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Supreme Court No. 79615-7

(Court of Appeals No. 244148-III)

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SUPREME COURT  
OF THE STATE OF WASHINGTON

KEN BRIGGS, JUDY ROBERTSON, MARK JOHNSON,  
BEVERLY NUNN, JAMI SMITH, SHIRLEY BADER, PAM  
ZELLER, MARGARET ("PEGGY") CLARK, ODALYS P.  
CASTILLO, and VALERIE BRUCK,

Plaintiffs/Petitioners,

v.

NOVA SERVICES, a Washington non-profit corporation, and  
LINDA BRENNAN,

Defendants/Respondents.

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SUPREME COURT  
OF THE STATE OF WASHINGTON

ANSWER TO APPELLANT'S PETITION FOR REVIEW

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**TABLE OF CONTENTS**

**I. IDENTITY OF RESPONDENT.....1**

**II. COURT OF APPEALS DECISION.....1**

**III. STATEMENT OF THE CASE.....1**

**IV. ARGUMENT.....2**

**A. Motion for Continuance under CR 56(f).....2**

**B. Motion to Compel.....3**

**C. Wrongful Termination in Violation of Public Policy.....3**

**D. Retaliatory Discharge.....4**

**E. Negligent Supervision/Retention.....4**

**V. CONCLUSION.....5**

## TABLE OF AUTHORITIES

### Cases

<i>Coggle v. Snow</i> , 56 Wn.App. 499, 784 P.2d 554 (1990).....	2
<i>Butler v. Joy</i> , 116 Wn.App. 291, 65 P.3d 671 (2003).....	2
<i>Bravo v. Dolsen Co.</i> , 125 Wn.2d 745, 888 P.2d 147 (1995).....	3
<i>NLRB v. Washington Aluminum Co.</i> , 370 U.S. 9 (1962).....	3
<i>Niece v. Elview Group Home</i> , 131 Wn.2d 39, 929 P.2d 420 (1997).....	4

### Statutes

RAP 13.4(b)  
RCW 49.32.020

### Rules

CR 37  
CR 56(f)

## **I. IDENTITY OF RESPONDENT**

Respondent Nova Services is a Washington non-profit corporation that herein answers and opposes Appellants' Petition for Review.

## **II. COURT OF APPEALS DECISION**

The Washington State Court of Appeals Division III, by decision filed November 14, 2006, (Court of Appeals No. 244148-III) upheld the trial court's dismissal on summary judgment of the Petitioners' claims for wrongful termination in violation of public policy, retaliatory discharge, and negligent supervision, as well as Petitioners' motions for continuance under CR 56(f) and to compel under CR 37. The decision is attached as the Appendix to Appellants' Petition for Review.

## **III. STATEMENT OF THE CASE**

On the 17th day of September, 2004, Plaintiffs filed suit against Defendant Nova Services alleging wrongful termination and violation of public policy, retaliatory discharge, negligent and intentional infliction of emotional distress and negligent supervision/retention. On the 27th day of April, 2005, Defendants' Motion for Summary Judgment was granted as to all claims by Superior Court Judge Gregory Sypolt. Plaintiffs appealed dismissal of their claims for wrongful discharge and violation of public policy, retaliatory discharge, and negligent supervision/retention. On November 14, 2006, the Washington Court of Appeals

Division III affirmed the trial court's holdings on all causes of action, as well as the trial court's denial of Plaintiffs' Motion for Continuance under CR 56(f) and Motion to Compel under CR 37.

Plaintiffs now petition this Court for review of the appellate court's decision.

#### **IV. ARGUMENT**

Respondent Nova Services opposes Appellants' Petition for Review because none of the issues presented for review meet the criteria of RAP 13.4(b) which states in relevant part:

A petition for review will be accepted by the Supreme Court only: (1) if the decision of the Court of Appeals is in conflict with the decision of the Supreme Court; or (2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

##### **A. Motion for Continuance under CR 56(f)**

The trial court properly reviewed the denial of Plaintiffs' Motion to Continue Defendants' Motion for Summary Judgment for Abuse of Discretion citing two long-established cases, *Coggle v. Snow*, 56 Wn.App. 499, 784 P.2d 554 (1990), and *Butler v. Joy*, 116 Wn.App. 291, 65 P.3d 671 (2003). The Appellate Court properly found that the Petitioners' had failed to specify what specific information the Petitioners intended to produce and how that information would

raise an issue of material fact. This issue fails to meet any of the criteria of RAP 13.4(b) and should not be reviewed.

**B. Motion to Compel.**

The appellate court properly reviewed the trial court's denial of Petitioners' Motion to Compel Discovery related to their claim for negligent supervision, again employing the abuse of discretion standard. The court found that none of the information sought could possibly provide issues of material fact related to the requirement that anyone posed a potential risk of harm to any of the plaintiffs. This issue is well settled. The standard of review was appropriate and this issue does not meet the requirements of RAP 13.4(b).

**C. Wrongful Termination in Violation of Public Policy.**

Plaintiffs' claim they were discharged for engaging in "concerted activities" under RCW 49.32.020. "Concerted activities" are activities undertaken by employees in unison with one another for the purpose of improving their "working conditions." RCW 49.32.020; *Bravo v. Dolsen Co.*, 125 Wn.2d 745, 888 P.2d 147 (1995). "Working conditions" relate to the terms and conditions of employment. RCW 49.32.020; *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *Bravo*, supra.

The "concerted activity" alleged was the drafting and submission of a letter to Nova's Board of Directors dated April 6, 2004. That letter was signed by Petitioners Briggs, Robertson, Johnson, Nunn, Bader and Smith. Both the trial court and appellate court properly held that the content of that letter did not

address working conditions and was not, therefore, concerted activity such as to trigger the protections afforded by the public policy provided by RCW 49.32.020. The appellate decision was the appropriate response based on case law and this decision should not be reviewed.

**D. Retaliatory Discharge.**

Having found that Plaintiffs had not engaged in statutorily protected activity, the court properly affirmed dismissal of Plaintiffs' claim for retaliatory discharge. Again, that decision was made in conformity with long established law at both the appellate and Supreme Court levels and should not now be reconsidered.

**E. Negligent Supervision/Retention.**

A negligent supervision claim requires showing: (1) an employee acted outside the scope of his or her employment; (2) the employee presented a risk of harm to other employees; (3) the employer knew, or should have known in the exercise of reasonable care, that the employee posed a risk of harm to others; and (4) that the employer's failure to supervise was the proximate cause of injuries to other employees. *Niece v. Elview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997).

The record is devoid of any showing by the Plaintiffs that any employee of the Respondents' posed a risk of harm to others. Based on well established case law and the absence of evidence on the critical elements of the claim, the appellate court properly affirmed the trial court's dismissal of Plaintiffs' claim for negligent

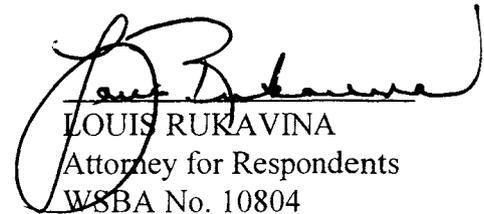
supervision/retention.

#### IV. CONCLUSION

All of the issues of which Appellants seek review have been decided previously at both Appellate and Supreme Court levels. None of those appellate holdings is in conflict with prior case law, none involve constitutional issues at the state or federal level and none involve issues of substantial public interest. The wrongful termination claims are inappropriate as to Plaintiffs Nunn, Johnson, Bader, Smith, Bruck or Clark since they resigned and introduced no evidence of constructive discharge. Plaintiffs Briggs and Robertson, the only employees who were discharged, were discharged for insubordination and were signatories to a letter that did not amount to "concerted activities." Under the circumstances, whether they were managers or not is irrelevant. The Supreme Court should deny Petitioners' Petition for Review.

DATED this 11th day of January, 2007.

Respectfully submitted,



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