Case No. 321657

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

Johnson Brothers Contracting, Inc.

Appellant,

v.

Charles L. Blevins and Jane Doe Blevins, and

Zine A. Badissy and Jane Doe Badissy,

Respondents.

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR:

A. The trial court erred by ruling that the Plaintiff's failure to timely produce photos sought in a defendants' CR 34 discovery request constituted a willful CR 26(g) violation, where exhaustive, good faith search and retrieval efforts had been employed, but the photos were not in plaintiff's own possession, custody, knowledge or control, but were in the hands of an unknown third-party, in yet another unknown third-party's personal file.

B. The trial court erred by ruling that the extraordinary and drastic, ultimate remedy of declaring a mistrial in a civil bench case was absolutely necessary to deal with mere cumulative evidence, instead of a continuance.

C. The trial court erred by ruling that $16,000.00 in attorney's fees and costs was a proper, severe sanction against the faultless Plaintiff due to the innocent actions of an independent third-party, allegedly in order to serve the intended purposes of deterring and punishing and educating against ever again being a willful violator attempting to gain tactical advantage by knowingly and intentionally withholding evidence in that party's possession, custody, and control, to the prejudice and disadvantage of the defense.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

A. What are a party's actual discovery obligations under CR 34?

B. What is a party's discovery certification obligation under CR 26(g)?

C. What is party's duty to amend or supplement under CR 26(e) when responsive evidence promised to the other party suddenly surfaces?

D. How should a Court determine whether there has been a CR 26(g) violation by a party and what to do about it in the least severe manner?

E. How should a Court determine whether there has simply been a mere irregularity and what to do about it in the least severe manner?

III. STATEMENT OF THE CASE

(OVERVIEW OF BACKGROUND FACTS)

In September of 2007, Plaintiff Johnson Brothers Contracting, Inc. (hereafter "JBC"), discovered on the day they were leaving the Defendants' jobsite to go to JBC's next job, that JBC's heavy equipment had been badly damaged from unauthorized usage, allegedly at the hands of the defendants. Plaintiff JBC served the Co-Defendants Blevins and Badissy with an August 20th, 2009 Complaint giving the following detailed description of damages:

> . . . a hydraulic hose was ripped off . . .

CP- 8, line 10.

> . . . one piece of equipment suddenly needed a huge amount of hydraulic fluid and the hydraulic hoses on that piece of

equipment were also newly and significantly damaged or vandalized.

CP- 8, lines 20-23.

> The damages were severe and significant and included but were not limited to: The John Deere 134 CLC had the hand rail broken, the window was broken, the pin was worked out and damaged, the mirror was missing, and there were scratches and rock damage to the machine as well as a few dents; the Kamatzu 380 Loader had a broke windshield, a broken grapple, a bent step, and a broken radiator guard; the John Deere 648 Skidder had a crack in the front blade and the rake, as well as the left arm being cracked, and two broken hydraulic hoses, all of which damages to all the equipment rendered it undeliverable to the next job site, and unreliable and also unuseable without risk of further damages to the equipment or injury to Plaintiff's and other workers.

CP-9, para. 3.11.

Plaintiff JBC originally retained attorney, Ms. Toni Meacham from Connell,

Washington, but Mr. Trujillo in Yakima became the new attorney for JBC in April of 2009, about one and a half years after the September 2007 incident. JBC and its witnesses were certain that photographs had been taken of the above-described September 2007 equipment damages by former JBC employee and eye-witness, Richard Holcomb (who personally viewed and then took pictures of all the damages), then gave those photographs to his manager and former JBC employee, Brent Deroo, in order to give them to JBC's former attorney, Ms. Toni Meacham. CP- 43, line 34 - CP- 44, line 2.

However, the pictures of the damages to the equipment described in the complaint were not found in the JBC client file that Ms. Meacham had copied for and provided to Mr. Trujillo when he became the new attorney for JBC in April of 2009, nor were the pictures in the possession of Mr. Holcomb or Mr. Deroo either. CP- 44, lines 3-5. JBC itself and the Sheriff's Department did not have any photos and everyone else could not find the photos either. CP-44, lines 5-7. JBC Attorney Mr. Trujillo even asked former counsel, now an outsider third-party, Ms. Meacham, to double check her old JBC file again when the Defendants served discovery on November 17th, 2010 (RP-259, lines 14-20), but Ms. Meacham again confirmed she did not have the

photographs, and in fact actually didn't remember ever getting any photos, and she had no idea where they were or who had them at all or who had them last. CP-44, lines 7-11.

On or about November 17th, 2010, Defendants Blevins and Badissy, through its counsel at the time, Robert E. Lawrence-Berrey, Jr., served Plaintiff JBC with the aforementioned CR 34 request for production of any and all photographs in JBC's possession, custody, or control as well as questions about the extent of the damages to the equipment. CP-44, lines 21-25. In response, JBC and its counsel, David Trujillo, spent many months searching again for the photographs, checking all over again with all the witnesses, all the current and former JBC employees, including but not limited to Richard Holcomb and Brent Deroo, and with the Sheriff's Department, and with Deputy Hoffee, and with former counsel Ms. Meacham, who again confirmed for at least the second time that the photographs were not in her JBC file. CP-44, lines 24-31; CP-231-232.

Ms. Meacham provided a sworn statement confirming that Mr. Trujillo first contacted her right after he took over JBC case in April of 2009 and again

sometime between December 2010 and March 2011 in response to the Defendant's November 2010 discovery, each time seeking the photographs, but the pictures simply were not in her JBC file every time she checked. CP-231-232. Ms. Meacham confirmed that she personally searched for the photographs in good faith as requested. CP-231, lines 22-24. JBC and its witnesses "thought" they gave the pictures to Ms. Meacham, but they were not exactly sure who they had given them to if Ms. Meacham didn't have them or didn't ever receive them as she claimed, and so JBC had no idea where the pictures actually were or who had them last. CP- 44, lines 12-16.

Accordingly, after exhausting all efforts as described above, JBC's counsel, Mr. Trujillo answered all the discovery questions from the Defendant regarding the physical extent and monetary amounts of the physical damages, identifying all witnesses thereto, but had no photographs to produce, and then signed the CR 26(g) certification to confirm that the discovery answers and production that were produced, had been produced after a reasonable and diligent search of all the evidence and records within JBC's and attorney Trujillo's possession, custody, and control and after consultation with all persons with any knowledge of the facts. CP-44, lines 34 to CP-45, line 4.

The discovery production records provided to Defendants Blevins and Badissy did, however, definitely included JBC's employee time cards with notations expressly stating that Richard Holcomb had spent time taking pictures of the equipment damages described in both the complaint and the discovery answers, on both September 6th and 7th, 2007, and these employee time records were not just produced in discovery to the defense but were also marked for identification at trial as Plaintiff's identification #10. CP-45, lines 4-10; See also Exhibit list at CP-34-40. Plaintiffs counsel also informed defense attorney Lawrence-Berrey that if the photographs were ever located they would be produced. RP-261, lines 11-15. Mr. Rob Case later took over the defense and Mr. Lawrence-Berrey withdrew to enter the judiciary.

On December 12th, 2011, almost 2 years before the trial on September 11th, 2013, Defendants Blevins and Badissy, through their new attorney Rob Case also took the depositions of JBC's witnesses and former employees Richard Holcomb and Brent Deroo who again carefully described the equipment damages they had seen with their eyes and indicated that photographs had been taken which they thought they had given to former counsel, Ms. Meacham, but again reiterated that she said she didn't have these photos and

she couldn't remember ever receiving them, and if she didn't have the photos, then they were lost somewhere they didn't know where, and had not turned up yet. CP-45, lines 12-21; RP-248, lines 5-7; RP-247, line 22 to RP-248, line 16; RP-249, lines 1-10. No one ever told Defendants the photos had been permanently destroyed by JBC or anyone else, or were gone for good. However, nothing occurred or ever changed that would cause any reasonable person to reasonably believe that it would be prudent or productive to resume any further searching, as everyone had already searched and had stated several times that they did not have the photographs and did not know where they were.

At the trial, even the trial Judge acknowledged that in the pretrial depositions, JBC's witnesses were asked if there were any photographs and the Defendants were advised that the answer was that there were photographs but they didn't know where they were. RP-266, lines 2-6. Then consistent with that, the Court also noted that "Mr. Holcomb testified on the stand that he did take pictures of the damage and gave those pictures to someone but couldn't remember who and testified to this court that those pictures were nowhere to be found." RP-267, line 24 to RP- 268, line 2. Unfortunately, there were

simply no new leads on where to search for the photographs, nor was there ever any indication that yet another search for photographs should be resumed or would have any new and improved chance of success. JBC certainly wished it could find the photos for added support.

However, all the relentless and merciless needling at trial from the defense about JBC not having any Plaintiff-helpful photographs to verify the credibility of the Plaintiff's eye-witness testimony about the equipment damages being verbally described by eye-witnesses albeit without corroborating photos, (at RP-85, lines 10-21; RP-199-205) eventually prompted one last, desperation search, mid-trial with Ms. Meacham, even though she had already made abundantly clear, no less than TWO TIMES already, that she did NOT have the photos. Id. Attorney Trujillo was able to reach Ms. Meacham on a Sunday, September 15th, 2013. CP-46, lines 5-7.

Ms. Meacham agreed to check her JBC file again for the third time even though it was now going to be much more inconvenient for her to do so. This was because Ms. Meacham had since archived her JBC file into a storage unit along with many other, much older, archived files. Appendix A, page 2, lines

6-13. This inconvenience turned out to be good luck. The archived JBC file was again found to have no pictures, but then Ms. Meacham suddenly caught sight of the older, previously closed, archived, separate, personal file of JBC manager, Brent Deroo, and there the photos were found late in the afternoon of Monday, September 16th, 2013. Id.; CP-46, line 25 to CP-47, line 4.

JBC's counsel had the photographs scanned and printed out into complete sets of 8 1/2 x 11 inch color photocopies and personally delivered a complete set to Defense counsel the very next morning at 10:00 am on September 17th, 2013, a full 25 (TWENTY FIVE) hours before the parties were to resume the trial on September 18th, 2013 for the rest of Plaintiff JBC's case-in-chief. CP-47, lines 10-28. Sometime after 11:00 am on September 18th, 2013, JBC had the photographs marked as JBC's Identification #20 in order to simply have Rick Holcomb identify the newly located photographs as being the ones he had taken showing the damages he already verbally described and testified to. Mr. Holcomb is the one who had looked at all the damages on the equipment with his own eyes and then took the photographs of what he had looked at to verbally paint a visual depiction of what he had already seen in person and had been verbally describing to everyone with his own eye-

witness testimony based on memory alone. CP-47, lines 27-32.

Defense counsel then objected to the photos and claimed he'd been "set up", (RP-243, lines 15-16), saying that Plaintiff and or counsel "had them" and then ". . . during the middle of trial" were "going to spring them on the opponent" in direct violation of CR 26(g). RP-243, lines 11-13; CP-47, lines 33-34. The Court ordered a recess at 11:30 am for both sides to brief the issue and report back at 1:30 pm. RP-245, lines 7-9CP-47, lines 34-35. At 1:30 pm, Defense counsel reported that he found two cases allegedly supporting his contentions that JBC should be held responsible for an inadvertent violation of CR 26(g) based on the two cases he claimed stood for the proposition that inadvertent non-disclosure of responsive discovery production materials is still deemed willful in violation of CR 26(g) as a matter of law and that such a violation mandated attorney fee sanctions and for which no less than a mistrial was also needed. RP-249, line 22 to RP-250, line 17; and CP-48, lines 1-11.

Plaintiff JBC's counsel Mr. Trujillo gave a full explanation on the record and as an officer of the court of the how he and JBC had tried to locate the

photographs several times over the years both when first taking the case, and again in a good faith effort to respond to the discovery request of November 2010. RP-258, line 21 to RP-263, line 12. JBC's counsel explained how the photographs were searched for a third time during trial on a mere whim although not because of any obligation or because of any sudden leads, and were miraculously located at the last minute, mid-trial, and that Plaintiffs would not resist any length of continuance the Defendants wanted to deal with the photographs which now confirmed everything the Plaintiff's witnesses had testified to. Id .

The Court also reviewed a September 16th, 2013 sworn statement from Toni Meacham which she had drafted simply to explain how the photographs were located at the last minute during trial. RP-268, line 25 to RP-269, line 1; Appendix A. (See also Ms. Meacham's supplemental declaration of November 4th, 2013 filed at CP-231-232, clarifying an omission in the first declaration). The Court specifically held:

> "I take Mr. Trujillo at his word as an officer of the court that he in fact asked Toni Meacham to look for the documents –pardon me, look for the photographs – in November of 2010

[in response to the Defendants' discovery request], but not again until Sunday, September 15th, 2013.

RP-269, lines 21-25.

In spite of the fact that the Plaintiff had established the fact that Plaintiff had clearly undertaken a diligent search for the photographs with all third-parties that might have them, and there was no willful violation or bad faith, the Defense nevertheless alleged that CR 26(g) had been violated anyhow, that the Plaintiffs had withheld their own helpful evidence from themselves and everyone else, and claimed that case law supported the defense's allegation that a CR 26(g) violation had occurred even if inadvertent. The defense then demanded a mistrial and a sanctions award of fees and costs and also claimed that the arrival of the photos had ruined and wasted his efforts to pursue an alleged claim for spoliation, and or that the defense had relied that the photographs would never surface and thus had "been led astray". RP-257, lines 1-3. Defense counsel explained that if the photographs had been provided before trial, he "may have gone out and hired an expert to examine what is depicted in these photographs as consistent with the JBC's witnesses' story." RP-257, lines 15-18.

IV. ARGUMENT

A. THE STANDARD OF REVIEW:

1. An appellate court reviews a trial court's decision on a discovery order for an abuse of discretion. Judicial discretion means a sound judgment that is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and that is directed by the reasoning conscience of the judge to a just result. An appellate court will find an abuse of discretion only on a clear showing that the trial court's exercise of discretion was manifestly unreasonable or that the trial court exercised its discretion of untenable grounds or for untenable reasons. Diaz v. Migrant Council, 165 Wash. App. 59, 73 (Division III, November 2011)(further citations omitted).

A court also abuses its discretion when it "uses an incorrect standard of law or the facts do not meet the requirements of the standard of law." Collings v. Mortgage Services, 175 Wash. App. 589, 598 (2013)(quoting from Sherron Assocs. Loan Fund V (Mars Hotel), LLC v. Saucier, 157 Wash. App. 357, 361, 237 P.3d 338 (2010), review denied, 171 Wn.2d 1012 (2011).

> 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)). [Furthermore,] [q]uestions of law are reviewed de novo. In re Firestorm 1991, 129 Wn.2d 130, 135, 916 P.2d 411 (1996); Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, at 339, 858 P.2d 1054 (1993) . . .

Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006)

B. The Analytical Framework (Argument and Authority):

1. CR 34 (a)(1) actually states that the party seeking the discovery is only entitled to production of all "tangible things which constitute or contain matters within the scope of rule 26(b) **AND WHICH ARE IN THE POSSESSION, CUSTODY OR CONTROL OF THE PARTY UPON WHOM THE REQUEST IS SERVED;".**

Subdivisions (a) and (b) of CR 34 are designed to be used

> only where the documents and things are in the **POSSESSION, CUSTODY, OR CONTROL** of the party upon whom the request is served, or the land or other property is in the possession or control of the party upon whom the request is served.

Orland and Tegland, Washington Practice, Volume 4, Rules for Superior Court, page 212 (1992)(further citation omitted). A party is generally presumed to have control of a document if the party has the right to obtain the document. Orland and Tegland, supra. at 208 (further citation omitted). However, presumptions may be rebutted by the actual facts of the situation. Kitsap Bank v. Denley, 177 Wash. App. 559, 570 (2013).

A good case on possession, custody, and control for discovery purposes is Diaz v. Washington State Migrant Council, 165 Wash. App. 59 (Division III, November 2011)(a corporation, consisting of currently employed counsel members who invoked their individual fifth amendment rights to refuse to answer discovery served on the corporation, is nevertheless properly sanctioned as a party for thereby willfully refusing to comply with a discovery obligation; the "availability" of the discovery sought and whether

that discovery material is "within" the corporate party's "possession, custody, or control" depends on the legal relationship between the corporation and its directors and the duties owed by the directors to the corporation).

In Diaz, the party defendant corporation had an actively employed board of directors who had actual knowledge within their actual possession, custody, and control, and with each director having a current and actual ongoing legal and financial responsibility to the corporation. Id., at 77. Therein, Division III noted:

> 'Control,' apart from possession, is defined as "the legal right to obtain the documents requests upon demand." Searock v. Stripling, 736 F.2d 650, 653 (11th Cir. 1984). Control may also be found where an entity has access to and the ability to obtain the documents. Bank of N.Y. v. Meridien BIAO Bank Tanzania Ltd., 171 F.R.D. 135, 144 (S.D.N.Y. 1997); Addamax Corp. v. Open Software Foundation, Inc., 148 F.R.D. 462, 469 (D. Mass 1993). The burden of demonstrating that the party from who discovery is sought has the practical ability to obtain the documents at issue lies with

> the party seeking discovery. Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 525 n.7 (S.D.N.Y. 1992).
>
> . . . Mr. Diaz has **NOT** shown that the Migrant Council had the legal or practical ability to secure any responsive personal records belonging to the directors. . . . [therefore] the Court had no basis for finding it in contempt for a failure to respond to request for production No. 8.

Diaz, supra. at 78.

"Control" was never proven by the Defendants Blevins and Badissy against Plaintiff JBC in this case. "In the absence of a finding on a factual issue we must indulge in the presumption that the party with the burden of proof failed to sustain their burden on this issue." State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). The defense absolutely never proved or obtained any ruling that JBC had possession, custody or control of the pictures at the time of their November 17th, 2010 discovery request. The touchstone of the entire inquiry is "the ability of the opposing party to formulate a response or to comply with the request. Panorama v. Golden Rule Roofing, 102 Wash. App. 422, 431 (2000) (citing to Fisons, supra. at 343), and yet here in this

case at bar, it is beyond argument and undisputed that despite JBC's best efforts, JBC simply did not have the actual ability to comply at that time.

That is precisely because the photos at issue were sitting in the file of an entirely different client (a former employee of JBC) in the archived, storage unit of a former attorney, and not in the former attorney's JBC file. Nevertheless, JBC fully complied with its own obligations under CR 26(g) and did respond in good faith to the discovery request with diligent inquiries and asked JBC's former attorney for the photos to no avail. However, JBC had no knowledge of former counsel's other file (which was entirely a personal and private matter of Brent Deroo that JBC had no right to compel the employee now ex-employee to provide access for, just like Interrogatory No. 8 in the Diaz case) and no right to access it or the former attorney's storage locker or someone else's file.

Assuming that a former client has enough presumed "control" to demand that a former attorney produce everything in that party, former client's own file, there is no way that authority extends to compelling searches or disclosures of CONTENTS IN OTHER PEOPLE'S FILES BELONGING TO FORMER

COUNSEL. JBC did everything it could possibly do. JBC did absolutely nothing wrong and yet has been done a shocking disservice and an injustice from the very court it turned to for justice.

The situation is very similar to that in Panorama Village v. Golden Rule Roofing, 102 Wash. App. 422, 431, 10 P.3d 417 (2000)(Trial Court properly refused to impose any discovery sanctions against a party for failing to produce a letter sought in discovery which letter simply "was not in Panorama's files but in the records of [another] company, Access Roofing . . . and counsel for Panorama testified that he had not seen the document before the motion to compel its production.").

Unfortunately, control over the photographs had already been lost by JBC and everyone, particularly JBC's FORMER counsel Ms. Meacham, as Mr. Trujillo learned to his dismay when he was first retained back in April of 2009. This was all over a year and a half before Defendants served their November 17th, 2010 discovery request. Mr. Trujillo had never previously seen the photographs found on September 15th, 2013 in former counsel's archived storage unit, in the archived file of a completely different former

client, until the afternoon of September 16th, 2013.

So, one thing is clear: At the time of the Defendant's November 17th, 2010 discovery request, it was an undisputable fact that former counsel Ms. Meacham was no longer employed by or working for or under the CONTROL of JBC at all. Any searches or repeated searches for records on the part of that third-party outsider, Ms. Meacham, at that point in time, were done as a mere courtesy only for JBC as a former client. In any event, JBC did inquire of all possible persons to seek the photographs in response to the Defendant's discovery request, exhaustively, diligently and in good faith, but all to no avail. JBC and JBC's counsel fully complied with all the mandates of CR 26(g), end of story.

A CR 26(g) certification by the attorney or party signing the discovery answers, confirms that the party and its attorney of record made a reasonably diligent inquiry in response to all the discovery requests. "The signature or certification provisions [of CR 26(g)] are similar to those of CR 11." Orland and Tegland, supra., page 49. An attorney signature under CR 11 verifies that the attorney has read what was signed and that the contents thereof are

well grounded in fact and warranted by the evidence or the lack thereof, after a reasonable inquiry under the circumstances. CR 11.

Again, no one disputes that in response to Defendant Blevins and Badissy's discovery request, JBC inquired of every possible person seeking the photographs to no avail and properly certified its answers as having been provided after that reasonably diligent inquiry. It well established that:

> The [CR 26(g)] duty to make reasonable inquiry is satisfied if the investigation and the conclusions of the attorney are reasonable when viewed in the light of the totality of the circumstances.

Orland and Tegland, supra. at 49 (further citations omitted).

Again, it is uncontested that all the facts show that in response to Defendant's November 17th, 2010 CR 34 discovery request for the photographs at issue, JBC's counsel Mr. Trujillo checked with his client and all the client's current and former employees who had any knowledge, including but not limited to Mr. Holcomb and Mr. Deroo, and checked with the Sheriff's Department and the Sheriff that had investigated the incident, and checked with former

counsel Tony Meacham, all of which secondary efforts were a repeat of prior efforts that had already been made back in April of 2009, but were nevertheless performed again, in full honor of JBC's CR 26(g) obligations.

Nevertheless, the Defendant moving party for CR 26(g) sanctions never refuted the simple fact that JBC and JBC's counsel Mr. Trujillo simply did not have the photographs in their possession or control at the time of the discovery request despite an exasperating and fervent search for the photographs in full compliance with the spirit and intent of all obligations under both CR 34 and CR 26(g). JBC and JBC's counsel and no one else ever failed to search, or ever withheld the photographs, or ever tried to cheat the defense or gain any tactical advantage. The only party that really got hurt was the Plaintiff losing its own valuable, corroborating evidence.

The photographs (Identification #20) absolutely helped corroborate JBC's case. JBC had every incentive and desire to absolutely produce any and all photographs it could possibly find (not just to help JBC corroborate and prove its case but better yet to encourage and convince the opposition of the need to settle). JBC had absolutely no incentive to lose or withhold its

photographs of its own damages. Nothing was being gained by the Plaintiff intentionally withholding its own helpful corroborating evidence against the Defendants who were actually benefitting from the absence thereof.

Discussion of CR 37 is also illustrative. If instead of a November 17th, 2010 CR 34 discovery request for production of photographs, we had an actual CR 37 order compelling production of photographs, the sole difference between JBC's CR 34 obligations and any court ordered obligations under CR37, is one is a request and one is an order. However, both require JBC to perform the same good faith tasks, and therefore should be identical as to the triggering point for sanctions.

CR 37 actually presents a more serious situation because it is precisely a party's initial failure to comply with a friendly request for production under CR 34, that gets elevated to a CR 37 court order for production of the exact same item. The situation only changes from being asked to being ordered. If one were to say that Plaintiff JBC and Mr. Trujillo's failure to produce photographs was sanctionable conduct at all, even CR 37 requires significant grounds for imposing even much lesser sanctions for which the following

cases are illustrative: Estate of Fahnlander, 81 Wash. App. 206, 211, 913 P.2d 426 (1996)(The sanction of disallowing a last minute substitute expert for failure to produce discovery thereon as ordered by the court, is authorized for unjustified or unexplained resistance to discovery, but before imposing any sanctions the court should consider whether the party was actually a "wrongdoer", and whether the situation was actually the perpetration of a trial tactic and or an intentional violation of any discovery rule or court order); Viereck v. Fibreboard Corp., 81 Wash. App. 579, 915 P.2dd 581 (1996)(Exclusion of testimony evidence is justified upon showing intentional or tactical non-disclosure, willful violation of court order to produce discovery with no reasonable excuse, or other unconscionable conduct).

JBC and its counsel Mr. Trujillo not only didn't have any actual possession or control over the photos, but rather a former attorney and now outsider third-party over whom JBC had no control over, had them but didn't even know it or know where. As such, JBC and JBC's counsel Trujillo were faultlessly in no position to produce or withhold those photos. That predicament FULLY EXPLAINED and justified the inability to produce.

The only issue, which really isn't even at issue, is whether JBC and Mr. Trujillo diligently searched for them and it is beyond argument that they absolutely did to no avail. The photos were only helpful to JBC and JBC had no benefit or incentive not to produce whatever it could. There was no intentional or tactical or unconscionable action or inaction; no willful violation of CR 34 or CR 26(g). JBC's former counsel, Ms. Meacham, fully explained what happened and Mr. Trujillo relayed this to the Court. Appendix A and CP-231-2. The situation was at the very worst, a mere unfortunate IRREGULARITY for which a simple continuance would cure.

Had the Defendants served Ms. Meacham with a subpoena, there is still a three part test the Courts use when evidence is in the hands of a third party. In United States v. Goldfine, 169 F. Supp. 93, affirmed 268 F.2d 941, Cert. Denied 363 U.S. 842, 4 L.Ed.2d 1727, 80 S. Ct. 1608 (1958), the Court held that in criminal and civil contempt proceedings brought by the government against the president and treasurer of several corporations for an allegedly willful failure to comply with a judicial subpoena requiring production of records, the government had to first prove (1) that the records at issue existed at the time the government's order or request for those records was actually

served on the defendant, and (2) that the defendant had the ability to comply with the request for production at that time, and (3) thereafter the defendant willfully failed to comply with the request for production.

In Federal Trade Commission v. Blaine, 308 F. Supp. 932 (D.C. Ga., 1970) a civil contempt petition to adjudge a president of a corporation in contempt of court for failure to produce certain records was held properly denied, where there was undisputed evidence that at the time of service of the subpoena, the records and documents sought to be produced were NOT in the possession or control of the defendant at that time and he did not know where they were, did not know who had them, or why they were not in the files they should have been in. That is the situation of this case and there was no CR 26(g) violation. At most, there was an irregularity resolvable by continuance.

Counsel for Defendants Blevins and Badissy in this case at bar, told the trial court that Carlson v. Lake Chelan Community Hospital, 116 Wash. App. 718, 737, 75 P.3d 533 (2003), Mayer v. Sto Industries, Inc., supra. at 685, supported the proposition that "for inadvertent accidents of [this] sort do qualify as intentional misconduct. They do qualify." RP-254, lines 9-14; RP-

263, lines16-19. Based on that alleged authority, Defense counsel argued that JBC must be deemed to have willfully violated CR 26(g). That is completely incorrect. These two cases are not even on point and did not support the Defendants' position at all, but rather the citation thereto has caused injustice.

All the Carlson court really did, was to note that in Gammon v. Clark Equipment Co., 38 Wash. App. 274, 280, 686 P2d 1102 (1984) affirmed , 104 Wn.2d 613, 707 p.2d 685 (1985), "an inadvertent error [of a party, not a third-party outsider] in failing to disclose an expert [actually a known expert, which was absolutely well within that party's knowledge, possession, and control at the time of the request for the disclosure requested with regard to that expert] has been deemed willful as a "'wilful' violation means a violation without reasonable excuse [FOR THE PARTY'S OWN ACTIONS]." To be sure, the trial Court did not find that Mr. Trujillo or JBC did not reasonably try to respond to the discovery request, which is the only inquiry for a CR 26(g) certification. Third-parties are not even before this court unless they failed to respond to a subpoena.

First of all, Carlson isn't even on point at all for our case at bar dealing with

photographs discovered in the hands of a third-party, non-party, no longer employed or controlled by the Plaintiff, who unknowingly had sole possession and control of the items sought, but didn't even know it, had lost it and couldn't find it, and had accidently represented to JBC and JBC's counsel that she did not have it, in direct response to JBC's and Mr. Trujillo's diligent inquiries thereon performed in full compliance with CR 26(g).

What truly and actually happened in Carlson, which Defense counsel Mr. Case neglected to mention to the court, was that the party defendant itself therein had knowingly and personally withheld the allegedly valid reasons possessed by that Defendant employer itself, not a third party, all for that employee's termination. Knowledge of the requested facts thereon was fully within that Defendant's own possession and control and readily available and actually capable of being produced at the actual time of the discovery request and also at the time of the CR 26(g) certified answer given thereto. Not so for JBC and attorney Trujillo, which Carlson isn't even on point for or have any application to whatsoever.

The Gammon case, relied upon in the Carlson case, isn't even on point at all

either, let alone a basis for any ruling in the case at bar. In Gammon, the Court specifically held that "[A party's] Violation of a discovery order without reasonable excuse constitutes a willful violation of the discovery rules." **GAMMON DID NOT FIND A MERE INADVERTENT FAILURE OF A PARTY, LET ALONE A NON-PARTY**, and actually held as follows:

> "Our review of the discovery process in this case leave little doubt that **THERE HAS BEEN WILLFUL NONCOMPLIANCE** on the party of either Clark or Clark's attorneys. **NO REASON WAS GIVEN FOR THE FAILURE** [two years before trial] to respond to interrogatory 20 [and the actually **ORDER COMPELLING THE SAME]** and to provide all accident reports involving Bobcat tipovers [of which there were records of over 50 (FIFTY) such incidents wherein **EVIDENCE WAS KNOWINGLY AND INTENTIONALLY WITHHELD DESPITE BEING FULLY IN THE DEFENDANT'S OWN DIRECT POSSESSION AND CONTROL THAT WHOLE TIME!** Plus two more boxes of additional reports of even more

incidents on top of those fifty!]."

Gammon, supra. at 280-281. (Emphasis added).

In Mayer, the proven facts were that a defendant manufacturer itself had actually provided knowingly false testimony under oath at trial by claiming the manufacturer's product was not flawed when in fact the defendant's exact same witness, Mr. Thomas Remmele, had actually issued an internal memorandum (which memo was in the party defendant's actual personal possession and control) admitting that their product was "inherently flawed", and yet the Defendant used the knowingly false testimony and the discovery violation specifically to fraudulently obtain a defense verdict. This was only discovered after the trial had already ended with a defense verdict when a different attorney from another case with similar claims happened to share it with the losing party's attorney afterwards.

Plaintiff in that case then promptly invoked CR 59 and moved for a new trial and invoked CR 26(g) seeking sanctions for wasted legal fees and costs in the fraudulently obtained defense verdict and the discovery violation used to obtain it. The trial court specifically found that an INTENTIONAL discovery

violation by a party had occurred. Id., at 682. Furthermore, it clearly INVOLVED DOCUMENTATION IN THE PARTY DEFENDANT'S OWN ACTUAL POSSESSION AND CONTROL. There was no allegation that the document had been lost nor were any reasonable excuses proffered for not turning over that evidence whatsoever. Instead, the defense had clearly been caught intentionally trying to perpetrate an injustice in order to defraud and cheat as a defense, ironically to an already unfair and deceptive business practice case being defended in the first place.

The Mayer Court then also awarded the CR 26(g) sanctions for the Plaintiff's wasted attorney's fees from the first intentionally tainted trial in the amount of $468,147.29 in fees, the accrued finance charges/statutory interest thereon of $276,732.75, and $33,717.00 for appellate fees that had also been incurred, which was all for the Defendant's proven intentional discovery abuse in violation of CR 26(g). Mayer, supra at 682. However, THERE WAS SIMPLY NO DISCOVERY ABUSE IN THIS CASE AT BAR. The Defendants are apparently being critical of the third-party former counsel who lost the photographs entrusted to her well before the discovery request was even made. However, NO ONE can say anything negative against party

JBC or JBC's counsel of record Mr. Trujillo who absolutely did properly respond to the discovery request to the fullest possible extent, at the time it was propounded by the Defendants to JBC in full compliance with the rules.

Next, the Defendants claimed they lost fees pursuing a claim for spoliation. That is preposterous there never was any basis for such a claim. "SPOLIATION is the INTENTIONAL DESTRUCTION of evidence." Marshall v. Bally's Pacwest, Inc., 94 Wash. App. 372, 381, 972 P.2d 475 (1999)(further citations omitted)(emphasis added). The Marshall case further held that the Doctrine of Spoliation, which no one has ever actually alleged or has ever had any basis whatsoever to allege in this case, only applies when evidence: (1) has been PERMANENTLY DESTROYED, which in this case the evidence was never destroyed at all, let alone permanently, and no one ever claimed or had any reason to suggest it was, and (2) a party had knowledge and notice that evidence was relevant to the case and to the claims of one or even both parties, which is undisputed in this case at bar, AND (3) THAT THE PARTY WITH THE EVIDENCE HAD BEEN SPECIFICALLY REQUESTED BY THE OTHER PARTY FOR THE OPPORTUNITY FOR EXAMINATION AND EVALUATION OF THE SAME, which never

happened in this case before the evidence was already temporarily lost beyond JBC's control and it was already too late, THEN the Court MAY presume that the spoliated evidence would have been adverse to THE PARTY RESPONSIBLE FOR THE SPOLIATION AND the Court may also shift the burden of proof regarding the spoliated evidence to the party responsible for the spoliation and may presume that the destroyed evidence would have been unfavorable to them.

However, this presumption, which starts to be created if the first three elements are present, thereafter applies ONLY IF: (4) THE PARTY that a spoliation ruling is sought against, had the ACTUAL CULPABILITY OR FAULT for the allegedly ACTUAL AND PERMANENT DESTRUCTION thereof which then turns on (5) whether THE PARTY ACTUALLY ACTED IN BAD FAITH OR WHEN THERE IS NO INNOCENT EXPLANATION for the destruction. Marshall v. Bally's Pacwest, Inc., 94 Wash. App. 372, 972 P.2d 475 (1999).

As outlined above, whether missing evidence is important or relevant as will warrant imposition of sanctions based on spoliation of evidence, will depend

on the circumstances of the case. However, another important consideration is whether the loss or destruction of evidence has resulted in an ADVANTAGE to the PARTY THAT "LOST" IT. Henderson v. Tyrell, 80 Wash. App. 592, 910 P.2d 522 (1996). However, JBC certainly obtained no advantage from any loss of the photos and wasn't the one that lost them either. The Defendants weren't so upset that this devastating corroborative evidence had never been located for them before, as they were just truly and actually upset that the newly discovered photographs fully corroborated everything JBC's witnesses had already testified to, fully sealing their credibility and confirming everything that had been claimed already as true.

In any event, the court could not even employ the lesser remedy of striking or excluding evidence as a sanction, absent a showing of INTENTIONAL non-disclosure or WILLFUL violation or other unconscionable MISCONDUCT. Goodman v. Boeing Co., 75 Wash. App. 60, 877 P.2d 703 (1994). As such, one can readily see why the Defense really had nothing to plead or say at all about spoliation or intentional or willful or unconscionable conduct, especially not consistent with the mandates of CR 11.

The Defense recklessly mis-cited cases out of context and baselessly threw around the word "spoliation" to get the court riled up against JBC over nothing that was the fault of JBC, especially when the earliest time that the defendants ever asked for the September 2007 pictures was November 17th, 2010. This Court will note that the Defendants' discovery request was OVER THREE FULL YEARS after the September 2007 incident, which tardy request alone can be fatal and literally inexplicable in and of itself to any later allegation of spoliation. Henderson v. Tyrell, 80 Wash. 592, 611, 910 P.2d 522 (1996)(waiting two years before even asking to see the evidence at issue); see also Marshall v. Bally's Pacwest, Inc., supra. at 382 (waiting four and a half years before asking to see the evidence).

In this case, Defendant Blevins and Badissy knew that Ames and Duke had implicated them in statements to the Yakima County Sheriff and that manager Brent Deroo let Blevins know in a very heated, profanity-ridden conversation that day that the Defendants were going to have a serious problem regarding the damaged equipment. RP-21, line 1 to RP-23, line 17. Yet from day one the Defendants never once asked to see the equipment or pictures thereof, informally or otherwise till OVER THREE (3) YEARS

AND THREE (3) MONTHS LATER. Unfortunately, by the time Defendants Blevins and Badissy even bothered to do so on November 17th, 2010, the photographic evidence had already long since been lost WELL BEFORE any defendant or defense attorney had ever bothered to "specifically request the opportunity for examination and evaluation of anything". This is exactly why the Defendants' allegation that they somehow unfairly spent time on a spoliation defense was baseless.

The fact of the matter is that the Defendants never pleaded spoliation because after a diligent inquiry into the facts and law, in full compliance with CR 11, they must have truly realized and known they had no basis for doing so. Likewise, they also never sought a motion to compel because they knew JBC's hands were tied. Defendants also never sought a pre-trial motion in limine or any ruling based on the spoliation doctrine or any other legal basis whatsoever, precisely because there was none. Most importantly, the Defendants already knew full well that they never had any assurances that the evidence was really gone for good or would not surface.

Once photographs were located on the afternoon of September 16th, 2013,

JBC had to disclose and produce the photos to supplement the discovery as an "amendment" under CR 26(e)(2) to avoid a knowing concealment and or pursuant to CR 26(e)(3) given the gentlemen's agreement (at RP-261, lines 11-15) to produce them if anything ever happened to turn up.

> Under Subdivision (e)(2) of the Rule [CR 26], a party is under a duty reasonably to amend a prior response if he obtains information upon the basis of which (1) he knows that the [prior] response was incorrect when made, or (2) he knows that the response, tough 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.

Orland and Tegland, supra. at 46 (further citations omitted).

The fact that the photographs, once discovered, had to be turned over, is magnified by the following illustrative example of what would happen if JBC and Mr. Trujillo had won this case and obtained full relief based on the credibility of the numerous fully credible and corroborating eye-witness descriptions of the damages even without ever disclosing or producing the newly found photographs repeating and showing the exact same damages that

were verbally described. What then, if after the trial, Defense counsel for Blevins and Badissy, Mr. Case, happened to bump into Ms. Toni Meacham who then says: "hey, I found those photos for your case in the wrong file in my archived storage facility at the last minute during your trial, and gave them to Mr. Trujillo so he could promptly supplement his answers to your discovery production requests, did they help or hurt you in that case?"

And then let's say, for the sake of argument, that the photographs instead of showing and corroborating everything JBC's witnesses had already testified to as these photographs actually do, but would have instead refuted everything JBC's witnesses had claimed, and that instead of telling the truth, JBC's witnesses had lied or exaggerated and been inaccurate on everything they were claiming with regard to damaged equipment. Mr. Case would then finally have proper grounds for a CR 59 new trial and a very real request for attorney's fees and costs then, and only then.

The bottom line is that JBC was required to disclose and produce the photos once the location became known and they were finally secured into JBC's possession, now matter what, and even though the potential result of the same

cut both ways, with both parties equally in the same situation with the photographs. That is exactly what JBC's counsel properly did as any reasonable, prudent, and ethical attorney would have done and should not be punished for lest other attorneys be deterred from doing the same right thing.

The drastic remedy of a mistrial is only to be used as a last resort when absolutely necessary and only when nothing less than a new trial can remedy the situation. A mistrial is an absolute last resort, and very severe action for any judge to ever take against any JBC in any case. It is all but unheard of in a civil bench trial and is only occasionally seen and still very rare in criminal, JURY TRIALS. That is true even in the critical setting of a criminal jury trial where a litigant's freedom and potential incarceration is at stake.

> We again point out that timely objection gives the trial court certain alternatives, including a continuance to allow the surprised party to meet the surprise testimony [or evidence] . . ., **BEFORE RESORTING TO <u>THE DRASTIC AND COSTLY</u> REMEDY OF A MISTRIAL.**

<u>Sather v. Lindahl</u>, 43 Wn.2d 463, 466,(1953)(Emphasis added).

> To support imposition of one of the greater sanctions - such

> as a new trial - **THE RECORD MUST CLEARLY SHOW** (1) one party willfully or deliberately violated the discovery rules and orders, (2) the opposing party was substantially prejudiced in its ability to prepare for trial, and (3) the trial court explicitly considered whether a less sanction would have sufficed.

Barton v. Department of Transportation, 178 Wn.2d 193, 215 (2013)(citing to Magana v. Hyundai Motor Am., 167 Wn.2d 570, 584, 220 P.2d 191 (2009)(citing to Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)).

However, the record here is completely devoid of any misconduct at all, let alone anything willful or deliberate. Furthermore, the defendants were already prepared to defend the damages as already described in detail in the summons and complaint, the written discovery answers, the deposition testimony. There were absolutely no surprises. The photos did not change anything from the detailed description of the alleged damages described in detail in the Complaint served on the Defendants and as further explained in depositions.

In fact, the trial judge himself noted that "The Plaintiff's witnesses testified as anticipated by the defense regard damages." RP-267, lines 19-20. The photos merely corroborated and proved exactly the same things that JBC had already told the Defendants about in advance and had testified to, all of which the Defendants were already fully advised of and prepared for, prior to trial. Any alleged prejudice to the defendants was minor at best since they had already geared up for everything they were told in advance about for years that the photographs would now simply repeat and visually show as previously described already. Both parties were equally affected and a short continuance would have resolved the situation fully.

Finally, while the trial court did discuss a litany its views of options to deal with the minor irregularity and could have done justice without needlessly burdening and prejudicing JBC and the court's own resources, it is clear and inescapable that a mere continuance would have easily been more than sufficient to resolve the mere irregularity. The fact that corroborating pictures suddenly became available to both parties from an outside third-party source, is at the very most, just an innocent and entirely explainable

"irregularity"[1], but it is no fault of either of the parties. Trial courts have broad discretionary powers in conducting a trial and fairly and equally dealing with any "irregularities" that arise.

In determining whether a trial irregularity prejudiced the jury so as to deny the defendant his right to a fair trial, we will consider: (1) the seriousness of the irregularity; (2) whether the statement at issue was cumulative evidence; (3) whether the jurors were properly instructed to disregard the remarks of counsel not supported by the evidence; and (4) whether the prejudice was so grievous that nothing short of a new trial could remedy the error. State v. Weber, 99 Wn.2d 158, 165-6, 659 P.2d 1102 (1983).

Here, there was no jury worry at all. Second, the photos were entirely cumulative in fact and by definition. Third, the Judge was more than capable of telling himself to be fair to everyone. Fourth, the alleged "prejudice" was not so "grievous" that nothing short of a new trial was needed. The defense

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1 The word comes from CR 59(a)(1), which actually governs post-trial motions for a new trial because of "irregularities", but not for mid-trial motions as attempted here.

had already geared up for the damages that had already long since described in detail and in advance years earlier, such that the defense seeing what they were already told about was simply no surprise at all and a continuance was more than sufficient to deal with the same. "[Courts] should grant a mistrial only when nothing but a new trial can remedy the error [i.e. - where the "irregularity" irreparably prejudices a jury] or in other words, when the harmed party has been so prejudiced that only a new trial can remedy the error." Kimball v. Otis Elevator Co., 89 Wash. App. 169, 178, 947 P.2d 1275 (1997)(citing to State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)).

This rule applies when the concern about receiving a fair trial rises to the pinnacle of the constitutional level like it does for a criminal defendant in a jury trial where incarceration and loss of liberty and freedom is on the line, as opposed to mere civil defendants like Blevins and Badissy in a bench trial in front of a judge sworn to uphold the law. Even a criminal Court will only grant a mistrial when nothing else but a new trial will remedy the situation. State v. Mak, 105 Wn.2d 692, 718 P.2d 407 (1986) . Any concerns in our case at bar did not rise to this level.

Furthermore, the situation was not IRREPARABLE. That simply cannot be said in this case. Notably, the Kimball case "IRREGULARITY" Was actually an act of INTENTIONAL MISCONDUCT by way of the party's defense attorney making inappropriate comments potentially TAINTING THE ENTIRE CASE TO THE JURY during closing argument, for which a curative instruction to disregard the same was held to have more than sufficed without any need to start the whole case all over again, and that easily was affirmed on review. Supra., at 178. There was no jury here. Judge Federspiel was presiding and there should have been no problem.

The merely corroborating photographs which surfaced from a third-party in this case at bar didn't IRREPARABLY harm anyone. They were merely relevant under ER 402, albeit ENTIRELY CUMULATIVE to the oral testimony that the Defense was already prepared for from depositions years earlier, and not prejudicial at all under ER 403. That the photos just happened support one party's claims and veracity or the other party's claims is completely irrelevant and pure happenstance. The pictures simply showed what all JBC's witnesses had already verbally described and testified to, based on what they had seen and had been already verbally describing all

along, and all these years with full advanced notice to the defense, was true, accurate, and correct. There were ABSOLUTELY NO SURPRISES to anyone. Everything shown in the photos had already been discussed and described beforehand.

As for accidents or surprises, a new trial may be granted in very rare circumstances under CR 59 if the party alleging UNFAIR SURPRISE can show: (1) a surprise in fact; (2) that ordinary prudence would not have prevented the surprise for the party claiming to be surprised; and (3) that the claim of surprise was promptly raised with the court and a continuance was requested and yet was denied. Jensen v. Spokane Falls & Norther Railway, 51 Wash. 448, 451, 98 Pac. 1124 (1909). For newly discovered evidence, a party moving for a new trial under CR 59 based on the ground of newly discovered evidence must also demonstrate that: (1) the new evidence will probably change the result; (2) the new evidence was discovered after trial; (3) due diligence before trial would not have disclose the new evidence; (4) the new evidence is material; and (5) **THE NEW EVIDENCE IS NOT MERELY CUMULATIVE OR IMPEACHING.** Nelson v. Placanica, 33 Wn.2d 523, 526, 206 P.2d 296 (1949)(Emphasis added).

The actual applicable rules for dealing with such mere "IRREGULARITIES" is as follows: in first determining the effect of an "irregularity", a reviewing court considers whether (1) it was serious, (2) it involved cumulative evidence, and (3) the trial court properly instructed the jury to disregard it. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994)(Emphasis added), which case was cited to as authority in Kimball v. Otis Elevator Co., 89 Wash. App. 169, 178, 947 P.2d 1275 (1997)(ACTUAL SERIOUS MISCONDUCT of the party's current counsel of record during trial, not a discharged former attorney). Here, the evidence was cumulative to what had already been alleged and testified to in deposition and trial. To be sure, Black's law dictionary defines "CUMULATIVE EVIDENCE" as follows:

> Additional or corroborative evidence to the same point. That which goes to prove what has already been established by other evidence.

Black's Law Dictionary, Abridged Sixth Edition, West Publishing Company (1991). Third, a reviewing court examines whether, the trial court properly instructed the jury to disregard something improper. Here, the evidence wasn't deemed inadmissible or improper in and of itself at all. Furthermore, we didn't have a jury. There was nothing improper to tell the jury to

disregard. This was a bench trial by a judge sworn to and readily able to do proper justice and to follow the law without prejudice to anyone.

Next, monetary sanctions served no purpose and were completely unwarranted because there was no violation in the first place. The purposes of imposing sanctions, when there is a willful violation of CR 26(g) are to: (1) deter, (2) punish, (3) compensate, and (4) educate. In re Firestorm, 129 Wn.2d 130, 142, 916 P.2d 411 (1996) (citing Washington State Physicians Ins. Exchange & Association v. Fisons, supra. at 355-6).

First, there was no willful act to "PUNISH" the party JBC for. Second, a party does not need any deterrent or education about the importance of not losing its own helpful corroborating evidence. That is entirely self-correcting behavior that no education or deterrent is needed for, like not touching fire. "To the extent possible, individual parties should not be penalized for their attorney's misconduct in the discovery process." In re Firestorm, supra. at 143. Ms. Meacham wasn't even JBC's attorney at the time of the discovery request.

Moreover, the trial court didn't just penalize JBC, it totally HAMMERED[2] JBC, for something that a former attorney no longer under JBC's employ or control inadvertently did years before, and completely outside of, the discovery process. Third, the sanctions were not even really for compensation of fees incurred from the alleged violation either. Since no photos could be found, no time had been spent on photos at all. Any legal work that could be employed on the photos once they did surface was not wasted or sanctionable time at all, yet the trial court even awarded fees for the deposition of Denny Ames which had nothing to do with the photographs. To be sure, JBC made a litany of proper objections to numerous aspects of the fees and costs awarded as sanctions at CP-115-130.

V. ATTORNEY'S FEES

If Appellant JBC prevails on appeal and ultimately obtain a judgment on remand, then at the very least, JBC will be entitled to statutory fees and costs

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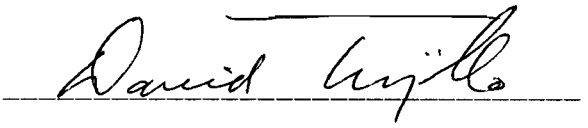
2 Actually, the effect of the penalty was exponentially more devastating to the JBC than just the $16,000 sanction. JBC itself likewise had well over $16,000 invested into the case too, making this actually significantly more than a $32,000 penalty, not counting the significant additional expense of appellate review on top of all that plus having to start all over again.

under RCW 4.84.010/080. If the Appellate court finds that the Defense violated CR 11 by mis-citing authority and needlessly caused the mistrial and this appeal, then fees and costs to JBC may be awarded under CR 11 against the Defendants. Either way, JBC will comply with RAP 18.1 and 14.4.

VI. CONCLUSION

This Appellate court should reverse the order finding a CR 26(g) violation and reverse the fee and costs award and remand for a new trial with a new judge. Respectfully submitted this 7th day of May, 2014.



DAVID B. TRUJILLO, WSBA #25580,

Attorney for Appellant JBC

Appendix A

CERTIFICATE OF TRANSMITTAL
I declare under penalty of perjury under the laws of the state of Washington that on Monday, September 16, 2013, I sent a copy of the document to which this is affixed to the attorneys of record for all parties via messenger service, facsimile, or by U.S. Mail, postage prepaid.

At Connell, Washington.

SUPERIOR COURT OF WASHINGTON
COUNTY OF YAKIMA

In re the Matter of: JOHNSON BROTHERS CONTRACTING, INC., **Plaintiff,** **v.** MT. ADAMS TRUCKING; DENNY AMES AND JANE DOE AMES; TIM DUKE AND JANE DOE DUKE; CHALRES LAVAUGH BLEVINS AND JANE DOE BLEVINS; AND ZINE ABIDINE BADISSY AND JANE DOE BADISSY D/B/A BLACK ROCK ORCHARDS, A SOLE PROPRIETORSHIP, **Defendants.**	**No.** 09-2-03133-8 DECLARATION OF TONI MEACHAM

TONI MEACHAM pursuant to RCW 9A.72.085, declares:

1. I make this declaration of my own personal knowledge and information and am competent to do so.
2. My office is located in Franklin County, Washington. I practice in Adams, Franklin, Grant, and Benton Counties. I am approximately one hour thirty minutes from Yakima.
3. In 2007 I represented Brent Deroo, who did business with Johnson Brothers Contacting, Inc. Mr. Deroo contacted me in 2007 about Johnson Brothers Contacting, Inc. and a potential case that Johnson Brothers Contracting, Inc. had regarding damage to their equipment in Yakima County, WA.
4. Mr. Ernie Johnson then contacted me about the case. Mr. Johnson was at Missoula Montana and needed assistance with managing the investigation

Toni Meacham
attorney at law
1420 Scooteney Rd
Connell, WA 99326
509-488-3289

into what happened with the equipment and figuring out steps that needed to be taken.

5. Part of the file preparation involved getting proof of the damage to the equipment. Johnson Brothers Contracting, Inc. supplied my office with pictures in 2007 of the damage done to the equipment. Inadvertently, those pictures were put into the Brent Deroo file, not the Johnson Brothers file.
6. In 2009 it became apparent that the matter needed to be litigated. I found local counsel for Johnson Brothers Contracting, Inc. and believed that I had sent Mr. Trujillo the entire file on the matter. Mr. Trujillo contacted me around that time to ask about the pictures, which I could not locate in the file that I had kept. I did not hear anything further on the matter and believed that Mr. Trujillo had been provided the pictures from another source.
7. On Sunday, September 15, 2013, I received a call from Mr. Trujillo. Mr. Trujillo asked me about the pictures. At this time, I had the files in a storage unit as they were no longer active files. I assured Mr. Trujillo that I would look in the Johnson Brothers Contracting, Inc. file.
8. On Monday, September 16, 2013 I went to the storage unit and looked in the Johnson Brothers Contracting, Inc. file. I did not find the pictures. I also decided to look through the Brent Deroo files. I did locate the pictures. I immediately emailed Mr. Trujillo and asked him to call me. Due to my rural location, I moved forward with scanning all of the pictures and emailing them to Mr. Trujillo immediately so that he received them by early afternoon September 16, 2013.
9. The pictures have been in my possession since 2007. The storage unit is located on my real property and is only used to store inactive files. I have mailed the original pictures to Mr. Trujillo.

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

SIGNED at Connell, Washington this 16th day of SEPTEMBER, 2013.

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Case No. 321657

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

Johnson Brothers Contracting, Inc.

Appellant,

v.

Charles L. Blevins and Jane Doe Blevins, and

Zine A. Badissy and Jane Doe Badissy,

Respondents.

CERTIFICATE OF SERVICE

OF APPELLANT'S OPENING BRIEF

DAVID B. TRUJILLO
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tdtrujillo@yahoo.com

I, DAVID B. TRUJILLO, certify and declare under penalty of perjury that on the 9th of May, 2014,

(A) I personally hand delivered a copy of: (1) the Appellant's Opening Brief; and (2) this Certificate of Service to the Attorney for the Respondents Charles L. Blevins and Jane Doe Blevins, and Zine A. Badissy and Jane Doe Badissy: D. R. "Rob" Case at Larson, Berg & Perkins, at 105 North 3rd Street, Yakima, Washington 98901; and

SUBSCRIBED AND SWORN TO this 9th day of May, 2014, in Yakima, Washington.

Attorney for Appellant Johnson Brothers Contracting, Inc.:

BY: David Trujillo
DAVID B. TRUJILLO, WSBA #25580