Case No. 92481-3

SUPREME COURT OF THE STATE OF WASHINGTON

JOHNSON BROTHERS CONTRACTING, INC.,

Plaintiff/Appellant/Petitioner,

vs.

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

Defendants/Respondents,

and

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

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

ANSWER TO PETITION FOR REVIEW

D. R. (ROB) CASE (WSBA #34313)
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I. IDENTITY OF RESPONDENTS

There are multiple, unrelated defendants in this case. The Respondents on this "Answer to Petition for Review" are defendants Charles L. Blevins, "Jane Doe" Blevins, Zine A. Badissy, and "Jane Doe" Badissy (hereinafter collectively referred to as "defendants" and/or "Respondents").[1]

II. CITATION TO COURT OF APPEALS DECISION

The "Petition for Review" concerns Division Three's unpublished decision filed on September 24, 2015, *Johnson Bros. Contracting, Inc. v. Blevins*, 2015 WL 5619164.

III. THE PETITIONER DOES NOT STATE PROPER "ISSUES"

The Court should summarily reject the Petition for non-compliance with RAP 13.4(c)(5). That rule requires the Petitioner to provide "[a] concise statement of the issues presented for review." *See* RAP 13.4(c)(5). What this Petitioner offers are two broad-sweeping, run-on sentences that are anything but concise. The first sentence contains 67 words and the second contains 89 words. Both sentences are crammed with extraneous (and false) assertions. *See Petition for Review*, pp.1-2.

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[1] By contrast, co-defendants Mt. Adams Trucking, Denny Ames, "Jane Doe" Ames, Tim Duke, and "Jane Doe" Duke are not participating on this appeal, and they are not represented by counsel.

"Concise" is defined as "marked by brevity of expression or statement" and "free from all elaboration and superfluous detail". *See www.merriam-webster.com/dictionary/concise.* Accordingly, this Court requires a Petitioner to state its issues presented for review "with specificity." *State v. Collins*, 121 Wn.2d 168, 178, 847 P.2d 919 (1993). A Petitioner cannot broadly challenge "the entire Court of Appeals opinion." *See Clam Shacks of America, Inc. v. Skagit County*, 109 Wn.2d 91, 98, 743 P.2d 265 (1987). Yet that is what this Petitioner attempts, which is improper.

The Court is justified in summarily rejecting a Petition when it "fails to clearly state the issues for review". *See e.g., State v. Coria*, 146 Wn.2d 631, 655, n.8, 48 P.3d 980 (2002) (Sanders, J., dissenting). There is no clarity to what the Petitioner says. Its run-on sentences are unintelligible, even after several readings. That, too, is improper.

The Respondents and the Court are not obligated to try and decipher what the supposed error(s) are. Rather, the Petitioner was obligated to comply with RAP 13.4(c)(5), which it has not done. As a result, the Petition should be summarily rejected.

IV. THE PETITIONER DOES NOT JUSTIFY REVIEW

The Court should also summarily reject the Petition because the Petitioner does not address (much less substantiate) any consideration

governing review under RAP 13.4(b)(1)-(4). Specifically, (1) the Petitioner does not identify any conflict between Division Three's ruling and a decision of this Court, (2) the Petitioner does not identify any conflict between Division Three's ruling and another Court of Appeals decision, (3) the Petitioner does not identify any significant question under the federal Constitution and/or the state constitution, and (4) the Petitioner does not identify any issue of substantial public interest. *See and Compare*, RAP 13.4(b)(1)-(4) & *Petition for Review*, pp.1-18.

Because none of the considerations is satisfied, the Petition is improper. This Court "only" accepts review when one (or more) consideration is satisfied. RAP 13.4(b). None is satisfied by this Petition, so review should be denied.

V. THE PETITIONER'S "STATEMENT OF THE CASE" IS INVALID

In violation of yet additional rules, the Petitioner's "Statement of the Case" is chock full of arguments and also assertions that lack valid supporting references to the record. This violates RAP 10.3(4) and 13.4(c)(6).

By way of example, the Petitioner imbeds the following arguments within its Statement of the Case: (1) that its witnesses supposedly testified "truthfully", *see Petition*, p.5; (2) that the defense supposedly "taunted the Plaintiff's witnesses" during trial, *see id.*, p.5; (3) that the plaintiff

supposedly acted "[i]n full compliance with CR 26(e)", *see Petition*, p.6; and (4) that the at-issue photographs were supposedly "favorable" to the plaintiff's case, *see id.*, p.7. Each of these arguments is just that – an argument.

Also by way of example, the Petitioner makes the following assertions without providing valid supporting references to the record, because no support for them exists within the record: (1) that Division Three supposedly used "after the fact hindsight", *see Petition*, pp.2 & 7; and (2) that the plaintiff's witnesses supposedly testified during depositions that the at-issue photographs "had been given to former counsel", which is cited to a Declaration by plaintiff's counsel – not to the deponents' actual testimony, *see id.*, p.5. These assertions are not true. They are merely what Petitioner's counsel wishes were true, yet they lack valid support in the record.

As before, this Court should summarily reject the Petition. The Petitioner has improperly crammed arguments and unsupported assertions into its Statement of the Case.[2]

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[2] Additional assertions by the Petitioner made within its "Argument" section also lack substantiation. These include (a) the notion that the evidentiary weight of the photographs would have been "helpful" to the plaintiff's case, *see Petition*, pp.17-18; and (b) the notion that defense counsel "pretend[ed] to be upset" when the photographs were suddenly located, *see id.*, p.17.

VI. THE PETITIONER IGNORES THE STANDARD OF REVIEW

Another notable deficiency is that the Petition for Review fails to recite the applicable standard of review. *See Petition*, pp.1-18. No doubt, this is because the standard is not in the Petitioner's favor.

This appeal concerns the trial court's imposition of sanctions against the plaintiff due to a discovery violation. Thus, the applicable standard of review is the deferential "abuse of discretion" standard. *See e.g.*, *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) ("A trial court exercises broad discretion in imposing discovery sanctions . . . and its determination will not be disturbed absent a clear abuse of discretion"); *accord Johnson Bros. Contracting, Inc. v. Blevins*, 2015 WL 5619164, at *5 (citing *Mayer v. Sto Industries*).

To be explained below, the Petitioner has not shown that the trial court abused its discretion nor that Division Three committed any error. The Petitioner simply repeats the same arguments it made to both lower courts, in hopes of getting a proverbial third bite at the apple. Those arguments are meritless, as they have always been.

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VII. RESPONDENTS' STATEMENT OF THE CASE

The Respondents respectfully direct the Court's attention to the factual summary provided by Division Three in its decision. That summary, rather than the Petitioner's improper "Statement of the Case", is what should guide this Court's decision.

The critical facts are as follows: (1) the defendants served discovery requests upon the plaintiff in November 2010, *see Johnson Bros. Contracting, Inc. v. Blevins*, 2015 WL 5619164, at *2; (2) those discovery request sought, *inter alia*, any photographs of the allegedly damaged equipment, *see id.*, at *2; (3) in fact, the plaintiff's agents had taken photographs in June 2007, yet no photographs were provided in response to the defendants' discovery requests, *see id.*, at **1-2; (4) rather, it was not until September 17, 2015, in mid-trial, that the plaintiff first provided copies of the photographs to the defense, *see id.*, at *3; (5) the plaintiff's explanation for the untimely disclosure was that the photographs had been misplaced by its agents and/or its former counsel, Toni Meacham, *see id.*, at **2-4; (6) the untimely disclosure of the photographs caused substantial prejudice to the defendants, because their trial defense was based on the non-existence of the photographs and spoliation of evidence, *see id.*, at **3-4 (citing 3 RP at 243) & at *7 (citing 3 RP at 270 & 271); (7) plaintiff's current counsel, David B. Trujillo,

made no attempt to locate or obtain the photographs during the 31 months between service of his client's discovery responses in March 2011 and mid-trial on September 15, 2013, which the trial court found to be an "unreasonable omission", *see Johnson Bros. Contracting, Inc. v. Blevins*, 2015 WL 5619164, at **7-8 (citing 3 RP at 256, 270, 157 & 266-267); and (8) the trial court considered permanently excluding the photographs, but instead declared a mistrial as an accommodation to the plaintiff and ordered the plaintiff to reimburse the defendants' incurred costs and attorneys' fees for the aborted trial, *see id.*, at *4 (citing 3 RP at 269).

Against this backdrop, with all fault lying with the plaintiff's agents, the plaintiff's former counsel and the plaintiff's current counsel, the plaintiff nevertheless contended (and still contends) that the defendants should have been provided no relief. According to plaintiffs' counsel, "[i]t's just one of those things in life that happens." *See Johnson Bros. Contracting, Inc. v. Blevins*, 2015 WL 5619164, at *4 (citing 3 RP at 269). This is entirely self-serving. The Petitioner wants the defendants to receive no reimbursement for the costs and fees incurred on the aborted trial, even though all fault lies on the plaintiff's side. *See Petition*, pp.17-18.

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VIII. ARGUMENT

A. The Plaintiff is Asking for an Absurd Result

At the outset its merits analysis, this Court should briefly reflect on what the Petitioner is asking for. Despite all fault lying on the plaintiff's side, the plaintiff asks this Court to reverse the reimbursement award to the defendants of their costs and fees incurred on the aborted trial. The plaintiff wants this Court to "stick" the defendants with financial losses for the aborted trial occasioned by the plaintiff's discovery violation. That is absurd. How would that be justice? Why should the defendants suffer financially due to the plaintiff's violation? The Petitioner's only attempted answer is to contend that, contrary to what both lower courts held, no discovery violation occurred. That is equally absurd.

The at-issue photographs were undoubtedly discoverable, discovery was sought, and yet the photographs were not timely disclosed. They were disclosed mid-trial, nearly three years after they were sought via discovery. Petitioner's current counsel invests considerable time and space trying to parse the language of the discovery rules and trying to focus the Court's attention on his original "certification" of the plaintiff's discovery responses back in March 2011. His hope is to distract the Court from the fact that he made no renewed effort to locate the photographs during the subsequent 31 months. Yet that omission lies at the core of

both lower court decisions.

B. Mr. Trujillo Failed to Exercise Reasonable Diligence

These photographs were critically important. It was flatly unreasonable for Mr. Trujillo to let nearly three years go by without renewing any effort to locate them, choosing only to make a renewed effort mid-trial after his witnesses had testified poorly. *See Johnson Bros. Contracting, Inc. v. Blevins*, 2015 WL 5619164, at *8 (citing 3 RP 266-267 & 270) (trial court's observation that the plaintiff's witnesses' testimony was "inconsistent" and reflected "little memory of the specific damage[s]" to the equipment) & CP 158 (trial court "Order", entered 11/01/13, p.9, handwritten interlineations) ("The witness[es]' testimony &/or memory was poor & inconsistent[,] and their credibility on the damages was suspect.").

Once Mr. Trujillo finally did make a renewed effort, mid-trial, the photographs were promptly located. He does not, and cannot, offer a reasonable explanation for not making a renewed effort earlier. He contends that he had "no indication that any further searching would do any good". *See Petition*, p.5. But that does not excuse his failure to try over the 31 months preceding trial. As Division Three wrote:

> Where documents requested in discovery are this important, greater diligence is required to establish a reasonable search.

See Johnson Bros. Contracting, Inc. v. Blevins, 2015 WL 5619164, at *7

Mr. Trujillo accuses both lower courts of engaging in "pure and completely unsupported hindsight speculation" for holding him accountable for not renewing the search until mid-trial. *See Petition*, p.12. To the contrary, it is a matter of basic common sense that if Mr. Trujillo had acted diligently, the photographs might have been found prior to trial such that the defendants' time and money would not have been wasted on an aborted trial. When it really mattered to the plaintiff and its lawyers, the photographs were promptly found. Letting 31 months go by without making any renewed effort was an "unreasonable omission", as concluded by both lower courts.

Mr. Trujillo's subjective belief that a renewed search would have been fruitless is not a valid excuse. An objective standard applies. *See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 343, 858 P.2d 1054 (1993). Mr. Trujillo failed to exercise reasonable diligence when his actions (and omissions) are evaluated under an objective standard. That was the discovery violation and it is what caused the mistrial.

C. The Photographs Were Always Under the Plaintiff's Control

It is undisputed that the at-issue photographs were always possessed by the plaintiff's agents and lawyers. However, the Petitioner

contends that because its former counsel was sloppy in her file-keeping, it would be unfair to conclude that the photographs were under the Petitioner's "control". *See Petition*, pp.13-16. In this regard, the Petitioner argues that it lacked "the ability to obtain the documents" because its former counsel had misplaced them. *See id.*, p.14 (citing *Diaz v. Washington State Migrant Council*, 165 Wn. App. 59, 77, 265 P.3d 956 (2011)). This argument is meritless.

As explained by Division Three, when a client delivers documents to its lawyer, the client has "the legal right to obtain the documents [back from the lawyer] upon demand." *See Johnson Bros. Contracting, Inc. v. Blevins*, 2015 WL 5619164, at *6 (quoting *Diaz v. Washington State Migrant Council*, 165 Wn. App. at 78). That Ms. Meacham was sloppy in her file-keeping does not change the fact that the plaintiff had the right to obtain the photographs back from her. *See Johnson Bros. Contracting, Inc. v. Blevins*, 2015 WL 561964, at *6 (citing *Am. Soc'y for Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 233 F.R.D. 209, 2012 (D.D.C. 2006) ("Because a client has the right, and ready ability, to obtain copies of documents gathered or created by its attorneys pursuant to their representation of that client, such documents

are clearly within the client's control.").[3]

Without any supporting citation of authority, the Petitioner contends that only "THE PRACTICAL ABILITY TO PRODUCE" the documents matters. *See Petition*, p.14 (capitalization in original). That is not what *Diaz*, nor any decision of this Court, says. The Petitioner is simply making things up in hopes of getting a new hearing.

It would be unfair for the defendants to have to absorb the adverse financial impact occasioned by the aborted trial as a result of the sloppy file-keeping of the plaintiff's former counsel. Rather, the plaintiff should bear that impact because all fault lies on the plaintiff's side and because the plaintiff, in turn, has recourse against Ms. Meacham for her sloppy file-keeping (whereas the defendants do not).[4]

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[3] Persuasive out-of-jurisdiction precedents are in accord. *See e.g.*, *Hanson v. Gartland Steamship Company*, 34 F.R.D. 493, 496 (N.D. Ohio 1964) ("Actual possession of documents sought under Rule 34 is not necessary, if the party has control. . . . If the items were originally produced by the party or his agents, and then turned over to the attorney, they are considered under the party's control"); *Poppino v. Jones Store Co.*, 1 F.R.D. 215, 219 (W.D. Mo. 1940) ("It is quite true that if an attorney for a party comes into possession of a document *as an attorney for that party* his possession of the document is the possession of the party.") (italic emphasis in original) & *Axler v. Scientific Ecology Group, Inc.*, 196 F.R.D. 210, 212 (D.Mass. 2000) ("A party must produce otherwise discoverable documents that are in his attorneys' possession, custody or control.").

[4] The Petitioner is incorrect in asserting that the defendants supposedly failed to obtain a ruling that the photographs were under the plaintiff's control. *See Petition*, pp.14-15. Division Three ruled, "the

D. Division One's Ruling in *Panorama Village* is Inapposite

Echoing its arguments from below, the Petitioner contends that the instant case is supposedly "very similar" to *Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 10 P.3d 417 (2003). *See Petition*, pp.16-17. To the contrary, *Panorama Village* is completely inapposite.

Panorama Village was a warranty dispute over defective roofs. The plaintiff therein retained Kelvin Hill as a testifying expert. Prior to Mr. Hill being personally retained as an expert, his company (Access Roofing) had inspected the roofs and prepared a draft repair estimate/letter. When Mr. Hill was subsequently deposed, the defense lawyers "briefly reviewed" his files and "found [the] draft letter". The defendant requested a copy of the letter, the plaintiff refused to provide one, and the defendant moved to exclude any testimony by Mr. Hill as a sanction. *See Panorama Village v. Golden Rule Roofing*, 102 Wn. App. at 430-431.

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

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photographs were under Johnson Brothers' control." *See Johnson Bros. Contracting, Inc. v. Blevins*, 2015 WL 5619164, at *6.

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

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

The critical takeaway from *Panorama Village* is <u>not</u> that the at-issue document was "in the records of [another] company", as the Petitioner contends. *See Petition*, p.17 (bracketed material in original). Rather, the takeaway is that there was still sufficient time to cure the prejudice in *Panorama Village* – that is why sanctions were not warranted there.

The instant case is different from *Panorama Village*. The trial court in the instant case specifically found (via an unchallenged Conclusion) as follows:

The photographs surfaced during trial, specifically on the eve of

> the fourth day of trial. By that point, the defendants has already planned and carried forth their trial strategy. The defendants' opening statement, witness cross-examinations and general arguments during trial cannot be effectively re-done or amended. The defendants have already had to modify their strategy due to the unexpected appearance of Mr. Ames at the start of trial. It would be unfair and unworkable for defendants Blevins and Badissy to re-modify their strategy in the midst of trial, particularly given the central importance of the photographs and that so much of trial has already occurred.

See CP 158 ("Order", p.9, lns.21-29). It follows that *Panorama Village* is inapposite to the instant case.

E. The Petitioner Has Not Made a Showing of "Abuse of Discretion"

Once a discovery violation is found to have occurred, "the imposition of sanctions is mandatory." *Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 737, 75 P.3d 533 (2003). The Petitioner has not made a sufficient showing that the trial court committed an "abuse of discretion". For instance, the Petitioner does not identify any different/lesser sanction that should have been imposed. Nor does the Petitioner offer anything to show that the award of $16,000 in reimbursement was unreasonable or miscalculated. *See Petition*, pp.17-18. Instead, the Petitioner effectively places all of its eggs in one basket by trying to show that no discovery violation occurred. That effort has already been rebutted by the Respondents above. *See supra*, pp.8-15.

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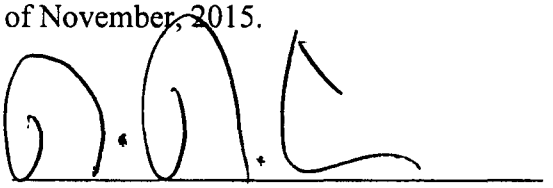
In *Mayer v. Sto Industries*, this Court held that "[t]he trial court did not abuse its discretion in determining that the [plaintiffs] should be fully compensated for the money wasted on the first trial and for the loss of use of that sum for the period of time described in the judgment." *See Mayer v. Sto Industries, Inc.*, 156 Wn.2d at 692. The same reasoning applies here. All fault lies on the plaintiff's side, so the reimbursement award to the defendants is justified and proper.

IX. CONCLUSION

The Petition should be rejected and appellate costs and fees should be awarded to the Respondents as a matter of equity, as a discovery sanction (*see e.g., Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993)), RAP 14.1-14.6, RAP 18.1, and/or pursuant to RCW 4.84.010 and .080.

DATED this 20th day of November, 2015.



D. R. (ROB) CASE (WSBA #34313)
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DECLARATIONS OF SERVICE

I, D. R. (ROB) CASE, do hereby declare and state as follows: On this day, in Yakima, Washington, I sent the original of this document via email for filing to the following recipient:

Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Email: Supreme@courts.wa.gov

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

SIGNED at Yakima, Washington, on November 20th, 2015.

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

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

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

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

SIGNED at Yakima, Washington, on November 20th, 2015.

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

OFFICE RECEPTIONIST, CLERK

To: Rob Case
Cc: tdtrujillo@yahoo.com
Subject: RE: Case No. 92481-3; Answer to Petition for Review

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Greetings:

On Supreme Court case number 92481-3, Johnson Brothers v. Blevins, attached is Respondents' "Answer to Petition for Review" in PDF format.

Consistent with the instructions provided on the Court's official website, I ask that you accept the attachment as the original filing of this item. If any problems occur with this transmission, if you would like a Word version, and/or if you would like additional hard copies, please let me know.

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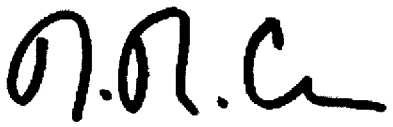

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