ORIGINAL

No. 48284-3-II

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

CHERIE Y. COOK, individually, and CLARK T. COOK, individually and their marital community,

Appellants,

v.

TACOMA MALL PARTNERSHIP, LLC & SIMON PROPERTY GROUP, INC., a Delaware Corporation, and SIMON PROPERTY GROUP, L.P., a Delaware Limited Partnership; U.S. SECURITY ASSOCIATES, a Delaware Corporation; ANDREWS INTERNATIONAL, LLC; a Delaware Limited Liability Corporation; ANDREWS INTERNATIONAL, INC., a Delaware Corporation; and JOHN DOE 1 through 10,

Respondents.,

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Appellant Cherie Cook was brutally assaulted at the Tacoma Mall when she was 77 years old, causing her to sustain life-threatening injuries. Cook filed suit on October 4, 2014, against Simon, the corporation who opened and managed the mall. Cook learned that U.S. Security was the legal entity who contracted with Simon to provide security at the Tacoma Mall after the statute of limitations ran on May 28, 2015. In September 2015, Simon provided Cook with evidence for the first time that U.S. Security had known about the lawsuit within days of it being filed in October 2014, and that it had agreed to indemnify Simon shortly thereafter.

Cook moved to add U.S. Security as a party to a lawsuit, and the trial court allowed the amendment on September 18, 2015. Nevertheless, even though U.S. Security had never before appeared as a defendant in this lawsuit, the trial court ordered on October 2, 2015—without any attorney appearing on behalf of U.S. Security and without any motion regarding discovery from U.S. Security pending—that Cook could not seek ***any*** discovery from U.S. Security unless it had been issued in the eight days since the amended complaint adding U.S. Security was filed. The trial court prohibited discovery regarding this new defendant on the grounds that Cook had been dilatory in adding U.S. Security as a defendant (despite already having granted leave to amend); Simon, who was allegedly trial-ready, had been prejudiced by the trial court's own decision to continue the trial date for five months; and no additional discovery would change the trial court's

view of the facts of this "simple" case that took "every bit of energy" it had not to dismiss on summary judgment.

The trial court's order closing discovery as to a newly-added party violated the letter and spirit of the civil rules. It also was based on inherently contradictory and unreasonable rationales and had no support under law. Additionally, given the trial court's comments on the record impugning the merits of Cook's case, the trial court here also violated the appearance of fairness doctrine. Recognizing that the trial court lacked "any tenable grounds or bases" for its "combination of decisions," this court ruled that the trial court's order closing discovery constituted both "obvious" and "probable" error and accepted discretionary review under RAP 2.3(b)(1) on grounds that the trial court committed obvious error. Now, Cook respectfully asks this Court to reverse the trial court's order closing discovery and remand the case to a different trial court judge.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1 The trial court erred in closing discovery as to a newly-added party.

No. 2 The trial court erred in denying Cook's request to issue a new case schedule as to a newly-added party.

No. 3 The trial court erred in denying reconsideration of its decision to close discovery as to a newly-added party.

No. 4 The trial court erred in displaying actual or apparent bias on the record.

Issues Pertaining to Assignments of Error

No. 1 Was the trial court's order closing discovery as to a newly-added party based on untenable reasons when it did not follow procedure in hearing a motion to close discovery?

(Assignment of Error Nos. 1, 2, 3)

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No. 2 Was the trial court's order refusal to issue a new case scheduling order with new discovery deadlines untenable and unreasonable?

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No. 3 Was the trial court's order closing discovery as to a newly-added party based on untenable reasons when no Washington law gave it such authority?

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No. 4 Was the trial court's order to close discovery as to a newly-added party manifestly unreasonable when discovery had not previously been conducted against the newly added party?

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No. 4 Was the trial court's order to close discovery as to a newly-added party manifestly unreasonable when considering *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 495-96, 933 P.2d 1036 (1997), and its progeny?

(Assignment of Error Nos. 1, 2, 3)

No. 5 Should this court remand the case to a new trial judge given the statements on the record?

(Assignment of Error Nos. 1, 2, 3, 4).

III. STATEMENT OF THE CASE

A. Background.

On May 28, 2012, Cherie Cook went shopping at the Tacoma Mall.[1] She exited the mall from Nordstrom and was assaulted in the parking lot by an assailant who tried to steal her purse.[2] In the process of being assaulted, Cook fell to the pavement, struck her head, and sustained life threatening injuries.[3]

Shortly before the incident, Tacoma Mall security guard John Waldron was patrolling the parking lot.[4, 5] On his first pass around the mall's parking lot, Waldron saw a slender female, approximately 15 to 16 years of age, sitting on a cement wall outside of Nordstrom.[6] The teenager was wearing a gray wool pea coat and dark pants, even though it was a warm spring day.[7] On his second pass about 20 minutes later, the teenager was sitting in the same spot on her cell phone.[8]

Cook was assaulted about 20 minutes after Waldron made his second pass.[9] At the time of the assault, Waldron was inside the mall and a

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[1] CP at 4. The motion for summary judgment response was sealed over Cook's objection. Simon argued that the policies and procedures met the stringent standards of closing the court record from the public under *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), and the trial court agreed.

[2] CP at 4-5.

[3] CP at 4-5.

[4] CP at 5.

[5] The Tacoma Mall only had one security guard to patrol the entire parking lot at any given point.

[6] CP at 5.

[7] CP at 5.

[8] CP at 5.

[9] CP at 5.

different security guard who has not been identified was patrolling.[10] When Cook crashed to the pavement, the assailant took off running.[11] The Tacoma Mall video security system captured the assailant fleeing but did not capture the assault.[12]

According to Tacoma Mall's security policies and procedures, "The most serious security incidents often occur in parking lots and garages."[13] In the five years before the underlying incident, eighteen robberies occurred in the Tacoma Mall's parking lot.[14]

B. Procedural History.

On October 8, 2014, Cook filed suit against Simon Property Group, Inc.[15] The complaint also identified John Doe 1 through 10 as entities acting as Simon agents who were responsible for the failure to provide adequate security.[16] Different iterations of the same defendant—Simon (collectively, "Simon")—were named in second and third amended complaints filed on December 12, 2014,[17] and January 20, 2015.[18]

After filing, the trial court's case schedule order set the following dates[19]:

Discovery cutoff	August 20, 2015

[10] CP at 5.
[11] CP at 5.
[12] CP at 6.
[13].CP at 6.
[14].CP at 6.
[15] CP at 27-35..
[16] CP at 27-35.
[17] CP at 43-51.
[18] CP at 52-60.
[19] CP at 26.

Trial	October 8, 2015

On October 16, 2014, Simon tendered the defense to U.S. Security (f/k/a "Andrews International," collectively, "U.S. Security"), the corporation responsible for providing security at the Tacoma Mall during the relevant time.[20] U.S. Security accepted the claim by November 4, 2014, and agreed to indemnify and hold harmless Simon.[21]

On February 4, 2015, Simon filed its first answer ever in response to Cook's third amended complaint.[22] The answer generally denied the allegations of liability and damages and asserted the following affirmative defenses:

> 1. The injuries alleged by Plaintiffs were caused by an instrumentality, person, or entity not within the control of these Answering Defendants and for whom these Answering Defendants are not responsible, which either bars the claims completely or else diminishes the damages by the proportion of such culpable conduct;
>
> 2. To the extent fault is attributed to such instrumentality, person, or entity, these Answering Defendants rely upon the provisions of the Revised Code of Washington 4.22.070 and other statutes for the apportionment of fault;[23]

Simon's answer did not mention U.S. Security Associates by name.[24]

On April 3, 2015, Cook served her first interrogatories and requests for production.[25] Interrogatory 7 stated:

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[20] CP at 2070-2071.
[21] CP at 2086.
[22] CP at 61-68.
[23] CP at 61-68.
[24] CP at 61-68.
[25] CP at 2106-2121.

> Please identify by name, address, and telephone number of all persons or entities (by business name) that provided surveillance, security, or other services related to the safety and security of persons entering Tacoma Mall property at the time of the incent that is the subject of this action.[26]

On May 29, the day after the statute of limitations ran[27], Simon served its written discovery response identifying U.S. Security for the first time in a pleading under oath as the security provider for the Tacoma Mall at the relevant time, stating:

> Defendants object to this interrogatory to the extent that it is overly broad, vague (as to "other services related to safety..."), and unduly burdensome. Without waiving said objections, U.S. Security Associates/Andrews International was under contract with Tacoma Mall to provide security services. Surveillance was performed by Tacoma Mall and by some of the stores that are located in the Tacoma Mall. Discovery is ongoing and this Answer may be supplemented.[28]

Simon did not produce the contract between it and U.S. Security until July 2, 2015.[29]

On July 20, 2015, Cook filed a notice of association of counsel.[30] She brought new counsel into the case because her initial counsel was experiencing personal difficulties.[31]

On July 30, 2015, Cook filed a motion to continue the trial date for six months and to reissue a case scheduling order to extend the deadlines to

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[26] CP at 2112.

[27] The statute of limitations for personal injury actions such as this one is three years. RCW 4.16.080(2).

[28] CP at 2095.

[29] CP at 1923.

[30] CP at 100-102.

[31] CP at 452-456.

account for the newly associated counsel.[32]

On August 7, 2015, Simon moved for summary judgment on all claims.[33] On August 21, 2015, the trial court heard Cook's motion to continue.[34] The trial court moved the summary judgment motion but held the trial date.[35]

On September 4, 2015, Simon supplemented their responses to Cook's discovery with insurance information, including evidence that Simon tendered a defense to U.S. Security almost immediately after the original complaint was filed.[36]

On September 10, 2015, Cook moved for leave to amend the complaint by adding U.S. Security as a defendant under *Powers v. W.B. Mobile Servs., Inc.*, 182 Wn.2d 159, 166, 339 P.3d 173 (2014).[37] On September 18, 2015, the trial court granted leave[38] and on September 24, 2015, Cook filed the amended complaint.[39]

On October 2, the trial court denied Simon's motion for summary judgment.[40] After the trial court's ruling, Simon began arguing for reconsideration of the order granting leave to amend the complaint.[41] The trial court denied reconsideration as to its decision allowing the new

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[32] CP at 106-113.
[33] CP at 122-140.
[34] VTP (Vol. I) at 1.
[35] VTP (Vol. I) at 19-20.
[36] CP at 1980.
[37] CP at 442-451.
[38] CP at 733-734.
[39] CP at 784-793.
[40] CP at 1859-1861.
[41] VTP (Vol. V) at 36.

defendants, but then it allowed Simon to argue that no further discovery should be permitted as to any defendant, despite the absence of any motion before the trial court asking for such relief.[42]

Cook objected as to the procedure of the argument, objected to closing discovery, and argued to the trial court that it should issue a new case schedule with a new discovery deadline allowing for discovery against U.S. Security as a newly-added defendant.[43] The trial court responded,

> To the extent that's a motion that I can hear today, I am going to deny the motion . . . I denied the defendants [sic] motion [for summary judgment], and it took every bit of energy for me to do that. And so I don't know what to tell you beyond that, but I've allowed you to amend your complaint.[44]

The trial court acknowledged that "a new party has just come into the case, so it doesn't seem unreasonable to me that they would at least believe they would be entitled to gain some discovery as to the new party," but nonetheless orally ruled that it was prohibiting further discovery unless it was outstanding at the time of the hearing on October 2, 2015, and instructed Cook to move for reconsideration if she disagreed with the decision.[45]

Also at the October 2, 2015, hearing, the trial court struck the October 8 trial date and issued a new case schedule with trial on March 2016.[46] The trial court did not offer a rationale as to why it was denying

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[42] VTP (Vol. V) at 37, 38-39.
[43] VTP (Vol. V) at 38-39.
[44] VTP (Vol. V) at 39.
[45] VTP (Vol. V) at 45.
[46] VTP (Vol. V) at 39-40; CP at 1854-1855.

discovery as to U.S. Security and yet nonetheless moving the trial date by five months.[47]

Cook moved for reconsideration, arguing that she was entitled to discovery from U.S. Security as a newly-added party and that the trial court's complete bar to such discovery was a de facto discovery sanction that was improper under *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 495-96, 933 P.2d 1036 (1997).[48] On October 16, the trial court denied reconsideration.[49] In doing so, it stated,

> [T]he problem that I had when I didn't grant the defense motion for summary judgment, whenever that was, two weeks ago, three weeks ago, I mean, it was all I could do to admit that you have even a simple case. So, I guess that's kind of where I'm coming from.
>
> You sort of told me about the Burnet factors and how I didn't consider lesser sanctions, I didn't consider your lack of willfulness and the violation, I didn't articulate that there's any kind of prejudice to the defense, and there is none. Well, you know, it seems to me that I could have granted your motion for summary judgment. I could have denied your amendment. I could have done those things, and that would have been a different sanction than simply declaring that in my view the discovery that has been completed and that closed five weeks ago, or whenever it was when it closed, wasn't subject to being reopened.
>
> It does seem to me that, by all accounts, Don Cook, either the dilatory Don Cook or the heroic Don Cook knew about U.S. Security and has known about them for months, and for whatever reason, opted not to add them. They were added by you later on. It seems to me that he was willful in his decision about how to prosecute his case.

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[47] VTP (Vol. V) at 39-49.
[48] CP at 1865-1875.
[49] CP at 2099-2100.

> And the defense has articulated a substantial prejudice. There is a substantial prejudice in being ready for trial and not being able to go to trial at a time when everybody has made arrangements for the trial to take place. You completed all your discovery, you think you know what the case is, and then at the last minute, the judge changes things on you, and I think it is prejudicial to push their case four months downstream. So, I think that when I -- when I did decline, when I have declined to reopen discovery, I'm taking all of those things into account as I'm doing it.
>
> I think that U.S. Security is somebody who's been known about and could have been discovered on. I don't know that any discovery that you obtained from them is going to change the fact that your case is there was some female, either a teen or a young adult, sitting in a particular place using a phone for 20 to 40 minutes in a public area outside the Tacoma Mall that was observed by people sitting and talking on her phone, and she was dressed apparently comfortably enough for her that she was able to sit in one place for an extended period of time. I'm not even convinced that that's the person who is the same person that your security guard saw multiple times, but the two of you seem to be convinced of that, so I am willing to go with it.
>
> But I think that I've been more than generous in allowing this case to be prosecuted the way you want it to be prosecuted, but I'm limiting the discovery at this point in time. It is closed, and I'm not reopening it.[50]

The trial court entered its October 16 order embodying this ruling despite having already moved the trial date to March 2016. Cook timely filed a notice for discretionary review, which was granted.

IV. ARGUMENT

A. Standard of Review

A trial court has broad discretion as to the choice of discovery sanctions under CR 26(g) or 37(b), and its determination will not be disturbed on appeal absent a clear showing of abuse of discretion. *Burnet,*

[50] VTP (Vol. IV) at 11-13.

131 Wn.2d 484; *Blair v. TA-Seattle E. No. 176*, 171 Wn.2d 342, 348, 254 P.3d 797 (2011); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993); *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976). The standard of review for a denial of a motion for reconsideration is also abuse of discretion. *Kleyer v. Harborview Med. Cntr. of University of Washington*, 76 Wn. App. 542, 545, 887 P.2d 468 (1995).

An abuse of discretion occurs when a decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Associated Mortgage*, 15 Wn. App. at 229. A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Lewis*, 115 Wn.2d 294, 298–99, 797 P.2d 1141 (1990)). Questions of law are reviewed de novo. *In re Firestorm 1991*, 129 Wn.2d 130, 135, 916 P.2d 411 (1996). "A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Fisons*, 122 Wn.2d at 339, 858 P.2d 1054.

B. The Trial Court's Decision to Close Discovery as to a Newly Added Party Was Based on Untenable Reasons.

Under CR 3, a civil action is commenced by service of a copy of the summons and complaint. Once an action commences, the rules require an

answer, CR 7, that shall state the defenses to each claim asserted and admit or deny the averments contained in the complaint. CR 8(b). The answering party is further entitled to affirmative defenses, CR 8(c), and may move for dispositive relief under CR 12.

The civil rules then allow discovery by (1) depositions, written interrogatories, production of documents or permission to enter upon land for inspection, physical and mental examinations, and requests for admission. CR 26(a). A party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." CR 26(b)(1).[51]

"At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery." CR 26(f).[52] The court must also order a discovery conference if a party files a motion that includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

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[51] "The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." CR 26(b)(1).

[52] In Pierce County, a new filing requires the clerk to "issue and file a document entitled Order Setting Case Schedule or an Order Assigning Case to Judicial Department and Setting a Hearing date. PCLR 3(b). The trial court may, either on motion or on its own, modify the Order Setting Case Schedule for good cause. PCLR 3(d). The local rules then provide specific time intervals for an Order Setting Case Schedule, including several discovery deadlines ranging from disclosure of witnesses to a cutoff. PCLR 3(g).

> (3) Any limitations proposed to be placed on discovery;
>
> (4) Any other proposed orders with respect to discovery; and
>
> (5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

CR 26(f). "Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires." CR 26(f).

Here, at Simon's urging, the trial court closed discovery as to U.S. Security only eight days after it was added as a party. Cook objected procedurally to the request to close discovery and requested the trial court to issue an amended case schedule order setting forth new deadlines. As to Cook's request, the trial court stated, "To the extent that's a motion that I can hear today, I am going to deny the motion."[53] Despite just having expressed doubt at having the ability to hear Cook's oral "motion" to issue a new case schedule, shortly thereafter, the trial court granted Simon's request—essentially the oral motion to which Cook was responding—to close discovery as to a newly-added party and then invited briefing in the form of motions for reconsideration if the parties wanted.

As a threshold matter, the trial court erred procedurally closing discovery U.S. Security without allowing Cook sufficient time under the

[53] VTP (Vol. V) at 39.

rules to respond.[54] CR 7; CR 26(f); PCLR 3; PCLR 7. Compounding the procedural error, the trial court actually ordered that all discovery as to U.S. Security was closed without citing a single rule granting it such authority or offering any reasonable basis for doing so. This was ***not*** a situation where discovery against a party was sought, the responding party objected, and the court considered whether the discovery needed to be limited.[55] CR 26(b)(1). Instead, this was a situation where discovery was completely closed at the outset of a lawsuit against U.S. Security—a party that had ***never*** before had to respond to a lawsuit by Cook. The discovery rules allow some limitations on discovery under certain conditions, but they do not authorize the trial court to close discovery entirely as to a newly-added party. By lacking ***any*** legal authority to completely close discovery, the trial court's decision to do so was clearly untenable. *See McCoy v. Kent Nursery. Inc.*, 163 Wn. App. 744, 758, 260 P.3d 967 (2011) (a discretionary decision is untenable if it was reached by applying the wrong legal standard).

Rather than closing all future discovery, justice and good cause required the trial court to issue a new case schedule and set new deadlines.

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[54] Closing discovery was not an issue that the trial court raised but rather was an issue that Simon raised improperly at the end of a motion for summary judgment. The civil rules allow for a discovery conference, but if a party requests one, then the requesting party must submit briefing containing specific information. CR 26(f). This ensures that the trial court has the proper information to consider when evaluating questions like whether to limit discovery. Rendering a decision like closing discovery as to a newly added party affects substantial rights, and doing so by disregarding procedure is untenable and unreasonable in of itself.

[55] CR 26(b)(1) presupposes that discovery requests have been served, and it allows a trial court to limit such *outstanding* discovery. The rule provides the trial court with a framework to consider in deciding whether to limit the *outstanding* discovery. Here, the scope of *outstanding* discovery was not at issue; rather, the trial court was considering a request to preemptively close all discovery.

CR 26(f) (an order may be modified if "justice so requires"); PCLR 3 (case schedule may be modified for "good cause."). Surely the addition of a completely new party, one who has never appeared before in litigation, constitutes good cause to modify a case schedule to administer justice according to how the civil rules are designed. If discovery had been permitted and either Simon or U.S. Security subsequently took issue with specific discovery requests, then they could have sought relief as to the specific discovery. CR 26(b)(1). Alternatively, either party could have requested a discovery conference by filing a motion that requested specific limitations. CR 26(f). Of course the trial court would nonetheless be bound by the standards set forth in the civil rules, including that a party may obtain any discovery regarding any matter that is relevant to the subject matter. CR 26(b)(1). Failing to follow the civil rules here both procedurally and substantively, the trial court ultimately rendered an untenable decision that constitutes reversible error.

C. The Trial Court's Decision to Close Discovery as to a Newly Added Party Was Manifestly Unreasonable.

U.S. Security knew about this lawsuit since the outset but was not named as a defendant until the trial court granted leave to amend. Due to the circumstances, the amendment did not occur until September 24, 2015, or 14 days before trial. It was therefore not until this point when Cook would have been permitted under the civil rules to send discovery requests to U.S. Security, including interrogatories under CR 33 and requests for admission under CR 36, both of which are available only from parties to a

lawsuit. But instead of allowing such discovery, the trial court arbitrarily and capriciously closed discovery for no legitimate reason.

Simon will likely claim that the trial court closed discovery because nothing was left to be done; however, this is a strawman argument where a completely new party is added because discovery is essential even for the basic questions like, What lay and expert witnesses will U.S. Security rely upon at trial? Indeed, at the time of the hearing on October 2, 2015, when the trial court closed discovery as to U.S. Security, it recognized admitted that Cook was "not unreasonable" to expect some discovery regarding U.S. Security. And yet the trial court nonetheless ordered that discovery as to U.S. Security was forbidden for no reason other than "the facts in this case are the facts in this case." This position, however, ignores the broad discovery allowed under CR 26, as well as basic procedure built into the rules to ensure that discovery is not improperly limited and that parties can avoid a trial by ambush. Going back to the initial example, Cook would not have even been entitled to engage in discovery of U.S. Security's experts, or understand who it would blame at trial.

Perhaps most alarming is the trial court's reasoning to close discovery. On October 2, 2015, the trial court stated the following when explaining that there would be no further discovery as to any defendants:

> Mr. Hastings, I denied the defendant's motion [for summary judgment], and it took every bit of energy for me to do that. And so I don't know what to tell you beyond that, but I've allowed you to amend your complaint.

In essence, the trial court's position as that it had already "allowed" Cook

to have previous rulings, and she should not have been asking for more. This reasoning is flawed on multiple levels, not least of which is that the trial court was bound by law to issue the prior decisions allowing the amendment to add U.S. Security and denying summary judgment. To then cite those as reasons why Cook is not entitled to discovery defies credulity.

A similar narrative appeared at the October 16 hearing, when the trial court said that it could have taken even more drastic measures like dismissal:

> You sort of told me about the Burnet factors and how I didn't consider lesser sanctions, I didn't consider your lack of willfulness and the violation, I didn't articulate that there's any kind of prejudice to the defense, and there is none. ***Well, you know, it seems to me that I could have granted your motion for summary judgment. I could have denied your amendment. I could have done those things, and that would have been a different sanction than simply declaring that in my view the discovery that has been completed and that closed five weeks ago, or whenever it was when it closed, wasn't subject to being reopened. . . . But I think that I've been more than generous in allowing this case to be prosecuted the way you want it to be prosecuted, but I'm limiting the discovery at this point in time.***

(Emphasis added).

Apparently the trial court believed that Cook should have been thankful for its prior decisions, not asking for discovery as to a newly-added party. This reasoning does nothing to support a decision closing discovery as to a newly added party, and it constitutes a clear manifestly unreasonable decision, particularly when combined with the absurdity of granting leave to amend to add a new party and then prohibiting discovery as to the newly-added party.

D. The Trial Court's Reconsideration Order Was Made in Error for the Same Reasons.

At the trial court's request, Cook filed a motion for reconsideration of its order closing discovery. The trial court denied this motion and abused its discretion again for the same reasons already articulated. Of particular concern on reconsideration, though, the trial court said that discovery on this "simple" case was done and that Cook should be fortunate that she was granted leave to add U.S. Security and permitted to go to trial:

> Well, you know, it seems to me that I could have granted your motion for summary judgment. I could have denied your amendment. I could have done those things, and that would have been a different sanction than simply declaring that in my view the discovery that has been completed and that closed five weeks ago, or whenever it was when it closed, wasn't subject to being reopened.

The trial court's view that this case is "simple" is problematic for several reasons, including that Cook suffered a traumatic brain injury that nearly killed her and that the defendants were nationwide corporations with skilled attorneys. Further, the trial court relied on such reasoning even though it was not considering specific discovery requests that could have shown why liability against U.S. Security was not as "simple" as believed. CR 26(b)(1) (allowing a court to limit discovery that has already been requested). Moreover, the trial court's position offends the basic notions of fairness articulated throughout the civil rules, allowing parties to engage in discovery to streamline trial issues and understand an adversary's trial position. The sum total of its reasoning—and lack thereof—clearly demonstrates that the trial court's reasons were manifestly unreasonable.

Equally alarming is that the trial court strongly implied that its decision to close discovery was also due to Cook's failure to add U.S. Security as a defendant earlier. This reasoning is troubling because the trial court had already granted leave to add U.S. Security, which means that it necessarily accepted Cook's argument that she exercised diligence in identifying U.S. Security as a party, as explained above.[56] Prior orders unrelated to discovery are not bargaining chips that should be used to limit discovery moving forward.

Finally, the trial court stated that reopening discovery would have prejudiced Simon by pushing trial four months downstream. But this is nonsensical because the situation was created when leave to amend was granted, as the law required.[57] The prejudice regarding trial readiness and pushing the trial therefore could not be used as a basis to deny discovery, as it was a function of law, not of Cook's dilatory conduct. The trial court's decision was inherently contradictory, and thus, unreasonable for the court to reject Simon's arguments of dilatory conduct with regard to the motion for leave to amend but then appearing to embrace such arguments as a reason for denying any discovery.

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[56] Under *Powers*, 182 Wn.2d 159, the Supreme Court held that "If a plaintiff is able to show that the plaintiff identified an unnamed defendant with reasonable particularity and tolled the statute of limitations by timely serving at least one named defendant, the statute of limitations will be tolled as to claims against such unnamed defendant." Cook met her burden of this showing when the trial court granted leave to amend the complaint by adding U.S. Security as a defendant. This is not at issue on appeal and is the law of the case. Therefore, the trial court's subsequent decisions must be viewed in the context of accepting that U.S. Security is a proper defendant.

[57] Simon will likely spend a large portion of its brief arguing why the amendment was improper, but again, this is not an issue that is before this court. At this point in litigation, the trial court's order granting leave to amend is the law of the case.

Moreover, the trial court also moved the trial date by five months for reasons that are also unclear given the record. Thus, any alleged prejudice to Simon for having to prepare for trial again as a reason supporting the closure of discovery effectively vanished when the trial court continued the case on October 2. It is entirely unclear and borderline vindictive to then prohibit discovery during this five-month period.

E. The Trial Court's Order Was Tantamount to an Improper Discovery Sanction.

The manifest unreasonableness in the trial court's decision here is even more apparent when considering *Burnet*, 131 Wn.2d 484, and its progeny. *Jones*, 179 Wn.2d 322; *Blair*, 171 Wn.2d 342; *Fisons Corp.*, 122 Wn.2d 299. *Burnet* was a case addressing CR 37, and it held that "the court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery." *Burnet*, 131 Wn.2d at 495-96. When imposing a severe sanction, "'the record must show three things—the trial court's consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it.'" *Blair*, 171 Wn.2d at 348 (quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)).

In *Burnet*, the plaintiffs filed a medical malpractice lawsuit in December 1983 against Spokane Valley General Hospital, Spokane Ambulance, and Dr. Robert Rosenthal. *Burnet*, 131 Wn.2d at 487. The lawsuit was filed to recover damages for Tristen Burnet's extensive neurologic damage, which was allegedly caused by medical malpractice.

Id. In July 1986, the plaintiffs amended their complaint to add claims against Dr. Graham and Sacred Heart Medical Center. *Id.* at 487. In November 1987, Sacred Heart and Dr. Graham moved for summary judgment. *Id.* at 488. The trial court denied the motion with respect to negligence and the corporate liability issue. *Id.* at 489.

In April 1991, the plaintiffs filed a supplemental answer to discovery contending that Sacred Heart was negligent in failing to properly review the physicians' credentials. *Id.* at 490. In response, Sacred Heart requested a discovery conference and a protective order prohibiting discovery on the credentialing claim, arguing that the plaintiffs had not pleaded the cause of action. *Id.* at 490. Sacred Heart contended that the plaintiffs' previous discovery responses led it to believe that the plaintiffs' experts would testify with respect to treatment decisions, not with regard to Sacred Heart's actions in credentialing the physicians and allowing them to treat the plaintiff. *Id.* at 491. The trial court agreed with Sacred Heart, indicating that "claims based on the doctrine of corporate negligence regarding credentialing have not been sufficiently pleaded nor have responses to discovery given sufficient notice of any such claim." *Id.* at 491. The trial court then issued an order stating that "no claim of corporate negligence regarding credentialing is at issue in this litigation and there shall be no further discovery from [Sacred Heart] on that issue." *Id.* at 491.

On appeal, Division Three upheld the trial court, characterizing the issue as a "compliance problem with a scheduling order." *Id.* at 491. The plaintiffs appealed to the Washington State Supreme Court, where they

argued that the trial court's order limiting discovery, in effect removing their claim that Sacred heart was negligent, was error. The Washington Supreme Court held that the negligent credentialing claim against Sacred Heart, and the discovery relating to it, "should not have been excluded absent a trial court's finding that the [plaintiffs] willfully violated a discovery order." *Id.* at 497. The Court also held that it was an abuse of discretion for the trial court "to impose the severe sanction of limiting discovery and excluding expert witness testimony on the credentialing issue without first having at least considered, on the record, a less severe sanction that could have advanced the purposes of discovery and yet compensated Sacred Heart for the effects of the Burnet's discovery failings." *Id.* at 498. Finally, the Court held that even if the trial court had "considered other options before imposing the sanction that it did," the only conclusion would be "that the sanction imposed in this case was too severe in light of the length of time to trial, the undisputedly severe injury to Tristen, and the absence of a finding that the Burnets willfully disregarded an order of the trial court." *Id.* at 498-99.

Burnet has been reaffirmed dozens of times since. *E.g.*, *Jones v. City of Seattle*, 189 Wn.2d 322, 314 P.3d 38 (2013); *Blair*, 171 Wn.2d 342; *Mayr v. Sto Indus., Inc.*, 156 Wn.2d 677, 132 P.3d 115 (2006). It is now black letter law for a trial court to apply the *Burnet* factors on the record if it is considering a severe sanction like striking a witness or excluding evidence. *Burnet* and its progeny broadly stand for the proposition that the "overriding responsibility is to interpret the rules in a way that advances the

underlying purpose of the rules, which is to reach a just determination in every action." *Burnet*, 131 Wn.2d at 498 (citing CR 1).

Applying the *Burnet* factors here is further evidence that the trial court's decision to close all discovery was manifestly unreasonable.[58] First, there is zero evidence of "willfulness" because Cook only recently added U.S. Security and did not violate any previous discovery order or otherwise act dilatory with regard to discovery as to this entity. Second, Simon did not show any prejudice that would flow from allowing discovery as to a newly added party when (1) discovery as to that party has never before been conducted, and (2) trial was already continued until March 2016. Third, the trial court did not consider any lesser sanctions. Although the trial court referenced the possibility that it could have simply refused to allow U.S. Security to be added as a defendant, that would have been a greater or equal sanctions to the one imposed here—allowing U.S. Security to be added to the case, but precluding any discovery regarding it, thus essentially precluding Cook from meaningfully pursuing any claims against it—not a ***lesser*** sanction. Based on the foregoing, it is clear that the decision

[58] Additionally, the *Burnet* factors do not contain an inquiry into the merits of the underlying case. Here, the trial court's decision, as reflected by its comments during the October 2 and October 16 hearings, involved its assessment of the merits—or, apparently to the trial court, the lack thereof—of Cook's case and the trial court's continuing chagrin at being bound by legal standards to deny summary judgment dismissal of Appellants' case. These comments on Cook's theory of the case and apparent regret for not having been able to dismiss it likely constituted a violation of the "appearance of fairness doctrine. *See State v. Newbern*, 95 Wn. App. 277, 297, 975 P.2d 1041 (Ct. App. 1999) (trial court's remarks did not violate doctrine because they "had no bearing on the merits of either side's theories)." Nonetheless, the trial court's consideration of the merits of Appellants' case against Defendant Simon unreasonably applied a different legal standard than *Burnet* in denying ***any*** discovery against a new, ***entirely different*** defendant. This too constituted an abuse of discretion.

prohibiting discovery as to U.S. Security was an abuse of discretion.

The trial court's order would effectively force Cook into a blind man's bluff trial against U.S. Security, directly contravening the civil rules' purpose of facilitating a just determination. Like the CR 37 sanction cases, the prohibition on any discovery here operated like a de facto sanction, except the result is more severe where the undisputed evidence is that Cook did not violate any court order warranting such treatment.

The only effect of the trial court's decision to deny any further discovery is to severely prejudice Cook. This is not a simple, straight-forward case, as stated by the trial court. It involves significant, life-changing injuries of Cook, as well as sophisticated corporate defendants who is alleged to have acted negligently. Simon is represented by a large and resourceful law firm that has demonstrated throughout this record a pattern and practice of aggressive discovery tactics that have led to improper withholding of information. These games and tactics left Cook in the position of attempting to seek discovery and ascertain a complete good faith basis for adding U.S. Security as a defendant, drafting an amended complaint, moving to amend a complaint, and seeking further discovery against U.S. Security with ***less than three months*** before expiration of the discovery cutoff and after the statute of limitations had already expired.

F. This Case Should Be Remanded to A Different Judge.

The appearance of fairness doctrine demands the absence of actual or apparent bias on the part of the judge or decision-maker. *State v. Worl*, 91 Wn. App. 88, 955 P.2d 814 (1998). "'The law goes farther than requiring

an impartial judge; it also requires that the judge appear to be impartial.'" *Id.* (quoting *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992)).

The trial court's decision here, as reflected by its comments during the October 2 and October 16 hearings, involved its assessment of the merits—or, apparently to the trial court, the lack thereof—of Cook's case and the trial court's continuing chagrin at being bound by legal standards to deny summary judgment dismissal of Cook's case. These comments on Cook's theory of the case and apparent regret for not having been able to dismiss it constituted a violation of the "appearance of fairness doctrine" by rising to the level of evidence of actual or potential bias. *Post*, 118 Wn.2d at 619. Therefore, Cook respectfully asks the court to remand with instructions to reassign this case to a new judge.

V. CONCLUSION

For the foregoing reasons, Cook respectfully asks this court to reverse the trial court's decision closing discovery and to remand for trial to a new judge.

RESPECTFULLY SUBMITTED this 13th day of July, 2016.

PFAU COCHRAN VERTETIS AMALA, PLLC

By:

Darrell L. Cochran, WSBA No. 22851
Kevin M. Hastings, WSBA No. 42316

CERTIFICATE OF SERVICE

Laura Neal, being first duly sworn upon oath, deposes and says:

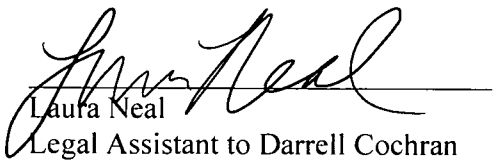
I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on July 13, 2016, I personally delivered, a true and correct copy of the above document, directed to:

Rodney Umberger and Anne Loucks
Williams, Kastner, & Gibbs PLLC
601 Union St., Ste. 4100
Seattle, WA 98101-2380

VIA EMAIL AND ABC LEGAL MESSENGER

DATED this 13th day of July 2016.



Laura Neal
Legal Assistant to Darrell Cochran

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