Court of Appeals, Division I No. 76669-4

King County Superior Court No. 15-2-25171-6 SEA

No. 96936-1

SUPREME COURT

OF THE STATE OF WASHINGTON

IMELDA ABREGO,

Petitioner

vs.

ALLIANT CREDIT UNION,
TURNBULL & BORN, P.L.L.C.,
and BRIAN M. BORN,

Respondents

ABREGO'S PETITION FOR REVIEW

Imelda Abrego, Pro Se Litigant
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Seattle, WA 98126

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A. Identity of Petitioner

Imelda Abrego is the petitioner. Abrego was the appellant in the Court of Appeals case 76669-4. Abrego was the defendant in the original King County Superior Court case 15-2-25171-6 SEA. Abrego was the counterclaim plaintiff in her compulsory counterclaim in the King County Superior Court case 15-2-25171-6 SEA.

B. Court of Appeals Decision

The Court of Appeals filed its unpublished opinion on December 31, 2018 (App. A) and filed an Order Denying Motion for Reconsideration on February 6, 2019 (App. B).

C. Issue Presented for Review

Article I Section 10 of the Constitution of the State of Washington regarding Administration of Justice states, "Justice in all cases shall be administered openly, and without unnecessary delay."

Did King County Superior Court and Court of Appeals Division I deny Abrego her constitutional right when they did not allow her to receive her discovery materials per Superior Court Civil Rule 26 (CR 26) and stopped additional discovery motions? YES.

D. Statement of the Case

In compliance to Federal Register Civil Procedure (FRCP) 33 and 34, Abrego served her first set of interrogatories and requests for

production of documents on July 25, 2016 to Alliant Credit Union's attorney on record Brian M. Born (Alliant et. al). CP 45-61. On August 19, 2016, Abrego emailed Born a reminder that the responses are due soon. CP 36. On August 31, 2016, Abrego emailed Born that it is past the 30-day time limit for responses to her interrogatories and requests for production and asked when she should be receiving them. CP 38. Born did not respond to either of the emails. Abrego's Op. Br. pp. 38-39.

In the 53 days that had passed since the July 25, 2016 date of service, Abrego had not received any response from Born regarding her discovery requests or her emails. Therefore, on September 16, 2016, Abrego filed a motion to compel. CP 19-23. In order to address the Certificate of Compliance with CR 26(i), Abrego stated that she "**attempted to comply** with CR 26(i) and Local Rule 37(e)." CP 25, line 16. She attached the emails as exhibits to prove her good faith effort towards compliance of CR 26(i). Abrego's Op. Br. p. 39. Abrego was not awarded fees and costs to bring this motion. Abrego's Op. Br. 40.

On September 23, 2016, Abrego received insufficient discovery responses with some objections from Alliant et. al. Per CR 37(d)(3), failure to act may not be excused on the ground that discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 26(c). For purposes of this section, an evasive or

misleading answer is to be treated as a failure to answer. Further, discovery responses did not meet the legal requirements of the Rules of Evidence. Abrego's Op. Br. pp. 20-30. Abrego's reply pp.2-4. In essence, Alliant et. al did not answer Abrego's discovery requests.

On September 26, 2016, Judge Bradshaw signed a Court's Order RE: CR 26(i) /KCLR 37(e) Compliance Requirement. CP 82. Born did not comply to court order. CP 97, lines 14-15. Abrego attempted to comply with court order and wrote a Joint Certificate of Compliance with KCLR 37(f). CP 97-102. Abrego itemized the reasons that Born's answers should be treated as a failure to answer under subpart CR 37(a)(3). CP 97, lines 18-22. Born refused to sign. CP 102. On November 23, 2016, Abrego filed her Joint Certificate of Compliance KCLR 37(f) without Born's signature. Abrego's Op. Br. p. 41

In addition to not complying to the court order signed on September 26, 2016, Alliant et. al, in essence, did not answer Abrego's discovery requests. On November 23, 2016, Abrego filed a motion for relief. CP 83-95. Even though the trial judge was aware of Alliant et. al's noncompliance, he denied Abrego's motion for relief. Further, the order denying Abrego's motion for relief states, that [Abrego's interrogatories and requests for production of documents] "…shall not be the subject of

any additional discovery motions…". CP 141. Abrego was not awarded fees and costs to bring this motion. Abrego's Op. Br. p. 41.

E. Argument Why Review Should Be Granted

1. Abrego was denied her constitutional right guaranteed by article I, section 10 of the Washington Constitution – RAP 13.4(b)(3)

CR 26 (App. C) is the court rule governing discovery practice in all civil matters. "In general, the rule allows for the discovery of anything material to the litigation, except for things protected by privilege." In re Firestorm 1991, 129 Wn.2d 130, 916 P.2d 411, (1996).

"This broad right of discovery is necessary to ensure access to the party seeking the discovery. It is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense." Puget Sound Blood Ctr., 117 Wn.2d at 782.

Spratt v. Toft, 180 Wn. App. 620, 714, 324 P.3d 707 (2014) states, "Washington courts have held that discovery is a necessary element in preserving access to the court, citing article I, section 10 of the Washington Constitution."

Further, "Washington Supreme Court has held that this right of access is a constitutional right. Cedell v. Farmers Ins. Co. of Wash., 176 Wn.2d 686, 698, 295 P.3d 239 (2013); Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 781-82, 819 P.2d 370 (1991); see also Spratt v. Toft, 180

Wn. App. 620, 633, 324 P.3d 707 (2014) (finding that a right of access to the courts includes "the right of discovery authorized by the civil rules")."

The purpose of CR 26 is to "allow production of all relevant facts and thereby narrow the issues, and promote efficient and early resolution of claims." Cedell v. Farmers Ins. Co. of Wash., 176 Wn.2d 686, 698, 295 P.3d 239 (2013). This provides the "parties an opportunity to understand the evidence, the facts and opinions, upon which the other parties in the action base their claims, defenses, and theories of liability, damages, and defense." 9A Breskin, David E., Washington Practice: Civil Procedure Forms and Commentary § 26.1, at 295 (3rd ed. 2000).

In Gammon v. Clark Equipment Co., 38 Wn.App. 274, 686 P.2d 1102, (1984), aff'd on other grounds, 104 Wn.2d 613, 707 P.2d 685 (1985), then Chief Judge Durham wrote:

> The Supreme Court has noted the aim of the liberal federal discovery rules is to "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." United States v. Proctor & Gamble Co., 356 U.S. 677, 682, 78 S.Ct. 983, 986, 2 L.Ed.2d 1077 (1958). The availability of liberal discovery means that civil trials no longer need be carried on in the dark. The way is now clear … for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 342, 858 P.2d 1054 (1993) states, "We held sanctions were appropriate because "a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials." We further noted the conduct of counsel in discovery is measured "against the spirit and purpose of the rules, not against the standard of practice of the local bar." Id. at 345, 858 P.2d 1054. We remanded the case to the trial court for a determination of appropriate sanctions to be imposed.

Abrego's constitutional right guaranteed by article I, section 10 of the Washington Constitution was denied. She continuously and consistently stated in her legal proceedings that she was being denied her constitutional right – the right to access. CP 88, line 17. Abrego filed a motion to compel and a motion for relief. The trial court did not allow Abrego to continue her attempts to receive discovery. Instead, it ordered Abrego to stop making additional discovery motions. CP 141.

This lack of access affected everything else downstream in this case. For example, per CR 56(f) the trial court should have refused Alliant et. al's application for summary judgment. Abrego was denied the opportunity to understand the evidence, facts, and opinions. How can Abrego adequately defend against Alliant's accusations? CP 132 ¶ 29 and

Abrego's Op. Br. p. 42. Abrego suffered and continues to suffer a tragic miscarriage of justice.

This court should grant review and nullify Alliant Credit Union's claim and grant Abrego's counterclaim.

2. Court of Appeals decision is in conflict with decision of the Supreme Court – RAP 13.4(b)(1)

The Court of Appeals decision is in conflict with the decision of the Supreme Court for the following above stated cases:

- Cedell v. Farmers Ins. Co. of Wash., 176 Wn.2d 686, 698, 295 P.3d 239 (2013)
- Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 781-82, 819 P.2d 370 (1991)
- Gammon v. Clark Equipment Co., 104 Wn.2d 613, 707 P.2d 685 (1985)
- In re Firestorm 1991, 129 Wn.2d 130, 916 P.2d 411 (1996)
- United States v. Proctor & Gamble Co., 356 U.S. 677, 682, 78 S.Ct. 983, 986, 2 L.Ed.2d 1077 (1958)
- Puget Sound Blood Ctr., 117 Wn.2d, 782
- Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 342, 345, 858 P.2d 1054 (1993)

This court should grant review and reverse to be consistent with legal precedents.

3. Court of Appeals decision is in conflict with a published decision of the Court of Appeals – RAP 13.4(b)(2)

The Court of Appeals decision is in conflict with the published decision of the Court of Appeals for the following above stated cases:

- Spratt v. Toft, 180 Wn. App. 620, 714, 324 P.3d 707 (2014)
- Gammon v. Clark Equipment Co., 38 Wn.App. 274, 686 P.2d 1102 (1984)

This court should grant review and reverse to be consistent with legal precedents.

F. Conclusion

The purpose and spirit of CR 26 is an important constitutional right that everyone should be able to enjoy. It has been well established by precedents, but it has not been heeded in Abrego's situation. Therefore, this Court should accept review to ensure that this type of tragic miscarriage of justice does not occur ever again.

Abrego respectfully requests that this court nullifies Alliant Credit Union's complaint, vacates the judgment, and grants Abrego's compulsory counterclaim with reasonable monetary values as previously described. Additionally, Abrego requests the costs incurred for filing the motion to compel and motion for relief to be awarded to me.

Dated this 7th day of March, 2019 at Seattle, WA

Respectfully submitted,

/s/ Imelda Abrego
Imelda Abrego
Petitioner and Pro Se Litigant

DECLARATION OF SERVICE

I declare that on March 7, 2019, I caused the Abrego's Petition for Review to be delivered to Brian M. Born of Turnbull & Born, P.L.L.C. at email address bborn@turnbullborn.com:

I certify under penalty of perjury that the foregoing is true and correct.

Dated this March 7, 2019 at Seattle, WA

/s/ Imelda Abrego
Imelda Abrego
Petitioner and Pro Se Litigant

G. Appendices

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ALLIANT CREDIT UNION, Respondent, v. IMELDA ABREGO, individually, and the marital community composed of IMELDA ABREGO and JOHN DOE ABREGO, husband and wife, Appellant.	)	DIVISION ONE No. 76669-4-I UNPUBLISHED OPINION FILED: December 31, 2018

DWYER, J. — Imelda Abrego obtained a loan from Alliant Credit Union on which she subsequently defaulted. Alliant sued Abrego for breach of contract and was granted summary judgment. On appeal, Abrego asserts that a factual dispute existed as to whether she personally applied for and obtained the loan and that the trial court improperly dismissed her counterclaims against Alliant and its attorneys for abuse of process. Finding no error, we affirm.

I

Alliant Credit Union received a vehicle loan application from Imelda Abrego on October 31, 2014. The loan application related to Abrego's request for the financed acquisition of a 2014 Mercedes GL 450. The application inputs included Abrego's name, e-mail, income, employer, and a VIN for the Mercedes.

On November 3, Abrego sent Alliant a copy of the purchase agreement for the Mercedes and earnings statements for two periods in October 2014. The purchase agreement showed the total purchase price of the Mercedes to be $74,419, with $9,419 to be paid directly by Abrego to the dealership and $65,000 to be financed by Alliant. This purchase agreement listed Abrego's home address, date of birth, driver's license number, and home telephone number.

The next day, Alliant's loan officer, Lukas Gagainis, telephoned Abrego at her landline number and had a conversation with Abrego that was recorded by Alliant. Abrego verified a number of personal identifier questions during the call. Gagainis informed Abrego that she would need to become an Alliant member to proceed with her loan application. Gagainis also advised Abrego that he would be out of the office the following day, November 5, and gave Abrego the name and telephone number of his supervisor, Andy Vostatek, so that she could telephone him to close on the loan details once she was approved for membership.

On November 5, Abrego submitted a membership application to Alliant to facilitate approval of her loan application and, that same day, telephoned Vostatek from her landline. During the call, she verified her Social Security number, date of birth, and ZIP code. Vostatek advised Abrego that she could expect an e-mail from Alliant's loan processing department that would subject her to a security verification process. During that call, Abrego confirmed that the $65,000 loan advance check

would be made jointly payable to her and to the Mercedes dealership and sent via Federal Express to her home address in Seattle. She also confirmed that monthly loan payments would be due on the 20th of each month.

After this telephone call took place, another Alliant employee prepared the loan documents and e-mailed them to Abrego via Docu-Sign, a company that provides authentication services to facilitate the electronic execution of contracts. Pursuant to Docu-Sign's authentication process, Abrego was required to correctly answer 18 security questions to access the loan documents and electronically sign them. The authentication questions were highly specific to Abrego, asking for information that included several prior street addresses, past vehicles owned or leased, and information about Abrego's relatives. Docu-Sign's certificate of completion shows that Abrego authenticated this security protocol and electronically signed the loan documents. The loan documents electronically signed by Abrego included a loan and security agreement, vehicle title requirement instructions, a notice to provide physical damage insurance, and authorization for Automated Clearing House automated payments on the loan. To authorize these automated payments, Abrego identified her personal Bank of America account from which monthly payments of $973.84 were to be withdrawn.

Following Abrego's execution of these loan documents, Alliant purchased a $65,000 check from Moneygram Payment Systems, which

was made jointly payable to Imelda Abrego and to Lauderdale Luxury Automotive. On November 6, Alliant sent this check to Abrego's address via Federal Express's overnight shipping option. Abrego admits receiving this check. But she did not send it on to the dealership. Instead, she overnighted the check to Deon Glover in Miami, Florida. Abrego later claimed that she did this in lieu of taking a planned trip to Florida to buy the Mercedes.

Abrego made her first $973.84 monthly payment on the loan on December 20, 2014, and continued making monthly payments until her failure to make the May 20, 2015 payment placed her in default.

During this time, however, Abrego did not provide Alliant with a vehicle title or with proof of insurance as the terms of the loan required. On February 4 and again on March 6, Alliant sent letters to Abrego reminding her of her obligation to provide it with the original title. Also in March, an Alliant employee called Abrego to remind her of the title obligation and to inform her that her monthly payments would increase due to Abrego's failure to provide proof of insurance on the Mercedes. Abrego then obtained insurance on the Mercedes and provided Alliant with proof of this insurance, resulting in her monthly payments remaining at $973.84.

However, Abrego still did not provide Alliant with a vehicle title. On April 7, an Alliant representative telephoned Abrego to speak with her regarding the title. Abrego stated, in response, that she had forgotten to

call the dealership about the title and that she would do so the same day. A follow-up call from Alliant on April 23 met with similar results—Abrego assuring the Alliant representative that she would contact the dealership.

Then, on May 5, Abrego, for the first time, affirmatively stated that she did not have the title to the vehicle and that she had "co-signed for friend." Following her default later that month, Abrego telephoned Alliant's fraud unit to state that the Mercedes was not in her possession, and that she "was part of a business where the vehicle was to be used for business purposes," but that she was scammed and the vehicle did not exist. Following several months during which the loan remained in default, Alliant filed suit against Abrego in the King County Superior Court.

Not long before the trial court was to enter a default judgment against her, Abrego filed a bankruptcy petition, causing Alliant's litigation to be stayed. In her bankruptcy schedules, Abrego identified the Mercedes as a personal asset and the loan from Alliant as an undisputed personal debt. Alliant's counsel subsequently issued a bankruptcy subpoena and, on February 4, 2016, deposed Abrego. In this deposition, Abrego made several admissions regarding the loan.

Abrego testified that the loan was part of a scheme entered into with two Florida men who led her to believe that they would start a business with her and that each of the three would contribute $130,000 in seed money. She further testified that she financed her $130,000 contribution through the $65,000 loan from Alliant and another $65,000

loan from SunTrust Bank, and that she delegated the task of completing the loan applications to the two men. Finally, she admitted that she understood that the loans were to be taken out in her name before being assumed by the business.

Abrego also provided documents responsive to Alliant's subpoena, including a police report intake form for the North Miami Police Department in which she stated that she "obtained" the loan from Alliant. Abrego also produced several e-mails that she had sent to the Florida men acknowledging that the debt was in her name and seeking further cooperation to have the business assume the debt.[1]

Following Abrego's deposition, both Alliant and the bankruptcy trustee filed independent nondischargeability complaints against Abrego in the bankruptcy court premised upon fraud and related allegations. Ultimately, Abrego stipulated to a waiver of discharge, which was approved by the bankruptcy court's order of June 24, 2016. This order stated that "any and all claims, debts, and liabilities of [Abrego] arising before November 25, 2015 . . . are not discharged and are hereby deemed nondischargeable to the fullest extent of the law."

Until this point, Abrego had been represented by an attorney. Following the dismissal of her bankruptcy petition and the lifting of the automatic stay on Alliant's litigation, Abrego, now pro se, filed an answer, counterclaims against Alliant, and cross claims against its attorneys,

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[1] The business was incorporated in Florida as SMGZ Group LLC.

Turnbull & Born, PLLC, and Brian M. Born, individually.[2] The trial court granted Alliant's motion for summary judgment, awarding Alliant judgment in the amount of $65,005.64 plus costs in the amount of $818.89. The court denied Abrego's cross motion for summary judgment and dismissed her counterclaims and third party claims. Subsequently, the trial court entered its findings of fact and conclusions of law and an amended judgment awarding Alliant $21,700 in attorney fees. Abrego appeals.

II

Abrego first contends that summary judgment was improperly granted to Alliant on its breach of contract claim. This is so, she avers, because an issue of material fact existed as to whether she personally applied for and obtained the loan in question, and because Alliant was not entitled to judgment as a matter of law. We disagree.

Summary judgment is proper when the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). We review an order of summary judgment de novo, performing the same inquiry as does the trial court. Mohr v. Grant, 153 Wn.2d 812, 821, 108 P.3d 768 (2005). The facts and all reasonable inferences drawn therefrom are construed in the light most favorable to the nonmoving party. In re the Estates of Jones, 170 Wn. App. 594, 603, 287 P.3d 610 (2012). Once a motion for summary judgment has been brought, however, the opposing party must produce specific evidence, either through affidavits or

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[2] Abrego alleged that Alliant and its attorneys committed the tort of abuse of process.

admissible evidence, demonstrating that a factual dispute exists or that the moving party, under the law, is not entitled to judgment. CR 56(e).

In considering whether a nonmoving party has shown the existence of a factual dispute, Washington courts employ the "sham affidavit" rule. Taylor v. Bell, 185 Wn. App. 270, 294, 340 P.3d 951 (2014). Under this rule, when a party has earlier rendered clear answers to unambiguous deposition questions that negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue by providing an affidavit that merely contradicts, without explanation, previously given clear testimony. Bell, 185 Wn. App. at 294; Marshall v. AC&S, Inc., 56 Wn. App. 181, 185, 782 P.2d 1107 (1989). The rule is a narrow one, as the self-serving affidavit must "directly contradict[]" the affiant's previous "unambiguous sworn testimony." Kaplan v. Nw. Mut. Life Ins. Co., 100 Wn. App. 571, 576, 990 P.2d 991 (2000). If the subsequent affidavit offers an explanation for the variance from the previously given testimony, the trier of fact should determine the explanation's plausibility and summary judgment should thus be denied. Safeco Ins. Co. of Am. v. McGrath, 63 Wn. App. 170, 175, 817 P.2d 861 (1991).

Alliant avers that the sham affidavit rule applies to Abrego's contention that she never applied for the $65,000 loan nor authorized others to do so in her name. Alliant points to several statements in the record that contradict this assertion and would, thus, negate any issue of material fact. Among these is Abrego's statement given to North Miami police, dated November 23, 2015 (shortly before the commencement of bankruptcy proceedings), that she

"obtained a loan for the business in the amount of $65,000.00 from Alliant Credit Union." This statement is accompanied by a written declaration:

> I, [Imelda Abrego], certify under oath and under penalty of perjury that the below statement is true and correct. I further certify that the below statement is made by me freely and voluntarily and without threat or promise of any kind.

Under Florida law, this declaration allows the police report to be considered a verified document equivalent to a sworn affidavit.[3] Thus, Abrego's statement that she "obtained a loan" is an unambiguous sworn statement that directly contradicts her later testimony. Furthermore, Abrego does not offer any explanation for the inconsistency between this statement and her current averment. Abrego has thus failed to demonstrate that a genuine dispute of material fact exists.

Alliant is also entitled to judgment as a matter of law on its claim for breach of contract. Alliant has proved all of the elements required for a successful breach of contract claim: the parties formed a valid contract, Alliant performed its obligations pursuant to the contract (providing a check for the full amount of the loan), Abrego breached this contract when she defaulted, and Alliant has suffered and continues to suffer damages as a result of Abrego's default.

Abrego's assertion that a contract was not formed is belied by Abrego's admission otherwise, discussed above. Alliant performed on the contract by providing the loan funding and Abrego breached the contract by defaulting.

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[3] FLA. STAT. § 92.525.

Abrego claims that Alliant did not actually suffer damages, citing a Florida department of motor vehicles record for the Mercedes that she never purchased, which states that there is no lien on the vehicle. Abrego would have us infer that the vehicle was purchased with Alliant's loan funds but that an unknown third party then paid off the loan. In fact, Abrego never purchased the vehicle, nor did she provide Alliant with the title thereto, nor did Alliant receive payment on the loan after Abrego defaulted. Indeed, that there is no lien is unsurprising given that Abrego never purchased the vehicle.

In her cross motion for summary judgment, Abrego presented several defenses to contract formation, none of which are availing.[4]

Abrego's primary argument appears to be that she should be relieved of her obligations because she is the victim of a scam. However, the actions of third parties do not affect Abrego's liability under the agreement. Abrego admitted obtaining the loan. Whether she applied for the loan herself or delegated this task to others, no party could have accessed the loan documents without the extensive personal information needed to clear the online security protocol. Abrego confirmed the details of the loan in a recorded telephone call and subsequently received the check. Once Alliant funded the loan pursuant to the agreement and delivered the check to Abrego, Abrego's obligation was fixed.

Abrego chose to overnight the check to Deon Glover and not to present it to the dealership, in violation of the terms of the loan. Moreover, she did not

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[4] On appeal, Abrego raises additional defenses that, pursuant to RAP 9.12, will not be considered as they were not raised in the trial court.

disclose to Alliant that the vehicle was supposedly being purchased for a "business" or that she would rely on her "business partners" to pay off the debt. Instead, she made loan payments for five months and, in a further effort to keep the ruse alive, even took out an insurance policy on a vehicle that she had never purchased. She also assured Alliant that she would be able to produce the title to the vehicle despite having had no contact with the dealership. Abrego's claimed subjective expectation, undisclosed to Alliant until after her default, that third parties would pay off the loan is wholly immaterial to the question of her liability.

Abrego also asserts that she should not be liable for the debt on the theory that Alliant should not have disbursed funds from a check that lacked the dealership's endorsement. This assertion ignores the fact that Alliant, as the purchaser and drawer of the check, had no connection to the clearinghouse transaction pursuant to which the funds were disbursed. Thus, Alliant had neither the ability nor the right to honor or dishonor the check. As both parties acknowledge, the check was issued not by Alliant but by Moneygram Payment Systems. Alliant wired funds to Moneygram to purchase the check; subsequent to the purchase, the check's funds would be drawn on the account of Moneygram, not Alliant.

Alliant sent this check to Abrego pursuant to the loan agreement with instructions to endorse the check and deliver it to the auto dealer, which Abrego also admits she did not do, as she instead overnighted the check to Deon Glover. Once Glover was in possession of the check, he needed only to convince a bank

to accept it and pay out the funds. The branch bank at which the check was cashed honored the check despite the missing endorsement and participated in a clearinghouse transaction with Moneygram to receive and disburse the funds. Alliant was not a party to this transaction; thus, Abrego's contention fails.

Abrego also alleged other facts on her cross motion to the effect that Alliant was "negligent." While negligence is not a defense in actions on a contract, Abrego alleges that her signature on the loan agreement was forged, that the earnings statements provided to secure the loan were fraudulent, that Alliant did not close her bank account after she requested that it do so, and that Alliant was informed that Abrego was the victim of a scam.

Abrego's claim that her signature was forged ignores the fact that she executed the loan agreement using Docu-Sign, a software program that produces an electronic signature. Electronic signatures are given the same legal status as handwritten signatures pursuant to the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001-7006. Pursuant to Docu-Sign's processes, the loan documents were e-mailed to Abrego in an encrypted format that could be accessed only after successfully answering an extensive security questionnaire, which Abrego completed. The signature is applied by clicking a "Confirm Signing" button.[5] The electronic execution of this agreement, whether completed by Abrego personally or by her "business partners" using information only Abrego could have provided, does not alter its enforceability.

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[5] DocuSign, "How Does DocuSign Work?" https://www.docusign.com/products/electronic-signature/how-docusign-works (last visited Nov. 29, 2018).

Abrego claims to have never received an earnings statement from her employer, and at her deposition stated that she had not seen the earnings statements in Alliant's possession because she was paid electronically. In the transcript of Abrego's telephone call with Alliant on November 4, 2014, however, she acknowledges providing Alliant with proof of income. Alliant had no reason to doubt the veracity of the earnings statements, which were consistent with Abrego's representations in her loan application.

Finally, neither Alliant's refusal to close Abrego's account when Abrego had defaulted on an outstanding debt nor Abrego's belated disclosure of the claimed scam to Alliant alter the fact that Alliant performed its obligations on the contract while Abrego failed to do so.

Abrego points to other irregularities in the loan application documents, none of which are material in light of her admissions and none of which alter the fact that the parties formed a contract. All of Abrego's assertions concerning "negligence" or a failure to exercise due diligence amount to nothing more than a claim that Alliant should have protected Abrego from her own wrongful behavior.

Abrego's defenses to the formation of a valid contract and against the existence of a breach all fail. Alliant was entitled to judgment on its breach of contract claim as a matter of law. The trial court was correct to grant Alliant's motion for summary judgment.

III

Abrego also appeals from the trial court's dismissal of her abuse of process claims against Alliant and its attorney of record, Brian M. Born. The

dismissal was made in error, she asserts, because Alliant, by and through its attorney, pursued its breach of contract claim despite Abrego's denials that she applied for or obtained the loan. We affirm the dismissal. Abrego's submissions do not satisfy any of the elements of an abuse of process claim either against Alliant or against its attorney.[6]

Abuse of process is defined as the use of "a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed." 16A DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 22:10, at 236 (4th ed. 2013). The essential elements in an action for abuse of process are:

> (1) The existence of an ulterior purpose—to accomplish an objective not within the proper scope of the process;
> (2) An act in the use of legal process not proper in the regular prosecution of the proceedings;
> (3) Harm caused by the abuse of process.

Bellevue Farm Owners Ass'n v. Stevens, 198 Wn. App. 464, 466, 394 P.3d 1018, review denied, 413 P.3d 565 (2017). Only in Abrego's reply brief on appeal does she allege an ulterior motive: that Alliant sought to collect double payment on the loan, to avoid responsibility for its own mistake (essentially, in granting her the

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[6] In the trial court, Abrego styled her counterclaims as "Harassment, Bad Faith Actions, and Discrimination from Counterclaim Defendants." On appeal, she characterizes the claim as one for abuse of process. We analyze the claim in accord with Abrego's desired characterization.

Alliant interpreted this counterclaim as alleging malicious prosecution and has defended it accordingly. A party alleging malicious prosecution must show that the underlying action (1) was instituted with knowledge that the same was false, (2) is unfounded, (3) was initiated with malice, (4) was filed without probable cause or was filed as part of a conspiracy to abuse judicial process by filing an action known to be false or unfounded, (5) led to the arrest or seizure of property, and (6) caused special injury that would not necessarily result from similar causes of action. RCW 4.24.350(1); Clark v. Baines, 150 Wn.2d 905, 912, 84 P.3d 245 (2004). Because there is no basis to conclude that Alliant knowingly instituted the underlying action based on false and malicious pretenses, Abrego's counterclaim also fails under a malicious prosecution analysis.

loan), and "to intimidate, harass, bully, humiliate, embarrass, slander, disparage, and discriminate against Abrego to injure and tie up her resources to coerce her into submission."

There is no basis to conclude that Alliant is seeking "double payment" on the loan because the loan was never paid off in the first place. There is also no basis to conclude that Alliant is seeking to "avoid responsibility" for a past misdeed; the entire point of suing for breach of contract is to prevent the party in breach from avoiding its responsibility when the other party has performed. Further, Abrego does not demonstrate that Alliant's actions constitute an effort to intimidate her into submission rather than simply carry out the present litigation. None of the documents to which Abrego cites supports an inference to the contrary.

As Abrego has not shown the existence of any ulterior purpose for Alliant's actions, we need not reach the second and third elements of an abuse of process claim. The trial court did not err in dismissing Abrego's counterclaim against Alliant.

Abrego's third party claims against Alliant's attorney, Brian M. Born, in his personal capacity, and against his firm, Turnbull & Born, PLLC, allege nothing other than the same facts discussed above, and are further precluded by the applicable statute governing abuse of process claims, RCW 4.24.350. Specifically, subsection (3) of this statute provides that "[n]o action may be brought against an attorney under this section solely because of that attorney's representation of a party in a lawsuit." As Abrego's claims against Born and

against Turnbull & Born, PLLC are wholly indistinct from her claim against Alliant, they plainly were made solely on the basis of the Born's representation of Alliant. They thus fail as a matter of law. The trial court did not err in dismissing these third party counterclaims.

IV

Alliant is entitled to an award of reasonable attorney fees on appeal pursuant to its contract with Abrego. The parties' loan agreement states that Abrego will pay "all costs of collecting what you owe under this Agreement, . . . including court costs, . . . and reasonable attorney fees. . . . This provision also applies to . . . appeals." The trial court correctly awarded attorney fees to Alliant. We do the same. Upon compliance with the applicable rule, a commissioner of our court will enter a suitable order.

Affirmed.

We concur:

FILED
2/6/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ALLIANT CREDIT UNION, Respondent, v. IMELDA ABREGO, individually, and the marital community composed of IMELDA ABREGO and JOHN DOE ABREGO, husband and wife, Appellant.	)	DIVISION ONE No. 76669-4-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

B-1

Superior Court Civil Rules, CR 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

Currentness

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

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. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

(2) *Insurance Agreements.* A party may obtain discovery and production of: (i) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and (ii) any documents affecting coverage (such as denying coverage, extending coverage, or reserving rights) from or on behalf of such person to the covered person or the covered person's representative. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Structured Settlements and Awards.* In a case where a settlement or final award provides for all or part of the recovery to be paid in the future, a party entitled to such payments may obtain disclosure of the actual cost to the defendant of making such payments. This disclosure may be obtained during settlement negotiations upon written demand by a party entitled to such payments. If disclosure of cost is demanded, the defendant may withdraw the offer of a structured settlement at any time before the offer is accepted.

(4) *Trial Preparation: Materials.* Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including a party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this section, a statement previously made is:

(A) a written statement signed or otherwise adopted or approved by the person making it; or

(B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(5) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. (ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.

(B) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(5)(A)(ii) and (b)(5)(B) of this rule; and (ii) with respect to discovery obtained under subsection (b)(5)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subsection (b)(5)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(6) *Claims of Privilege or Protection as Trial-Preparation Materials for Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified. Either party may promptly present the information in camera to the court for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(7) *Discovery From Treating Health Care Providers.* The party seeking discovery from a treating health care provider shall pay a reasonable fee for the reasonable time spent in responding to the discovery. If no agreement for the amount of the fee is reached in advance, absent an order to the contrary under section (c), the discovery shall occur and the health care provider or any party may later seek an order setting the amount of the fee to be paid by the party who sought the discovery. This subsection shall not apply to the provision of records under RCW 70.02 or any similar statute, nor to discovery authorized under any rules for criminal matters.

(8) *Treaties or Conventions.* If the methods of discovery provided by applicable treaty or convention are inadequate or inequitable and additional discovery is not prohibited by the treaty or convention, a party may employ the discovery methods described in these rules to supplement the discovery method provided by such treaty or convention.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that the contents of a deposition not be disclosed or be disclosed only in a designated way; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to:

(A) the identity and location of persons having knowledge of discoverable matters, and

(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert witness is expected to testify, and the substance of the expert witness's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:

(A) the party knows that the response was incorrect when made, or

(B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.

(f) Discovery Conference. 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. The court shall do so upon motion by the attorney for any party if the motion includes:

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

(2) A proposed plan and schedule of discovery;

(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.

Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

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.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 16.

(g) Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the attorney or the party has read the request, response, or objection, and that to the best of their knowledge, information, and belief formed after a reasonable inquiry it is:

(1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the

case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) Use of Discovery Materials. A party filing discovery materials on order of the court or for use in a proceeding or trial shall file only those portions upon which the party relies and may file a copy in lieu of the original.

(i) Motions; Conference of Counsel Required. The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.

(j) Access to Discovery Materials Under RCW 4.24.

(1) *In General.* For purposes of this rule, "discovery materials" means depositions, answers to interrogatories, documents or electronic data produced and physically exchanged in response to requests for production, and admissions pursuant to rules 26-37.

(2) *Motion.* The motion for access to discovery materials under the provisions of RCW 4.24 shall be filed in the court that heard the action in which the discovery took place. The person seeking access shall serve a copy of the motion on every party to the action, and on nonparties if ordered by the court.

(3) *Decision.* The provisions of RCW 4.24 shall determine whether the motion for access to discovery materials should be granted.

Credits

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; December 28, 1990; September 1, 1992; September 17, 1993; September 1, 1995; January 12, 2010; April 28, 2015.]

Relevant Notes of Decisions (3)
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Notes of Decisions listed below contain your search terms.

Discretion of court

The in-camera inspection of requested documents to determine whether there is a foundation in fact to overcome attorney-client privilege based on civil fraud is a matter of trial court discretion. **Cedell** v. **Farmers** Ins. Co. of Washington (2010) 157 Wash.App. 267, 237 P.3d 309, review granted 171 Wash.2d 1005, 249 P.3d 182, affirmed in part, reversed in part 176 Wash.2d 686, 295 P.3d 239. Privileged Communications and Confidentiality ⚖ 178

Insurance materials

Alleged *inconsistency* in insurer's valuation of insured's fire-damaged home, a short time limit on offer to settle, and insurer's alleged threat to deny coverage without explanation did not provide a sufficient factual showing of fraud on the part of insurer to support, under the fraud exception to attorney-client privilege, an in-camera review of documents requested by insured in action involving allegations of bad-faith failure to pay claim; there was no evidence that insurer knowingly misrepresented a material fact or that insured justifiably relied on misrepresentation to his detriment. **Cedell** v. **Farmers** Ins. Co. of Washington (2010) 157 Wash.App. 267, 237 P.3d 309. Privileged Communications and Confidentiality ⚖ 154; Privileged Communications and Confidentiality ⚖ 178

Fraudulent conduct

Under two-step analysis for determining whether fraudulent conduct exists that is sufficient to overcome the attorney-client privilege for documents sought in discovery, the trial court first determines whether there is a factual showing adequate to show that wrongful conduct sufficient to evoke the fraud exception has occurred, and, if so, the court then conducts an in-camera inspection of the documents to determine whether there is a foundation in fact to overcome the privilege based on civil fraud. **Cedell** v. **Farmers** Ins. Co. of Washington (2010) 157 Wash.App. 267, 237 P.3d 309, review granted 171 Wash.2d 1005, 249 P.3d 182, affirmed in part, reversed in part 176 Wash.2d 686, 295 P.3d 239. Privileged Communications and Confidentiality ⚖ 154; Privileged Communications and Confidentiality ⚖ 178

CR 26, WA R SUPER CT CIV CR 26
Annotated Superior Court Criminal Rules, including the Special Proceedings Rules -- Criminal, Criminal Rules for Courts of Limited Jurisdiction, and the Washington Child Support Schedule Appendix are current with amendments received through 8/1/18. Notes of decisions annotating these court rules are current through current cases available on Westlaw. Other state rules are current with amendments received through 8/1/18.

End of Document

IMELDA ABREGO - FILING PRO SE

March 08, 2019 - 4:14 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76669-4
Appellate Court Case Title:	Alliant Credit Union, Respondent v. Imelda Abrego, Appellant
Superior Court Case Number:	15-2-25171-6

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