

May 11, 2016, 1:16 pm

RECEIVED ELECTRONICALLY

SUPREME COURT

OF THE STATE OF WASHINGTON
NO. 93090-2

(Court of Appeals No. 326551-III)

MARISA WUNDERLICH and JOSEPH WUNDERLICH, a married
couple

Respondents,

vs.

JOHN P ROUSE and KARMA ROUSE, a married couple, and THORPE-
ABBOTT PROPERTIES LLC,

Appellants

RESPONDENTS' SUPPLEMENTAL BRIEF

M CASEY LAW, PLLC
Marshall Casey, WSBA #42552
1106 N. Washington, Suite B
Spokane, WA 99201
(509) 252-9700
Attorney for Respondents

TABLE OF CONTENTS

	Page
I. Identification of the parties.....	1
II. Court of Appeals decision.....	1
III. Issues presented for review	1
IV. Statement of the case.....	1
V. Argument.....	2
VI. Conclusion.....	6

Table of Cases

<i>Hundtofte v. Encarnacion, 181 Wn.2d 1, 6 (2014)</i>	3
<i>Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d P.2d(1993)</i>	3, 4

Statutes, Administrative Rules and Constitution

CR 26 (g).....	1, 3, 4, 5
CR 26(i).....	2
CR 37.....	2, 4

I. Identification of the parties.

The appellants in this matter have been identified in their petition. The respondents in this matter are Marisa and Joseph Wunderlich, plaintiffs in the underlying matter.

II. Court of Appeals decision

The decision has been identified by the Appellant in this matter.

III. Issues presented for review

While naming three issues presented, the first and third stated issues seem to be whether or not the appellate court reviewed the trial court's sanctions under the proper standard, abuse of discretion.

The second issue seems to be the reframing of the de novo versus abuse of discretion standard under a constitutional claim.

The respondents add no new issues, and request these issue(s) be denied since the standard of review for CR 26(g) sanctions is well settled in Washington.

IV. Statement of the case

This matter arose as an adverse possession case. CP 288-293. After its filing, Mr. Rouse moved for one of the key witnesses to be declared incapacitated and a guardianship appointed. CP 29-34 On January 3, 2014 Mr. Rouse was deposed. CP 14.

not to answer two sets of questions. CP 15-17. The first was in regards to the guardianship, and the second was in regards to certain questions on the Defendants' answer. Mr. Naves continued this objection for quite some time. CP 24-26.

A motion to compel a second deposition was done and fees were requested at that time. CP 9. The motion was granted, and the question of fees was reserved till later. CP 46

On February 21, 2014 a set of interrogatories was delivered to Mr. Naves that covered the Rouses and their closely held entity. In March of 2014 pure objections were returned. Counsel for the Wunderlichs immediately requested a CR 26(i). CP 326-356. This request was responded to by Mr. Naves asking for it to be recorded and last for a significant amount of time. *Id.*

During this time the Defendants opposed a moving of the trial date that was to make up for the delays in discovery. The Wunderlichs' moved for discovery sanctions under CR 26(g) and CR 37. The trial court found that sufficient cause existed for the sanctions and granted the sanctions to stop the discovery behavior and to move the case forward on the issues. CP 269-273.

The Defendants appealed the sanctions order, and the appellate court upheld the sanctions as appropriate. The Defendants now only

court upheld the sanctions as appropriate. The Defendants now only appeal whether or not the CR 26(g) sanctions are appropriate.

V. Argument

The standard of review for CR 26(g) sanctions was addressed in *Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054, 1075 (1993), where it is clearly stated “[w]e hold that the proper standard to apply in reviewing sanctions decisions is the abuse of discretion standard.” The Appellants spend a lot of time arguing for de novo review on their CR 26(g) sanctions. The Appellants quote non-sanction cases on questions of fact and interpretation of law to make their argument, but this is incorrect. The position of de novo review for CR 26(g) sanctions was argued by one of the parties in *Fisons*, and the *Fisons* court rejected de novo review, holding the proper standard to apply in reviewing sanctions decisions is the abuse of discretion standard. *Fisons*,

The Appellants imply that the abuse of discretion standard stopped the Appellate Court from reviewing the law in relation to these sanctions. This argument misinterprets the abuse of discretion standard. A court abuses its discretion when it bases its decision on facts not in the record, or when it applies the wrong legal standard. *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 6 (2014). Here the Appellate Court looked at the legal standard of CR 26(g) and the facts in the record and found no abuse.

This clear precedent on the standard of review that has been on the books since 1993 and means that the appellate court is not in conflict with the Supreme Court on the standard of review, and that the Appellate Court is not likely in conflict with other Washington courts of appeal. As for the issues of constitutionality, this seems to be misconstruing CR 26(g).

CR 26(g) gives three things an attorney certifies on signing a discovery document, that responses were

(1) consistent with the rules;

(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. Op. p. 8, citing CR 26(g), *Fisons*, 122 Wn.2d at 344. Along with this the purpose is “[r]esponses in discovery must be ‘consistent with the letter, spirit and purpose of the rules.’” *Id.*

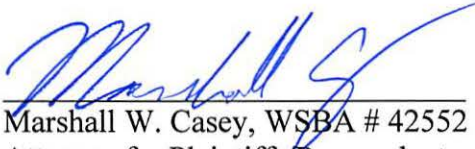
The Appellants spend a lot of time arguing how their answers were consistent with the letter of the rule, but ignore the other two items they certified under CR 26(g), that the objections were not done to harass, increase cost, or cause needles delay, along with not being unreasonably burdensome. CR 26(g) provides for sanctions under that rule separately from CR 37, and that is what was properly applied here. *Fisons*, 122 Wn.2d at 339-340. CR 26(g) has more than just “consistent” with the rule

as governing the response, but the Appellants argue that technically “consistent” with their only defense. CR 26(g) was created to “in order to provide a deterrent to discovery abuses as well as an impetus for candor and reason in the discovery phase of litigation.” *Id.* at 343. It was within this framework that the appellate court upheld the trial court’s discretion on the sanctions.

IV. Conclusion

Because the standard of review has been in place since 1993 as abuse of discretion, and it encompasses the review of a proper application of law the Respondents believe the issue of a new standard of review for CR 26(g) sanctions is not proper. For the interests of efficient justice, we ask the Supreme Court to deny review.

Respectfully submitted this 11 day May, 2016.



Marshall W. Casey, WSBA # 42552
Attorney for Plaintiffs/Respondents

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 11th day of May, 2016, I cause a true and correct copy of the foregoing document to be delivered in the manner indicated below to the following counsels of record:

<u>Counsel for Defendant/Appellant:</u> Eric K. Naves Fernwell Bldg., Ste 500 505 West Riverside Avenue Spokane, WA 99201-0518 (509) 267-3283 -Fax	<u>SENT VIA:</u> <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Hand delivered <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Email
---	--

Dated this on 11th of May, 2016.



Larisa Yukhno-Legal Assistant
M CASEY LAW, PLLC