ORIGINAL

Case No. 321657

COURT OF APPEALS, DIVISION THREE
STATE OF WASHINGTON



JOHNSON BROTHERS CONTRACTING, INC.,

Plaintiff/Appellant,

vs.

CHARLES L. BLEVINS and JANE DOE BLEVINS; and
ZINE A. BADISSY and JANE DOE BADISSY,
d/b/a BLACK ROCK ORCHARDS,

Defendants/Respondents,

and

MT. ADAMS TRUCKING;
DENNY AMES and JANE DOE AMES; and
TIM DUKE and JANE DOE DUKE,

Defendants/Cross-Defendants/Non-Parties to this Appeal.

# BRIEF OF RESPONDENTS

D. R. (ROB) CASE (WSBA #34313)
Larson Berg & Perkins PLLC
Attorneys for Respondents
Blevins & Badissy

105 North 3rd Street
Yakima, WA 98901
Phone: (509) 457-1515
Fax: (509) 457-1027
Email: Rob@LBPlaw.com

TABLE OF CONTENTS Page

TABLE OF AUTHORITIES Page

Washington Cases

///
///
///
///
///
///
///
///
///
///
///
///

Federal Cases

Washington Statutes



Washington Rules



Federal Rules



Other Authorities

## A. INTRODUCTION

The plaintiff/appellant asks this court to second guess the trial judge's determination, in a bench trial, that a mistrial was necessary due to prejudicial irregularities that were the fault of the plaintiff and its counsel. The trial judge was certainly in the best position to make the determination, and the plaintiff concedes that its appeal is controlled by the deferential "abuse of discretion" standard of review. *See e.g., Appellant's Opening Brief*, p.14.

In hopes of obtaining a reversal, the plaintiff distorts the record, ignores critical facts, and bases its arguments on invalid assertions. For instance, one of the plaintiff's principal contentions – repeated over and over throughout its brief – is that the at-issue photographs were supposedly "entirely cumulative" and/or "corroborative" to the witnesses' testimony. *See e.g., Appellant's Opening Brief*, pp.1, 12, 23-24, 35, 39, 41-43 & 45-48. That contention is nothing more than a self-serving, untrue assertion. It is what the plaintiff wishes and needs to be true, but it is not true. Tellingly, the plaintiff offers no meaningful argument and zero record citations to support the contention. Instead, the plaintiff just repeats it *ad nauseam* as if mere repetition might make the contention true.

Equally false, the plaintiff asserts that "NO ONE can say anything negative against party JBC or JBC's counsel of record Mr. Trujillo".

(Capitalization in original.) *See Appellant's Opening Brief*, pp.32-33. To the contrary, the trial court carefully documented how CR 26 was violated and it pinned that violation directly on Mr. Trujillo and the plaintiff. *See e.g.*, CP 157 ("Order", entered 11/01/13, p.8, lns.10-24, which includes an unchallenged Conclusion of Law saying: "Mr. Trujillo's failure to renew his request for Ms. Meacham to search her files for the photographs between November 2010 and September 15, 2013, was an unreasonable omission", underscore emphasis added) & CP 159 (same "Order", p.10, lns.13-14, which includes another unchallenged Conclusion saying: "the mistrial was caused by a discovery violation by the plaintiff and/or its counsel", underscore emphasis added).[1]

When the true record is considered, the plaintiff's arguments necessarily fail. The arguments fail because they are wholly predicated on invalid assertions. Each of the plaintiff's key assertions was considered, weighed, and rejected by the trial court. The defense will provide

[1] For clarity, this court does not have to conclude/agree that CR 26 was violated in order to uphold the trial court's decision. As previously noted, this appeal is controlled by the deferential abuse of discretion standard. *See supra*, p.1, 2nd ¶. In addition, the plaintiff conceded below that "the [trial] court still has inherent power[,] even if there was no violation[,] to fashion a remedy to do justice." (Underscore emphasis and bracketed material added.) *See* RP 260 (plaintiff's argument, transcript of 09/18/13, p.260, lns.23-25); *see also* RP 261 (same transcript, p.261, lns.21-23). The plaintiff should be estopped from making a contrary argument to this court in hopes of obtaining a reversal and an award of fees. *See e.g.*, *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009) ("The [invited error] doctrine was designed in part to prevent parties from misleading trial courts and receiving a windfall by doing so", bracketed material added).

detailed, often voluminous, record citations to demonstrate this reality.

Despite submitting a 50-page brief, the plaintiff fails to directly challenge any Finding of Fact or Conclusion of Law. This, too, is fatal to the appeal. The defense will cite controlling precedents to this effect. *See infra*, pp.8-9, §§C.1.-C.2.

The precedents cited by the plaintiff are inapposite to its legal arguments. For instance, the plaintiff repeatedly argues that because the at-issue photographs were possessed by its former counsel, Ms. Meacham, they were supposedly beyond the plaintiff's "control". *See e.g.*, *Appellant's Opening Brief*, pp.1, 5-6, 18-20, 25 & 29. None of the decisions cited by the plaintiff stands for that proposition, which is not surprising because each addressed a distinguishable factual circumstance. By contrast, the defense will cite multiple persuasive-weight federal precedents – as well as WSBA materials – that are factually on-point. When a party gives documents to its then-attorney, those documents are still under that party's control as a matter of law. *See infra*, pp.35-37, §E.2., including *Avocent Redmond Corp. v. Rose Electronics*, 491 F. Supp.2d 1000, 1010 (W.D. Wa 2007) ("such documents are clearly within the client's control" citations omitted and underscore emphasis added).

A mistrial was the only logical outcome. The trial court explained how the CR 26 violation (in addition to other irregularities) unfairly

prejudiced the defendants' trial preparations, strategy, and participation. *See e.g.*, CP 153-155, 158 ("Order", entered 11/01/13, p.4, lns.14-22; p.5, ln.15 – p.6, ln.21 & p.9, lns.1-6, including all handwritten interlineations); *accord* RP 270 (judge's oral ruling, transcript of 09/18/13, p.270, lns.16-23).[2] The court further explained why a mere continuance would not have been an adequate remedy. *See* CP 158 (same "Order", p.9, lns.20-29). These Findings and Conclusions are unchallenged.

The trial court considered the option of excluding/suppressing the photographs, which was the defendants' primary request. *See* CP 159 ("Order", entered 11/01/13, p.10, lns.1-4); RP 272 (judge's oral ruling, transcript of 09/18/13, p.272, lns.2-9) & RP 256 (defense counsel's argument, same transcript, p.256, lns.19-20). By declaring a mistrial instead, the court struck a balance. The plaintiff was not foreclosed from using the photographs in a new trial, and the current trial was negated as a matter of fairness to the defendants.[3]

This court should affirm the trial court's "Order" and "Judgment" in all respects. That includes the trial court's award of costs and fees to

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[2] The trial court's oral rulings – from September 18th and November 1st – were expressly incorporated into the written "Order". *See* RP (judge's oral ruling, transcript of 11/01/13, p.74, lns.15-17) & CP 156 ("Order", entered 11/01/13, p.7, lns.13-14, handwritten interlineations).

[3] Notably, the plaintiff never acknowledges that full suppression was considered as a possible sanction, and the plaintiff offers zero argument to show that a mistrial was somehow a more severe sanction than suppression would have been. *See Appellant's Opening Brief*, pp.1-50.

the defendants/respondents. Appellate fees and costs should also be awarded to the respondents. The trial was for naught, all fault lies on the plaintiff's side, and the respondents' time and money were wasted at trial (and are being further wasted on this meritless appeal).

## B. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

Each of the plaintiff's "Assignments of Error" is predicated on untrue, self-serving assertions. When those bogus assertions are stripped away, the plaintiff's Assignments of Error break down.

Assignment "A" is predicated on the two-part contention that "[1] the photos were not in plaintiff's . . . control, but were in the hands of [2] an unknown third-party". (Bracketed material and ellipsis added.) *See Appellant's Opening Brief*, p.1, ¶A. Both parts are false.

The record unequivocally confirms that the photographs were possessed by the plaintiff's former attorney, Toni Meacham, not by some "unknown" third-party. This fact is effectively conceded elsewhere by the plaintiff in its brief,[4] was conceded by the plaintiff as an "undisputed fact" below,[5] and was squarely found by the trial court in a Finding that the

[4] *See Appellant's Opening Brief*, pp.10 & 12 (discussing how the photographs were found in Ms. Meacham's files).

[5] *See* CP 52 ("Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Reconsideration", dated 10/03/13, p.4, lns.12-16, saying: "[i]t is . . . an undisputed fact, that on the date of the November 2010 discovery request . . . the pictures were in fact, actually in the . . . possession of . . . Ms. Meacham", ellipses and underscore emphasis added).

plaintiff does not challenge.[6]

Because the photographs were delivered to the plaintiff's then-attorney and stayed in her possession, the photographs were within the plaintiff's "control" as a matter of law. Directly on-point is the precedent of *Avocent Redmond Corp. v. Rose Electronics*, 491 F. Supp.2d 1000, 1010 (W.D. Wa 2007). That decision, as well as other persuasive-weight authorities, will be fully presented in the "Argument" section of this brief below. *See infra*, pp.35-37, §E.2.

The plaintiff's Assignment "B" is predicated on the contention that the photographs were "mere cumulative evidence" to its witnesses' testimony. *See Appellant's Opening Brief*, p.1, ¶B. That is false. In relevant part, the judge ruled as follows:

> I did not deem it cumulative . . . . If you remember, there were memory problems from your clients [*sic*, your witnesses] pertaining to what were [*sic*, was] damaged and some inconsistencies in their testimony. Some couldn't even remember the full scope and extent [of the alleged damages].

(Underscore emphasis, ellipsis, and bracketed material added.) *See* RP (judge's oral ruling, transcript of 11/01/13, p.52, lns.19-24).[7] Likewise, the judge made the following interlineations on the written "Order":

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[6] *See* CP 151 ("Order", entered 11/01/13, p.2, lns.6-8, including an unchallenged Finding of Fact saying: "The photographs . . . had always been in the exclusive possession of the plaintiff and/or the plaintiff's then-counsel (Toni Meacham)", ellipsis and underscore emphasis added).

[7] As previously noted, all of the judge's oral rulings were expressly incorporated into the written "Order". *See supra*, p.4, n.2.

> The witness[es]' testimony &/or memory was poor & inconsistent[,] and their credibility on the damages was suspect.

(Underscore emphasis and bracketed material added.) *See* CP 158 ("Order", entered 11/01/13, p.9, handwritten interlineations).

Notably, these rulings came after numerous and repeated arguments by plaintiff's counsel, both orally and in writing, seeking a ruling that the photographs were cumulative and confirmatory of the witnesses' testimony.[8] The court rejected those arguments. There is no Finding or Conclusion saying the photographs were cumulative.[9]

Finally, the plaintiff's Assignment "C" is predicated on the following contentions: (1) that the plaintiff was supposedly "faultless"

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[8] *See e.g.*, RP (oral arguments by plaintiff's counsel, transcript of 11/01/13, p.51, lns.2-22; p.57, lns.6-7; p.59, lns.19-20 & p.65, ln.4); CP 41 ("Plaintiff's Motion for Reconsideration" dated 10/03/13, p.1, lns.33-34); CP 47 (same pleading, p.8, ¶17., lns.10-12); CP 49 ("Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Reconsideration", dated 10/03/13, p.1, lns.21-22); CP 52 (same pleading, p.5, lns.3-4 & lns.11-15); CP 55 (same pleading, p.7, lns.18-19); CP 60 (same pleading, p.12, lns.10-11); CP 70 (same pleading, p.22, lns.13-15); CP 72-73 (same pleading, p.24, ln.9 – p.25, ln.5); CP 73 (same pleading, p.25, lns.9-10); CP 74 (same pleading, p.26, lns.6-7 & lns.23-24); CP 75-76 (same pleading, p.27, ln.18 – p.28, ln.10); CP 76 (same pleading, p.30, lns.24-25); CP 79 (same pleading, p.31, lns.7-8 & lns.21-24); CP 122 ("Plaintiff's Objections to Defendants' Proposed Order", dated 10/23/13, p.8, ¶12, lns.1-13) & CP 125-126 (same pleading, p.11, ¶18, lns.5-12 & p.11, ¶19, ln.14 – p.12, ln.1).

[9] As conceded by the plaintiff elsewhere in its brief: "In the absence of a finding on a factual issue [courts] must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." (Bracketed change made.) *See Appellant's Opening Brief*, p.18 (quoting *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997)). In citing this rule, the plaintiff contends that it should apply against the defense as to whether it was sufficiently established at the trial court that the at-issue photographs were in the plaintiff's control. *See Appellant's Opening Brief*, p.18 (arguing falsely, "The defense absolutely never proved or obtained any ruling that JBC had possession, custody or control of the pictures" when the discovery request was served on November 17, 2010). To the contrary, such a ruling was made, the plaintiff conceded this point as an "undisputed fact" below, and the point is also effectively conceded by other portions of the plaintiff's brief. *See supra*, pp.5-6, nn.4-6.

and "innocent", (2) that Ms. Meacham was supposedly an "independent" outsider, and (3) that a mistrial is supposedly only appropriate if one side "attempt[ed] to gain tactical advantage by knowingly and intentionally withholding evidence". (Bracketed change made.) *See Appellant's Opening Brief*, p.1, ¶C. All three contentions are invalid. Numbers one and two echo similar assertions embedded in the preceding Assignments, and they are invalid for the reasons stated above. *See supra*, pp.5-7. The third assertion is a false recitation of the law, which will be demonstrated in the "Argument" section of this brief below. *See infra*, pp.46-50, §E.5.

## C. FINDINGS AND CONCLUSIONS

**C.1. Each Finding is a Verity.** The plaintiff does not challenge any of the trial court's Findings of Fact. *See Appellant's Opening Brief*, pp.1-50. It is well-established that unchallenged Findings "will be considered verities on appeal." *See e.g.*, *Smith v. Breen*, 26 Wn. App. 802, 803, 614 P.2d 671 (1980) (Division Three). Furthermore, "[a] respondent in a bench trial is entitled to the benefit of all evidence and reasonable inferences therefrom in support of the findings of fact entered by the trial court." (Internal citations omitted.) *Keever & Associates, Inc. v. Randall*, 129 Wn. App. 733, 737, 119 P.3d 926 (2005) (Division Three), *review denied*, 157 Wn.2d 1009 (2006). That is because the trial court "is free to believe or disbelieve" any evidence and/or theory presented at trial. *See*

*Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 104-105, 267 P.3d 435 (2011) (Division Two).[10]

**C.2. Each Conclusion is the "Law of the Case".** The plaintiff also does not challenge any of the trial court's Conclusions of Law. *See Appellant's Opening Brief*, pp.1-50. As such, each Conclusion is deemed "the law of the case". *See e.g., Energy Northwest v. Hartje*, 148 Wn. App. 454, 465, 199 P.3d 1043 (2009) (Division Three) ("An unchallenged conclusion of law becomes the law of the case.").[11]

## D. STATEMENT OF THE CASE

**D.1. Nature of Case and Background Facts.** As explained by the trial judge, this case "is essentially a claim for damages to a fleet of heavy equipment". RP 264 (judge's oral ruling, transcript of 09/18/13, p.264, lns.16-18); *accord* RP 269 (same transcript, p.269, lns.21-24).

All of the at-issue equipment was either owned or leased by the

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[10] The plaintiff also does not assign error to the trial court's refusal to make any of its proposed, alternate Findings. The argument cannot be raised via reply. *See* RAP 10.3(a)&(c); *Sacco v. Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990). Regardless, a general argument that different Findings should have been made is not a proper assignment of error anyway; it is an improper request for the appellate court to search the record in hopes of discovering error. *See e.g., Koster v. Wingard*, 50 Wn.2d 855, 856, 314 P.2d 928 (1957); *Scroggin v. Worthy*, 51 Wn.2d 119, 124, 316 P.2d 480 (1957). "It is not the function or duty of [an appellate court] to search the record for errors, but only to rule on the errors specifically alleged." (Bracketed change made.) *Smith v. Breen*, 26 Wn. App. 802, 803, 614 P.3d 671 (1980) (Division Three).

[11] Even assuming *arguendo* that one or more Conclusions was properly challenged (which, for clarity, the defendants do not concede), "[a]n assignment of error as to a conclusion of law does not bring up for review the facts found upon which the conclusion is based." *See West Coast Airlines, Inc. v. Miner's Aircraft & Engine Service, Inc.*, 66 Wn.2d 513, 518, 403 P.2d 833 (1965). Thus, the Findings would still be verities.

plaintiff. *See* CP 7 (at-issue 2009 "Complaint", filed 08/20/09, p.4, ¶3.2). On the date(s) when it allegedly sustained damages, the equipment was parked on agricultural lands owned by defendants Badissy along Highway 24 outside of Moxee, Washington. *See* CP 7 (*id.*, p.4, ¶3.3) & CP 18 ("Answer of Defendants Badissy and Blevins", filed 10/20/09, p.1, ¶1.4).

The plaintiff's agents had been operating the equipment on Mr. Badissy's lands for several weeks. Specifically, they were removing old windbreak trees from one of Mr. Badissy's orchards, which orchard was known by the assumed business name of "BZ Black Rock Ranch". *See* CP 6-7 (at-issue 2009 "Complaint", pp.3-4, ¶¶3.1-3.3) & CP 19 ("Answer", p.2, ¶1.5). This was occurring pursuant to a written "Tree Removal/Grinding Agreement" dated June 16, 2007. *See* CP 16-17 (Agreement); CP 6-7 (at-issue 2009 "Complaint", pp.3-4, ¶3.1) & CP 19 ("Answer", p.2, ¶3.1).[12]

The plaintiff's agents ran the equipment during daylight hours in August and September, 2007. *See* CP 25 (original 2007 lawsuit, p.2, ¶¶3.2 & 3.4) & CP 7 (at-issue 2009 "Complaint", p.4, ¶¶3.2-3.3). Over the evenings, they left the equipment at the ranch instead of transporting it to-and-from the ranch daily. *See* RP 196-197 (trial testimony of plaintiff's

[12] A complete copy of the Tree Removal/Grinding Agreement can be found at CP 28-29. However, its specific terms and conditions are immaterial to the scope of this appeal. Because a mistrial was declared, the trial court did not render a merits decision.

agent, Richard Holcomb, p.196, ln.20 – p.197, ln.4); CP 8 (at-issue 2009 "Complaint", p.6, ¶3.7, lns.18-20) & CP 19 ("Answer", p.2, ¶3.6).

On one or more mornings in September, the plaintiff's agents claim to have noticed signs of nighttime tampering and/or unauthorized use of the equipment. *See e.g.*, CP 25-26 (original 2007 lawsuit, pp.2-3, ¶¶3.4-3.7) & CP 8-9 (at-issue 2009 "Complaint", pp.5-6, ¶¶3.6-3.9).

The plaintiff was exclusively working on orchard lands lying south of Highway 24. Separately, the ranch was also having additional windbreak trees removed from a different orchard lying north of Highway 24. *See e.g.*, RP 55 (trial testimony by plaintiff's agent, Brent Deroo, transcript of 09/12/13, p.55, lns.9-22).

The separate, north-side tree removal operation was being performed by Denny Ames and Tim Duke. *See* CP 5 (at-issue 2009 "Complaint", p.2, ¶¶1.2-1.3). Messrs. Ames and Duke operated under the name of "Mt. Adams Trucking", although it remains unclear whether Mt. Adams was an established entity or merely an assumed business name). *See* CP 5 (at-issue 2009 "Complaint", p.2, ¶¶1.2-1.3)

**D.2. Discovery of the Alleged Damages and Other Occurrences on September 6, 2007.** As of September 5th, the plaintiff was finished (or mostly finished) with its scope of work. The equipment was again left at the ranch over the evening.

Upon arriving the next day – September 6, 2007 – the plaintiff's agents claim the equipment was noticeably damaged. *See e.g.*, CP 9 (at-issue 2009 "Complaint", p.6, ¶¶3.9-3.10). They further claim that visible track marks led to the north-side of the Highway. *See* CP 11 (at-issue 2009 "Complaint", p.8, ¶3.15).

The plaintiff's agents "confronted" Messrs. Ames and Duke, the north-side operators. Messrs. Ames and Duke "admitted" and "confessed" to using the equipment. *See* CP 11-12 (*id.*, pp.8-9, ¶3.17-3.18).

Angry, the plaintiff's agents summoned a Sheriff's Deputy to the scene. *See e.g.*, CP 12 (*id.*, p.9, ¶3.18). The Deputy created a written report, which includes the following recitations:

> Both Tim and Denny admitted they used the tractors last evening to take out over one hundred trees. Tim admitted he used the loader, and that he knew the window was broken. . . .
>
> Tim stated he would pay for the damages when the company determines the cost.

*See* CP 32-33 (Deputy's report, dated 09/06/13, p.2, 3rd ¶ & p.3, top ¶).[13]

Rather than simply confessing, Messrs. Ames and Duke attempted to shift blame onto Charlie Blevins. Specifically, the Deputy's report recites: "Both Tim and Denny claimed that Charlie Blevins told them to use the tractors". *See* CP 32 (Deputy's report, p.2, 3rd ¶). In other words,

[13] The plaintiff offered a copy of the Deputy's report as an exhibit during trial, but the court ruled that it was inadmissible. *See* CP 155 ("Order", p.6, lns.16-18).

they claimed that Mr. Blevins had supposedly given them "permission".

At this point, Messrs. Badissy and Blevins had not yet arrived at the ranch for the day. The Deputy's report indicates: "[Mr.] Badissy had no idea about the incident when I called [him]." (Bracketed material added.) *See* CP 32 (Deputy's report, p.2, 3rd ¶). The report further indicates: "Minutes later, Charlie called my cell phone. Charlie denied giving permission for Tim Duke and Denny Ames to use the tractors". (Underscore emphasis added.) *See* CP 33 (*id.*, p.2, 4th ¶).

When Mr. Blevins arrived at the ranch, he spoke with the plaintiff's agents. He told them directly what he had previously explained to the Deputy: he was not involved in whatever Messrs. Ames and Duke had done the night before; their "permission" story was not true. *See e.g.*, RP 87 (trial testimony by plaintiff's agent, Brent Deroo, p.87, lns.9-19); *accord* CP 155 ("Order", p.6, lns.10-18).

**D.3. Before Anyone Else Could Photograph and/or Visually Inspect the Equipment, the Plaintiff's Agents Moved it Out of State.**

The plaintiff's agents took photographs of the equipment to document the alleged damages. *See e.g.*, RP 199 (deposition testimony of plaintiff's agent, Richard Holcomb, p.199, lns.8-22). They believed the photographs would be important evidence. *See e.g.*, RP 85 (trial testimony of plaintiff's agent, Brent Deroo, transcript of 09/12/13, p.85, lns.16-21).

Despite summoning a Deputy to the scene, the plaintiff's agents did not keep the equipment at the scene until he arrived. Instead, they immediately relocated the equipment to Hermiston, Oregon. *See* RP 90-91 (trial testimony by plaintiff's agent, Brent Deroo, transcript of 09/12/13, p.90, lns.20-22 & p.91, lns.9-24).

Because the equipment was relocated out of state, the Deputy was not able to take any photographs or visually inspect it. *See* CP 32 (Deputy's report, p.2, 5th ¶ saying: "The tractors are now in Hermiston Oregon"). Likewise, Messrs. Badissy and Blevins – who arrived shortly after the Deputy – had no chance to take photographs or visually inspect the equipment for themselves. *See e.g.*, RP 266 (judge's oral ruling, transcript of 09/18/13, p.266, lns.22-25, reciting: "the machinery had been removed from the site preventing the defendants at the time from taking their own photographs or recording the scope and extent of the damages that had [*sic*, are] alleged to have occurred", bracketed material added).

Even though the plaintiff's agents took photographs, they did not provide copies to anyone else at the time – not to the Deputy, not to Messrs. Badidsy and Blevins, nor even to Messrs. Ames and Duke.

**D.4. <u>The Original 2007 Lawsuit.</u>** On December 11, 2007, the plaintiff filed suit via its then-attorney Toni Meacham. Specifically, the plaintiff sued Denny Ames, Tim Duke and their business, Mt. Adams

Trucking. *See* CP 24-27 (original 2007 lawsuit).

A copy of the Deputy's report was appended to the 2007 lawsuit as an exhibit. *See* CP 31-33 (Deputy's report). However, the plaintiff did not plead any claims against Messrs. Badissy and Blevins (nor against the ranch itself) on the 2007 lawsuit. *See* CP 24-27 (original 2007 lawsuit). Likewise, Messrs. Ames and Duke did not file any sort of third-party claim against Messrs. Badissy and Blevins.

For whatever reason, the 2007 lawsuit "sat dormant until it was dismissed without prejudice as the result of an Order of Dismissal for Want of Prosecution dated April 15, 2009". *See* RP 265-265 (judge's oral ruling, transcript of 09/18/13, p.264, ln.16 – p.265, ln.2).

**D.5. The Equipment Was Repaired in 2007 Without Notice.**

The equipment was repaired before the original 2007 lawsuit was filed. Plaintiff's agent Brent Deroo recalls that the repairs were completed within two weeks, specifically by September 20, 2007. *See e.g.*, RP 25-27 (trial testimony of plaintiff's agent, Brent Deroo, transcript of 09/11/13, p.25, ln.10 – p.27, ln.6) & RP 92 (same testimony, transcript of 09/12/13, p.92, lns.22-25).

There is no evidence of anyone notifying Messrs. Badissy and Blevins that the equipment was scheduled to be repaired. There was no ostensible reason for anyone to have notified them, nor for them to have

asked for notification. No one was threatening to sue Messrs. Badissy and Blevins, and when the 2007 suit was filed they were not named as parties.

**D.6. <u>The Photographs Were Given to Attorney Meacham and She Lost/Misfiled Them.</u>** As previously stated, copies of the photographs were not provided to Messrs. Badissy and Blevins. Instead, only one set of photographs was generated and the plaintiff's agents gave that single set to Ms. Meacham on some unknown date in 2007. *See e.g., Appellant's Opening Brief*, p.4, top ¶.

After dismissal of the original 2007 lawsuit, the plaintiff changed attorneys. Specifically, Ms. Meacham was discharged and the plaintiff retained attorney David Trujillo (its current counsel). *See e.g., Appellant's Opening Brief*, pp.3-4.

Ms. Meacham gave a copy of her file to Mr. Trujillo. *See id.*, p.4. However, she did not forward the photographs. *Id.* Via an after-the-fact 2013 "Declaration", her proffered explanation is that she had mistakenly misfiled the photographs – that they were placed into a personal file for Brent Deroo (the plaintiff's agent) rather than the plaintiff's corporate file. *See e.g., Appellant's Opening Brief*, p.10, top ¶ & p.12, bottom ¶.

**D.7. <u>The New 2009 "Complaint".</u>** On August 20, 2009, Mr. Trujillo filed a new lawsuit on the plaintiff's behalf. In stark and sudden contrast to the prior 2007 lawsuit, the new 2009 lawsuit named

Messrs. Badissy and Blevins (as well as the ranch) as codefendants along with Ames, Duke and Mt. Adams. *See* CP 8-15 (subject 2009 "Complaint", filed 08/20/09). This was a surprising turn of events. Mr. Duke had previously promised to pay for the damages (*see* CP 32, Deputy's report, p.2, 3rd ¶), roughly 24 months had passed, and as far as Messrs. Badissy and Blevins knew the situation had been resolved.

**D.8. The Plaintiff Took a Small Default Judgment Against Ames.** When they failed to respond to the 2009 "Complaint", the plaintiff took a "Default Judgment" against Mr. Ames and Mt. Adams – but not against Mr. Duke. A copy of the Default Judgment are not included in the transmitted appeal record, but the trial judge recited the following details:

> A Default Judgment was taken some time ago against Defendant Ames in an amount substantially less than the Plaintiff now seeks at trial against the defendants [*i.e.*, the Respondents on this appeal] notwithstanding a tort theory invoking joint and several liability.

(Underscore emphasis and bracketed material added.) RP 265 (judge's oral ruling, transcript of 0918/13, p.265, lns.12-16).

**D.9. Respondents' "Answer" and "Cross-Claim".** The respondents filed an "Answer" on October 20, 2009. *See e.g.*, CP 18-22 ("Answer", filed 10/20/09). They denied all personal liability and stressed that they had no involvement, nor knowledge, as to whatever Messrs. Ames and Duke (operating under the name Mt. Adams) might have done to the equipment. *See* CP 20 ("Answer", p.3, ¶3.12 alleging: "Mr.

Blevins and Mr. Badissy do not know to what extent the equipment was used and/or damaged by Mt. Adams, nor the extent of the plaintiff's damages, if any, caused by Mt. Adams, and therefore deny the same.").[14]

The respondents further filed a cross-claim against Messrs. Ames and Duke based on (1) the plaintiff's allegation that they had "admitted" personally causing the alleged damages,[15] (2) the Deputy's report to the same effect,[16] and (3) the simple fact that the respondents had not been involved in whatever happened to the equipment.[17] The cross-claim sought indemnification. *See* CP 21-22 (cross-claim portion of "Answer").

By the date of trial, service of process on the cross-claim had still not been effectuated. As recited by the trial court,

> The Defendant [*i.e.*, the Respondents on this appeal] did file a cross-claim against both Mr. Ames and Mr. Duke, but was never able to secure service of process on either of those cross-defendants. The defendant alleges that Mr. Ames evaded service of process. Counsel for the Defendant and the Plaintiff had a gentleman's agreement that they would notify each other if and when they ever located Mr. Ames.

(Bracketed material added.) RP 266 (judge's oral ruling, transcript of 09/18/13, p.266, lns.9-13).

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[14] At this point, Messrs. Badissy and Blevins were still represented by Robert E. Lawrence-Berrey, Jr. *See* CP 22 (Mr. Lawrence-Berrey, Jr.'s signature on "Answer"). As this court certainly knows, Mr. Lawrence-Berrey, Jr., subsequently took a seat on the Yakima County Superior Court, and he currently serves on Division Three.

[15] *See* CP 11 (at-issue 2009 "Complaint", p.8, ¶3.17, lns.17-19).

[16] *See* CP 32 (Deputy's report, p.2, 3rd ¶).

[17] *See e.g.*, CP 20 ("Answer", p.3, ¶3.12).

**D.10. Respondents' Written Discovery Requests.** On November 17, 2010, Messrs. Badissy and Blevins, via their then-counsel Mr. Lawrence-Berrey, Jr., propounded written discovery requests upon the plaintiff. *See e.g., Appellant's Opening Brief*, p.5. The discovery requests included a demand for copies of "any and all photographs". *See Appellant's Opening Brief*, p.5; *accord* RP 265-266 (judge's oral ruling, transcript of 09/18/13, p.265, ln.17 – p.266, ln.1).

Via Mr. Trujillo, the plaintiff served its answers and response in early 2011. *See e.g.*, RP 246-247 (argument by defense counsel, transcript of 09/18/13, p.246, ln.25 – p.247, ln.2). The plaintiff's answers and responses are not within the transmitted appeal record. However, it is undisputed that no photographs were supplied or even mentioned by the plaintiff. *See e.g., Appellant's Opening Brief*, p.6.

As recited by the trial judge, the plaintiff did not say "that photographs existed but could not be found". *See* RP 265 (judge's oral ruling, transcript of 09/18/13, p.265, lns.22-23). Nor did the plaintiff ever amend its original answers so as "to state that photographs had once existed but could not be found or [to provide] an explanation as to why." (Bracketed material added.) *See* RP 265-266 (same transcript, p.265,

ln.23 – p.266, ln.1). The plaintiff just never mentioned any photographs.[18]

**D.11. <u>The Photographs Could Not Be Found.</u>** When working on his client's answers and responses, Mr. Trujillo telephoned Ms. Meacham to ask if she knew about any photographs. Ms. Meacham reported back that "in fact [she] didn't remember ever getting any photos". (Bracketed material added.) *See Appellant's Opening Brief*, p.5, top ¶.

In addition to not keeping copies, the plaintiff's agents did not create any notes as to where the photos had gone. They "thought" Ms. Meacham had them, but, candidly, "they were not exactly sure who they had given them to". *See Appellant's Opening Brief*, p.5, top ¶.

Thus, by the time that Messrs. Badissy and Blevins had been sued and started to engage in discovery, the photographs had long since been

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[18] The plaintiff's "Statement of the Case" is potentially misleading/confusing as to the chronology of events bearing upon whether, and when, the defendants first learned about any photographs. Specifically, the plaintiff discusses the Respondents' written discovery requests and Ms. Meacham's Declaration in successive paragraphs, and then says: "Ms. Meacham provided a sworn statement confirming . . . ." (Ellipsis added.) *See Appellant's Opening Brief*, p.5. For clarity, the court should understand that Ms. Meacham's Declaration was <u>not</u> written or served as part of the written discovery answers. Quite the contrary, the Declaration was produced in late 2013, whereas the discovery answers were provided in early 2011. *See and Compare*, RP 246-247 (argument by defense counsel, transcript of 09/18/13, p.246, ln.25 – p.247, ln.2) & *Appellant's Opening Brief*, pp.4, 10 & 12. There is no evidence in the transmitted appeal record that the defendants knew as of 2010 or 2011 that photographs once did exist, that they had been misplaced, and/or that a search continued to be ongoing for the photographs. *See* RP 265 (judge's oral ruling, transcript of 09/18/13, p.265, lns.22-23). The only contrary "citation" offered by plaintiff's counsel is to his own oral representations to the trial court about supposed discussions between him and Mr. Lawrence-Berrey, Jr. *See Appellant's Opening Brief*, p.7 (citing RP 261, lns.11-15). However, the trial court did not accept/ratify those representations – it rejected them. *See* RP 265 (judge's oral ruling, transcript of 09/18/13, p.265, lns.22-23).

lost. The plaintiff, its agents, and its attorneys "had no idea where the pictures actually were or who had them last." *Id.*, p.6, top ¶.[19]

**D.12. <u>The Witnesses Did Not Say, Either in Depositions or at Trial, that the Photographs had been Given to Ms. Meacham.</u>** Following completion of written discovery, defendants Badissy and Blevins, via their counsel, deposed the plaintiff's agents. *See e.g.*, *Appellant's Opening Brief*, p.7, 2nd ¶.

Via its brief, the plaintiff asserts (1) that the deponents supposedly "carefully described the equipment damages they had seen with their own eyes", and (2) that they supposedly "indicated that photographs had been taken which they thought they had given to former counsel, Ms. Meacham". *See id.* Neither assertion is true.

As support for these two assertions, the plaintiff offers four citations. *See Appellant's Opening Brief*, p.8, top ¶. However, none of those citations validly substantiates either assertion. Once again, the

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[19] At page 36 of its brief, the plaintiff argues as follows: "This Court will note that the Defendants' discovery request was OVER THREE FULL YEARS after the September 2007 incident". (Capitalization in original.) *See Appellant's Opening Brief*, p.36. This argument is woefully lacking of context. Messrs. Badissy and Blevins were not sued until 2009, approximately two years after the subject incident. By that point, the equipment had long since been repaired and the photographs had already been lost. *See e.g.*, *Appellant's Opening Brief*, p.20, bottom ¶. When the discovery requests were served, the case had not yet been scheduled for trial or any other disposition. Going back further, there is no evidence that Messrs. Badissy and Blevins even knew about the 2007 lawsuit. Even if they had known about it, they were not parties to the case so there was no reason (or even method) for them to engage in discovery. They were complete outsiders to the 2007 lawsuit. Messrs. Badissy and Blevins did <u>not</u> unreasonably delay.

plaintiff is arguing what it wishes were true, not what is true.

The plaintiff's first citation is "CP-45, lines 12-21". *See Appellant's Opening Brief*, p.8, top ¶. That citation traces to one of Mr. Trujillo's own "Declarations" and, in turn, his Declaration contains zero quotations from and/or page citations to the witnesses' depositions. *See* CP 45 ("Declaration" by Mr. Trujillo as part of "Plaintiff's Motion for Reconsideration", dated 10/03/13, p.5, ¶7, lns.12-21). This is not valid evidence. Mr. Trujillo purports to summarize what the witnesses supposedly said during their depositions, which is classic inadmissible hearsay. Also, "[a] declaration purporting to describe what was said during court proceedings is not a substitute for a record." *Collings v. City First Mortgage Services*, 175 Wn. App. 589, 602, 308 P.3d 692 (2013).

The plaintiff's second citation is "RP-248, lines 5-7". *See Appellant's Opening Brief*, p.8, top ¶. That citation traces to part of defense counsel's oral argument before the trial court. *See* RP 248 (defense counsel's argument, transcript of 09/18/13, p.248, lns.5-7). Substantively, the referenced pages do not lend any support to the plaintiff's two assertions. The referenced lines merely say that no photographs were provided via discovery. *See* RP 248.

The plaintiff's third citation, which is partly redundant to the second, is "RP-247, line 22 to RP-248, line 16". *See Appellant's Opening*

*Brief*, p.8, top ¶. That citation also traces to part of defense counsel's oral argument before the trial court. *See* RP pp.247-248 (transcript of 09/18/13, p.247, ln.22 – p.248, ln.16). Not only do the referenced pages not support the plaintiff's assertions, they actually disprove one of the assertions. Specifically, the plaintiff's second assertion is that the deponents supposedly said "they thought they had given [the photographs] to former counsel, Ms. Meacham". (Bracketed material added.) *See Appellant's Opening Brief*, p.8, top ¶. Relative to that assertion, defense counsel said the following about Mr. Holcomb's deposition:

> I asked him [plaintiff's agent, Richard Holcomb] if he took photo – I can pull them [*i.e.*, the relevant pages of the deposition transcript] specifically out, but I asked [and he answered], "You took photographs right?" "Yeah." "Do you know what happened to them?" "No."

(Bracketed material added.) RP 248 (defense counsel's argument, transcript of 09/18/13, p.248, lns.11-14). Defense counsel did not mention Ms. Meacham because Mr. Holcomb had not mentioned her.

The plaintiff's fourth and final citation is "RP-249, lines 1-10". *See Appellant's Opening Brief*, p.8, top ¶. That citation also traces to part of defense counsel's argument below. Specifically, it traces to defense counsel's summary of how the witnesses testified at trial – not during their depositions. *See* RP 249 (defense counsel's argument, transcript of 09/18/13, p.249, lns.1-10). Thus, this citation does not substantiate the

plaintiff's assertions about what was supposedly said during depositions.

The actual deposition transcripts are not part of the transmitted appeal record. However, the trial court found (via an unchallenged Finding) that during their depositions the plaintiff's agents said "they were not aware of what happened to [the photos]." (Underscore emphasis and bracketed material added.) *See* CP 152 ("Order", p.3, ¶d., lns.12-14). In their trial testimony, they similarly testified as follows:

> Q. Are you aware of any photographs that exist of these damages that you claim occurred to the equipment?
> A. I am aware of photographs taken, but that's when the attorneys changed from our behalf because I know that Richard, as well as Luke Davis took pictures. Where those photographs are today, I am not sure.

(Underscore emphasis added.) *See* RP 85 (trial testimony of plaintiff's agent, Brent Deroo, transcript of 09/11/13, p.85, lns.10-15);

> Q. Okay. And when – do you know what happened to the pictures after you took them? Do you know if you gave them to some –
> A. And that I don't know, no. Yeah, I had given them to the office.

(Underscore emphasis added.) *See* RP 231 (trial testimony of plaintiff's agent, Richard Holcomb, transcript of 09/12/13, p.231, lns.16-20); *accord* RP 266 (trial court's oral ruling, transcript of 09/18/13, p.266, lns.2-6) & RP 267-268 (same, p.267, ln.24 – p.268, ln.2).[20]

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[20] As previously stated, the actual deposition transcripts are not part of the transmitted appeal record. The plaintiff should not be permitted to add the missing deposition pages under the guise of "supplementing" the record as part of its reply brief. Regardless, the actual deposition transcripts would not bolster the plaintiff's assertions

**D.13. Plaintiff's Counsel Made No Further Effort to Find the Missing Photographs and/or to Serve Mr. Duke. Instead, Plaintiff's Counsel Noted the Case for Trial.** Mr. Trujillo made no further effort to locate the missing photographs. He did not telephone Ms. Meacham following the depositions, which further belies his false suggestion that the deponents had supposedly said Ms. Meacham had the photographs. *See* CP 152 & 157 ("Order", p.3, lns.2-3 & p.8, lns.22-24). Nor is there any evidence of Mr. Trujillo making further effort to serve defendant Duke.

Instead, Mr. Trujillo noted the case for trial, despite the fact that service of process had not yet been effectuated as to multiple parties (*i.e.*, no service had occurred as codefendant Duke on the plaintiff's claims, nor as to Messrs. Ames and Duke on the cross-claim). *See e.g.*, CP 154 & 156 ("Order", p.5, ¶1, lns.18-22 & p.7, lns.5-11). As the trial court found (via an unchallenged Finding): "This created logistical and legal difficulties for the court and the parties." *See* CP 156 ("Order", p.7, lns.11-12).

**D.14. The Respondents Prepared for Trial Based on the Absence of the Photographs and the Absence of Messrs. Ames and**

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anyway. Below, plaintiff's counsel likewise misrepresented what the deponents had said, which prompted the following response by defense counsel: "Counsel just made a representation that during both of these witness's depositions they told me the photos were given to Ms. Meacham. I challenge counsel to point those sections of the depositions out to the court, because they do not exist." *See* RP (defense counsel's oral argument, transcript of 11/01/13, p.66, lns.13-18). Plaintiff's counsel did not, and still cannot, provide any valid citations to the deposition transcripts to substantiate his argument. He is just self-servingly putting words in the witnesses' mouths.

**Duke.** Via its oral rulings (which the plaintiff does not challenge on this appeal), the trial court noted as follows:

> The defendant [*i.e.*, the Respondents on this appeal] prepared it defense upon two primary theories. One, that Mr. Ames was nowhere to be found and the defense was relying on his absence to proceed to trial on the assumption that the plaintiff would find it difficult to tie his clients [*i.e.*, the Respondents on this appeal] to the use of the machinery in question. And two, that there was no photographic evidence of damages to the machinery and witnesses' testimony to date was inconsistent with the scope and extend of the money damages sought at trial. And [further] that the machinery had been removed from the site preventing the defendants at that time from taking their own photographs or recording the scope and extent of the damages that had [*sic*, are] alleged to have occurred.

(Bracketed material added.) RP 266 (judge's oral ruling, transcript of 09/18/13, p.266, lns.14-25). Likewise, the written "Order" states:

> Defense counsel's trial preparations, in addition to being based on the absence of the photographs (which issue is discussed above), were also significantly based on the reasonable belief that Mr. Ames was nowhere to be found.

*See* CP 155 ("Order", p.6, lns.7-9).

**D.15. Mr. Ames Suddenly Surfaced on the Eve of Trial, the Plaintiff Vacated the Default Judgment Against Him, and He then Testified in Attempted Support of the Plaintiff's Case-in-Chief.** In the process of serving pre-trial motions on plaintiff's counsel on September 10, 2013, defense counsel "learned for the first time that Mr. Ames would be appearing at trial to testify during the plaintiff's case-in-chief." *See* CP 154-155 ("Order", p.5, ln.29 – p.6, ln.1). This came as a complete

surprise. "Counsel had a gentleman's agreement that if either were successful in serving Mr. Ames, the other side would be promptly notified. This was because they had both been unsuccessful in prior attempts to serve Mr. Ames." *See* CP 155 ("Order", p.6, lns.3-6). Contrary to that agreement, Mr. Trujillo did not disclose that Mr. Ames had surfaced.

When trial began on September 11, 2013, the defense immediately moved to exclude any testimony by Mr. Ames. Rather than fully preventing Mr. Ames from testifying, the court ordered him to appear for an emergency deposition between the first and second days of trial. *See* CP 155-156 ("Order", p.6, ln.22 – p.7, ln.2).

During the second day of trial on September 12, 2013, the court advised Mr. Ames of his Fifth Amendment right to remain silent (because the criminal investigation remained open). Mr. Ames chose to waive his Fifth Amendment right. *See* CP 156 ("Order", p.7, lns.2-4). In exchange, plaintiff's counsel vacated the Default Judgment that had been previously entered against Mr. Ames. *See e.g.*, CP 140 (defendants' "Reply in Support of Presentation", dated 10/31/13, p.10, n.1).

After testifying in support of the plaintiff's case-in-chief, Mr. Ames again disappeared. He did not appear for, or participate in, trial thereafter. *See* RP 112 (judge's oral remarks, transcript of 09/12/13,

p.112, lns.19-23).[21]

**D.16. <u>The Plaintiff's Witnesses Testified Poorly During Trial.</u>**

Without any confirmatory record citations, the plaintiff says defense counsel supposedly engaged in "relentless and merciless needling" of the witnesses during trial. *See Appellant's Opening Brief*, p.9.[22]

Once again, the plaintiff's assertion is false. As previously indicated, the trial court found (via an unchallenged Conclusion), that "[t]he witness[es]' testimony &/or memory was poor & inconsistent[,] and their credibility on the damages was suspect." (Underscore emphasis and bracketed material added.) *See* CP 158 ("Order", entered 11/01/13, p.9, handwritten interlineations).

In fact, defense counsel simply cross-examined the witnesses so as to point out the many gaps and contradictions in their testimony. They

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[21] The plaintiff did not include Mr. Ames's trial testimony, nor his deposition transcript, within the transmitted appeal record. *See Appellant's Opening Brief*, pp.1-50. Below, the plaintiff argued that "[n]one of the facts provided by Ames changed" between his deposition and trial testimony. *See* CP 120 ("Plaintiff's Objections to Defendants' Proposed Order", dated 10/23/13, p.6, lns.5-6). That was, and remains, completely false. As written by defense counsel below: "During his in-court testimony, Mr. Ames changed his testimony on many points compared to his deposition from less than 24 hours previously. He was all over the board on nearly every issue of importance." *See* CP 139 (defendants' "Reply in Support of Presentation", dated 10/31/13, p.9, lns.27-30). In turn, the judge found, as previously discussed, that "[t]he witness[es]' testimony &/or memory was poor & inconsistent[,] and their credibility on the damages was suspect." (Bracketed changes made.) *See* CP 158 ("Order", entered 11/01/13, p.9, handwritten interlineations).

[22] Below, plaintiff's counsel went even further in his harsh accusatory rhetoric. He called defense counsel "foolish", "arrogant", "nauseating", "obnoxious", and "full of it". *See e.g.*, CP 132 (defendants' "Reply in Support of Presentation", dated 10/31/13, p.2, lns.1-21). These attacks were false, needlessly gratuitous, and all too typical of Mr. Trujillo's style of practice.

could not recall how many pieces of equipment were damaged, nor what the exact damages were. *See e.g.*, RP 93-94 (trial testimony of plaintiff's agent, Brent Deroo, p.93, ln.24 – p.94, ln.15); RP 105 (same testimony, p.105, lns.15-19); RP 107-110 (same testimony, p.107, ln.16 – p.110, ln.1); RP 187-188 (trial testimony of plaintiff's agent, Richard Holcomb, p.187, ln.2 – p.188, ln.23); RP 198 (same testimony, p.198, lns.8-24); RP 201-204 (same testimony, p.201, ln.3 – p.204, ln.3); RP 207-208 (same testimony, p.207, ln.8 – p.208, ln.6); RP 208-209 (same testimony, p.208, ln.18 – p.209, ln.14); RP 210-211 (same testimony, p.210, ln.18 – p.211, ln.5); RP 212-213 (same testimony, p.212, ln.4 – p.213, ln.21); RP 214 (same testimony, p.214, lns.2-25); RP 215-217 (same testimony, p.215, ln.22 – p.217, ln.12); RP 218-220 (same testimony, p.218, ln.10 – p.220, ln.17); RP 223-224 (same testimony, p.223, ln.7 – p.224, ln.20); & RP 227-228 (same testimony, p.227, ln.6 – p.228, ln.10); *accord* CP 133 (defendant's "Reply in Support of Presentation", dated 10/31/13, p.3, lns.13-14: "Compared to their sworn depositions, the witnesses repeatedly changed their story and vacillated", underscore emphasis added).

**D.17. The Photographs Were "Miraculously Located" After Three Days of Trial.** After his witnesses were so extensively cross-examined, Mr. Trujillo decided to resume looking for the photographs. He describes this as a "desperation search, mid-trial". (Underscore emphasis

added.) *See Appellant's Opening Brief*, p.9.

Trial had recessed on Friday, September 13th until Tuesday, September 18th. On Sunday, September 15th, Mr. Trujillo telephoned Ms. Meacham. He provides no explanation for why he did not call her earlier. He noted the case for trial months earlier, he knew that trial was approaching, he let three days of trial go by, and when a multi-day recess was declared he still delayed a few more days before calling her.

According to plaintiff's counsel, the photographs were "miraculously located". *See Appellant's Opening Brief*, p.12. Ms. Meacham claims to have suddenly found the photographs in a personal file for plaintiff's agent Mr. Deroo, rather than in the plaintiff's corporate file. *See e.g.*, CP 152 ("Order", p.3, lns.17-23).

Upon receiving the photographs, plaintiff's counsel made copies and delivered those copies to defense counsel. Plaintiff's counsel emphasizes that the copies were provided "a full 25 (TWENTY FIVE) hours before the parties were to resume the trial on September 18th". (Capitalization in original.) *See Appellant's Opening Brief*, p.10. Of course, the truly critical fact is that three trial days had passed – not how much time remained before the fourth trial day.

**D.18. <u>The Respondents Moved to Exclude the Photographs, but the Court Decided that a Mistrial was Appropriate.</u>** Leading up to

the resumption of trial, plaintiff's counsel showed the photographs to his witnesses. Then, at the start of the fourth day of trial on Tuesday, September 18th, plaintiff's counsel recalled Mr. Holcomb to the stand, handed him the photographs, and began asking him questions about them. *See Appellant's Opening Brief*, p.10. Defense counsel promptly objected, a brief discussion occurred about the situation, and a brief recess was taken to allow counsel (and the court) time to conduct emergency legal research. *See* RP 246 (transcript of 09/18/13, p.246, lns.4-5).

Via its brief, the plaintiff contends that defense counsel "demanded a mistrial and a sanctions award of fees and costs". *See Appellant's Opening Brief*, p.13. In truth, defense counsel's primary request was for the court to fully exclude/suppress the photographs and to finish the trial. *See* RP 256 (defense counsel's argument, transcript of 09/18/13, p.256, lns.19-20). In relevant part, the trial court ruled as follows:

> A continuance would be a non-severe sanction, but it would not cure the prejudice that has befallen the defendants and thus would not accomplish the purpose of the rule. The photographs surfaced during trial, specifically on the eve of the fourth day of trial. By that point, the defendants has already planned and carried forth their trial strategy. The defendants' opening statement, witness cross-examinations and general arguments during trial cannot be effectively re-done or amended. The defendants have already had to modify their strategy due to the unexpected appearance of Mr. Ames at the start of trial. It would be unfair and unworkable for defendants Blevins and Badissy to re-modify their strategy in the midst of trial, particularly given the central importance of the photographs and that so much of trial has already occurred.

> Suppressing the photographs would potentially cure the prejudice that has befallen the defendants, but that outcome would be draconian for the plaintiff. If the photographs are excluded from evidence, that might preclude the plaintiff form seeking its full measure of damages if liability is established against one or more defendants.
>
> . . .
>
> Ultimately, the court concludes that the appropriate remedy/sanction is two-fold. First, a mistrial is declared. Second, because the mistrial was caused by a discovery violation by the plaintiff and/or its counsel, the plaintiff, Johnson Brothers Contracting, Inc., must reimburse the legal fees and out-of-pocket expenses that were reasonably incurred by defendants Blevins and Badissy to prepare for, attend and participate in, and travel to trial. This combination is the lease severe sanction/remedy that will cure the prejudice that has befallen the defendants while not being so minimal as to undermine the purpose of CR 26. Moreover, this combination is the least draconian for the plaintiff, as it will not preclude the plaintiff from using the photographs during the eventual retrial.

(Ellipsis added.) *See* CP 158-159 ("Order", p.9, ln.20 – p.10, ln.20).

In declaring a mistrial, the court was further guided by the fact that plaintiff's counsel had already shown the photographs to his witnesses. Thus, even if the photographs were excluded, the court would not be able to "differentiate the memories of plaintiff's witnesses from before review and after review of the photos." *See* CP 158 ("Order", p.9, lns.7-8, handwritten interlineations).

**D.19. <u>A Mistrial was Declared Because the Plaintiff and its Counsel Violated the Letter and Spirit of CR 26.</u>** The trial court ruled that the plaintiff and its counsel "did violate the letter, spirit and purpose

of the legal discovery process, and that such violation was not reasonable." *See* CP 157 ("Order", p.8, ¶d., lns.10-11). More specifically, the court ruled that "Mr. Trujillo's failure to renew his request for Ms. Meacham to search her files for the photographs between November 2010 and September 15, 2013, was an unreasonable omission." *See* CP 157 (*id.*, lns.22-24). "[I]f [Ms. Meacham] had been pressed to diligently search for them during 2011, 2012 and/or the early months of 2013, it stands to reason that the photographs would have been disclosed to defense counsel well in advance of trial." (Bracketed changes made.) *See* CP 157 (*id.*, lns.24-27).

**D.20. <u>The Trial Court Did Not Determine the Evidentiary Weight of the Photographs.</u>** In addition to his oft-repeated assertion that the photographs were supposedly "entirely cumulative" (which assertion has already been rebutted above, *see supra*, pp.7-8), plaintiff's counsel further contends (1) that the missing photographs were "helpful" to the plaintiff's case, (2) that the plaintiff "had absolutely no incentive to lose or withhold" them, (3) that the plaintiff "obtained no advantage, (4) that all parties were "equally in the same situation" when the photographs magically surfaced, and (5) that the photographs were "devastating" to the defense because they "fully seal[ed]" the plaintiff's credibility. *See Appellant's Opening Brief*, pp.9, 13, 23-24, 35 & 40.

There is no support for any of these assertions in the transmitted appeal record. Once again, plaintiff's counsel is just arguing what he wishes were true, not what the trial court actually found. As written by defense counsel below,

> The court did not determine the evidentiary value or weight of the photographs. Specifically, the court did not rule that the photographs bolstered the plaintiff's case, nor that they critically damaged the defendants' veracity. Rather, the court merely concluded that the photographs could be important.

*See* CP 134 (defendants' "Reply in Support of Presentation", dated 10/31/13, p.4, lns.10 & 12-13).

## E. ARGUMENT

### E.1. Abuse of Discretion Standard and Discovery Sanctions.

The plaintiff concedes that this appeal is controlled by the deferential "abuse of discretion" standard of review. *See Appellant's Opening Brief*, p.14, ¶1. "Significantly, a trial court has broad discretion as to the sanction to impose for the violation of a discovery order or discovery rules." *Carlson v. Lake Chelan Community Hospital*, 116 Wn. App. 718, 737, 75 P.3d 533 (2003).

"If a violation of CR 26 is found, the imposition of sanctions is mandatory." *Carlson v. Lake Chelan*, 116 Wn. App. at 737. The sanction must "not be so minimal that it undermines the purpose of discovery." *Id.* The court "must consider all the surrounding circumstances". *Id.*, at 738.

**E.2. Documents Held by a Party's Attorney (or Former Attorney) are Within that Party's "Control" as a Matter of Law.**

Citing to Orland and Tegland, the plaintiff acknowledges that "[a] party is presumed to have control of a document if the party has the right to obtain the document." *See Appellant's Opening Brief*, p.16 (citing Orland and Tegland, Washington Practice, Volume 4, Rules of Superior Court, page 208 (1992)). Tegland notes that "[a]ppellate decisions in Washington are sparse, but federal case law is abundant." *See* Karl B. Tegland, 3 Wash. Prac., Rules Practice CR 34 (7th ed.), author's comments, #7, 2nd ¶. More fully, Tegland observes as follows:

> The federal cases make it clear that documents subject to production are not limited to those in the physical possession of the opposing party. The general rule is that a request under CR 34 reaches any documents that the opposing party has a legal right to obtain. Thus, for example, the rule will normally reach documents that a party has provided to an attorney or an insurer. . . .

(Underscore emphasis and ellipsis added.) Karl B. Tegland, 3 Wash. Prac., Rules Practice CR 34 (7th ed.), author's comments, #7, 2nd ¶.

> As far back as 1962, the Sixth Circuit wrote as follows:
>
> It is a well settled principle that if the client may be compelled to produce documents in his possession then the attorney may be compelled to produce the same documents when they are in his custody. 8 Wigmore, Evidence, McNaughton Rev. 591, §2307. If this were not so, then the client could always evade his duty to produce by placing the documents with his attorney.

(Underscore emphasis added.) *Ruppert v Repper*, 309 F.2d 97, 99 (6th Cir.

1962). More recently, federal district courts have written as follows:

> Generally, actual possession of documents sought under Rule 34 is not necessary, if the party has control. 4 Moore's Federal Practice 2471 (2d ed. 1950). Professor Moore assets that the question of whether documents in the possession of a party's attorney are under the control of the party is resolved by discerning their origin. If the items were originally produced by the party or his agents, and then turned over to the attorney, they are considered under the party's control. . . .

(Underscore emphasis and ellipsis added.) *Hanson v. Gartland Steamship Company*, 34 F.R.D. 493, 496 (N.D. Ohio 1964);

> Control includes documents that a party has the legal right to obtain on demand. *Alexander v. FBI*, 198 F.R.D. 306, 313 (D.D.C. 2000); *Tavourlareas v. Piro*, 93 F.R.D. 11, 20 (D.D.C. 1981). Because a client has the right, and the ready ability, to obtain copies of documents gathered or created by its attorneys pursuant to their representation of that client, such documents are clearly within the client's control. *See, e.g., Poole ex rel. Elliott v. Textron, Inc.*, 192 F.R.D. 494, 501 (D. Md. 2000); *Poppino v. Jones Store Co.*, 1 F.R.D. 215, 219 (W.D. Mo. 1940) ("It is quite true that if an attorney for a party comes into possession of a document *as an attorney for that party* his possession of the document is the possession of the party.").

(Underscore emphasis added; italic emphasis in original.) *American Society for the Prevention of Cruelty of Animals v. Ringling Brothers and Barnum & Bailey Circus*, 233 F.R.D. 209, 212 (D.D.C. 2006);

> Actual possession, custody or control is not required. "A party may be ordered to produce a document in the possession of a non-party entity if that party has a legal right to obtain the document or has control over the entity who is in possession of the document." *Soto v. City of Concord*, 162 F.R.D. 603, 620 (N.D.Cal. 1995). Such documents include documents under the control of the party's attorney. *Meeks v. Parsons*, 2009 U.S. Dist. LEXIS 90283, 2009 WL 3303718 (E.D.Cal. September 18, 2009)

> (involving a subpoena to the CDCR); *Axler v. Scientific Ecology Group, Inc.*, 196 F.R.D. 210, 212 (D.Mass. 2000) ("A party must produce otherwise discoverable documents that are in his attorneys' possession, custody or control.").

(Underscore emphasis added.) *Gorrell v. Sneath*, 292 F.R.D. 629, 632 (E.D.Cal. 2013).

The plaintiff characterizes Ms. Meacham as "former counsel, now an outsider third-party". *See Appellant's Opening Brief*, p.4. However, the law makes no distinction between former counsel and new counsel on this issue. If a party delivers documents to its then-attorney, those documents remain subject to disclosure via the legal discovery process. The documents are not somehow insulated from disclosure because they are held by a discharged attorney. Directly on-point is the Western District case of *Avocent Redmond Corp. v. Rose Electronics*, 491 F.Supp.2d 1000 (W.D. Wa. 2007).

In *Avocent Redmond*, a law firm – the now-defunct Heller Ehrman LLP – served as corporate counsel to Open Source Asia Technologies, Inc. ("OSA"). In 2004, OSA was acquired by Avocent Redmond. Subsequently, in 2007, Avocent Redmond filed a patent infringement case against Rose Electronics and others. Heller Erhman filed a "Notice of Appearance" on behalf of the defendants. Because Heller Erhman had previously represented OSA (a subsidiary to the plaintiff), the plaintiff filed a motion seeking to have Heller Erhman disqualified from

representing the defendants. *See Avocent Redmond v. Rose Electronics*, 491 F.Supp.2d at 1001-1002.

As part of the disqualification motion, a question arose as to whether the plaintiff had to provide discovery to the defendants of documents that had been previously given to Heller Erhman during the time that Heller Erhman represented OSA (a subsidiary to the plaintiff). In answering that question, the Western District did not recognize or establish any different standard for documents held by former counsel (as potentially distinct from documents held by current counsel). Quite the contrary, the court cited and followed the above-quoted line of cases. The court followed those cases even though Heller Erhman's representation of OSA had long since ceased and further despite Heller Erhman's insistence that it had never directly represented the plaintiff (but rather had only represented a subsidiary company). The relevant excerpt from *Avocent Redmond* reads as follows:

> Given plaintiff's belief that it was previously represented by Heller Ehrman, in order to comply with these requests for production, plaintiff presumptively has an obligation under Fed.R.Civ.P. 34 to contact Heller Ehrman and obtain whatever "documents and electronically stored information" Heller Ehrman has that is responsive to defendants' discovery requests. *See Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 233 F.R.D. 209, 212 (D.D.C. 2006) ("Because a client has the right, and the ready ability, to obtain copies of documents gathered or created by its attorneys pursuant to their representation of that client, such documents are clearly within the

> client's control"); 8A Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* §2210 (2d ed. 1994) ("The concept of 'control' is very important in applying the rule [Fed.R.Civ.P. 34], but the application of this concept is often highly fact-specific. Inspection can be had if the party to whom the request is made has the legal right to obtain the document, even though in fact it has no copy. Thus, a party can be required to produce a document that it has turned over to its attorney.").

(Underscore emphases added; internal footnotes omitted; bracketed material in original.) *See Avocent Redmond v. Rose Electronics*, at 1010; *accord Convertino v. United States Department of Justice*, 565 F. Supp.2d 10, 14 (D.D.C. 2008) ("Nor is it acceptable for Convertino to assert that certain responsive documents are in the possession of another attorney providing counsel for him in related matters. . . . [Those documents] are certainly within his 'control' as that term is understood in discovery", underscore emphasis, ellipsis and bracketed material added).

There is no reason to believe that Washington courts would reach a different conclusion. First, Washington's discovery rules largely mimic their federal counterparts. Second, as previously noted, Tegland specifically points to federal precedents in his analysis of Washington's discovery rules. *See supra*, p.43. Third, Advisory Opinion 181 by the WSBA states in relevant part as follows:

> At the conclusion of a representation, unless there is an express agreement to the contrary, the file generated in the course of representation, with limited exceptions, must be turned over to the client at the client's request . . . .

(Underscore emphasis and ellipsis added.) *See WSBA Advisory Opinion 181*, Topic II, ¶B (a copy of which is included in the Appendix to this brief). Fourth and likewise, the WSBA's published FAQs include the following directive:

> A lawyer must take steps to the extent reasonably practicable to protect a client's interests including surrendering papers and property to which the client is entitled. RPC 1.16(d). Client papers include: the actual documents the client gave the lawyer, or papers such as medical records, and documents the lawyer has acquired at the client's expense.

(Underscore emphasis added.) *See* printout from www.wsba.org/Resources-and-Services/Ethics/Ethics-FAQ (a copy of which is included in the Appendix to this brief). Fifth, Division One recently clarified that documents "intended to be seen by persons other than the attorney" are discoverable. *See Mechling v. City of Monroe*, 152 Wn. App. 830, 853, 22 P.3d 808 (2009), *review denied*, 169 Wn.2d 1007 (2010). Sixth and finally, the two decisions cited by the plaintiff on this issue are factually distinguishable and inapposite.

The plaintiff cites *Diaz v. Washington State Migrant Council* as "[a] good case on possession, custody, and control for discovery purposes". *See Appellant's Opening Brief*, p.16. The plaintiff then invests two pages summarizing the facts and case-specific outcome in *Diaz*. *See id.*, pp.17-18. However, *Diaz* was a wrongful termination case wherein the at-issue documents were held by a corporate board. *See Diaz v.*

*Washington State Migrant Council*, 165 Wn. App. 59, 66-67, 265 P.3d 956 (2011). *Diaz* does not answer, and does not purport to answer, whether documents held by a former attorney must be disclosed.[23]

The plaintiff contends that the instant case "is very similar" to *Panorama Village Homeowners Association v. Golden Rule Roofing, Inc. See Appellant's Opening Brief*, p.20. To the contrary, *Panorama Village* was a warranty dispute over defective roofs. The plaintiff therein retained Kelvin Hill as a testifying expert. Prior to Mr. Hill being personally retained as an expert, his company (Access Roofing) had inspected the roofs and prepared a draft repair estimate/letter. When Mr. Hill was subsequently deposed, the defense lawyers "briefly reviewed" his files and "found [the] draft letter". The defendant requested a copy of the letter, the plaintiff refused to provide one, and the defendant moved to exclude any testimony by Mr. Hill as a sanction. *See Panorama Village v. Golden Rule Roofing*, 102 Wn. App. 422, 430-431, 10 P.3d 417 (2000).

The trial court in *Panorama Village* "ruled that the document was discoverable and ordered production of the file". However, the court "declined to impose sanctions." *See Panorama Village v. Golden Rule*

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[23] Tegland notes that this court adopted "a relatively broad reading" of the disclosure rules in *Diaz*. *See* Karl B. Tegland, 3 Wash. Prac., Rules Practice CR 34 (7th ed.), author's comments, #7, 4th ¶. That, not the case-specific outcome, is the proper import of *Diaz* vis-à-vis the instant case.

*Roofing*, 102 Wn. App. at 431. "In declining to impose sanctions, the trial court noted that any potential prejudice from the late discovery of the document, after Hill's perpetuation deposition, could be cured because Hill was available to testify at trial." *See Panorama Village v. Golden Rule Roofing*, 102 Wn. App. at 431.

Division One affirmed the trial court's decision in *Panorama Village*, whereas the plaintiff in the instant case is asking for the trial court's decision to be overturned. The defense lawyers actually saw the at-issue letter prior to trial in *Panorama Village*, whereas at-issue photographs in the instant case were not disclosed until eve of the fourth day of trial. That is a huge distinction.

The critical takeaway from *Panorama Village* is <u>not</u> that the at-issue document was "in the records of [another] company", as the plaintiff contends. (Bracketed material in original.) *See Appellant's Opening Brief*, p.20. Rather, the takeaway is that there was still sufficient time to cure the prejudice in *Panorama Village* – that is why sanctions were not warranted there. The instant case is different. The trial court here specifically found (via an unchallenged Conclusion) as follows:

> The photographs surfaced during trial, specifically on the eve of the fourth day of trial. By that point, the defendants has already planned and carried forth their trial strategy. The defendants' opening statement, witness cross-examinations and general arguments during trial cannot be effectively re-done or amended.

> The defendants have already had to modify their strategy due to the unexpected appearance of Mr. Ames at the start of trial. It would be unfair and unworkable for defendants Blevins and Badissy to re-modify their strategy in the midst of trial, particularly given the central importance of the photographs and that so much of trial has already occurred.

*See* CP 158 ("Order", p.9, lns.21-29).

**E.3. "Inadvertent Nondisclosure" and/or Failing to Provide a "Reasonable Excuse" Can Warrant Sanctions.** This court recently held that "a showing of intent is not required before sanctions may be imposed." *See Carlson v. Lake Chelan*, 116 Wn. App. at 739. That is because "even an inadvertent failure to disclose is enough [to warrant sanctions] if there is a violation of the rule [CR 26] without a reasonable excuse." (Bracketed material added.) *Id.*

In the instant case, the photographs were discoverable, they were timely sought, they were not disclosed, and no reasonable explanation (or any explanation whatsoever) was provided. *See Appellant's Opening Brief*, pp.5-6; RP 265-266 & CP 152. The nondisclosure was at least inadvertent (if not worse). *See e.g.*, CP 153 ("Order", p.4, ¶g., ln.26, saying: "Mr. Trujillo contended that the prior non-disclosure was merely inadvertent") & RP 261 (argument by plaintiff's counsel, transcript of 09/18/13, p.261, lns.15-16, saying: "It's just one of those things").

In an attempt to overcome *Carlson*, plaintiff's counsel (1) self-servingly tries to modify the decision's text, (2) argues that the decision is

"not even on point", and (3) repeats his argument that the photographs were supposedly beyond the plaintiff's "control". *See Appellant's Opening Brief*, pp.28-29. None of this is valid.

*Carlson* is important not due to any factual similarity to the instant case, but because it recites the applicable standards of law. *See* RP 250 (defense counsel's argument, transcript of 09/18/13, p.250, lns.9-21, citing and quoting the rules of law from *Carlson*, not any supposedly-analogous facts). Those standards should be applied as written, without the self-servingly modifications offered by plaintiff's counsel. In reciting the inadvertence-coupled-with-no-reasonable-excuse-can-warrant-sanctions standard, *Carlson* makes no distinction between the actions of a party and the actions of that party's (past or current) attorney. *See Carlson v. Lake Chelan*, 116 Wn. App. at 739. This makes sense, because an attorney acts as an agent for the party, and his/her actions are imputed to the party. Even if *Carlson* did make such a distinction (which it does not), the plaintiff's "control" argument would still be invalid for the reasons discussed above. *See supra*, pp.35-43, §E.2.[24]

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[24] Plaintiff's counsel also tries to rewrite *Gammon v. Clark Equipment Co.* He self-servingly inserts multiple substantive clauses into the decision (including bold capitalized letters and two exclamation points), he argues that *Gammon* "isn't even on point at all", and he once again repeats his "control" argument. *See Appellant's Opening Brief*, pp.29-31 (citing and misstating *Gammon v. Clark Equipment Co.*, 38 Wn. App. 274, 280-281, 686 P.2d 1102 (1984)). All of this is invalid for the same reasons.

**E.4. <u>The Decisions Cited by the Plaintiff on the Issue of "Non-Disclosure" are Inapposite to the Instant Case.</u>** The plaintiff highlights *Estate of Fahnlander* and *Viereck v. Febreboard Corp.* as "illustrative" cases. *See Appellant's Opening Brief*, pp.24-25. To the contrary, both cases are inapposite to the instant case.

In *Estate of Fahnlander*, the plaintiff's expert (Dr. Bigelow) was not deposed due to incompatible schedules. On review, this court held that "the trial court did not abuse its discretion in striking Dr. Bigelow's testimony." *See In re Estate of Fahnlander II*, 81 Wn. App. 206, 210, 913 P.2d 526 (1996). Thirteen days before trial (*i.e.*, June 7th versus June 20th), the plaintiff moved to substitute a different expert (Dr. Scott). The trial court refused to allow the substitution, but that decision was reversed on appeal. This court held that a continuance coupled with monetary sanctions would have been an adequate, and less severe, remedy. *See In re Estate of Fahnlander*, 81 Wn. App. at 211. Of course, the chief distinction is that three days of trial had already passed in the instant case by the time Mr. Trujillo pressed Ms. Meacham to find the photographs.

In *Viereck v. Fibreboard Corp.*, Division One upheld the trial court's decision to limit the scope of testimony by a defense expert (Dr. Hinkes). The defense had "no reasonable excuse" for failing to disclose the expert's opinions in advance and the nondisclosure "was prejudicial"

to the plaintiff. *See Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 587-588, 915 P.2d 581 (1996). That result does not bolster the plaintiff's appeal in the instant case; it actually bolsters the defendants' position.

**E.5. <u>The Plaintiff's Arguments About Spoliation are Wrong.</u>**

The plaintiff's first argument on spoliation is that "such a claim . . . has [n]ever actually [been] alleged." (Ellipsis and bracketed material added.) *See Appellant's Opening Brief*, p.33; *see also id.*, p.37. But the plaintiff does not present any authority – controlling or persuasive – stating that spoliation is a claim and/or that it must be specifically pled. There are "few Washington cases that directly address spoliation". *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 381, 972 P.2d 475 (1999); *accord Henderson v. Tyrrell*, 80 Wn. App. 592, 606, 910 P.2d 522 (1996) (Division Three). However, federal decisions clarify as follows:

> [Spoliation] is not an affirmative defense, but a rule of evidence, to be administered at the discretion of the trial court. Consequently, <u>a party need not indicate its intent to invoke the spoliation rule in the pleadings.</u>

(Bracketed material and underscore emphasis added.) *Vodusek v. Bayliner Marine Corporation*, 71 F.3d 148, 155-156 (4th Cir. 1995);

> Unlike an affirmative defense, the spoliation rule does not prevent recovery by the plaintiff despite the plaintiff's presentation of a *prima facie* case; it only leads to the exclusion of evidence or the admission of negative evidence. In this sense, the spoliation rule is not a defense at all, because it does not bar recovery.
>
> Even in its most extreme form, when judgment is entered in favor

> of the defendant because evidence critical to the plaintiff's cause of action is excluded, judgment in favor of the defendant is appropriate only because the plaintiff is unable to establish a *prima facie* case due to the exclusion of evidence. The matter therefore is not extrinsic to the plaintiff's cause of action, but directly negates the cause of action. At best, then, the spoliation rule is a general defense, not an affirmative defense.

(Italics in original; underscore emphasis added.) *Donohoe v. American Isuzu Motors, Inc.*, 155 F.R.D. 515, 520 (M.D. Penn 1994).

The plaintiff's second argument on spoliation is that it only applies when evidence has been "intentionally destroyed". *See Appellant's Opening Brief*, p.33. Inconsistently, however, the plaintiff later acknowledges that if evidence is "lost", spoliation may apply. *See id.*, p.35 (citing *Henderson v. Tyrell*, 80 Wn. App. 592, which case concerned, *inter alia*, a blood sample that was lost, *see id.* at 603: "[Mr. Gregory] did not know what happened to the sample", bracketed material added). As written by one Virginia court,

> "The textbook definition of 'spoliation' is 'the intentional destruction of evidence[.'] . . . However, spoliation issues also arise when evidence is lost, altered or cannot be produced." Steve E. Couch, *Spoliation of Evidence: Is One Man's Trashing Another Man's Treasure*, 62 Tex. B.J. 242, 243 & n.4 (1999). Spoliation "encompasses [conduct that is either] . . . intentional or negligent." Karen Wells Roby & Pamela W. Carter, *Spoliation: The Case of the Missing Evidence*, 47 La B.J. 222, 222 (1999). A spoliation inference may be applied in an existing action if, at the time the evidence was lost or destroyed, "a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Boyd v. Travelers Ins. Co.*, 166 Ill.2d 188, 209 Ill. Dec. 727, 652 N.E.2d 267, 270-71 (1995 (citations omitted), *quoted in* Robert L. Tucker, *The Flexible*

> *Doctrine of Spoliation of Evidence: Cause of Action, Defense, Evidentiary Presumption, and Discovery Sanction*, 46 Def L.J. 587, 603 (1997) citing *Boyd* language as representative of cases that have considered issue).

(Underscore emphases added; no other changes made.) *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, 40 Va. App. 565, 582, 580 S.E.2d 467 (2003). There is no question that the plaintiff's agents knew the photographs were important evidence. At trial, plaintiff's agent Brent Deroo testified as follows:

> Q. And you told Richard [Holcomb, another plaintiff's agent] to take the photographs so you would have a record, didn't you?
> A. Yes I did.
> Q. Because you thought those photographs would be important evidence, correct?
> A. Yes I did.

*See e.g.*, RP 85 (trial testimony of plaintiff's agent, Brent Deroo, transcript of 09/12/13, p.85, lns.16-21).[25]

The plaintiff's third argument on spoliation is that the defendants' written discovery requests were supposedly "tardy", so much so that it is supposedly "inexplicable" to raise any argument of spoliation. *See Appellant's Opening Brief*, p.36. To the contrary, the defendants'

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[25] Several pages earlier, the plaintiff argues that "[n]o one ever told Defendants the photos had been permanently destroyed by JBC or anyone else, or [that they] were gone for good." (Bracketed changes added.) *See Appellant's Opening Brief*, p.8, top ¶. That argument is meritless. The plaintiff does not present any authority saying that spoliation only applies if a party affirmatively declares that it has destroyed evidence, because none exists. Moreover, no photos were provided (or even mentioned) in response to the written discovery requests, the deponents had no idea where the photos were, and the trial witnesses had no idea either. The photos were "gone for good."

discovery requests were not tardy under the timeline of events, as previously explained above. *See supra*, p.21, n.19. In addition, the two decisions cited by the plaintiff are – once again – inapposite. In those two cases, the at-issue evidence was tangible physical evidence. *See Henderson v. Tyrell*, 80 Wn. App. at 602 (automobile and blood samples); *Marshall v. Bally's*, 94 Wn. App. at 374 (treadmill). By contrast, the at-issue evidence in the instant case is a group of photographs. Needless to say, the burden/difficulty of maintaining tangible items will often be more onerous than the burden of simply keeping track of a group of photographs. Also, the whole purpose of taking photographs is to have a record for future use after the physical evidence is repaired or discarded.

A request for photographs is quite different from a request to inspect physical evidence (and/or an argument that physical evidence was prematurely destroyed). A different, much longer (and perhaps unlimited) timeliness-tardiness deadline should apply when the requesting party is simply asking to see and/or copy photographs that the other side created.

Finally and more generally, there certainly was "a basis" for a spoliation argument during trial. The equipment was moved out-of-state before anyone else could inspect it and/or take photographs, it was repaired without notice, and the only set of photographs was lost. *See* RP 90-91, 266 & CP 32. All of this was done by the plaintiff (via its agents,

including Ms. Meacham), and all of it occurred years before the respondents were sued. *See Appellant's Opening Brief*, pp.5-6.

Losing the only set of photographs and offering zero explanation is the functional equivalent of "destroying" them. Even without the additional "surrounding circumstances"[26], there was a sufficient basis for a spoliation argument. Because the trial was not completed, the court did not make a final determination but there was a basis for the argument.

## F. CONCLUSION AND REQUEST FOR COSTS AND FEES

Mr. Trujillo was dilatory in following up with Ms. Meacham, the plaintiff's agents were careless in not keeping copies of the photos, and Ms. Meacham was sloppy in her recordkeeping. The trial was for naught, all fault lies on the plaintiff's side, and the respondents' time and money were wasted (and are further wasted on this meritless appeal). At this point, it is not possible to resume the trial. The result should be affirmed, and appellate costs and fees should be awarded to the respondents as a matter of equity, as a discovery sanction (*see e.g.*, *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993)), and/or pursuant to RCW 4.84.010 and .080.

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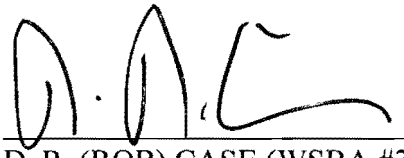
[26] *See e.g.*, the original unprosecuted 2007 lawsuit that did not name Messrs. Badissy and Blevins as defendants, Mr. Ames's sudden appearance on the eve of trial, and the plaintiff's vacation of the Default Judgment in exchange for Ames's testimony.

DATED this 10th day of July, 2014.



D. R. (ROB) CASE (WSBA #34313)
Larson Berg & Perkins PLLC
Attorneys for Respondents

## DECLARATIONS OF SERVICE

I, CHERYL I. BRICE, do hereby declare and state as follows: On this day, in Yakima, Washington, I sent copies of this document via overnight U.S. Express mail, with postage prepaid, to the following:

Court of Appeals, Division One (original and one copy)
Clerk's Office
500 North Cedar Street
Spokane, WA 99201-1905

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

SIGNED at Yakima, Washington, on July 10, 2014.

Cheryl I. Brice

CHERYL I. BRICE, Legal Assistant

I, D. R. (ROB) CASE, do hereby declare and state a follows: On this day, in Yakima, Washington, at approximately 4:15 p.m., I hand-delivered a copy of this document to office of the appellant's attorney of record as follows:

Law Office of David B. Trujillo
4702A Tieton Drive
Yakima, WA 98908

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

SIGNED at Yakima, Washington, on July 10th, 2014.

D. R. (ROB) CASE (WSBA #34313)

# Appendix

WSBA

**Advisory Opinion:** 181
**Year Issued:** 1987
**RPC(s):** 1.16
**Subject:** Asserting Possessory Lien Rights and Responding to Former Client's Request for Files

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At the conclusion of the representation of a client, the client often requests a copy of the "file." If the lawyer's fees remain unpaid, the lawyer may want to assert lien rights. If no lien rights are claimed, a question often arises as to what parts of the file must be provided and whether the lawyer can charge the client for the expense of copying the file. The Rules of Professional Conduct shed light on both questions.

I. The attorney's possessory lien.

A. Issue: What are the ethical limitations on a lawyer's right to assert a lien on the papers or money of a client or former client?

B. Conclusion: A lawyer cannot exercise the right to assert a lien against files and papers when withholding these documents would materially interfere with the client's subsequent legal representation. Nor can the lien be asserted against monies held in trust by the lawyer for a specific purpose or subject to a valid claim by a third party.

C. Discussion: Attorneys have a "retaining" or a "possessory" lien under RCW 60.40.010 against papers or money in the lawyer's possession. In contrast to a "charging" lien under RCW 60.40.010(4) on a judgment obtained for a client, the retaining lien on papers or money cannot be foreclosed. Ross v. Scannell, 97 Wn.2d 598, 647 P.2d 1004 (1982). The lien "may merely be used to embarrass the client, or, as some cases express it to 'worry' him into the payment of the charges." Gottstein v. Harrington, 25 Wash. 508, 511, 65 P. 753 (1901).

The client, however, retains an absolute right, in civil cases at least, to terminate the lawyer at any time for any reason, or for no reason at all. RPC 1.16(a)(3); Belli v. Shaw, 98 Wn.2d 569, 657 P.2d 315 (1983). Upon termination of the relationship, RPC 1.16(d) requires that:

A lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled. . . . The lawyer may retain papers relating to the client to the extent permitted by other law.

If assertion of the lien would prejudice the former client, the duty to protect the former client's interests supersedes the right to assert the lien.

A client's need for the files will almost always be presumed from the request for the files.

But this need does not mean that in every case the assertion of a lien will prejudice the client. If there is no dispute about fees and the client has the ability to pay the outstanding charges, it is proper for the lawyer to assert the lien. In this situation, it is the former client's refusal to pay that will cause any injury. When, however, there is a dispute about the amount owed, or the client does not have the ability to pay, the lawyer cannot assert lien rights if there is any possibility of interference with the former client's effective self-representation or representation by a new lawyer.

The right to assert the lien against funds of the client in the lawyer's control is also limited. For example, a lawyer may not assert a lien against monies which constitute, or which have been commingled with, child support payments. Fuqua v. Fuqua, 88 Wn.2d 100, 558 P.2d 801 (1977). Similarly, if a lawyer accepts funds from a client for a specific purpose, such as for posting a bond or paying a court imposed penalty, the failure to use the funds for the agreed purpose may constitute misrepresentation, failure to carry out a contract of employment, or failure to properly handle client funds. See, e.g., In re McMurray, 99 Wn.2d 920, 665 P.2d 1352 (1983). Funds held by a lawyer over which a third party has an enforceable lien may not be subject to the attorney's possessory lien. See, e.g., Department of Labor and Industries v. Dillon, 28 Wn. App. 853, 626 P.2d 1004 (1981). When the funds are not held in trust for a specific purpose or subject to a valid claim by a third party, the lawyer may hold the funds subject to the lien even though the client may direct that the funds be transferred to a new attorney and claim that a refusal to transfer will prevent the client from obtaining effective representation.

If there is a dispute about the amount of fees owed, the prudent course would be for the lawyer to immediately institute court action to resolve the issue, to limit the lien to the undisputed amount, and to release the balance of funds.

Since the retaining or possessory lien cannot be foreclosed, any funds held pursuant to the lien must be held in the lawyer's trust account. The lawyer can apply those funds against what is owed only by obtaining a judgment against the client and enforcing the judgment by the normal judgment enforcement processes.

II. Responding to a former client's request for files

A. Issue: When a former client requests the file and no lien is asserted, what copying costs can a lawyer charge and what papers and files must be delivered?

B. Conclusion: At the conclusion of a representation, unless there is an express agreement to the contrary, the file generated in the course of representation, with limited exceptions, must be turned over to the client at the client's request, and if the lawyer wishes to retain copies for the lawyer's use, the copies must be made at the lawyer's expense.

C. Discussion: In analyzing this question a lawyer's file assembled in the course of representing a client can be broken down as follows:

(a) Client's papers—the actual documents the client gave to the lawyer or papers, such as medical records, the lawyer has acquired at the client's expense.

(b) Documents the disposition of which is controlled by a protective order or other

obligation of confidentiality;

(c) Miscellaneous material that would be of no value to the client; and

(d) The balance of the file, including documents stored electronically.

Client's papers—the actual documents the client caused to be delivered to the lawyer or papers, such as medical records that the lawyer has acquired at the client's expense—must be returned to the client on the termination of the representation at the client's request unless a lien is asserted. If the lawyer wants to retain copies, the lawyer must bear the copying expense, and would hold the copies subject to the duty of confidentiality imposed by RPC 1.6.

Aside from principles of ownership, RPC 1.16(d) requires the lawyer, upon termination of representation, to take steps to the extent reasonably practical to protect a client's interests including surrendering papers and property to which the client is entitled. Subject to limited exceptions, this Rule obligates the lawyer to deliver the file to client. If the lawyer wants to retain copies for the lawyer's own use, the lawyer must pay for the copies.

While the client's interests must be the lawyer's foremost concern, if the lawyer can reasonably conclude that withholding certain papers will not prejudice the client, the lawyer may withhold those papers. Examples of papers the withholding of which would not prejudice the client would be drafts of papers, duplicate copies, photocopies of research material, and lawyers' personal notes containing subjective impressions such as comments about identifiable persons.

A protective order or confidentiality obligation that limits the distribution of documents or specifies the manner of their disposition may supersede a conflicting demand of a former client.

The lawyer and client can make an arrangement different from that outlined above. A lawyer and client could agree that the files to be generated or accumulated will belong to the lawyer and that the client will have to pay for all copies sent to the client. Similarly, if the client wishes the lawyer to retain copies it would be appropriate to charge the copying expense to the client.

[amended 2009]

# Frequently Asked Questions



## If I am buying or selling a law practice, what are some of my ethical obligations?

**Your paramount ethical obligation is to the client.** When selling a practice, the seller needs to give written notice to each client. RPC 1.17(c). This is to protect the client's right to retain other counsel or take possession of the file if the client chooses not to proceed with the new lawyer. See **Practice Transitions — Ending Your Practice.**

## What should I do if I learn my client committed perjury?

- This dilemma raises complex questions of legal ethics, and due care must be taken to ensure compliance with applicable requirements in Washington, which in some ways differ from the requirements of the Model Rules of Professional Conduct. **A careful review of Washington RPC RPC 3.3, 1.6, and 1.16 is recommended.**
- **A lawyer must not offer evidence that the lawyer knows to be false.** RPC 3.3(a)(4). If a lawyer comes to know that he or she has offered material evidence that is false, such as false client testimony, then the lawyer must promptly disclose this fact to the tribunal unless disclosure is prohibited by RPC 1.6. RPC 3.3(c).
- Rule 1.6 prevents a lawyer from revealing information relating to the representation of a client *unless* the client gives informed consent or the disclosure is expressly authorized by Rule 1.6. **Even if the client has committed perjury, the lawyer is obligated to protect the confidentiality of information under RPC 1.6.** If disclosure of the perjury to the tribunal is prohibited by Rule 1.6, the lawyer must make reasonable efforts to convince the client to consent to disclosure. "If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation..." RPC 3.3(d). However, circumstances rarely if ever allow a lawyer to continue after he has knowledge his client has committed perjury. And in withdrawing, the lawyer must respect the confidentiality obligation under RPC 1.6 and proceed in accordance with RPC 1.16 (Declining or Terminating Representation). After representation has been terminated, a lawyer must maintain confidentiality to the extent required by RPC 1.9.
- According to RPC 1.16, a lawyer shall terminate representation if the representation will result in violation of the Rules of Professional Conduct or other law. **If the lawyer knows that the client has committed perjury and the client has refused to consent to disclosure of the false statement to the tribunal, the lawyer must terminate the representation.** See Comment [10] to RPC 1.2 (a lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent).
- **Termination in such circumstances may require court approval or notice.** If the court requests an explanation for the withdrawal, and the basis for the withdrawal is confidential, the lawyer's statement that "professional considerations require termination of representation" ordinarily should be accepted as sufficient. See RPC 1.16, Comment [3].

## What should I do when I feel my client lacks the ability to make decisions or the client's ability to do so is deteriorating?

As far as is reasonably possible, a lawyer is obligated to take steps to maintain a normal lawyer-client relationship even if a client's capacity to make adequately informed decisions is diminished. RPC 1.14(a).

When the lawyer believes that because of diminished capacity the client is at risk of substantial physical, financial, or other harm unless action is taken, then the lawyer is permitted to take reasonably necessary protective action. RPC 1.14(b). What protective action is reasonably necessary depends on the circumstances.

Comment [5] to RPC 1.14 provides guidance in this regard:

**Protective action might include**:

- consulting with family members;
- using voluntary surrogate decision-making tools such as durable powers of attorney;
- consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.

**If a lawyer takes protective action, the lawyer should be guided by such factors as**:

- the wishes and values of the client to the extent known;
- the client's best interests and the goal of minimizing intrusion into the client's decision-making autonomy;
- Maximizing client capacities and respecting the client's family and social connections.

### What do I do with unclaimed trust account funds?

Unclaimed funds result from either a balance left in the trust account for a client a lawyer can no longer locate or from outstanding checks that the lawyer is unable to reissue. Any unclaimed trust account funds must be handled according to the Uniform Unclaimed Property Act, RCW 63.29 . The Act requires that funds be remitted to the Department of Revenue Unclaimed Property Division within three years of when the funds were issued or had a last activity date. See also the WSBA-published booklet **Managing Client Trust Accounts** (page 25).

### If communications with my client are going poorly, can I withdraw from the representation? If so, when can I withdraw?

- A lawyer may withdraw from representing a client if the withdrawal can be accomplished without material adverse effect on the interest of the client. RPC 1.16(b)(1).
- When a client-lawyer disagreement arises, the lawyer should consult with the client and seek a mutually acceptable resolution of the disagreement. RPC 1.2 Comment [2] and RPC 1.4.
- **The effort to resolve differences should occur promptly, since in some situations withdrawing sooner rather than later may better protect client interests**. Under RPC 1.16(d), upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that had not been earned or incurred.

### How long do I need to keep closed client files?

- Washington's RPC offer little specific guidance about the maintenance, storage, or destruction of client files. RPC 1.15A and 1.15B require lawyers to safeguard client property. RPC 1.16(d) states that a lawyer must take reasonably practicable steps to return client property, including papers and documents, to the client at the termination of the representation.
- In general, all original client files, particularly original wills, should be returned to the client after the conclusion of representation, depending on the practice area. **Neither the WSBA nor the RPC's require a lawyer to retain an entire client file for a specific period of time after the lawyer-client relationship has ended.**
- RPC 1.15B(a) requires that trust account records and related documents be retained for seven years after the events they record.
- As for other client files, the suggested period for retaining files varies depending on the nature of the matter. For probate claims and estates, we suggest that files be retained for ten years after final judgment. For criminal cases, leases or real estate transactions, dissolutions, bankruptcy, tort claims, and contact actions, we suggest that files be retained for seven years. For **more information about practice specialties and guidelines for file retention, see the Guide to Best Practices for Client File Retention and Management**.

### What files and information do I give to my former client?

- At the conclusion of a representation, the client file generated in the course of the representation must be turned over to the client at the client's request. If the lawyer wishes to retain copies for the lawyer's use, the copies must be made at the lawyer's expense unless charges were specified in the lawyer-client fee agreement. Washington State Bar Association Advisory Opinion 181 and RPC 1.5.
- A lawyer must take steps to the extent reasonably practical to protect a client's interests including surrendering papers and property to which the client is entitled. RPC 1.16(d). Client papers include: the actual documents the client gave the lawyer or papers, such as medical records, and documents the lawyer has acquired at the client's expense.
- Examples of papers the lawyer need not surrender to the client include:
- drafts of papers
- duplicate copies
- photocopies of research material
- lawyers' personal notes containing subjective impressions. Washington State Bar Association Advisory Opinion 181.

### Am I required to report to the Bar my own conduct that might violate the RPC's?

There are two situations when a lawyer is required to report to the Bar the lawyer's own conduct: **(1) after having been publicly disciplined or transferred to disability inactive status in another jurisdiction, and (2) after the lawyer receives an overdraft notification involving a trust account**. (The lawyer must fully explain the cause of the overdraft.) See ELC 9.2(a) and 15.4(d).

Regarding criminal convictions, effective January 1, 2014, a Washington lawyer convicted of a felony must report that conviction to the Bar within 30 days. ELC 7.1(b).

### Can I mention my conversation with the Ethics Line in my response to a grievance?

Under APR 19(e)(5), no information relating to an ethics inquiry to Professional Responsibility Counsel, including the fact that a lawyer made an inquiry, the content of the lawyer's inquiry, or Professional Responsibility Counsel's response to the lawyer's inquiry may be used in response to any grievance filed against the lawyer or complaint under the ELC. Likewise, this information is not admissible in any proceedings under the ELC.