Case No. 321657

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

Johnson Brothers Contracting, Inc.

Appellant,

v.

Charles L. Blevins and Jane Doe Blevins, and

Zine A. Badissy and Jane Doe Badissy,

Respondents.

APPELLANT'S REPLY BRIEF

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I. REPLY TO DEFENDANTS ARGUMENTS

A. PLAINTIFF HAD ALREADY FULLY COMPLIED WITH CR 26(g) AND EVEN UNDER CR 26(e) THERE IS NO CONTINUING OBLIGATION TO UNDERTAKE ANY FURTHER SEARCH EFFORTS AT ALL THEREAFTER.

Defendants do not dispute and the trial court certainly agreed that the Plaintiff had complied with CR 26(g) in response to the Defendants' discovery requests by performing a reasonable and diligent search to see if any responsive photographs existed as requested. This is undisputed by the evidence. CP-44, lines 21-25; CP-44, lines 24-31; CP-231-232.

As far as the Plaintiff could tell, after its exhaustive search, any photos of the damages already extensively and visually described in detail in the pleadings and testimony, were no where to be found, and thereafter there were no new leads for who might have them or where else to search further. Yet, the Defendants' sole support for its entire position in this appeal, is the claim that the Judge ruled as follows:

> Mr. Trujillo's FAILURE TO RENEW his request for Ms. Meacham to SEARCH her files for the photographs between November 2010 and September 15, 2013, was an unreasonable omission.

Brief of Respondents page 2, lines 5-8 (citing to CP-157, page 8, lines 10-24)(emphasis added).

In other words, Defendants' entire argument and the Judge's entire ruling at bar now is the argument that the Plaintiff had a continuing duty to keep searching, even after every possible person that might have the photos was diligently questioned twice already, and had said they didn't have them.

The fatal flaw in the trial court's ruling above and Defendant's arguments founded thereon, is the erroneous and completely unsupported assumption that Plaintiff had any reason or any continuing legal obligation under CR 26 to conduct any further searches at all. There simply was no obligation extending beyond the already fully CR 26(g) compliant and certified good faith search that had already been exhausted and concluded and even clarified in the depositions that followed.

The only real and dispositive issue in the case was whether or not, for the response given to the discovery request, did the Plaintiff and Plaintiff's counsel, Mr. Trujillo, actually comply with CR 26(g) and conduct a

reasonable and diligent search for requested items to no avail just like Mr. Trujillo did when he first took the case as established at CP-44; RP-259. That Plaintiff and Mr. Trujillo did so is uncontested by both the Defense and the trial judge below. Even Defendants acknowledge that the record reflects that:

> When working on his client's [discovery] answers and responses, Mr. Trujillo telephoned Ms. Meacham to ask if she knew about any photographs. Ms. Meacham reported back [to Mr. Trujillo] that 'in fact [she] didn't remember ever getting any photos.'

Respondents' Brief, page 20, lines 2-5 (citing Appellant's Opening Brief, page 5, top paragraph (citing CP-44, lines 7-11)).

This was in fact the **SECOND TIME** that Ms. Meacham had told Mr. Trujillo that she did not have any photographs. The fact of the matter is that Mr. Trujillo had not only asked Ms. Meacham for the photographs again in honor of his CR 26(g) duties, but this was in addition to the fact that he had already asked her if she had the photos when he first took over the case back in April of 2009. CP-44, lines 24-31; CP-231-232.

In fact, both Plaintiff JBC and its counsel, Mr. Trujillo, prior to their CR 26(g) certification in response to the Defendants discovery at issue, had spent many months searching for the photographs, checking allover again with all the witnesses, all the current and former Plaintiff JBC employees, including but not limited to Richard Holcomb (who took the photographs at issue) and Brent Deroo, and with the Sheriff's Department, and with Deputy Hoffee, as well as Ms. Meacham. CP-44, lines 24-31; CP-231-232.

Additionally, Defendants' counsel admitted in open court that in follow up to the Plaintiff's CR 26(g) certified discovery answers, that defense counsel had deposed Mr. Holcomb and that Mr. Holcomb had confirmed during his deposition of December 12th, 2011, that Holcomb was the person who photographed the items at issue, but Mr. Holcomb simply did not know what had happened to those photographs. RP-247-248. The trial judge even concluded the same thing at RP-266, lines 2-6, wherein the Court itself noted that Mr. Holcomb had repeated those same facts in his testimony during the trial. RP-267, line 24 to RP-268, line 2.

Furthermore, the discovery production records provided by Plaintiff

to the defendants showed employee time cards expressly noting Mr. Holcomb's time that he had spent taking photographs of the damaged equipment at issue. CP-45, lines 4-10; CP-34-40.

Plaintiff JBC's counsel Mr. Trujillo also gave a full explanation on the record and as an officer of the court about how he and JBC had tried to locate the photographs several times over the years from first taking the case in April of 2009, and again in a good faith effort to respond to the Defendants' discovery request in November 2010. RP-258, line 21 to RP-263, line 12. In response, the trial judge specifically held:

> I take Mr. Trujillo at his word as an officer of the court that he in fact asked Toni Meacham to look for the documents - pardon me, look for the photographs - in November of 2010 [in response to the Defendants' November 17th, 2010 discovery request], but not again until Sunday, September 15th, 2013.

RP-269, lines 21-25. The "but not again until Sunday, September 15th, 2013" for what was a third desperation request to Ms. Meacham is crux of the entire matter before this appellate court.

There is no question the Plaintiff and Plaintiff's counsel Mr. Trujillo fully complied with the requirements of CR 26(g) and undertook a reasonable and diligent search. The only question is what was required of the Plaintiffs to do thereafter? That is - what was required of the Plaintiff **AFTER** the Plaintiff's CR 26(g) certifications were already given, and after a reasonable and diligent search for which no photographs were found or confirmed to even exist? What if anything was the Plaintiff obligated to do at all thereafter? Was the plaintiff required to keep calling and hounding Ms. Meacham or anyone else even after she and everyone else had twice told Mr. Trujillo that they did not have the photographs at issue and did not know where any photographs were.

CR 26(e), governing the Supplementation of Responses, controls and provides the answer that resolves this entire appeal in the Appellant Plaintiff's favor. To be sure, the CR 26(g) duty to make a reasonable inquiry does not impose any forever ongoing or continuing duty. Rather, CR 26(e) only provides in relevant part as follows:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to

supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as a n expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response **IF HE OBTAINS INFORMATION** upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

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

responses.

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

CR 26(e). The rule says if additional information is obtained, not that the party is obligated to forever keep searching after a reasonable and diligent search was already employed, exhausted and answered and certified as such.

In this case, there was no duty or agreement to undertake any further search efforts for any photographs or anything else. However, "if they were obtained", then and only then did CR 26(e)(2)and(3) mandate prompt supplementation at that time. To be sure however, there was no commitment or obligation to employ any additional blind searches or to repeat the same searches that had already failed, when there were no new leads calling for it. If photos happened to be located, then they would be produced. That is all.

In this case, the Plaintiff made a completely voluntary, random, desperation third attempt to locate the photos during the trial and Ms. Meacham who had twice before looked for the photos but couldn't find them,

suddenly found them in an archived storage area, misfiled in another client's file. At that point, because the photos had in fact been located, the Plaintiff then had a CR 26(e) duty to promptly disclose them to the Defendants which it did and should be commended for not sanctioned. CP-152, lines 17-23; RP-258, line 21 to RP-268, line 12; See again Appellant's Opening Brief, at Appendix A, page 2, paragraphs 7-9.

"Upon receiving the photographs, plaintiff's counsel made copies and delivered those copies to defense counsel." Respondent's Brief, page 30, lines 13-14. No one has accused the Plaintiff of any delay in immediately supplementing with the photos as required. CR 26(e) simply requires a supplemented disclosure on receipt, but it does not mandate a continuos or ongoing search obligation.

Washington Court Rules Annotated Second Edition, Volume Two, by Susan E. Foster and Marie G. Aglion of Perkins Coie LLP (2001-2002) further explains CR 26(e)'s supplementation obligations as follows:

> Rule 26(e) imposes a limited duty on a party to supplement responses to discovery requests with after-acquired

information. This duty is imposed if (1) the original response was incomplete; (2) a question directly addresses the identity and location of persons with knowledge of discoverable matters; (3) a question directly addresses the identity of person expected to be called as expert witnesses at trial; or (4) a response that was correct when made is no longer true and the circumstances are such that a failure to amend the responses is in substance a knowing concealment. Apart from these duties, a party is not required to automatically supplement its response.

. . .

Many discovery requests include a statement that the requests impose a continuing duty on the responding party. To the extent that these requests attempt to impose a duty greater than that imposed in Rule 26(e), they are ineffective. The proper method for obtaining supplementations to discovery requests is through a formal request for supplementation. Counsel would be well advised to issued such formal requests at different intervals as the case proceeds towards trial.

Id., at page 244. There simply is no continuing duty. That is fatal to the Defendants' position and to the trial court's rulings at bar now.

There is no absolutely no legal basis to find any violation of CR 26(g) or to award sanctions against the Plaintiff, absent any legal authority establishing any continuing duty to search further. On that basis the trial Court has improperly concluded that "Mr. Trujillo's failure to renew his request for Ms. Meacham to search her files [for a third time after twice already confirming to Mr. Trujillo that she did not have the photographs] for the photographs between November 2010 and September 15th, 2013 was an unreasonable omission." CP-157, lines 22-24.

Furthermore, the trial Court engaged in pure and completely unsupported hind-sight speculation, in spite of the complete absence of any duty to do so, that if Ms. Meacham "had been pressed to diligently search for them [the photos] during 2011, 2012, and/or the early months of 2013, it stands to reason that the photographs would have been [found in another client's files sitting in a archived storage area and then] disclosed to defense counsel well in advance of trial". CP-157, lines 24-27. That finding is

factually baseless and does not create any hind-sight legal duty under CR 26(e) to engage in additional searches after having already searching and checking with everyone twice, before properly giving the CR 26(g) certification to having already fully completed a reasonable and diligent search. Ms. Meacham had twice stated she didn't have the photos.

In this case, the Plaintiff provided the Court with a reasonable explanation of the prior inability to produce the photographs with the prior discovery answers. That excuse was that the Plaintiff and Plaintiff's counsel Mr. Trujillo were unable to produce, but had tried valiantly to do so. The inability to produce was all because of Ms. Meacham's two repeated denials and twice claiming she did not have the photographs. Any argument that this explanation is not a "reasonable explanation" for not producing the photos earlier, ignores the obvious.

The last minute surfacing of the photographs presented a mere "irregularity" in the case and only came about by pure dumb luck. There was no discovery abuse or misconduct at all in this case, let alone anything willful or deliberate that would have ever justified a mistrial, let alone sanctions, or

any punishment or any fee award against the innocent Plaintiff. The bottom line is there was no violation of CR 26(g) and no further duties owed under CR 26(e), except to promptly turn over evidence when and if it surfaced, but without any further duty owed to keep forever searching. Furthermore, the defendants were already fully prepared to defend the damages explicitly listed in detail in the Plaintiff's Complaint at CP-8, line 10, lines 20-23; and CP-9, paragraph 3.11.

To be sure, in addition to seeing the detailed description of all the damages listed in the complaint, the defendants had also already fully deposed both witnesses who had personally viewed the damages including Brent Deroo, and also Richard Holcomb. Mr. Holcomb was the eye-witness who not only saw but photographed the damages that he had personally looked at and had described for the Defendants in both his deposition and at trial. The photographs were merely cumulative to all of that information and that information was already in the Defendants' possession for the trial.

In fact, the defense couldn't point to a single photograph that refuted anything or created any surprise whatsoever from the already detailed

descriptions in the Plaintiff's complaint, Plaintiff's discovery answers, and Plaintiff's witnesses' deposition testimony or the trial testimony for which the Defendants were absolutely ready to defend already. Absolutely nothing had changed but the weight of the now cumulative evidence. The camera was simply a third eye-witness on top of Mr. Deroo and Mr. Holcomb.

In fact, as the trial judge actually conceded, "THE PLAINTIFF'S WITNESSES TESTIFIED AS ANTICIPATED BY THE DEFENSE REGARDING DAMAGES." RP-267, lines 19-20 (emphasis added). The only real surprise to the Defendants, if any, was that the Plaintiff's witnesses had been telling the truth the whole time because the photographs simply corroborated what the Plaintiff's witnesses had already described.

Thus, the cumulative addition of the photographs regarding the same things only changed the weight of the testimony and of course, added to the credibility of the Plaintiff's two people who witnesses the same. Accordingly, a mere continuance would have sufficed for any desired further study and any technical review of the photographs by the defendants and or any defense experts and Plaintiff readily offered to accommodate any

continuance needed as shown at RP-262, line 8 to RP-263, line 1.

Let us not forget, these photographs were Plaintiff's own helpful evidence supporting the Plaintiff's own case. This was by no means exculpatory evidence or evidence intentionally withheld to gain tactical advantage over the defendants. The defendants were certainly content to proceed to trial without the photographs being used against them. In fact, the Plaintiff itself is the one who suffered the most here. There was no incentive, advantage, or gain to be had whatsoever from not producing the fully supporting photos that would only help the plaintiff's case. Plaintiff certainly wanted to find the photographs exponentially more than the Defendants wanted them found, if it can even be said the defendants ever wanted the photos to ever surface at all.

II. CONCLUSION

This Appellate court should reverse the order finding a CR 26(g) violation because there was no violation and no basis for even alleging the same. Furthermore, there was no CR 26(e) duty to even keep looking after already diligently searching. There were no new leads. Sadly and for

obvious reasons, the Defendants didn't even discuss CR 26(g) or (e) in their entire 51 page Respondents' Brief. Accordingly, the Court should also reverse the fee and costs awarded as alleged sanctions that would ever serve any purpose since there was no violation.

Imposing sanctions against a Plaintiff for when someone else, no longer under the Plaintiff's direction or control at the time of the discovery request, loses the Plaintiff's own helpful evidence is improper and serves absolutely none of the intended purposes of sanctions in this situation.

The unprecedented and needless ordering of a new trial was a huge and expensive setback for the Plaintiff and was shocking and the only way to cure that highly prejudicial burden so unfairly imposed on the Plaintiff can only be had by a new trial at this point anyhow. However, the surfacing of these lost photos secured on a whim by a completely non-obligatory, desperation repeat search that suddenly came up lucky, was simply a mere "irregularity". Both of the parties can easily deal with this when this Court simply remands this case back for a new trial, with a new judge.

There should be no sanctions against the Plaintiff and the wrongful allegation of any alleged discovery abuse on the Plaintiff's or Mr. Trujillo should be reversed and vacated..

Respectfully submitted this 10th day of September, 2014.

David Trujillo

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Attorney for Appellant JBC

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CERTIFICATE OF SERVICE

OF APPELLANT'S REPLY BRIEF

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I, DAVID B. TRUJILLO, certify and declare under penalty of perjury that on the 10th of September, 2014,

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

SUBSCRIBED AND SWORN TO this 10th day of September, 2014, in Yakima, Washington.

Attorney for Appellant Johnson Brothers Contracting, Inc.:

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