready produced the Hayden Declaration to Plaintiff's counsel in April 2005. CP 1529. The YWCA also produced the Hayden declaration to Plaintiff's counsel before August 5 th , as indicated by Mr. Martin's letter dated August 2, 2005. CP 2103-06.

Plaintiff's Statement	Citation	Truth
<p>The Plaintiff quotes Ketchum as testifying: "...including transitional housing through the YWCA. I do know that Dori was looking for transitional housing..." Page 19</p>	<p>CP 1238: Ketchum Dec.</p>	<p>Ketchum in fact testified: "...including transitional housing through the YWCA. <u>Although I do not have any personal knowledge as to how Dori Cordova met Lawrence Owens</u>, I do know that Dori was looking for transitional housing..." (emphasis added).</p> <p>Plaintiff failed to indicate any testimony was omitted from the quote, let alone testimony as critical as this.</p>
<p>"As [Balderama] testified at her deposition, the official record that she cited to as Exhibit 1 was the record that triggered her memory as to when Dori first mentioned Owens." Page 20</p>	<p>CP 2011: Balderama Dec.</p>	<p>There is no such testimony in the record.</p>
<p>"In fact, Othello Howell's official records demonstrate and record that Dori and the Yoshidas did not get along and that the Yoshidas did not have Dori's phone number in January of 2004, nor did Dori have the Yoshidas' phone number. If Dori did not have the Yoshidas' phone number, how could she have called the Yoshidas several times in the fall of 2003?" Page 20</p>	<p>CP 1985: Howell's Treatment Notes</p>	<p>Nothing on the page cited suggests that Cordova did not get along with the Yoshidas. Moreover, Howell stated that, in January 2004, Cordova reported to him that she had "lost" the Yoshidas' number, suggesting that she had the number at one time. CP 1985. Further, Cordova would presumably have to have <i>some</i> contact with the Yoshidas in order to "not get along" with them.</p>

Plaintiff's Statement	Citation	Truth
<p>“No one witnessed Owens steal this weapon from Antioquia. There was no evidence of forced entry into Antioquia’s roommate’s car and no police officer ever investigated Antioquia’s story. Antioquia also told the police that he knew Owens was looking for a shotgun. Antioquia had just recently purchased the shotgun prior to the gun getting into Owens’ possession. <u>Antioquia admitted that he showed the gun off Owens [sic];</u> and further, Antioquia, without prompting, called the Seattle Police Department to inform them that he was the legal owner of the gun used to murder Dori. <u>All of the inferences from these facts lead to one conclusion: Antioquia sold the murder weapon to Owens.</u>” Pages 20-21 (emphasis added).</p>	<p>CP 669: Seattle Police Department Report</p>	<p>According to the Report cited by the Plaintiff, Antioquia contacted the police after learning of the shooting on the news. He stated that he recognized the gun as belonging to him and that he last saw the gun in his roommate’s car but now it was missing. There was no visible forced entry on the vehicle, but the driver’s side window can be forced open by hand. Antioquia said that Owens had recently been asking to purchase a firearm. Owens knew that Antioquia stored the gun in his roommate’s car. The Report further says, “Mr. Antioquia states that he did not sell Owens the shotgun. Antioquia believes that Lawrence Owens broke into his roommate’s [sic] vehicle to steal the shotgun.” CP 669. There is no support for the statement that Antioquia “showed off” the gun to Owens. Nor is there support for the statement that Antioquia sold the gun to Owens.</p>
<p>“Respondent’s knowing placement of a Level Three sex offender at the YWCA...” Page 24</p>	<p>None</p>	<p>Labor Ready denies that it knew of Owens’ criminal history. Labor Ready employee Shauna Rossio, who hired Owens and placed him at the YWCA, testified that she did not have such knowledge. CP 398 (stating that <i>if</i> she had the knowledge about Owens’ criminal history, she definitely <i>would have</i> informed the YWCA).</p>

Plaintiff's Statement	Citation	Truth
<p>“Labor Ready received <u>actual</u> notice from the Department of Corrections that Owens was a Level-III sex offender, that Owens was a criminal risk, that Owens was a danger to women, and that Owens would likely reoffend if placed in a target-rich environment such as the YWCA. Labor Ready knowingly placed Owens with his vicious disposition and propensities at the YWCA, while failing to alert the YWCA to the readily foreseeable and preventable danger.” Page 33 (emphasis in original)</p>	<p>None</p>	<p>See above.</p>

33848-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DIANNA LYNN, Appellant,

v.

LABOR READY, INC., Appellee.

**CERTIFICATE OF SERVICE OF
APPELLEE'S REPLY IN SUPPORT OF CROSS-APPEAL**

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP

1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

Kelly P. Corr, WSBA No. 00555
Kelsey Joyce, WSBA No. 29280

Attorneys for Appellee/Cross-
Appellant Labor Ready, Inc.

ORIGINAL

The undersigned declares as follows:

1. I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys for Appellee/Cross-Appellant Labor Ready, Inc. herein.

2. On July 3, 2006, I caused true and correct copies of the following:

- (a) Appellee's Reply In Support of Cross-Appeal; and
- (b) Certificate of Service;

on the following attorneys via same day legal messenger:

Thaddeus P. Martin
Attorney at Law
4002 Tacoma Mall Blvd., Suite 102
Tacoma, WA 98409

FILED
COMPTROLLER
06 JUL -3 PM 2:41
STATE OF WASHINGTON
BY COURTNEY

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

DATED this 3rd day of July, 2006, at Seattle, Washington.


Loida Gallegos