74048-2

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Court of Appeals
Division I
State of Washington

No. 74048-2-I

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

SUSAN CAMICIA,

Respondent,

v.

HOWARD S. WRIGHT CONSTRUCTION COMPANY,
a Washington corporation; and CITY OF MERCER ISLAND,

Defendants,

and

ANDREW G. COOLEY and KEATING,
BUCKLIN & MCCORMACK, INC., P.S.,

Appellants.

BRIEF OF APPELLANTS

Philip A. Talmadge, WSBA #6973
Thomas M. Fitzpatrick, WSBA #8894
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
3rd Floor, Suite C
Seattle, WA 98126
(206) 574-6661
Attorneys for Appellants Cooley and
Keating Bucklin & McCormack,
Inc., P.S.

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A. INTRODUCTION

Plaintiff Susan Camicia was injured on June 19, 2006 in a collision between her bicycle and a bollard, a post on the I-90 trail in the City of Mercer Island near the intersection of 81st Avenue SE and North Mercer Way. She sued the City of Mercer Island ("City") and Howard S. Wright Construction Co., the trail's builder, in 2007 for her claimed personal injuries. The City was defended by Andrew Cooley of the Keating, Bucklin & McCormack firm ("Cooley").

In the years between 2007 and 2015, Camicia propounded five sets of discovery requests to the City to which the City responded. On the eve of trial (set for May 11, 2015), and after the discovery cut-off date, Camicia's counsel demanded a discovery conference to air a series of discovery-related grievances. That conference was not productive.

Camicia then filed a broad motion to compel. The trial court granted that motion three days before the trial was set to commence, giving the City 48 hours to produce records of all bicycle accidents within its boundaries for an 18-year period. The trial court then entered a subsequent order imposing sanctions against the City and a fine against the City and Cooley jointly and severally to punish the alleged violations.

The trial court's onerous sanctions against Cooley and his law firm are the subject of this appeal. The trial court's order was an abuse of

discretion imposing sanctions against counsel who fully met a plaintiff's discovery requests made over eight years of litigation. Moreover, the trial court's order would have required such counsel to conduct a records search that would have violated state and federal health care privacy directives. This Court should clarify the obligations of counsel for governmental entities to respond to overbroad and vague discovery requests, as here.

B. ASSIGMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its May 6, 2015 order on motion to compel.

2. The trial court erred in entering its September 14, 2015 order on motion for sanctions/admitting evidence of other accidents.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court abuse its discretion in concluding that the City and Cooley and his firm failed to produce Fire Department records pertaining to bicycle injuries and sanctioning them where such records are specifically protected from production by state and federal law? (Assignments of Error Numbers 1, 2)

2. Did the trial court abuse its discretion in concluding that Cooley and his firm deliberately violated discovery rules and sanctioned them where any destruction of tort claim records was undertaken by the City in accordance with state law? (Assignments of Error Numbers 1, 2)

3. Did the trial court generally err in imposing any sanctions on Cooley where Cooley responded to Camicia's discovery requests on behalf of the City in good faith, in an objectively reasonable manner, and the trial court failed to explicitly explain Cooley's precise sanctionable conduct, and Camicia delayed moving to compel on the discovery issues? (Assignments of Error Numbers 1, 2)

C. STATEMENT OF THE CASE

In 2006, Susan Camicia, a resident of Mercer Island and a paralegal at the Seattle law firm of Calfo, Harrigan, Leyh & Eakes, was riding her bicycle on Mercer Island when she struck a wooden bollard on a park path. CP 5. That bollard, installed in 1985 by WSDOT as part of the I-90 reconstruction project, was designed to prevent cars from entering the mixed use path. CP 295; *Camicia v. Howard S. Wright Const. Co*., 179 Wn.2d 684, 688, 317 P.3d 987, 988 (2014). Camicia was injured. CP 5.

Mercer Island police officer Ryan Parr happened upon the accident shortly after it occurred. CP 352. He took photos that day. CP 352. He returned to the scene a few days later at the request of the City Attorney and took more photos. CP 323.

Within days of the accident, lawyers at Camicia's law firm retained experts and began investigating a possible lawsuit. In anticipation of a lawsuit, Camicia filed an administrative tort claim form with the City to

satisfy the requirements of RCW 4.96.020, CP 5, so that both she and her attorney knew there were tort claim files at the City.

In September 2007, Camicia sued the City and Howard S. Wright Construction Company in the King County Superior Court alleging that the City's mixed use path was dangerous. CP 1-8. Howard S. Wright was a contractor building a park & ride garage next to the path; she alleged that it installed construction fencing too close to the path and that it improperly stored its construction signs on the trail, blocking her free path and pushing her into the middle bollard that she struck. CP 939.[1] The case was ultimately assigned to the Honorable Laura Inveen.

Along with the summons and complaint, Camicia's lawyers served extensive discovery requests. CP 281-92. The City timely filed objections and provided answers to the initial discovery. In particular, the 2007 interrogatories broadly sought all information about all "claims or injury or death to bicyclists or pedestrians that involved fences, bollards, or other obstructions or defects in a public right-of-way either before or after this accident." Interrogatory 14; CP 289. This interrogatory was not specific as to the time frame for the request. CP 289.

Consistent with CR 34(b)(3), which provides that a party may "state a specific objection" and otherwise answer, the City timely objected

[1] Howard S. Wright and related entities settled with Camicia prior to trial. CP 107.

on the basis of the request being vague as to time and "overly broad as to location." CP 282.[2]

[2] Camicia also asked the following:

> Interrogatory No. 15. Are you aware of any notices, reports, complaints, claims or other communications from any source about safety concerns to pedestrians or bicyclists from fences, bollards or other obstructions or defects in any sidewalk, path or public right-of way in the City of Mercer Island, either before or after this incident? If so, please identify or describe the dates and details of all such notices, reports or complaints, the names, addresses and telephone numbers of all persons who made and received them, all documents electronic communications or tangible things concerning them, and all decisions or actions taken in response to such notices, reports or complaints.
>
> ANSWER: Objection. Compound. Vague as to what is meant by "notice" or "other communications" and "other obstructions or defects."
>
> Interrogatory No. 20. Do you, your representatives, agents or attorneys have any photographs, movies, videos, diagrams, models, surveillance photography or videos or any other depictions concerning the physical facts or scene of the incident, the plaintiff, plaintiff's injuries, or any other potentially relevant object, matter or issue in this case? If so, please identify the subject, date and person preparing each such representation, the nature of the representation (whether map, diagram, model, photograph, movie, etc.), and the name and address of the present custodian.
>
> ANSWER: Yes, see attached.
>
> Please produce genuine, authentic originals or copies of the following documents and things:
>
> 11. All incident reports, investigative reports or other documents, drawings, computer data, photos, movies, videos or other depictions relating to other bicycling and pedestrian accidents and related safety concerns as referenced in Interrogatory Nos. 14 and 15.
>
> RESPONSE: See documents previously attached. [The City produced a 2007 police report about a bicyclist who turned around and fell off his bicycle]
>
> 15. All photographs, movies, videos, diagrams, models, etc. as referenced in Interrogatory No. 20.

To answer these interrogatories, Cooley went to the City departments that would be logical holders of accident reports, including the police department (charged by the law to investigate all accidents including bicycle accidents),[3] the public works department (with jurisdiction over roads and streets) and the park department (with jurisdiction over park paths). CP 217-18, 833, 1054. No one, including Camicia, suggested that the City's attorney should check with the fire department for medical incident report forms. CP 1054.[4]

The City was only able to obtain Camicia's medical incident report form by preparing a release that was compliant with state and federal medical information privacy laws. CP 236. This release was first reviewed by Camicia's attorney and then executed by her, CP 234-36, and,

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RESPONSE: See attached.

CP 282-85.

[3] RCW 46.61.755 states that bicycles "shall be subject to all of the duties applicable to the driver of a vehicle by the chapter." RCW 46.52.030 requires both drivers and police to prepare accident reports on a form approved by the Washington State Patrol. The Supreme Court has said: "state law requires police to report accidents (RCW 46.52.070)." *Lane v. City of Seattle*, 164 Wn.2d 875, 883, 194 P.3d 977, 980 (2008). The City police prepared a police accident report for Camicia's accident.

[4] Both the City and Camicia knew the fire department has EMTs and paramedics who would respond to injury accidents and prepare reports. CP 233-36, 1086. Indeed, Camicia received medical treatment at the scene from both the Mercer Island and Bellevue Fire Department paramedics. CP 233-36, 394. The records created following that treatment were viewed by both the City and Camicia as confidential health care records, available on with a valid signed release. CP 233-36, 242, 1086. (Budlong letter to Regence warning it not to release Camicia medical billings without RCW 70.02-compliant discovery request).

the City's fire department disclosed Camicia's confidential medical records that it held. CP 236.

Cooley never reviewed any confidential medical records held by the City fire department. CP 218. Such reports were never provided to him or anyone else at the City by the fire department. CP 218, 790-811, 1054-57. The only fire department records he reviewed were the reports created for Camicia's accident, and then only after she executed the referenced voluntary release. CP 236, 394, 1056. Cooley never saw or knew of the incident reports subsequently referenced in the trial court's order.[5]

The second issue related to the question of police records of accident investigations on park property. As noted *supra*, the police department was charged with investigating such accidents. But, in 2015, Cooley's firm found and produced a 2005 email between the police department and the parks department in which the police department specifically stated that it did not investigate bicycle accidents on park

[5] These include the 2005 Plein accident, and accidents that occurred after 2006 involving Petty, Elmer, and Easton. CP 1054. There was a 2014 accident involving Gjerdrum that was referenced in both a police report and a medical incident report, but no evidence the City produced that to its lawyer. The trial court ultimately allowed the introduction of evidence of the Plein and Gjerdrum accidents as an evidentiary sanction. CP 1353.

property and that the fire department was the only City agency that responds to injury accidents on park property. CP 304.[6]

On the eve of trial, in late April 2015, Camicia filed a broad motion to compel. CP 186-201. Camicia's motion was extensive, demanding production of all City fire department medical incident reports relating to bicycle injures, the alleged investigation materials she claimed were generated by Officer Parr, and tort claims forms filed in connection with bicycle-related injuries. *Id*. Each will be addressed in turn.

(1) Fire Department Medical Incident Report Forms

Camicia's motion to compel sought records "kept by its Fire Department." CP 190. Camicia conceded that the City raised confidentiality of the fire department records in a pre-motion CR 26(i) discovery conference. CP 191, 225, 318. She asserted that the City had to produce all "incident reports" created by the fire department, claiming without any citation or evidence, that the fire department is not a "health care provider" and does not create "health care information." CP 363. The City responded that the fire department EMTs and paramedics were licensed and registered health care providers and the health care records they create are not subject to review or disclosure. CP 205, 790-811.

[6] The police department did, in fact, investigate Camicia's bicycle accident. The trial court correctly noted that "City officials" were aware of this "underlap," CP 1343, but there was never any evidence that Cooley was aware that the fire department had more records than the police department. CP 1054.

(2) The Parr Investigation

Camicia also raised a concern regarding the production of documents in connection with Officer Parr's role in investigating her accident. CP 191-92.

In Camicia's 2007 discovery, she asked whether the City did an investigation and whether there were photos. CP 282, 284. Cooley worked with the City to answer that discovery. CP 1054-55. The answers indicated that Officer Parr did an investigation. CP 1110. The City produced his report. CP 1110. His report disclosed that he had taken both Polaroid and 35MM photos. CP 1116. The discovery asked the City to produce the photos related to the police investigation. CP 1114. The response says "See attached." CP 1114.

Even though he was aware of the Parr investigation at least as early as 2009, CP 353, Camicia's counsel alleged, for the first time in 2015 that the City did not produce the Parr photos in 2007, but it waited until May 2010 to produce them. CP 192. The record before the trial court did not include the original 2007 discovery responses to identify what was produced. Camicia's counsel claimed the photos were not produced in 2007. CP 192. Cooley did not have an intact recollection to dispute that claim. CP 1054-55. It appears neither side had an intact copy of exactly what had been provided years before.

According to Camicia, the photos were withheld to try and mislead Camicia at her depositions about the weather conditions on the day of her accident. CP 1146. But the weather conditions are a matter of fact, and not dictated by photos.[7]

(3) Tort Claim Records

Camicia also contended that the City failed to produce tort claim forms pertaining to bicycle injuries. CP 368. In 2007, with the original discovery, Camicia asked the City, "Are you aware of any…claims…from any source about safety concerns to pedestrians or bicyclists from fences, bollards or other obstructions…?" CP 116-17. Because this interrogatory

[7] Moreover, the City argued that it would have no logical advantage by withholding these photos. One of the central issues in the case was whether co-defendant Howard S. Wright was improperly storing construction signs on the bike path. The photos showed that it was storing those signs on the path. They were leaning on an outer edge bollard and partially blocking the path. Camicia later testified that the improperly stored signs were blocking her path, and forced her to ride into the bollard. The City had no incentive to withhold evidence that would enhance the culpability of Howard S. Wright. The trial court agreed, stating:

> The evidence does not support a finding that the City and Mr. Cooley deliberately concealed Officer Parr's June 19, 2006 accident scene photos to obtain a tactical advantage over plaintiff in this litigation. The photos were referenced in a police report evidence inventory, which was provided to Plaintiff in initial discovery responses. The photographs showed construction signs in the travelled pathway purportedly placed in the pathway by the agent of a co-defendant, the disclosure and existence of which would be helpful to the City's case in shifting liability, to the extent it existed, to the co-defendant Howard S. Wright construction. Further, there is no evidence this late disclosure has resulted in prejudice to Plaintiff.

CP 1346.

was unbounded as to location and to time, the City duly objected, and it answered:

> During construction of the I-90 freeway and LID, there were areas of the bike path that were closed or subject to disruption from construction. This was in the '80s to early '90s. We believe those complaints were registered with WSDOT. Plaintiff is the only claim or lawsuit involving a bicycle vs. bollard…

CP 117. Camicia also asked if the City had ever been a party to any lawsuit "involving claims of injury or death to bicyclists…" CP 117. As the question was also unbounded by time or date, the City incorporated its earlier objection and said "See attached claim and lawsuit." CP 118.

In the many years to follow, this interrogatory objection or answer was never challenged. CP 833.[8]

At oral argument on the motion to compel in 2015, Camicia demanded for the first time that the City investigate the existence of those tort claim files. The trial court agreed and made that a condition of its order, requiring production of City files from 1997–2014. CP 420. When the City investigated those files, it learned that the City Clerk had destroyed records prior to 2006. CP 829. The Clerk testified that she

[8] A tort claim involving a bicycle accident with personal injury or property damages must be reported by either the police or the cyclist. RCW 46.52.030(1). The statute requires all persons involved in a bicycle accident to file a report within 24 hours to the City police department. *Id.* The City has a right to assume that people will obey the law -- *N. Bend Lumber Co. v. City of Seattle*, 116 Wash. 500, 507, 199 P. 988, 990 (1921) – and a right to assume that the Mercer Island Police Department will have a copy of an accident report associated with any tort claim. Thus, the police department remained the logical place to look for records, not the City Clerk's office.

destroyed the records in the normal course of business and in compliance with the document retention scheduled promulgated by the State Archivist, and followed by local agencies. CP 829.[9] As with the Fire Department records, there was no evidence that Cooley knew that the clerk had any records or that she was destroying any records.

The trial court entered an order on May 6, 2015 granting Camicia's motion to compel, despite the tardiness of that motion. CP 420-22. The court ordered the production of City fire department records for 1997-2014, giving the City just 48 hours to comply. CP 420. The court further determined that the Parr photos were not timely produced in 2007. CP 421. The court initially denied an award of sanctions against the City or Cooley "[d]ue to the fact Plaintiff filed overlength briefs in violation of KCLCR 7, and certain of Plaintiff's requests were not meritorious…" CP 421.

The trial court followed up its May 6 order with an extensive September 14, 2015 sanctions order. CP 1340-56. The court asserted that Cooley "strategically ignored" looking at City fire department records, the City improperly destroyed tort claims records, and the City failed to produce records of bicycle accidents known to it. CP 1344. On the Parr

[9] As with the issue of the medical records, there is no evidence that Cooley ever reviewed tort claim files, knew what evidence they did or did not disclose and intentionally withheld them. He had no role in their routine destruction. CP 833.

investigation, the court noted that Parr's photos were not produced for 18 months, but there was no deliberate concealing of them. CP 1346-47. The court then concluded that the City's failure to produce records was "willful," and that Cooley and his firm's responses to Camicia's first discovery requests were "false, misleading, and evasive." CP 1348.[10] As a sanction, the court granted a trial continuance to Camicia, made punitive evidentiary rulings against the City, indicated it would "favorably consider" a spoliation instruction, and fined the City and Cooley and his firm $10,000, jointly and severally, payable to the Legal Foundation of Washington. CP 1352.

Cooley timely appealed the sanctions order. CP 1464-86.[11]

D. SUMMARY OF ARGUMENT

The trial court here abused its discretion in sanctioning Cooley for alleged discovery violations as a matter of law in ordering the production of City fire department records when state and federal health care information privacy laws barred the disclosure of such records. The court

[10] The court even went so far as to opine, without any evidence, that Cooley would not change his conduct in the future and that he was "unapologetic, defensive, and refuses to admit that he or the City violated discovery obligations." CP 1349. The court addressed the City's legal arguments on health care records only in passing, CP 1349-50, and admitted, albeit in a footnote, that many of the bicycle injury discovery requests fell outside Camicia's initial discovery request. CP 1348 n.4.

[11] The principal case between Camicia and the City was settled in a late 2015 mediation. The case was dismissed in the trial court on the stipulation of the parties by an order entered on January 25, 2016. Cooley filed an amended notice of appeal to include that order.

further erred in finding the City engaged in spoliation in connection with the routine destruction of tort claims undertaken pursuant to state law on destruction of such records set by the State Archivist. Finally, the trial court's imposition of discovery sanctions was an abuse of discretion where Camicia waited 8 years after the commencement of this action to file a motion to compel.

Additionally, the trial court abused its discretion in sanctioning Cooley where Cooley provided objectively reasonable responses to Camicia's discovery requests in good faith; the trial court failed to adequately specify why sanctions should be imposed against Cooley, instead of the City.

E. ARGUMENT[12]

(1) The Pertinent Standards in Washington for Discovery Violations and the Imposition of Sanctions Against a Party and Its Counsel

Washington has developed principles for imposition of sanctions in the discovery context. *See* Philip Talmadge, *et al.*, *When Counsel Screws Up: The Imposition and Calculation of Attorney Fees as Sanctions*, 33 Seattle U. L. Rev. 437, 454-59 (2010). As noted in that article, discovery

[12] Decisions pertaining to discovery violations fall within the trial court's discretion and are reviewed for abuse of that discretion. *Wash. Physic. Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) ("*Fisons*"). However, an abuse of discretion is present if the trial court, as here, applies the wrong legal standard in making its sanctions decision, as this Court concluded in *Kreidler v. Cascade Nat'l Ins. Co.*, 179 Wn. App. 851, 866, 321 P.3d 281 (2014).

sanctions may be appropriate under CR 26(a), CR 37(b), or the court's inherent authority; sanctions are generally reserved for "egregious conduct by trial counsel." *Id.* at 454. As will be discussed *infra*, however, the court's articulation of the nature of "extreme" sanctions, such as those present here, and whether sanctions can be imposed against a litigant's counsel, are hazy and lack analytical rigor.

There is little question that discovery is important to the conduct of civil litigation in Washington. Our Supreme Court so stated in *Lowy v. PeaceHealth*, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012). Indeed, discovery is associated with the constitutional right to court access articulated in article I, § 10 of the Washington Constitution. *Id*. Discovery under the civil rules is intended to result in the exchange of information relevant to the litigation in a spirit of forthrightness and cooperation, without delaying tactics, excessive expense, or undue burden. *Fisons*, 122 Wn.2d at 340-43. Courts "need not to tolerate deliberate and willful discovery abuse." *Magaña v. Hyundai Motor America*, 167 Wn.2d 570, 576, 220 P.3d 191 (2012). At the same time, the Supreme Court has indicated that "[f]air and reasoned resistance to discovery is not sanctionable." *Fisons*, 122 Wn.2d at 346.

The *Fisons* court discussed when a party or its attorney violates the discovery principles referenced above; discovery responses must be

consistent with the letter, spirit, and purpose of the civil rules. *Id*. at 344. The Court stated:

> On its face, Rule 26(g) requires an attorney signing a discovery response to certify that the attorney has read the response and that after a reasonable inquiry believes it is (1) consistent with the discovery rules and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; (2) not interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had, the amount in controversy, and the importance of the issues at stake in the litigation.
>
> Whether an attorney has made a reasonable inquiry is to be judged by an objective standard. Subjective belief or good faith alone no longer shields an attorney from sanctions under the rules.
>
> In determining whether an attorney has complied with the rule, the court should consider all of the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response or to comply with the request.

Id. at 343.

Sanctions for discovery violations may flow from CR 26(g), CR 37(b), or the courts' inherent power, *id*. at 339-40, but, historically, sanctions have been reserved for egregious misconduct. *See, e.g., Fisons*, *supra* (party persistently and deliberately withheld two "smoking gun" letters); *Magaña*, *supra* (sophisticated multinational corporation, experienced in litigation, willfully, deliberately, and continually failed to

comply with discovery requests); *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012) (exclusion of key witness); *Barton v. State*, 178 Wn.2d 193, 308 P.3d 597 (2013) (failure of counsel to disclose settlement agreement); *Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2014) (exclusion of late disclosed witnesses).[13]

If severe sanctions such as a default judgment or exclusion of witnesses is contemplated by a court, that court must explicitly consider whether a lesser sanction would suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced an opponent's ability to prepare for trial. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 693-96, 41 P.3d 1175 (2002).[14] Our Supreme Court has made it crystal clear that the trial court must make findings on these critical factors or evaluate them on the record. *E.g.*, *Teter*, 174 Wn.2d at 216-21; *Blair v. TA-Seattle E No. 176*, 171 Wn.2d 342, 348-49, 254 P.3d 797 (2011).

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[13] The Court of Appeals has similarly treated discovery violations. *E.g.*, *Gammon v. Clark Equipment Co.*, 38 Wn. App. 274, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985) (deliberate withholding of accident reports); *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 696 P.2d 28 (1985) (manufacturer unilaterally determined what was relevant in responding to discovery requests); *Smith v. Behr Processing Corp.*, 113 Wn. App. 306, 54 P.3d 665 (2002) (manufacturer violated court order requiring witness disclosure in failing to disclose expert opinions or deliver product tests that revealed defects).

[14] Imposition of monetary sanctions alone does not trigger the *Burnet* protocol. *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 690, 132 P.3d 115 (2006).

Washington cases have not articulated, however, outside the CR 11 context,[15] when an attorney, as opposed to the client, should be the subject of sanctions.[16] In *Johnson v. Jones*, 91 Wn. App. 127, 955 P.2d 826 (1998), the Court of Appeals upheld the imposition of CR 37 sanctions against both the attorney and the client where both acted in violation of the discovery rules and engaged in obstructionist conduct. *Id*. at 132-35. The court went on to approve of CR 11 sanctions awarded only against the attorney. In *Breda*, *supra*, the Court of Appeals approved of sanctions against the attorney only. These cases suggest, but do not fully articulate, that the attorney may not be liable for misconduct that is the client's fault; plainly, the client is not sanctioned for conduct that is only the attorney's.

Federal law indicates that while both the client and the attorney may be sanctioned, *Hyde & Drath v. Baker*, 24 F.3d 1162, 1172 (9th Cir.

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[15] Because an attorney signs a pleading, the attorney, as well as the client, can be sanctioned for pursuing a frivolous action under CR 11. *See, e.g.*, *Watson v. Meier*, 64 Wn. App. 889, 891, 827 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992); *Madden v. Foley*, 83 Wn. App. 385, 392-93, 922 P.2d 1364 (1996) (attorney and firm); *Splash Design, Inc. v. Lee*, 104 Wn. App. 38, 41 n.1, 14 P.3d 879 (2000), *review denied*, 143 Wn.2d 1022 (2001); *Wash. Motorsports Ltd. Partnership v. Spokane Raceway Park, Inc.*, 168 Wn. App. 710, 282 P.3d 1107 (2012).

[16] The Supreme Court in *Rivers* noted that "The 'sins of the lawyer' are visited upon the client." 145 Wn.2d at 679. The Court did not address the opposite point as whether the "sins" of the client are visited upon the lawyer. Here, it appears they were.

An attorney sanctioned by the trial court is an aggrieved party on appeal pursuant to RAP 3.1 and may appeal whether or not the client does so. *In re Guardianship of Lasky*, 54 Wn. App. 841, 848 776 P.2d 695 (1989); *Breda v. B.P.O. Elks Lake City 1800 SO–620*, 120 Wn. App. 351, 90 P.3d 1079 (2004).

1994), the sanctions should fall on the attorney only when the violations are the result of the attorney's specific neglect or other misconduct. *Butler v. Pearson*, 636 F.2d 526, 531 (D.C. Cir. 1980). In *Hyde & Drath*, the Ninth Circuit stated that the burden should fall on the party being sanctioned to demonstrate substantial justification or special circumstances. 24 F.3d at 1171. Indeed, as the D.C. Circuit observed in *Jackson v. Washington Monthly Co.*, 569 F.2d 119, 123-24 (D.C. Cir. 1977):

> When the client has not personally misbehaved and his opponent in the litigation has not been harmed, the interests of justice are better served by an exercise of discretion in favor of appropriate action against the lawyer as the medium for vindication of the judicial process and the protection of the citizenry from future imposition. Public confidence in the legal system is not enhanced when one component punishes blameless litigants for the misdoings of another component of the system; to laymen unfamiliar with the fundamentals of agency law, that can only convey the erroneous impression that lawyers protect other lawyers at the expense of everyone else.

Of course, the converse of this proposition is true as well. Attorneys who do not engage in discovery misconduct should not be sanctioned for the behavior of their clients. *Humphreys Exterminating Co. v. Poulter*, 62 F.R.D. 392, 395 (D. Md. 1974).

Here, Cooley met the burden of documenting that there were special circumstances that attended the discovery issues below or that any

responsibility for failing to respond to Camicia's discovery requests fell on the City.

(2) The Trial Court Abused Its Discretion in Sanctioning Cooley for Failing to Produce Records that Could Not Be Produced by Law or Were Unavailable Consistent with State Policy

Cooley will address the issue of whether sanctions were properly imposed against him *infra*. However, the trial court improperly sanctioned either the City or Cooley as to certain records not available in the discovery process as a matter of law.[17]

(a) The Trial Court Erred in Concluding That the City Could Turn Over Private Health Care Records in Violation of State and Federal Law

The core of the trial court's basis for both its May 6, 2015 and September 14, 2015 orders was its perception that the City and/or Cooley willfully refused to produce fire department records to which Camicia was entitled. CP 1343, 1344, 1347, 1349-50. The trial court was wrong in this perception because both state and federal health care records privacy law foreclosed City access to those records – the fire department's EMTs were health care providers. The trial court erred in summarily rejecting the

[17] CR 26 only requires production of materials that would lead to discovery of admissible evidence. CR 26(b)(1). Moreover, even if the City or Cooley deliberately withheld documents, any evaluation of such a violation is subject to a harmless error analysis. *Jones*, 179 Wn.2d at 337-38.

proposition that such records were covered by state and federal privacy laws. CP 1350.

(i) State Law

Washington has adopted the Uniform Health Care Information Act ("UHCIA"). RCW 70.02.060 expressly provides:[18]

> (1) Before service of a discovery request or compulsory process on a health care provider for health care information, an attorney shall provide advance notice to the health care provider and the patient or the patient's attorney involved through service of process or first-class mail, indicating the health care provider from whom the information is sought, what health care information is sought, and the date by which a protective order must be obtained to prevent the health care provider from complying. Such date shall give the patient and the health care provider adequate time to seek a protective order, but in no event be less than fourteen days since the date of service or delivery to the patient and the health care provider of the foregoing. Thereafter the request for discovery or compulsory process shall be served on the health care provider.
>
> (2) Without the written consent of the patient, the health care provider may not disclose the health care information sought under subsection (1) of this section if the requestor has not complied with the requirements of subsection (1) of this section…

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[18] "Health care" is broadly defined in RCW 70.02.010(14) as:

> any care, service or procedure provided by a health care provider:
>
> (a) To diagnose, treat, or maintain a patient's physical or mental condition; or
>
> (b) That affects the structure or any function of the human body.

The UHCIA broadly defines a health care provider as follows:

> … a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession.

RCW 70.02.010(18). Nevertheless, the trial court concluded in its May 6 order that the UHCIA was inapplicable here. CP 420.

Plainly, an emergency medical technician is authorized by Washington law to provide health care in some instances on his or her own, or generally under the license of a medical doctor. RCW 18.71.200 (physician's trained advanced medical paramedic); RCW 18.73.031 (emergency medical technician); *Braswell v. Shoreline Fire Dep't*, 622 F.3d 1099, 1101 (9th Cir. 2010) (noting that under Washington law, the practice of "paramedicine" occurs under the license of a physician).[19] As such he or she is a health care provider and the trial court erred in summarily rejecting the application of the UHCIA to fire department records. CP 1350.

Washington has applied the UHCIA broadly. The Legislature specifically noted that "[h]ealth care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interest in privacy, health care, or other interests." RCW

[19] Other states have recognized that EMTs are health care providers. *E.g.*, *Canister v. Emergency Ambulance Service*, 72 Cal Rptr.3d 792 (Cal. App. 2008) (EMTs are health care providers under California medical negligence statute).

70.02.005. *See Berger v. Sonneland*, 144 Wn.2d 91, 106, 26 P.3d 257 (2001) (to effectuate preservation of patient privacy, UHCIA is not remedy of patient whose confidential information is disclosed without authorization); *Murphy v. Albertson's, Inc.*, 243 F.3d 548 (9th Cir. 2000) (court reversed trial court decision dismissing UHCIA claim of unauthorized disclosure of information to law enforcement); *Doe v. Group Health Co-op of Puget Sound, Inc.*, 85 Wn. App. 213, 217, 932 P.2d 178, 180 (1997), *overruled on other grounds*, *Reid v. Pierce Cty.*, 136 Wn.2d 195, 961 P.2d 333 (1998) (recognizing private cause of action against hospital for unauthorized release of health care information).[20]

Only upon the filing of the reply brief on her second motion to compel did Camicia argue for the first time that the fire department is not a "health care provider" or "health care facility"; that it does not conduct "health care operations"; and that its accident reports do not contain "health care information." CP 362-64. Camicia's argument was unsupported and the trial court erred in adopting it.[21]

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[20] The *Berger* court further held that the UHCIA is not ambiguous. 144 Wn.2d at 105. It is a plainly worded statute that means what it says. Confidential patient health care records can only be disclosed under very specific and limited conditions, and certainly not in response to a discovery request addressed to a city with a fire department.

[21] On reply, Camicia made a passing reference to the idea that if the City redacted names from the medical incident report forms, that would satisfy the UHCIA. CP 362-64. However, Camicia's proposed order, entered by the trial court, contained no redactions. CP 420. The trial court adopted Camicia's primary argument that she was not seeking health care information. CP 1350.

All City firefighters, lieutenants, the battalion chief, the deputy chief and the chief are *certified* Emergency Medical Technicians (EMTs). CP 790. The fire department's EMTs are certified through King County EMS. *Id.* EMT certification is not in name only. Indeed, an individual must complete an intensive 190 hour program that includes classroom work, field work, and clinical time at Harborview. *Id.* The program is taught by paramedics and an end-certification test must be passed at the end of the program for the National Registry of EMTs. *Id.* This certification places the fire department records at issue squarely within the purview of the UHCIA. *Id.*

The department's status as a "health care provider" is further supported by its internal policies. Not only are the fire department's EMTs certified, the department itself has adopted policies (Standard Operating Guidelines, HIPAA & Security of Records), which reference both the UHCIA and the Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d, *et seq.* (“HIPAA”). CP 791. The definition of "health care provider" in the policy mirrors that of the definition of "health care provider" in RCW 70.02.010(18). *Id.*

The seriousness of the department's compliance with RCW 70.02 is further illustrated by its agreements with affiliates. When the department deals with affiliates, it must engage in an agreement in which

those affiliates must agree to be bound by the same statutory requirements. *Id.* As an example, the North East King County Regional Public Safety Communications Agency agreed to be bound by the laws governing security and confidentiality of protected health information which includes but is not limited to the UHCIA. CP 791, 801-09. The fire department notice of privacy practices further demonstrates the department's obligation to treat.

Thus, the City's fire department EMTs provided health care in the context of dealing with emergencies.[22] The trial court erred in ordering the production of such documents under the UHCIA.

(ii) HIPAA Prevented Access by Cooley to Fire Department Records

[22] Camicia cited no relevant authority below to support the view that fire department personnel were not UHCIA providers. Nor did she come forward any evidence that would support her position. Instead, she relied solely (and incorrectly) on *Lowy*, 174 Wn.2d at 769, a case dealing with a hospital's privilege in connection with medical quality assurance. The plaintiff alleged that she sustained nerve damage as a result of an improper IV procedure while a patient at PeaceHealth Hospital. She brought a medical negligence action against the hospital. Through a CR 30(b)(6) deposition, the plaintiff sought information relating to instances of IV infusion complications or injuries over an eight year span. The hospital maintained a list of those incidents for purposes of its quality improvement program. The hospital argued that RCW 70.41.200 (the quality improvement statute) prohibited the hospital from reviewing its own quality assurance records. The Supreme Court disagreed, holding that the hospital's consultation of its own privileged database to identify relevant discoverable files that fall outside of the privilege would not violate the hospital's privilege. *Id*. at 789-90. Significantly Lowy was not asking for disclosure of patients' names and contact information, just the fact of prior nerve injury evidence. Here, Camicia was seeking the exact opposite; she wanted the names and addresses of individuals who had received medical treatment from the fire department.

Federal law also provides broad protection to the privacy of a person's medical records. HIPAA, enacted in 1996, restricts health care entities from disclosure of "protected health information." Congress intended to broadly protect the privacy of health records. *S.C. Med. Ass'n v. Thompson*, 327 F.3d 346, 348 (4th Cir. 2003); *Webb v. Smart Document Solutions, LLC*, 499 E.3d 1078, 1083-84 (9th Cir. 2007). Regulations authorized by the HIPAA, 42 U.S.C. § 1320d *et seq*., prohibit ex parte communications with health care providers regarding patients' medical condition without their consent or a "qualified protective order" (45 C.F.R. § 164.512). While HIPAA's privacy provisions allow for disclosure of medical information in judicial proceedings, disclosure is permitted pursuant to a court order, subpoena, or discovery request only when the healthcare provider "receives satisfactory assurance from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order." 45 C.F.R. § 164.512(1)(e)(ii)(b). The protective order must prohibit using or disclosing the protected health information for any purpose other than the litigation, and require the return to the physician or destruction of the protected health information at the end of the litigation or proceeding. 45 C.F.R. § 164.512(1)(e)(v). HIPAA, too, defines protected health information broadly to encompass "information pertaining to the health

condition or treatment of an individual, or the payment of health care services." *In re American Medical Systems, Inc. Pelvic Repair Systems Product Liability Litigation*, 946 F. Supp. 2d 512, 516 (S.D. W. Va. 2013).[23]

The City asserted below that its fire department records are subject to that federal health care records privacy law that is counterpart to the UHCIA; the City's fire chief testified unequivocally:

> Fire Department Records generated in response to any serious accident are HIPAA protected. They are kept exclusively in control of the Fire department and not even given to counsel. The Fire Department does not and cannot produce this confidential information in response to a Public Records Request or civil discovery absent a HIPAA release.

CP 261. Camicia provided no evidence to the contrary.[24]

Inexplicably, the trial court stated in its sanctions order that HIPAA did not apply to fire department records. CP 1349-50. It was wrong. Moreover, the court concluded that if a party fails to search these

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[23] 42 U.S.C. § 1320d(4) states that health information "means any information, whether oral or recorded in any form or medium, that – (A) is created or received by health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual." The definition of health care provider in 42 U.S.C. § 1320d(3) is equally broad.

[24] Camicia's own conduct was to the contrary. She executed a HIPAA release for her own fire records from Bellevue Fire Department. CP 233-36. Why would Camicia sign a release if she did not understand that privacy principles applied to it?

HIPAA records and produce them in response to a standard discovery request it faces sanctions. Nothing could be further from the word and spirit of these laws.[25]

Washington case law applying HIPAA is sparse,[26] but it is clear that Camicia did not comply with HIPAA in seeking disclosure of what was HIPAA-protected health information contained in City records. The trial court abused its discretion in ignoring HIPAA's limitations on disclosure in its order on the motion to compel and its sanctions order. The potential for harm in the trial court's order is manifest.[27]

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[25] The trial court's order suggested that the City should have sought a protective order. CP 1343. But if this Court agrees that the records are indeed privileged, then no protective order was needed. CR 26(a) (prohibiting discovery of "privileged" information); 3A Karl B. Tegland, *Wash. Prac., Rules Practice* CR 26 (6th ed.) ("evidence that would be objectionable at trial on the basis of a privilege is likewise protected against discovery"). In *Lowy*, the Court suggested that a hospital had a duty to look at its own files to determine possible discoverable information even if privileged, 174 Wn.2d at 790, but it never suggested that simply by suing a governmental entity, a duty to review all privileged information from all agencies of that governmental entity generally arises. The burden of such a requirement as to state government agencies or agencies in larger general purpose local governments is patent.

[26] *E.g.*, *State v. Sanchez*, 177 Wn.2d 835, 848-49, 306 P.3d 935 (2013) (SSODA evaluation of offender by sheriff not subject to HIPAA); *Youngs v. Peacehealth*, 179 Wn.2d 645, 666 n.9, 316 P.3d 1035 (2014) (HIPAA does not authorize disclosure of health care records whose disclosure is barred by state law).

[27] Paul Plein crashed his bicycle on WSDOT property near the west end of the island and the Mercer Island Fire Department responded. CP 943. The trial court ordered Plein's medical incident report form to be disclosed with no warning to him and without meeting the requirements of UHCIA. CP 1347. That medical incident report form disclosed his medical history ("Allergies: None"), the prescriptions medicine he took ("zantac" and "prilosec"), that he suffered a head injury with concussion, and where he was transported for further medical treatment. CP 946.

Eric Shankland was hit by a Honda CRV in 2009, and like Plein received medical treatment from City paramedics. CP 889. The trial court ordered disclosure of

Here, a rule requiring a municipality in tort litigation to search the confidential medical incident report forms and disclose them to a party would be inconsistent with this state's long history of protecting the privacy of patients seeking health care.[28]

(b) The Trial Court Erred in Concluding That the City's Routine Destruction of Tort Claim Records Consistent with State Law Constituted Spoliation

In anticipation of her lawsuit, Camicia filed an administrative tort claim form with the City to satisfy the requirements of RCW 4.96.020. CP 833. Thus, both she and her attorney knew there were tort claim files at the City. CP 833. When the City answered discovery in 2007, it did reference tort claim files and did produce one lawsuit and one tort claim record. CP 117-18. In 2015, at oral argument on the motion to compel, Camicia demanded that the City investigate the existence of those tort claim files. The trial court agreed and made that a condition of its order, requiring production of files from 1997-2015. When the City went to

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his medical incident report form that disclosed his medical history ("history of left shoulder injury" "back surgery" "Allergies: None"), the injuries he suffered in the car accident ("small abrasion on forehead," "neck tenderness," "left hip tenderness"), his prescriptions ("prilosec") and that he was transported to Overlake Hospital. CP 889. There is no evidence that any of these individuals believed that these confidential health care records would be made public when the law would generally prohibit their disclosure.

[28] This is not a case like *Lowy* or *Magana*, where the defendant was keeping plaintiff in the dark about a whole class of records. Here, Camicia knew the fire department created records, as they created records regarding her treatment, and she knew the City viewed them as privileged, as evidenced by the use of a HIPPA-compliant release that she signed to provide her own records.

investigate those files, it learned that the City Clerk had destroyed records prior to 2006. CP 1348. The Clerk testified that she destroyed the records in the normal course of business and in compliance with the document retention schedule promulgated by the State Archivist, and followed by local agencies. CP 839.

The trial court found a duty to preserve these records, concluded that the evidence was thus destroyed, and found that spoliation had occurred. CP 1348. The trial court rejected the City's contention that its destruction of pre-2006 tort claim records was routine and consistent with state law as interpreted by the State Archivist. CP 1348, 1352-53. The trial court erred.[29]

Washington courts have developed a 2-part test to evaluate whether spoliation of evidence has occurred, beginning with *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996). Courts generally weigh (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party. *Id*. at 607. Central to that second factor is whether the party has a duty to preserve the evidence in question. *Homeworks Constr. Inc. v. Wells*, 133 Wn. App. 892, 900, 138 P.3d 654 (2006). Only after making this analysis may a court impose a sanction, which might include the inference that the evidence would have

[29] While the trial court sanctioned the City for this conduct, it is not clear if the court permitted this decision to impact its decision to sanction Cooley.

been unfavorable to the party. *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).

In application, Washington courts have generally rejected finding spoliation, particularly where there is no evidence of any duty to preserve records.[30] Applying the spoliation protocol first adopted in *Henderson*, the trial court erred in making its spoliation decision. First, the absence of tort claims was not crucial to Camicia's arguments here. The bulk of the old destroyed tort claims had nothing to do with bicycle accidents in any event. Camicia could obtain evidence of such accidents in other forms of discovery. Critically, as noted by the *Cook* court, there is no general duty in Washington law to preserve potential claim-related evidence. 190 Wn. App. at 461-64. The burden of such a duty on municipalities like the City would be overwhelming and costly. That is precisely why the State

[30] *See, e.g., Henderson*, *supra* (no spoliation sanction including dismissal or jury instruction where the defendant had no duty to preserve a vehicle involved in an accident and the defendant was unaware of other evidence from the accident scene including shoes and blood samples); *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999) (no spoliation where health club replaced CPU treadmill at issue in case in ordinary course of service on the machine); *Homeworks Const.*, *supra* (reversing spoliation finding against contractor and its insurer as to stucco in a house because no duty to preserve such materials in light of homeowner's decision to repair the house and the stucco unknown to contractor or the insurer); *Ripley v. Lanzer*, 152 Wn. App. 296, 215 P.3d 1020 (2012) (no spoliation where neither surgeon nor medical center had a duty to preserve a handle from a scalpel that broke during a surgery); *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 307 P.3d 811 (2013) (no spoliation where store destroyed videotapes from day plaintiff fell in store where plaintiff failed to establish any duty on Walmart's part to preserve the videotapes in question); *Cook v. Tarbert Logging, Inc.*, 190 Wn. App. 448, 360 P.3d 855 (2015) (no duty to preserve a pickup truck involved in collision).

Archivist adopted the policy of records retention for six years. The City had no duty to preserve records beyond that time period.

The trial court abused its discretion in concluding that the City and/or Cooley somehow engaged in sanctionable spoliation of evidence here.

(c) Camicia's Delay in Seeking Discovery Negates the Basis for Sanctions

Despite the 2007 discovery requests and the City's response, Camicia took no contemporaneous action on this response — no CR 26(i) discovery conference, no motion to compel. While this issue has not arisen in Washington law, Camicia should not have been rewarded for her dilatory conduct in failing to timely assert any discovery-related concerns she might have had and waiting until the last minute before trial to assert an entitlement to 18 years of information on all types of bicycle incidents in the City. *See, e.g., Rivera-Almodovar v. Instituto Socioeconomico Comunitario, Inc.*, 730 F.3d 23, 26 (1st Cir. 2013) ("Plaintiff cannot simply sit on her hands until after the discovery period has expired and then claim the defendants have not complied with their discovery obligations."); *Rosario v. Livaditis*, 963 F.2d 1013, 1019 (7th Cir. 1992) (A party who fails to pursue discovery in the face of a court ordered cut-off cannot plead prejudice from his own inaction).

The trial court erred in sanctioning Cooley where Camicia waited *8 years* to raise concerns about the adequacy of 2007 discovery responses.

(3) The Trial Court Erred in Sanctioning Cooley For Alleged Deliberate Failures to Respond to Camicia's Discovery Requests When Cooley's Responses to Those Requests Were Objectively Reasonable and in Good Faith

As noted *supra,* after *Fisons,* Washington law assesses whether an attorney's inquiry of a client as to materials responsive to discovery requests is measured by an objective standard; subjective belief or good faith is not enough to avoid sanctionable conduct under CR 26(g) or CR 37(d). But here, Cooley's actions were objectively reasonable and in good faith. Given the circumstances surrounding the discovery requests, Cooley's conduct was not sanctionable.

The trial court's sanctions order concluded that the City willfully failed to respond to discovery without reasonable excuse or justification, CP 1348, but its legal basis for discovery sanctions was flawed where statutory privacy protections applied to the City fire department records, and the City properly destroyed records in accordance with State law, Cooley did not deliberately withhold production of materials in light of what Camicia specifically requested. In fact, some of the records requested did not exist. Nevertheless, the court opined that Cooley's responses to the discovery requests were false or misleading, and his

invocation of health care information privacy laws as to fire department records was unjustifiable. CP 1349-50. The trial court was wrong.

Camicia sent interrogatories to the City in 2007; in interrogatory 14, a central focus of Camicia's motion to compel, she asked:

> Have you or your agents, investigators, lawyers or anyone else investigated any incidents involving danger, injury or death to bicyclists or pedestrian because of fences, bollards, or other obstructions or defects in any sidewalk, path or public right of way in the City of Mercer Island, either before or after this incident. If so, please identify or describe all such investigations and accident locations, the name, address, telephone number and job title of each person who reported or investigated each accident; the date of each accident; the name and number of each incident report and investigation report, and the name, address, telephone number and job title of each person who has custody of the reports or investigation documents.

CP 1342.

The City objected to the interrogatory on October 30, 2007, *seven and a half years before Camicia's motion to compel*, stating:

> Objection. Compound. Vague as to time. Overly broad as to location. If by "incidents" you mean accidents, there have never been any bicycle vs. bollard accidents to the City's institutional knowledge. Otherwise, the question is vague as to time, the word "incident" and "danger." Certainly there have been pedestrian incident in the City since its incorporation.
>
> There was one bike accident in October 2007, where a bicyclist turning around fell off a bicycle and partially struck a cement post on EMW. See police report.

CP 1342.

This is exactly what the Civil Rules call for--a timely objection to what is objectionable,[31] and response as to the remainder. Camicia understood as much. There was no doubt that the City was objecting to the unbound timeframe, and was also explicitly objecting to the request's overly broad scope as to location and nature of the condition. CP 1342.[32]

It was unreasonable of the trial court to assert that Cooley had a duty to somehow seek out records to which he had no access. CP 1344. Moreover, contrary to the trial court's assertion regarding "institutional knowledge" on the City's part, CP 1349, Cooley was not responsible for discovering what five separate City departments actually possessed, including the fire department records to which he had no access. He acted reasonably in seeking the records in the logical departments where they

[31] Interpreting a rule identical to Washington's CR 37(a)(4), the United States Supreme Court said the "test for avoiding the imposition of attorney's fees for resisting discovery in district court is whether the resistance was 'substantially justified,'" *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 2550, 101 L. Ed. 2d 490 (1988) "[D]iscovery conduct should be found 'substantially justified' under Rule 37 if it is a response to a genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action." Rutter, *Prac. Guide Fed. Civ. Proc. Before Trial* (Nat Ed.) Ch. 11(V)-B. In cases where "there is legitimate difference of opinion" about whether an objection and refusal to answer is proper, a court should not find a sanctionable discovery violation.

[32] Also, before the trial court, Camicia took inconsistent opinions. First, she claimed that the City did not possess any privileged records, arguing that she was not seeking health care records and the UHCIA and HIPAA did not apply to fire department paramedics. CP 363. She also suggested that the City needed to produce a privilege log. CP 361. She never explained how the failure to produce a privilege log could be squared with her position that no privilege existed. Moreover, she never explained how failure to produce a privilege log prejudiced her in any way. Camicia and her counsel knew that the City viewed fire department medical reports as privileged.

would likely exist.[33] The trial court's determination that Cooley "strategically ignored looking at Fire Department records" is unsupported by the record. CP 1344.[34]

Moreover, in order for the records at issue to be discoverable at all, they had to be materials that would lead to admissible evidence. CR 26(b)(1). Washington law bars the admissibility of evidence of other accidents to prove negligence in another setting; evidence of other accidents is only admissible for limited purposes to establish a dangerous or defective condition or notice of a defect. *Porter v. Chicago, M. St. P. & P. R. Co.*, 41 Wn.2d 836, 841-43, 252 P.3d 306 (1953); *Blood v. Allied Stores Corp.*, 62 Wn.2d 187, 189, 381 P.2d 742 (1963). Critically,

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[33] In *Magaña*, the corporate lawyer only looked at the legal department files for evidence of other seat back failure claims. 167 Wn.2d at 198. But it was the Consumer Affairs Department that worked with consumers to report defects. *Id*. Indeed, consumers were directed by the owner's manual to report issues to the Consumer Affairs Department. *Id*. Thus it was the logical place to look.

Here the logical place to look was the police department (with jurisdiction over accident reports) and the parks department (with jurisdiction over park property). RCW 46.52.030(1). Cooley could not know that both the police and bike accident victims would abrogate their duty to file statutorily required reports.

[34] Cooley did not know that the City police department was not undertaking its statutory duty to investigate all accidents. RCW 46.52.030; AGO 1961-62 No. 63 (RCW 46.52.030 requires the reporting of accidents on both public and *private roads and property*). He also did not know that bicyclists like Plein, when his accident was not investigated by the police, were not filing their own reports under the statute. In Camicia's case, she crashed on a park path, and the Mercer Island Police prepared a full police report. CP 352. It was only days before the May 2015 motion to compel that Cooley became aware anyone knew that the City Police were not investigating bike accidents on park property. CP 304. There is simply no records to support the trial court's conclusion of a "strategic" intent.

however, because the introduction of such evidence introduces *collateral matters* into the case, the other accidents must be *substantially similar* to the accident at issue in the case. *Id.* *See generally*, 5 Karl B. Tegland, *Wash. Prac., Evidence Law and Practice* (5th ed.) § 402.11. Moreover, "[i]f dangerousness is the issue, a high degree of similarity will be essential." Weinstein and Berger, *Weinstein's Evidence* § 401[10].[35]

Camicia's 2007 discovery request seeking any bike accident, anywhere on Mercer Island, was not reasonably calculated to lead to admissible evidence in this case, as a matter of law. Accidents involving a car hitting a bicycle in a driveway far removed from the park path where Camicia crashed are not substantially similar to the accident here any more than the collision of two kids on a sidewalk would be. Yet that is what Camicia's 2007 discovery sought, and the trial court ultimately

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[35] *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1269 (7th Cir. 1988) provides a good illustration of such similarity. Following an accident, the plaintiff sued an airplane manufacturer alleging that a defect prevented the plane from de-icing, and eventually forced it into a nosedive. *Id*. at 1264. At trial, the plaintiff attempted to offer evidence of another Beech Aircraft accident that occurred near St. Anne, Illinois. The St. Anne accident involved a report by the pilot that he was "having a little trouble with ice," during icy conditions. The airplane ended up going into a nosedive and crashing. *Id*. at 1266-67. The Seventh Circuit excluded the St. Anne crash for lack of foundation establishing substantial similarity. *Id.* at 1269. This ruling is supported by the common sense principle that accidents happen for many reasons. *See also, Read v. Mt. Tom Ski Area, Inc*., 639 N.E.2d 391, 393 (Mass. App. 1994) ("[e]vidence that accidents similar to the plaintiff's have occurred at the same location generally is viewed with disfavor, precisely because the earlier mishap may have been the consequence of idiosyncratic circumstances (*e.g.*, the weather, the physical condition of the injured person, the light conditions) not present in the incident now the subject of trial").

ordered. Even the one prior bollard accident that was disclosed (the Plein 2005 accident) was admitted as a discovery sanction, not because it met the test for sufficient similarity. CP 1353 ("As a discovery sanction, the court will…allow evidence of the Plein accident…").

The City's responses to Camicia's discovery requests were proper.[36] It was reasonable for the City to resist this overly broad discovery under the relevancy standard applicable to prior accident evidence, and therefore it was not sanctionable.

Further, the trial court's September 14 order imposed a series of discovery sanctions against the City and Cooley, elevating it beyond a mere monetary sanctions order as in *Mayer*; the court's sanctions were not confined to monetary sanctions and encompassed evidentiary sanctions as well as a spoliation sanction. CP 1351-54. The trial court was obliged to comply with the *Burnet/Rivers* protocol, but did not do so in its order.

Finally, apart from its general aspersions cast upon Cooley, the trial court did not explain in its sanction order why Cooley, as opposed to the City, should have been the subject of sanctions. CP 1350. As noted *supra*, the law on this issue is not well-developed in Washington. However, applying the federal standards noted *supra*, any failure to

[36] With regard to the Parr investigation records, at most the photographs were not produced due to inadvertence. They were specifically referenced in the City's response to Camicia's discovery requests. CP 1110, 1116. They were produced when the inadvertence was noticed in 2010. CP 118. Such a mistake is not sanctionable.

produce documents here was the responsibility of the City, not Cooley. Cooley never possessed the records that allegedly should have been produced according to the trial court and there is no evidence in this record that Cooley condoned or failed to produce records. A good faith insistence that the production of records would violate legal restrictions on disclosure is proper advocacy and, short of a violation of CR 11, not sanctionable.

F. CONCLUSION

The trial court abused its discretion in asserting that Andrew Cooley and his law firm engaged in willful discovery violations, deliberately withholding documents from opposing counsel and then imposing onerous sanctions for such alleged violations, particularly where state and federal health care privacy requirements applied, and state law permitted the destruction of the tort claim forms at issue. Discovery sanctions were also inappropriate where Camicia literally waited nearly eight years, on the eve of trial, to raise any concerns about the adequacy of the responses to discovery.

This Court should reverse the trial court's May 6 and September 14, 2015 orders to the extent they apply to Cooley and his firm. Costs on appeal should be awarded to Cooley and the firm.

DATED this 3d day of March, 2016.

Respectfully submitted,

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Thomas M. Fitzpatrick, WSBA #8894
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
3rd Floor, Suite C
Seattle, WA 98126
(206) 574-6661
Attorneys for Appellants Cooley and
Keating Bucklin & McCormack,
Inc., P.S.

APPENDIX

CR 26(g):

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

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

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

(3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

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

CR 37(d):

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Production or Inspection. If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his or her deposition, after being served with a proper notice, or (2) to serve answers or objections to

interrogatories submitted under rule 33, after proper service of interrogatories, or (3) to serve a written response to a request for production of documents or inspection submitted under rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 26(c). For purposes of this section, an evasive or misleading answer is to be treated as a failure to answer.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

SUSAN CAMICIA,

Plaintiff,

v.

HOWARD S. WRIGHT CONSTRUCTION COMPANY, a Washington corporation; and CITY OF MERCER ISLAND, a municipal corporation,

Defendants.

NO. 07-2-29545-3 SEA

ORDER ON PLAINTIFF'S SECOND MOTION TO COMPEL OF DEFENDANT MERCER ISLAND

This matter comes on for hearing without oral argument on Plaintiff's Second Motion to Compel Discovery from Defendant City of Mercer Island. The court has reviewed the files and records herein, including:

1. Plaintiff's Second Motion to Compel Discovery with supporting declaration of John Budlong with exhibits;
2. Defendant City of Mercer Island's Response;
3. Declaration of Andrew G. Cooley with exhibits;
4. Declaration of City of Mercer Island Police Department Commander Jokinen;
5. Declaration of City of Mercer Island Fire Chief Heitman;
6. Declaration of Sergeant Ryan Parr;
7. Plaintiff's Reply;[1]
8. Supplemental Declaration of Budlong.

Now, therefore, it is hereby ORDERED that Defendant City of Mercer Island shall produce to Plaintiff by May 7, 2015:

1. All of its records of other bicycle accidents, including bike-bollard collisions, on its streets and bicycle trails for the period from 1997-2014. Defense asserts "HIPAA" applies without providing specific authority. Further, RCW 70.02 does not apply. Plaintiff is not requesting "health care information" per RCW 70.02.010(16). Defense counsel's additional assertion in his declaration that no other accidents occurred "at this location" is not persuasive, given Plaintiff's request was not

[1] Both Plaintiff's motion and its reply exceed page limits set out in KCLCR 7. Belatedly, Plaintiff moved for permission to file an overlength reply at the same time as filing the overlength reply. The timing of such a motion is meaningless.

limited to "this location".

2. The City's 2005 staff and attorney reports and hearing transcripts to the Mercer Island Council on whether the City is authorized to close the I-90 trail to bicyclists.[2].

3. The policies of the City's excess reinsurers and any documents affecting their coverage.

If defendant City of Mercer Island does not timely produce all of the documents in paragraphs 1 and 2 to Plaintiff, its counsel shall certify pursuant to CR 26(g) that he and the City have searched all of its files and records where the documents reasonably may be located, has asked all of the City's employees who may possess or control the documents, and has otherwise made reasonable inquiry to obtain the documents, and that the documents do not exist to the best of his knowledge and belief and to the best of the City's knowledge and belief.

It is further ORDERED that the requests for (1) all original source digital (*i.e.* jpeg, bmp, gif) or physical photographs taken by investigating Mercer Island Police Officer Ryan Parr on June 19, 2006 at the scene of Susan Camicia's accident and (2) the software necessary to open the 3D analysis files created by its accident reconstruction expert Gerald Bretting are DENIED.

Due to the fact Plaintiff filed overlength briefs in violation of KCLCR7, and certain of Plaintiff's requests were not meritorious, the Court DENIES the motion for sanctions against Defendant City of Mercer Island and its defense counsel.

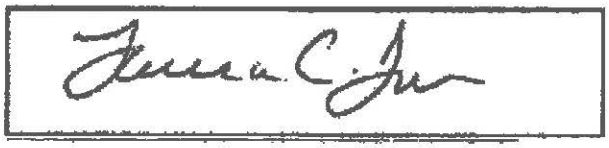
Dated this _____ day of May, 2015.

LAURA INVEEN, JUDGE

[2] Defendant's position is unclear to this writer. Counsel suggests these have been provided, or that they are accessible on-line, referencing a website, which the undersigned reviewed. That website did not appear to have anything related to the years prior to this accident.

King County Superior Court
Judicial Electronic Signature Page

Case Number:	07-2-29545-3
Case Title:	CAMICIA VS WRIGHT CONST CO, HOWARD S ET ANO
Document Title:	.ORDER ON MOTION TO COMPEL
Signed by:	Laura Inveen
Date:	5/6/2015 9:00:00 AM



Judge/Commissioner: Laura Inveen

This document is signed in accordance with the provisions in GR 30.

Certificate Hash:	E38BBAEA97798E86CC98E92119CF685F545E5D70
Certificate effective date:	7/29/2013 12:52:38 PM
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

SUSAN CAMICIA,

Plaintiff,

v.

CITY OF MERCER ISLAND,

Defendant.

No. 07-2-29545-3 SEA

ORDER ON MOTION FOR SANCTIONS/ADMITTING EVIDENCE OF OTHER ACCIDENTS

This matter comes before the Court on two distinct, but interrelated issues: Plaintiff's motion to admit other accident evidence and Plaintiff's motion for sanctions resulting from asserted discovery violations. To the extent other accident evidence would not be admissible under traditional evidentiary analysis, Plaintiff asks the court to allow it as a sanction. The Court has reviewed the files and records herein, including:

1. Plaintiff's Second Motion to Compel Discovery from Defendant City of Mercer Island with supporting Declaration of John Budlong with exhibits and plaintiff's reply memo;
2. Defendant City's Response to Plaintiff's Second Motion to Compel with supporting Declarations of Steve Heitman, David Jokinen, Ryan Parr, and Andrew Cooley with exhibits;
3. Plaintiff's Motion for a Default Judgment with supporting Declaration of John Budlong with exhibits;
4. Plaintiff's Motion to Enforce Court's May 6, 2015 Discovery Order with supporting Declaration of Tara Eubanks with exhibits;
5. Defendant's CR26(g) Certification;
6. Plaintiff's Response to Defendant's CR26(g) Certification
7. Declaration of Andrew Cooley in Opposition to Discovery Sanctions;
8. Declaration of Karin Roberts, Deputy City Clerk
9. Plaintiff's Offer of Proof to Admit other relevant bicycle accidents with supporting Declaration of John Budlong with exhibits ;
10. Declaration of Richard Gill;
11. Declaration of Edward M. Stevens;
12. Declaration of Susan Camicia;
13. Declaration of David Dornbush;

14. Declaration of Coryn Gjerdrum;
15. Declaration of Paul R. Plein;
16. Defendant's Response to Offer of Proof with supporting Declaration of Andrew Cooley with exhibits;
17. Declaration of Gerald P. Bretting Regarding Group Riding Dynamics;
18. Declaration of Richard Conrad;
19. Declaration of Police Officer Bob Delashmutt;
20. Declaration of Firefighter Darrel Gordon;
21. Declaration of Bowen Hucks;
22. Declaration of MIPD Officer Hyderkhan;
23. Declaration of Beth Kearny;
24. Declaration of Jason Kintner;
25. Declaration of Trevor Kissel;
26. Declaration of Chris Martindale;
27. Declaration of Steve McCoy;
28. Declaration of Mercer Island Detective Joe Morris;
29. Declaration of Jamie Schoenborn;
30. Supplemental Declaration of Paul Plein; and
31. Plaintiff's Reply Memorandum on Offer of Proof to admit other relevant bicycle accident and on motion for default or evidentiary sanctions with supplemental Declaration of John Budlong with exhibits.

The Court having heard oral argument and deeming itself fully advised, it is hereby ORDERED that Plaintiff's Motion for Discovery Sanctions against defendant City of Mercer Island is granted and denied in part, pursuant to the following Findings and Conclusions:

FINDINGS

1. On June 19, 2006, plaintiff Susan Camicia sustained a spinal cord injury in a bicycle-bollard collision on the I-90 Trail in Mercer Island near the intersection of 81st Ave. SE and North Mercer way.

2. On that date, Mercer Island Police Officer Ryan Parr responded to plaintiff's accident and took photos of the conditions at the accident scene.

3. The day following the accident, the City of Mercer Island retained attorney Andrew Cooley to defend it against potential personal injury claims arising from Plaintiff's accident. Since that time, he has continued to be the lead attorney for the City in this

litigation. He is an experienced attorney in the area of municipality defense, and has been practicing law for 30 years. He has been integrally involved, directing the strategy and themes of the case, including taking and defending depositions, overseeing discovery, conducting witness interviews and site investigation, working with experts and consultants, preparing for, and arguing motions. From June 20, 2006 until 2015, Mr. Cooley coordinated the City's defense against plaintiff's claims with Mercer Island City Attorney Katie Knight[1].

4. Plaintiff commenced this lawsuit in August, 2007 and served her first discovery requests on the Defendant City in October, 2007. Relevant questions and the October 30, 2007 answers to those requests are as follows:

Int. 14: Have you or your agents, investigators, lawyers or anyone else investigated any incidents involving danger, injury or death to bicyclists or pedestrians because of fences, bollards or other obstructions or defects in any sidewalk, path or public right-of-way in the City of Mercer Island, either before or after this incident? If so, please identify or describe all such investigations and accident locations, the name, address, telephone number and job title of each person who reported or investigated each accident; the date of each accident, the name and number of each incident report and investigation report, and the name, address, telephone number and job title of each person who has custody of the reports or investigation documents.

ANSWER: Objection. Compound. Vague as to time. Overly broad as to location. If by "incidents you mean accidents, there have never been any bicycle vs. bollard accidents to the City's institutional knowledge. Otherwise, the question is vague as to time, the word "incident" and "danger". Certainly there have been pedestrian incidents in the City since its incorporation.

There was one bike accident in October 2007, where a bicyclist turning around fell off a bicycle and partially struck a cement post on EMW. See police report.

Int. 15. Are you aware of any notices, reports, complaints, claims or other communications from any source about safety concerns to pedestrians or bicyclists from fences, bollards or other obstructions or defects in any sidewalk, path or public right-of-way in the City of Mercer Island, either before or after this incident? If so, please identify or describe the dates and details of all such notices, reports or complaints, the names, addresses and telephone numbers of all persons who made and received them, all

[1] In 2015 Knight left the City's employment.

documents electronic communications or tangible things concerning them, and all decisions or actions taken in response to such notices, reports or complaints.

ANSWER: Objection. Compound. Vague as to what is meant by "notice" or "other communications" and "other obstructions or defects." ...

Int 20. Do you, your representatives, agents or attorneys have any photographs, movies, videos, diagrams, models, surveillance photography or videos or any other depictions concerning the physical facts or scene of the incident, the plaintiff, plaintiff's injuries, or any other potentially relevant object, matter or issue in this case? If so, please identify the subject, date and person preparing each such representation, the nature of the representation (whether map, diagram, model, photograph, movie, etc.), and the name and address of the present custodian.

ANSWER: Yes, see attached.

Please produce genuine, authentic originals or copies of the following documents and things:

11. All incident reports, investigative reports or other documents, drawings, computer data, photos, movies, videos or other depictions relating to other bicycling and pedestrian accidents and related safety concerns as referenced in Interrogatory Nos. 14 and 15.

RESPONSE: See documents previously attached. [The City produced a 2007 police report about a bicyclist who turned around and fell off his bicycle]

15. All photographs, movies, videos, diagrams, models, etc. as referenced in Interrogatory No. 20.

RESPONSE: See attached.

5. Although the City noted broad objections, it went on to answer the questions. The City's responses did not indicate that it was withholding any information or documents responsive to Plaintiff's discovery requests. A reader would reasonably infer the City had substantively answered the interrogatories in question.

6. The City did not seek a protective order to limit or eliminate its obligation to respond fully to Plaintiff's discovery requests,

7. City officials have known since before Plaintiff's accident that records of bicycle accidents, (including bike-collard collisions) are kept by its Fire Department.[2] Neither

the City nor Mr. Cooley searched for records of other bicycle accidents responsive to Plaintiff's discovery requests in the City's Fire Department. Cooley strategically ignored looking at Fire Department records. Nor was a complete review made of the Police Department, City Clerk's or City Attorney's files, or records where they knew or should have known that responsive information might be located.

8. After Plaintiff's first discovery requests were propounded, the City destroyed claims and complaints that were potentially responsive to Plaintiff's discovery requests, causing such records preceding Plaintiff's accident to be lost. During the course of litigating the discovery issues in May, 2015, it was disclosed that the City had not searched its "claims for damages" forms for records responsive to the discovery requests. When ordered to do so, it was revealed that all claims for damages forms and records relating to claims for damages generated before the Plaintiff's accident had been destroyed.[3]

9. Prior to Plaintiff's accident, on July 16, 2005, Paul Pleine was injured in a bicycle-bollard collision on a portion of the I-90 Trail located on Washington Department of Transportation right of way within Mercer Island to which Mercer Island Fire Department personnel responded and arranged for Pleine to be taken to Swedish Hospital. Fire Department personnel prepared a report of the Pleine incident.

10. On August 22, 2005, City Parks Director Peter Mayer reported a recent "cyclist-bollard post collision" in an email to City Engineer Patrick Yamashita, which was copied to City Traffic Engineer Nancy Fairchild and other City personnel. Since there has been no evidence produced of any other cyclist-bollard collision in that time-frame, the only

[2] April, 2005 email from Police Department Commander Lacy to Parks Director Mayer.
[3] Pursuant to the Declaration of Karin Roberts, Deputy City Clerk, this destruction was in accordance with the general retention schedule for local agency records as set forth by the Washington State Archives, which provides these records are retained for a period of six years after the claim is closed.

reasonable inference is that Mayer was referring to the Pleine incident. This email was not produced in initial responses to discovery.

11. A week after Plaintiff's accident, David Smith complained to the City that the wood bollard posts on the I-90 trail were dangerous to bicyclists. The City Clerk documented the Smith complaint in City records.

12. Between February and June 2007, John Duggan made a series of complaints to the City that the wood bollard posts on the I-90 trail were dangerous to bicyclists. City Attorney Katie Knight communicated with Mr. Duggan numerous times about his complaints. City Traffic Engineer Nancy Fairchild and City Attorney Katie Knight documented the Duggan complaints in City records.

13. In August 2007, Rebecca Slivka of the Bicycle Watchdog group complained to the City that the wood bollard posts on the I-90 trail were dangerous to bicyclists. City Attorney Katie Knight was informed of Slivka's bollard complaint. City employees referred the Slivka complaint to City Attorney Katie Knight.

14. In August 2009, Joshua Putnam complained to the City that the wood bollard posts on the I-90 trail were dangerous to bicyclists. City Development Director Steve Lancaster documented the Putnam complaint in City records.

15. The Defendant City and attorney Cooley did not disclose any information or records regarding other bicycle accidents or any related claims or complaints of injuries or safety concerns in its responses to plaintiff's first discovery requests.

16. After writing his August 22, 2005 email identifying a recent bike-bollard collision, City Parks Director Peter Mayer testified in his February 2009 deposition that no one "had

ever notified him that there was some danger with regard to wooden bollards used in park bike path settings."

17. After receiving Mayer's August 22, 2005 email identifying a recent bike-bollard collision, City Engineer Patrick Yamashita testified at his deposition in July 2008 that to his knowledge the City of Mercer Island had not received any complaints about bollards before plaintiff's accident.

18. The photos the City produced in October, 2007 did not include the photos Mercer Island Police Officer Ryan Parr took of the accident scene on June 19, 2006. Mr. Cooley did not produce Officer Parr's June 19, 2006 accident scene photos until May 6, 2009, which was after he had taken two depositions of the plaintiff and had deposed all but one of her expert witnesses.

19. Officer Parr's photos were relevant because they showed the scene conditions soon after the accident, including lighting conditions and construction signs in Plaintiff's lane of travel on the I-90 Trail. It deprived Plaintiff of the opportunity to refresh her recollection of existing conditions before her depositions and deprived her expert witnesses of that evidence before their depositions.

20. Mr. Cooley does not have an explanation why Officer Parr's accident scene photos were not produced to plaintiff for 18 months after he answered plaintiff's first discovery requests in October, 2007.

21. The evidence does not support a finding that the City and Mr. Cooley deliberately concealed Officer Parr's June 19, 2006 accident scene photos to obtain a tactical advantage over plaintiff in this litigation. The photos were referenced in a police report evidence inventory, which was provided to Plaintiff in initial discovery responses. The

photographs showed construction signs in the travelled pathway purportedly placed in the pathway by the agent of a co-defendant, the disclosure and existence of which would be helpful to the City's case in shifting liability, to the extent it existed, to the co-defendant Howard S. Wright Construction. Further, there is no evidence this late disclosure has resulted in prejudice to Plaintiff.

22. On June 28, 2014, the City was informed of Coryn Gjerdrum's bicycle pitch-over accident which occurred on that day on the same unmarked bollard that Susan Camicia hit.

23. On April 23, 2015, Mercer Island's defense counsel represented to Plaintiff's counsel in writing "there are zero reports (of accidents) connected to plaintiff's accident site", despite the City's knowledge of Gjerdrum's June, 2014 collision, as documented in the Mercer Island Police Department incident report.

24. On May 6, 2015, as a result of concerns that came to light that the City had not been responsive to initial discovery requests, including the fact it had not searched Fire Department records, the Court entered a broad discovery order designed to ensure all records which could lead to potentially relevant evidence were provided to Plaintiff. The order required the City produce to Plaintiff by May 7, 2015 "All of its records of other bicycle accidents, including bike bollard collisions, on its streets and bicycle trails for the period from 1997-2014."

25. Between May 11 and May 14, 2015, the City produced hundreds of records of other bicycle accidents, claims, complaints and related safety concerns that were responsive to plaintiff's October 2007 discovery requests and the May 6, 2015 order, including records

of 5 other bicycle bollard collision incidents– the Pleine, Gjerdrum, Petty, Elmer and Easton collisions.

26. The City's destruction of all pre-incident records of claims and complaints about bicycle accidents and injuries while Plaintiff's discovery requests were pending resulted in spoliation of potentially relevant evidence, and may have prevented Plaintiff from proving whether Mercer Island had prior notice of bicyclists being injured on bollards or other obstruction hazards, except for the Plein bike-bollard collision. It is acknowledged that some, or all, of these incidents would have also been disclosed in the (late) disclosed Fire Department records, Police Department records, or lawsuits. We will never know. The City is not entitled to a favorable inference, as the destruction of these records was wholly within its control.

27. Plaintiff did not discover records of the other bicycle accidents[4] and other bike-bollard collisions until Defendant City produced them pursuant to the court's May 6, 2015 discovery order. Plaintiff was unable to provide evidence to her expert witnesses in time to determine the similarity and relevancy of other bicycle accidents and prepare their testimony for trial on May 11, 2015, requiring a trial continuance to October 19, 2015.

28. The City's failure to respond fully to discovery was willful, as it was without reasonable excuse or justification.

29. The City's and its defense counsel's responses to Plaintiff's first discovery requests were false, misleading and evasive.

[4] The court recognizes that many of the bike accidents did not fall under the initial discovery request, and were produced pursuant to the court's broader order of May 6, 2015 which was issued due to the City's previous misleading and incomplete initial responses.

30. To date, Defense counsel shows no indication of a plan to change his conduct in the future. Defense counsel is unapologetic, defensive, and refuses to admit that he or the City violated discovery obligations.

31. Throughout the course of discovery and litigation surrounding it in this proceeding, counsel has made comments that are misleading. Examples include:

a. In responding to Interrogatory 14, the City answered: "*If by 'incidents you mean accidents, there have never been any bicycle vs. bollard accidents to the City's institutional knowledge.'*" (Emphasis added.) The qualification of "institutional" knowledge appears to be a term designed to insulate the city from making full disclosure.

b. Interrogatory 15 sought information about incidents "in any sidewalk, path or public right-of-way in the City of Mercer Island, either before or after this incident?" In attempting to justify the failure to disclose the Plein accident, defense counsel rephrased the question in his own pleadings to change the meaning of the question, by using the term "Mercer Island right-of-way". He then argued that since the Plein accident occurred in WSDOT right-of-way, there was no need for the city to disclose the incident – regardless of the fact it occurred on right-of-way within the City of Mercer Island, the City's own Fire Department responded to the incident, and a city department head referenced the incident in an email one month after it happened. The Court's experience with defense counsel has demonstrated that he is extremely well-spoken and talented with words. The court can only assume this re-phrase was intentional.

c. To this date, Defense counsel argues that reports of accidents maintained within the City's Fire department are not subject to disclosure due to "HIPPA". In his 4/29/15 Declaration he writes "I do not believe that it occurred to anybody that Plaintiff was also

seeking *medical records* prepared by the Fire Department." The fact of the matter is that Plaintiff never asked for medical records. In oral argument Mr. Cooley acknowledged that he has never searched Fire Department records for responses to discovery in past cases, and suggests no intent to change that practice. Given the fact that defense counsel's law practice focuses primarily on municipalities, it is highly likely this issue will come up in the future.

CONCLUSIONS

The court is guided by the analysis of discovery sanctions set out in *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009). Quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 356 (1993), 858 P.2d 1054, the Supreme Court reiterated: "The purposes of sanctions orders are to deter, to punish, to compensate and to educate." 167 Wash.2d at 584. The *Magana* court provides further direction to the trial court when determining sanctions:

> A court should issue sanctions appropriate to advancing the purposes of discovery. *Burnet*, 131 Wash.2d at 497, 933 P.2d 1036. The discovery sanction should be proportional to the discovery violation and the circumstances of the case. Id. at 496-97, 933 P.2d 1036. "[T]he least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong." *Fisons*, 122 Wash.2d at 355B56, 858 P.2d 1054 (footnote omitted).

167 Wash.2d at 590.

The defendant City and its defense counsel willfully violated the discovery rules by not conducting a reasonable search for its records; by not seeking a protective order if they wished to narrow the scope of discovery; by not disclosing the City's records of complaints; by falsely representing to Plaintiff "*there have never been any bicycle vs. bollard accidents to the City's institutional knowledge*"; and by not supplementing its discovery responses with correct responses when it knew the response was incorrect when made.

Plaintiff argues that "lesser sanctions" such as a monetary fine, a continuance, and striking the City's fault apportionment defense, are insufficient sanctions to impose. Plaintiff specifically does not request any of those sanctions. Plaintiff argues that the only appropriate sanction[5] is for the court to admit evidence of all or some of other bicycle accidents and related claims and complaints. The court addresses each of those potential sanctions:

1. Default. Default is reserved as the most severe sanction, when no lesser sanction will suffice. The Court finds imposition of all the lesser sanctions addressed hereafter will adequately deter, punish, compensate, and education, and denies the motion for default.

2. Continuance. As a result of the City's delay in producing responsive records, the court has allowed two continuances. One was from May 11 to May 26, 2015, the purpose of which was to determine what records had not been disclosed by the City. The other was from May 26 to October 19, 2015. The purpose of the second continuance was to allow Plaintiff's experts to review the newly disclosed discovery from the City, and to determine what, if any, was relevant to incorporate into their opinions. The continuance alone is an insufficient remedy and has not adequately addressed the prejudice to the plaintiff or the judicial system. It was granted on the day trial was set to begin, disrupting trial preparation and the court's schedule. Further, to the extent liability exists, compensation to the Plaintiff will be delayed, and the defendant will be rewarded by such a delay.

3. Striking the fault apportionment defense. This potential sanction has not been addressed by either party, and therefore the court declines to address it.

4. Monetary sanctions. Plaintiff argues that her fee agreement with counsel provides that to the extent monetary sanctions are awarded, they would go to Plaintiff's counsel, rather than Plaintiff, and thus an award of monetary sanctions would be of no

[5] Plaintiff's initial position was that she should be awarded a default as a sanction, and she has preserved this request.

benefit to Plaintiff. This argument is not persuasive to the court. Monetary sanctions would serve to compensate Plaintiff's counsel for their time expended in pursuing this late disclosed discovery. Further, there would be nothing to preclude counsel from discounting their final fee, should they choose, to take into account sanctions received. Additionally, it is highly likely that the additional work Plaintiff's experts did to review the additional records, and incorporate that review into updated reports and opinions was an expense for which compensation is in order. Finally, to the extent monetary sanctions serve as a punishment, it is irrelevant as to whom the sanctions are directed.

5. Fine. To the extent Plaintiff is not requesting monetary sanctions, a substantial monetary fine is necessary to deter future discovery violations, and to punish for the violations. Given the magnitude of potential damages, the cost to the Plaintiff and to the Court for the resources devoted to these issues, and continuing the trial on the date scheduled, a substantial fine is in order. The Court finds that $10,000 is a conservative figure to accomplish the goals of discovery sanctions. The Court orders as a joint and several obligation the City and Defense Counsel to pay a total fine of $10,000 to the Legal Foundation of Washington by October 19, 2015 for the provision of legal services to those with financial need.[6]

6. Evidentiary rulings as a sanction. Granting a continuance and imposing monetary sanctions will only partially achieve the purpose of sanctions in this case. Neither will bring back potential relevant evidence which was destroyed after the City was served with Plaintiff's discovery requests. Should liability be determined against the City, the potential damage verdict is in the multi-millions dollar range. To the extent there is evidence missing, its destruction was in the control of the City. For purposes of determining sanctions, the court must infer that its existence would have strengthened the Plaintiff's case. As a result, the court is left with having to fashion an order that would,

[6] This payment shall be in addition to any budgetary appropriation the City would have made or Defense counsel would have donated to this fund.

in effect, strengthen the Plaintiff's case. As a discovery sanction, in considering the admissibility of evidence of prior accidents, the court's application of its discretion will weigh heavily in favor of admissibility. In doing so, the court will not allow evidence which has no relevance, which will cause undue delay, waste time, or confuse the issues. In that regard, the Court rules as follows:

a. **Plein.** There is some out of state authority to suggest the "substantial similarity" standard is relaxed for prior accidents when offered on the issue of notice rather than dangerousness. This standard has not been addressed in Washington. Plaintiff offers the 2005 Paul Plein bicycle-bollard collision under the relaxed "substantial similarity" test. As a discovery sanction, the court will apply the "relaxed standard" and allow evidence of the Plein accident on the issue of notice to the City of a collision incident with a similar bollard.[7]

b. **Gjerdrum.** Coryn Gjerdrum's 2014 collision and plaintiff's 2006 collision with the same unmarked, undelineated, unreflectorized bollard were substantially similar, and the Gjerdrum accident is therefore relevant and admissible on whether the bollard was inherently dangerous.

c. **Bike accidents at the intersection of 81st Ave. SE and I-90 trail.** Pursuant to ER 702, Plaintiff's experts Gill and Stephens may testify to bike accidents which have occurred at the intersection of 81st Ave. SE and the I-90 trial (Hammond, Shankland, Amadon, Powell, Rudolph, and Lee) to the extent they are a basis for their opinions.[8] The accidents are not independently admissible. Such opinions are not dependent upon who was at fault in the accident, and therefore, the parties shall not be allowed to litigate that issue. Although Defendant may cross-

[7] The fact the City may not have had the legal authority to make corrections to the Plein bollard is not relevant. The accident was responded to by the MI Fire Department personnel, both of whom (Trevor Kissel & Darrel Gordon), declared that had they had any concerns regarding the bollard, they would have communicated them to the City Parks or Public Works departments. 6/30/15 Dec of Kissel, 6/27/15 Dec of Gordon.

[8] In so ruling, the court is not addressing each of the five theories of liability Plaintiff asserts the experts will be opining on. That will be dependent upon how the evidence develops at trial.

examine the experts on their knowledge of the accidents, Defendant shall not be allowed to introduce extrinsic evidence of the accidents.

It is premature to rule on whether the accidents are admissible for purposes of impeaching Defendant's expert(s). The court recognizes Washington authority on whether "dissimilar" accidents may be admitted when relevant to the witness's credibility is unclear[9]. Although the court is inclined to apply a relaxed standard in this case as a discovery sanction, a nexus between the accident and the defense expert's opinion is necessary. This will ultimately be determined at trial.

d. **Bike Accidents near the Park &Ride Entrance.** The Patton accident occurred near the Park and Ride entrance. The court finds no relevance to this accident, and no evidence of it shall be elicited.

e. **O'Campo email.** The court declines to admit the O'Campo email as a sanction, maintaining its prior ruling

f. **Post-accidents complaints.** The court declines to admit evidence of post-accident complaints about the bollard as a sanction (Smith, Duggan, Slivka and Putnam), maintaining its prior ruling.

Spoliation of Evidence Jury Instruction. The court will favorably consider a spoliation of evidence jury instruction relating to the destroyed claims, should one be offered.

New issues raised in Plaintiff's Reply. The court declines to consider new issues raised in Plaintiff's Reply materials, as procedurally improper.

Done this ____ day of September, 2015.

JUDGE LAURA C. INVEEN

[9] In violation of GR 14.1, Defendant City cites to an unpublished case on this subject. *Bolleau v. Sang Ryong Yoo*, 170 Wash. App. 1022(2012).

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Judicial Electronic Signature Page

Case Number:	07-2-29545-3
Case Title:	CAMICIA VS WRIGHT CONST CO HOWARD S ET ANO
Document Title:	ORDER ON SANCTIONS/EVIDENCE
Signed by:	Laura Inveen
Date:	9/14/2015 3:48:17 PM

Judge/Commissioner: Laura Inveen

This document is signed in accordance with the provisions in GR 30.

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DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the Brief of Appellants in Court of Appeals Cause No. 74048-2-I to the following:

Andrew G. Cooley
Jeremy W. Culumber
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104

John Budlong
Law Offices of John Budlong
100 Second Avenue South, Suite 200
Edmonds, WA 98020

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

DATED: March 3, 2016, at Seattle, Washington.

Stephanie Nix-Leighton

Stephanie Nix-Leighton, Legal Assistant
Talmadge/Fitzpatrick/Tribe