NO. 326551-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

MARISA WUNDERLICH and JOSEPH WONDERLICH,
a married couple

Respondents

v.

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

Appellants

BRIEF OF APPELLANTS

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A. ASSIGNMENTS OF ERROR

Assignment of Error No. 1

The Superior Court of Spokane County, State of Washington, erred on February 14, 2014, in Cause No. 13-0-203767-4, when entering its "Order" compelling Mr. Rouse to answer certain questions, over his counsel's objection, in the course of a subsequent second deposition. [CP 52].

Assignment of Error No. 2

The Superior Court of Spokane County, State of Washington, erred on May 30, 2014, in Cause No. 13-0-203767-4, when entering its "Order for Sanctions Against Mr. Nayes," wherein the Court imposed monetary sanctions against defendants' and appellants' counsel, Eric K. Nayes, without factual or legal grounds whatsoever to support and warrant the same. [CP 126-130].

Assignment of Error No. 3

The Superior Court of Spokane County, State of Washington, erred on May 30, 2014, in Cause No. 13-0-203767-4, when entering its "Order for Sanctions Against Mr. Nayes" wherein the Court, in

its written "Findings," erroneously stated in Finding No. 1:

> Mr. Nayes's actions in responding to the first set of interrogatories and requests from production, both in only serving objections and in the later requirements placed upon Mr. Nayes's participation in CR 26(i)conference have violated CR 26(g).

[CP 127].

Assignment of Error No. 4

The Superior Court of Spokane County, State of Washington, erred on May 30, 2014, in Cause No. 13-0-203767-4, when entering its "Order for Sanctions Against Mr. Nayes" wherein the Court, in its written "Findings," erroneously stated in Finding No. 2:

> Mr. Nayes's actions in the deposition of Mr. Rouse violated the rules of CR 30(h) and necessitated a motion to compel the second deposition of Mr. Rouse;

[CP 127].

Assignment of Error No. 5

The Superior Court of Spokane County, State of Washington, erred on May 30, 2014, in Cause No. 13-0-203767-4, when entering its "Order for Sanctions Against Mr. Nayes" wherein the Court, in

its written "Findings," erroneously stated in Finding No. 3:

> The proper sanction in this matter, considering the least severe sanctions necessary to accomplish the purpose of the sanctions, is to award the Plaintiffs the cost that the discovery violations have caused to them.

[CP 127].

Assignment of Error No. 6

The Superior Court of Spokane County, State of Washington, erred on May 30, 2014, in Cause No. 13-0-203767-4, when entering its "Order for Sanctions Against Mr. Nayes" wherein the Court, in its written "Findings," erroneously stated in Finding No. 4:

> Mr. Nayes violation of CR 26(g) increased the discovery costs by making Plaintiffs' counsel research 20 pages of objections for two hours, and participate in a CR 26(i) conference, on the record for two and a half hours. It also required the Plaintiffs to pay for the cost of ordering the record for the CR 26(i)conference.

[CP 127].

Assignment of Error No. 7

The Superior Court of Spokane County, State of Washington, erred on May 30, 2014, in Cause No. 13-0-203767-4, when entering its "Order for

Sanctions Against Mr. Nayes" wherein the Court, in its written "Findings," erroneously stated in Finding No. 5:

> Time the Plaintiffs spent dealing with the CR 26(g) violations was a reasonable amount of time, and the hourly rate of $225 per hour for attorney time is a reasonable hourly rate. The court finds the cost of $1,012.50 to be a reasonable cost in this matter.

[CP 127].

Assignment of Error No. 8

The Superior Court of Spokane County, State of Washington, erred on May 30, 2014, in Cause No. 13-0-203767-4, when entering its "Order for Sanctions Against Mr. Nayes" wherein the Court, in its written "Findings," erroneously stated in Finding No. 6:

> Time the Plaintiffs spent dealing with the CR 30(h) violations and doing a motion to compel under CR 37 was a reasonable amount of time, and the hourly rate of $225 per hour for attorney time is a reasonable hourly rate. The court finds the cost of $225 to be a reasonable cost in this matter.

[CP 127-28].

Assignment of Error No. 9

The Superior Court of Spokane County, State of Washington, erred on May 30, 2014, in Cause No.

13-0-203767-4, when entering its "Order for Sanctions Against Mr. Nayes" wherein the Court, in its written "Findings," erroneously stated in Finding No. 7:

> The cost of ordering the transcript for the CR 26(i) conference is also found to be related to the CR 26(g) violations, and is in the amount of $388.80.

[CP 128].

Assignment of Error No. 10

The Superior Court of Spokane County, State of Washington, erred on May 30, 2014, in Cause No. 13-0-203767-4, when entering its "Order for Sanctions Against Mr. Nayes" wherein the Court, in its written "Findings," erroneously stated in Finding No. 8:

> The cost of the appearance fee for a second deposition Of Mr. Rouse is related to the motion to compel under CR 37 and proper to be reimbursed to the Plaintiffs in as part of the motion to compel, and is in the amount of $50.00.

[CP 128].

Assignment of Error No. 11

The Superior Court of Spokane County, State of Washington, erred on May 30, 2014, in Cause No. 13-0-203767-4, when entering its "Order for

Sanctions Against Mr. Nayes" wherein the Court, in its written "Order" erroneously stated:

> It is hereby ordered, adjudged and decreed that Mr. Nayes shall pay to the Plaintiffs CR 26(g) sanctions of $1,401.30, and CR 37 sanctions of $ 275.00. Such payment shall be made to M Casey Law IOLTA and to be issued within 30 days of this order.

[CP 128].

Assignment of Error No. 12

The Superior Court of Spokane County, State of Washington, erred on July 15, 2014, in Cause No. 13-0-203767-4, in entering its "Order on Reconsideration" denying the motion of defendants and appellants.

[CP 286-287].

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue No. 1

Whether, contrary to the erroneous determination of the superior court, the attorney for defendants and appellants, Eric K. Nayes, properly objected and instructed his client and the deponent, John Rouse, not to answer a question during his deposition whether his aunt, Ellen

Heinemann has demonstrated an inability to adequate provide nutrition for herself, insofar as (a) said question is in derogation of CR 30(h)(1) wherein examining counsel is required to refrain from asking questions he knows to be beyond the legitimate scope of discovery, and (b) said question, under the mandate of CR 26(b)(1), was entirely irrelevant to the subject matter involved in the action pertaining to adverse possession and did not relate to any claim or defense of any party? [Assignments of Error Nos. 1, 2, 4, 5, 8, 10 and 11].

Issue No. 2

Whether, contrary to the erroneous determination of the superior court, the attorney for defendants and appellants, Eric K. Nayes, properly objected and instructed his client and the deponent, John Rouse, not to answer an argumentative and hypothetical question for which no facts exist as foundation for said question insofar as (a) said question is in derogation of CR 30(h)(1) wherein examining counsel is required to refrain from asking questions he knows to be

beyond the legitimate scope of discovery, (b) said question, under the mandate of CR 26(b)(1), was entirely irrelevant to the subject matter involved in the action pertaining to adverse possession and did not relate to any claim or defense of any party and (c) said question was simply framed in order to mislead and with the intent of generating an inaccurate and false answer and to confuse the witness? [Assignments of Error Nos. 1, 2, 4, 5, 8, 10 and 11].

Issue No. 3

Whether, contrary to the erroneous determination of the superior court, the objections framed by the attorney for defendants and appellants, Eric K. Nayes, to Plaintiffs' First Set of Interrogatories Propounded to Defendants, dated March 24, 2014, did not violate or contravene the considerations in CR 26(g) regarding his certification of the defendants and appellants' objections and responses to said discovery requests? [Assignments of Error Nos. 3, 5, 6, 7, 9 and 11].

Issue No. 4

Whether, contrary to the erroneous determination of the superior court, the objections framed by the attorney for defendants and appellants, Eric K. Nayes, to Plaintiffs' First Set of Requests for Production Propounded to Defendants, dated March 24, 2014, did not violate or contravene the considerations in CR 26(g) regarding his certification of the defendants' objections and responses to said discovery requests? [Assignments of Error Nos. 3, 5, 6, 7, 9 and 11].

Issue No. 5

Whether, contrary to the erroneous determination of the superior court, the request by the attorney for defendants, Eric K. Nayes, to have a CR 26(i) conference recorded by a court reporter, at the sole expense of defendants, did not violate CR 26(g)? [Assignments of Error Nos. 3, 5, 6, 7, 9 and 11].

Issue No. 6

Whether the superior court, in light of the numerous failures of said court in either ignoring

or improperly applying the governing court rules and applicable law, erred in denying the motion of defendants for reconsideration under CR 59(a)? [Assignments of Error Nos. 1 through 11].

C. STATEMENT OF THE CASE

The primary subject matter of this action entailed a claim of adverse possession raised by plaintiffs to land owned by defendant, Thorpe-Abbott Properties, LLC. [CP 288-293]. During the course of discovery, plaintiffs took the deposition of defendant, John Rouse, on January 3, 2014. [CP 14] In this deposition, the attorney for plaintiff, Marshall Casey, posed two questions to John Rouse, to which the undersigned counsel for Mr. Rouse, Eric K. Nayes, objected and instructed his client, the deponent, not to answer.

The first question was:

> Q. Does she (Ellen Heinemann) have a demonstrated inability to adequately provide nutrition for herself?
>
> MR. NAYES: I object to this line of questioning. I don't see the relevance whatsoever to an adverse possession suit as to what he (John Rouse) thinks about

his aunt's ability to take care of herself.

Notwithstanding this objection, Marshall Casey, attorney for plaintiff, offered nothing whatsoever to explain the relevancy of this question or the propriety of this line of inquiry. [CP 16-17].

The second question was:

Q. If the Complaint had said they put cattle on the property versus grazed --

A. (John Rouse) When you say they, specifically who do you mean?

Q. The plaintiffs or their predecessors.

A. Okay. Plaintiffs --

MR. NAYES: There's no foundation for this line of questioning, Mr. Casey. I mean, you are asking purely hypotheticals that haven't happened at all.
. . .

MR. CASEY: Are you going to instruct him not to answer?

MR. NAYES: Yes. Just don't answer any more of these hypothetical questions

[CP 18-19].

Thereafter, the attorneys for the parties held a conference pursuant to Rule 26(i) of the Civil Rules for Superior Court [CR 26(i)] on January 28, 2014, which focused on the foregoing questions and

the undersigned's continuing objections regarding the same. No resolution of the objections was reached between counsel. [CP 41].

The superior court entered its "Order" dated February 14, 2014, finding that the foregoing questions "were correct" and that no basis for an instruction not to answer existed. The imposition of sanctions was reserved "for another time." [CP 52].

In addition to the controversy surrounding the two questions in the foregoing deposition, a **single** document entitled "Plaintiffs' First Set of Interrogatories and Requests for Production Propounded to Defendant John Rouse, Karma Rouse and Thorpe-Abbott Properties, LLC," dated February 21, 2014 [See, Nayes Declaration in Support of Motion for Reconsideration (hereinafter referred to "Nayes Declaration"), Exhibit "A"][CP 141-158], purportedly propounded **jointly** to defendants and appellants thirteen (13) statements denominated as an "interrogatory" and seven (7) statements denominated as a "request for production." This **single** document was served on the office of Eric

K. Nayes, the attorney for the foregoing named defendants and appellants, on February 21, 2014. [Nayes Declaration, Exhibit "A"][CP 141].

Additionally, "Plaintiffs' First Set of Interrogatories and Requests for Production Propounded to Defendant John Rouse, Karma Rouse and Thorpe-Abbott Properties, LLC" ("hereinafter sometimes "Plaintiffs' First Set") [Nayes Declaration, Exhibit "A"][CP 141-158] provided, on average, less than three (3) inches of space for each of the three defendants and appellants to provide any answer or response to the statements denominated as an "interrogatory" or any statements denominated as a "request for production." Further, said **single** document specified no time, place or manner of any inspection and the performing of any related acts concerning any statement denominated as a "request for production." [CP 141-144; 151-158]. Besides the foregoing legal deficiencies clearly apparent on the face of "Plaintiffs' First Set" and noted above, the thirteen (13) statements denominated as an "interrogatory" and the seven (7) statements

denominated as a "request for production" were also objectionable for other reasons identified below.

Because of these numerous and glaring deficiencies associated with "Plaintiffs' First Set," the undersigned, as attorney for defendants and appellants, John P. Rouse, Karma Rouse, and Thorpe-Abbott Properties, LLC, prepared a document entitled "Objections of Defendants, John P. Rouse, Karma Rouse, and Thorpe-Abbott Properties, LLC, to Plaintiffs' First Set of Interrogatories Propounded to Defendants," dated March 24, 2014 [See, Nayes Declaration, Exhibit "B"][CP 160-167], and timely served the same on the office of Marshall Casey, attorney for the respondents, Marisa Wunderlich and Joseph Wunderlich, the same day. [CP 137].

Additionally, the undersigned prepared a document entitled "Response of Defendants, John P. Rouse, Karma Rouse, and Thorpe-Abbott Properties, LLC, to Plaintiffs' First Set of Requests for Production Propounded to Defendants," dated March 24, 2014 [See, Nayes Declaration, Exhibit "C"][CP

169-180], and likewise timely served the same on the office of Marshall Casey, attorney for plaintiffs, on the same day, that is, March 24, 2014. [CP 137]. The "Objections, Etc." [Nayes Declaration, Exhibit "B"][CP 160-167] of appellants and the "Response" [Nayes Declaration, Exhibit "C"][CP 169-180] of appellants challenged the validity of "Plaintiffs' First Set" [Nayes Declaration, Exhibit "A"][CP 141-158], as well as the statements denominated as interrogatories and the statements denominated as a requests for production, which were also in themselves not well-founded for many reasons.

On March 24, 2014, Marshall Casey, sent a letter to the undersigned, which letter requested a CR 26(i) conference regarding the "Objections of Defendants, Etc." and the "Response of Defendants, Etc." [Nayes Declaration, Exhibit "D"][CP 182]. The undersigned replied to said letter on March 25, 2014. [Nayes Declaration, Exhibit "E"][CP 184-186]. This letter asked that the CR 26(i) conference be recorded by a certified court reporter. The precise reason and justification

for requesting that the CR 26(i) conference be recorded was to prevent Marshall Casey, attorney for plaintiffs, from embellishing and falsifying the nature and substance of statements made by the undersigned or otherwise maligning and defaming the undersigned or his clients. [See, Nayes Declaration, p. 3, ll 16-19][CP 138]. Mr. Casey sent a further letter dated March 26, 2014. [Nayes Declaration, Exhibit "F"][CP 188].

A CR 26(i) conference was held at the offices of Marshall Casey, attorney for respondents, for his convenience, on Monday, March 31, 2014, commencing at 1:30 p.m. [CP 58]. The conference was recorded by Dorothy Stiles, RMR, CRR. [CP 58-88]. Thereafter, by a "Motion and Memorandum for Sanctions Against Mr. Nayes and the Defendants," dated May 2, 2014, and filed herein on May 2, 2014 [CP 91-103], respondents, by and through their attorney Marshall Casey, moved for sanctions against the undersigned and his clients regarding the "Objections of Defendants, John P. Rouse, Karma Rouse, and Thorpe-Abbott Properties, LLC, to Plaintiffs' First Set of Interrogatories

Propounded to Defendants," dated March 24, 2014 [Nayes Declaration, Exhibit "B"][CP 160-167], and the "Response of Defendants, John P. Rouse, Karma Rouse, and Thorpe-Abbott Properties, LLC, to Plaintiffs' First Set of Requests for Production Propounded to Defendants," dated March 24, 2014 [Nayes Declaration, Exhibit "C"][CP 169-180].

The alleged grounds of the "Motion, Etc." were that said "Objections, Etc." and said "Response" violated CR 26(g). [CP 94-97]. In opposition to said "Motion, Etc.", appellants filed and served a "Memorandum of Points and Authorities of Defendants in Answer to Plaintiffs' Motion for Sanctions." [CP 109-123].

After a hearing on said "Motion and Memorandum for Sanctions Against Mr. Nayes and the Defendants," of respondents, the Court entered its "Order for Sanctions Against Mr. Nayes" on May 30, 2014. [CP 126-130].

Defendants, and their attorney, Eric K. Nayes, timely filed a Motion for Reconsideration of Order for Sanctions, under CR 59(a), on June 9, 2014. [CP 133-135]. Said motion was denied by the

superior court on July 15, 2014. [CP 286-287]. This appeal followed. [CP 277-287].

D. STANDARD OF REVIEW

Issues involving questions of law are reviewed de novo on appeal. See, State v. Horrace, 144 Wn.2d 386, 392, 28 P.3d 753 (2001). In turn, review of an issue associated with the exercise of discretion by the trial court is governed by the standard of manifest abuse of discretion. State v. Boirgeouis, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). The trial court will be deemed to have abused its discretion when the court acted on untenable grounds, untenable reasons, or has erroneously interpreted, misapplied, or chosen to ignore the governing law. Gordon v. Gordon, 44 Wn.2d 222, 226-27, 266 P.2d 786 (1954); State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); In re Marr. of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1989). In other words, a factual determination which is followed by a misapplication of the law constitutes an abuse of discretion warranting reversal on appeal. See, In

re Marr. of Spreen, 107 Wn.App. 341, 346, 28 P.3d 769 (2001).

E. ARGUMENT

Issues No. 1 and No. 2 Pertaining to Deposition of John Rouse

In connection with the foregoing controversies concerning the deposition of John Rouse, plaintiffs' took the unwavering position that said lay deponent was obligated to answer any and all questions asked by counsel for plaintiffs, regardless of their relevancy, or even though the questions were strictly argumentative and hypothetical in nature.

However, contrary to their stated position, there are clearly limits on the scope of discovery and questions which may be asked of a deponent. Specifically, in this regard, CR 26(b)(1) provides:

> **(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In General. Parties may obtain discovery regarding any matter, not privileged, **which is relevant to the subject matter involved in the pending**

> **action**, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

[Emphasis added].

By the same measure, CR 30(h)(1) provides:

> **(h) Conduct of Depositions.** The following shall govern deposition practice:
>
> (1) Conduct of Examining Counsel. Examining counsel will refrain from asking questions he or she **knows to be beyond the legitimate scope of discovery** . . . .

[Emphasis added].

In addition to the foregoing limitations placed on discovery as set forth in CR 26(b)(1) and CR 30(h)(1), the governing law pertaining to Issue No. 1 and Issue No. 2 in this appeal set forth above, dictates that said questions are patently objectionable, not a legitimate subject of discovery, and simply need not be answered by the deponent.

1. Third Party's Ability to Provide Adequate Nutrition for Herself is Not Relevant [Issue No. 1].

The first question posed by plaintiffs' attorney during the deposition of Mr. Rouse concerns whether Ellen Heinemann (a third party) had demonstrated an inability to adequately provide nutrition for herself. [CP 16-17]. For purposes of CR 26(b)(1), this question has absolutely no relevancy or bearing whatsoever to the subject matter of this action, which is an suit for adverse possession. [CP 288-293].

In other words, the question posed by plaintiffs' counsel does not relate to the claim or defense of any party, nor did plaintiffs' counsel make any offer of proof as to how it would, any way, be "reasonably calculated to lead to the discovery of admissible evidence." Id. Clearly, the ability, or lack thereof, of Ellen Heinemann to feed herself has no relevancy whatsoever to any claim or cause of action associated with the pending matter of adverse possession. Furthermore, as a lay witness Mr. Rouse could not offer any expert testimony or

opinion on the subject of adequate nutrition as to Mrs. Heinemann.

2. Argumentative and Hypothetical Questions Addressed to a Lay Witness are Patently Improper and Objectionable [Issue No. 2].

As identified above in appellants' statement of the case, the second question posed by plaintiffs' attorney during the deposition of Mr. Rouse was argumentative, hypothetical, and totally devoid of any foundation whatsoever. [CP 18-19]. Accordingly, the question has no relevancy or bearing whatsoever to the subject matter of this action. Hence, said second question of plaintiffs' counsel during the deposition of Mr. Rouse was highly improper and, therefore, objectionable. CR 26(b)(1); CR 30(h)(1).

It is a well established principle of law that argumentative and hypothetical questions are objectionable and not subject to being answered. The courts do not condone, and will not suffer, what amounts to a fishing expedition to pour over any supposed or purely speculative aspect of a case. See, In re Personal Restraint of Gentry, 132 Wn.2d 378, 394, 972 P.2d 1250, 1259 (1999).

Moreover, as McCormick aptly points out, argumentative and hypothetical questions are inherently misleading in nature, are often framed with the intent of generating inaccurate and false answers and of confusing the witness. Hence, argumentative and hypothetical questions are objectionable and not allowed. Vol. 1, McCormick on Evidence, §7 at 28-29 (6th Ed. 2007); see also, Glazer v. Adams, 64 Wn.2d 144, 391 P.2d 195 (1964); 3 Wigmore, Evidence, §780 at 171-73 (Chadbourn rev. 1970).

Issues No. 3 and No. 4 Pertaining to Objections to Plaintiffs' Interrogatories and Requests for Production Propounded to Defendants

From the record, the superior court ignored, and overlooked the sum and substance of the "Objections of Defendants, John P. Rouse, Karma Rouse, and Thorpe-Abbott Properties, LLC, to Plaintiffs' First Set of Interrogatories Propounded to Defendants," dated March 24, 2014 [Nayes Declaration, Exhibit "B"][CP 160-167], as well as the "Response of Defendants, John P. Rouse, Karma Rouse, and Thorpe-Abbott Properties, LLC, to Plaintiffs' First Set of Requests for

Production Propounded to Defendants," dated March 24, 2014 [Nayes Declaration, Exhibit "C"][CP 169-180], but nevertheless found the same violated CR 26(g). Further, the superior court entered its findings without having ever reviewed in any manner "Plaintiffs' First Set of Interrogatories and Requests for Production Propounded to Defendant John Rouse, Karma Rouse and Thorpe-Abbott Properties, LLC," dated February 21, 2014 [Nayes Declaration, Exhibit "A"][CP 141-158]. Of course, this document, to wit: "Plaintiffs' First Set," is the pleading to which defendants were objecting by the "Objections of Defendants, Etc." [Nayes Declaration, Exhibit "B"][CP 160-167] and the "Response of Defendants, Etc. [Nayes Declaration, Exhibit "C"][CP 169-180].

3. Objections of Defendants, John P. Rouse, Karma Rouse, and Thorpe-Abbott Properties, LLC, to Plaintiffs' First Set of Interrogatories Propounded to Defendants, dated March 24, 2014, Did Not Violate CR 26(g) [Issue No. 3]

Appellants maintain that had the superior court, in fact, reviewed "Plaintiffs' First Set, Etc." [Nayes Declaration, Exhibit "A"][CP 141-

158], the court would have ascertained from the face of said document that, first, said single document was directed jointly to defendant, John P. Rouse, defendant, Karma Rouse, and defendant, Thorpe-Abbott Properties, LLC, and that the blank space provided after each of the thirteen (13) statements denominated as an "interrogatory" was, on average, less than three (3) inches for all of the three defendants to provide any answer or response to the statements denominated as an "interrogatory."

In this regard, CR 33(a) specifically provides: "Any **party** may serve upon any other **party** written interrogatories to be answered **by the party served** . . . ." [Emphasis added]. All references to party in CR 33 are in the singular. Not once is party used in the plural, that is "parties." Hence, CR 33 expressly requires that interrogatories be served separately upon a single party, not jointly upon plural parties, as was done with the purported interrogatories contained in "Plaintiffs' First Set, Etc." [Nayes Declaration, Exhibit "A"][CP 141-158].

The appellants' interpretation of CR 33 is substantiated by a number of well-recognized form books containing accepted forms for interrogatories. In each instance found, the form interrogatories were directed to a single party, rather than to multiple parties. See, 10 D. Brisken "Civil Procedure Forms and Commentary," Wash. Prac., §33.21-§33.22 (pp. 38-43)(2000). Likewise, the corresponding Federal Rule of Civil Procedure, that is Fed. R. Civ. Pro. 33, uses the word "party" in the singular. In each instance of a form found applying the corresponding Federal Rule, the respective interrogatory was directed only to a single party. See, 7 Bender's Federal Practice Forms, Form No. 33(II):1 (2009); 3B Bender's Forms of Discovery, Chapter 32, 2.1-2.6 (2011). Commons sense dictates that one party's knowledge and information may not be the same as some other party's knowledge and information as to a given interrogatory, and, therefore, an interrogatory is to be directed to a **single party**.

CR 33(a) further provides: "Interrogatories **shall** be so arranged that after each separate

question there shall appear a blank space reasonably calculated to enable the answering **party** to place the written response." [Emphasis added]. This command of CR 33 is mandatory, not optional. On its face, "Plaintiffs' First Set, Etc." [Nayes Declaration, Exhibit "A"][CP 141-158] left an average of less than three (3) inches for any response to any statements denominated as an "interrogatory." Accordingly, "Plaintiffs' First Set, Etc." also clearly violated this mandatory command of CR 33. Because "Plaintiffs' First Set, Etc." manifestly violated the foregoing unambiguous requirements of CR 33(a), the defendants objected in general to "Plaintiffs' First Set, Etc.," and the statements denominated as an "interrogatory" on those grounds.

In addition, appellants objected to individual statements denominated as an "interrogatory" on separate and specific grounds. [Nayes Declaration, Exhibit "B," pp. 2-6][CP 161-165]. In this regard, appellants objected to the statements denominated as Interrogatory No. 1, Interrogatory No. 2, Interrogatory No. 4, and

Interrogatory No. 6 [CP 144-147] (note that Marshall Casey, the attorney for plaintiffs and respondents, does not number the statements serially) on grounds supported by fact and by law. These grounds included (a) that said statements requested information on witnesses beyond asking for the identity of persons who have information concerning facts relevant to the issues in this action [See, Weber v. Biddle, 72 Wash.2d 22, 431 P.2d 705 (1967); Agranoff v. Jay, 9 Wash. App. 429, 512 P.2d 1132 (1973)], (b) that said statements were overly broad [See e.g., Finch v. Hercules, Inc., 149 F.R.D. 60 (D. Del. 1993)], (c) that said statements asked objecting defendants to speculate concerning knowledge of third parties [See, In re Erie-Lackawanna Ry., 496 F.2d 1189 (6th Cir. 1974); Struthers Scientific & Int'l Corp. v. General Foods Corp., 45 F.R.D. 375 (S.D. Tex. 1968), and (d) that said statements improperly asked for a rehearsal of evidence that the objecting defendants may present at trial. [See, Weber v. Biddle, supra; Agranoff v. Jay, supra]. Appellants objected to Interrogatory No.

12 [CP 149-150]for the specific factual and legal reasons stated in said objection. [Nayes Declaration, Exhibit "B," pp. 6-7][CP 165-166]. Finally, appellants objected to Interrogatory No. 13 [CP 150] on the recognized grounds that the interrogatory is vague, ambiguous, overly broad, unintelligible, compound and complex in that terms used in the interrogatory are not defined nor explained. [Nayes Declaration, Exhibit "B," pp. 6-7][CP 166]. [See e.g., Cahela v. Bernard, 155 F.R.D. 221 (N.D. Ga. 1994); Nalco Chem. Co. v. Hydro Techs., Inc., 149 F.R.D. 686 (E.D. Wis. 1993)].

Based on the above, appellants are at a total loss to understand how the "Objections of Defendants, John P. Rouse, Karma Rouse, and Thorpe-Abbott Properties, LLC, to Plaintiffs' First Set of Interrogatories Propounded to Defendants," dated March 24, 2014 [Nayes Declaration, Exhibit "B"][CP 160-167] violate CR 26(g). Said "Objections of Defendants, Etc." regarding the purported interrogatories are absolutely consistent with the Civil Rules for

Superior Court in that the objections are based on clear violations of CR 33 by Mr. Casey and the plaintiffs. Hence, no violation whatsoever can be properly sustained against the appellants and their attorney, Mr. Nayes, in terms of CR 26(g) regarding said "Objections of Defendants, Etc."

4. Objections of Appellants to Plaintiffs' First Set of Requests for Production Propounded to Defendants, dated March 24, 2014 [Nayes Declaration, Exhibit "B"] Did Not Violate CR 26(g) [Issue No. 4].

Appellants further maintain that had the Court, in fact, reviewed "Plaintiffs' First Set, Etc." [Nayes Declaration, Exhibit "A"][CP 141-158], the Court would have also ascertained from the face of said document that a single document had been improperly directed jointly to defendant, John P. Rouse, defendant, Karma Rouse, and defendant, Thorpe-Abbott Properties, LLC, purportedly under CR 34, and that "Plaintiffs' First Set, Etc." had not properly specified a time, place or manner of making any production or performing any actions allegedly requested under said document.

With respect to the "Response of Defendants,

John P. Rouse, Karma Rouse, and Thorpe-Abbott Properties, LLC, to Plaintiffs' First Set of Requests for Production Propounded to Defendants," dated March 24, 2014 [Nayes Declaration, Exhibit "C"][CP 169-180], CR 34(a) provides:

> Any party may serve on **any other party** a request within the scope of Rule 26(b)(1) to produce and permit the to inspect, copy, test, photograph, record, measure, or sample the following items in the **responding party's** possession, custody, or control: any designated documents, electronically stored information, or things . . . including . . . writings . . . and other data or data compilations stored in any medium from which information can be obtained, either directly or, if necessary, after translation or conversion by the **responding party** into a reasonably usable form, or to inspect and copy, test, or sample any things which constitute or contain matters within the scope of rule 26(b) and which are in the possession, custody or control of the **responding party** . . . .

[Emphasis added].

Further, CR 34(b)(1) provides:

> Service. The request may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other **party** with or after service of the summons and complaint upon that **party**.

[Emphasis added].

Additionally, all duties placed upon the responding party under CR 34(b)(3) refer to **a party** in the singular, not in the plural. Not once is the word "parties," that is the plural of party, used anywhere in CR 34. Finally, CR 34(b)(2)(B) specifies that the request "**shall specify** a reasonable **time, place and manner** of making the production and performing the related acts." [Emphasis added]. This command of CR 34 is not optional but mandatory.

Because "Plaintiffs' First Set, Etc.," as it pertained to the seven (7) statements denominated as a "request for production" [CP 141-144;151-154] clearly violated the foregoing unambiguous requirements of CR 34, the defendants were fully justified in objecting in general to "Plaintiffs' First Set, Etc.," and the statements denominated as a "request." [Nayes Declaration, Exhibit "C," p. 12][CP 180]. Furthermore, the interpretation of CR 34 by the defendants is solidly confirmed by form books containing the proper format for requests for production. In each instance found, any form requests for production were directed to

only a single party and specified a time, place and manner of any inspection and the performing of related acts. See, 10 D. Brisken "Civil Procedure Forms and Commentary," Wash. Prac., §34.11-§34.22 (pp. 91-97)(2000). Additionally, Fed.R.Civ.Pro. 34, the parallel Federal Rules of Civil Procedure, also denotes the singular form of the word "party" and requires that a reasonable time, place and manner must be specified. Again, in each instance of a form found applying Fed.R.Civ.Pro. 34, the respective requests for production were directed only to a single party and specified a time, place and manner of any inspection and the performing of related acts. See, 8 Bender's Federal Practice Forms, §34.1, et. seq. (2011).

Moreover, defendants objected to individual statements denominated as a "request" on separate and specific grounds. [Nayes Declaration, Exhibit "C," pp. 2-12][CP 170-180]. In this regard, CR 34 and the case law cited above clearly support the further, specific objections raised by defendants in their "Response of Defendants, John P. Rouse, Karma Rouse, and Thorpe-Abbott Properties, LLC, to

Plaintiffs' First Set of Requests for Production Propounded to Defendants. [CP 70-180].

In light of the foregoing points of law and analysis, appellants and the undersigned are confounded and once again at a total loss to understand how the "Response of Defendants, John P. Rouse, Karma Rouse, and Thorpe-Abbott Properties, LLC, to Plaintiffs' First Set of Requests for Production Propounded to Defendants," dated March 24, 2014 [Nayes Declaration, Exhibit "C"][CP 169-180] violates CR 26(g). Said "Response of Defendants, Etc." regarding the purported requests for production is absolutely consistent with the Civil Rules for Superior Court in that the objections are based on clear violations of CR 34 by Mr. Casey and the plaintiffs.

Hence, no violation can be properly sustained against the defendants in terms of CR 26(g) regarding the "Response of Defendants, Etc." [Nayes Declaration, Exhibit "C"]. Thus, it is clear that the superior court engaged in a manifest abuse of discretion in this regard. See,

Gordon v. Gordon, 44 Wn.2d 222, 226-27, 266 P.2d 786 (1954); State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); In re Marr. of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1989).

Issue No. 5 Pertaining to Reporting and Recording of CR 26(i) Conference

5. Requesting the Reporting of a CR 26(i) Conference Does Not Violate CR 26(g) [Issue No. 5].

Appellants are entirely unaware of any court rule, statute, case law or other recognized legal authority wherein the superior court can hold a party in violation of CR 26(g) by having a CR 26(i) conference reported or recorded. Appellants had the subject CR 26(i) conference recorded in order to prevent counsel for respondents from embellishing or falsifying the nature and substance of statements made by the undersigned attorney or otherwise maligning and defaming the undersigned attorney or his clients, the appellants herein [CP 138]. Additionally, for the purpose of recording the CR 26(i) conference, appellants stated in writing that they would pay the appearance fee for any court reporter [CP 185] and did so in this case [CP 138].

Hence, no violation can be properly sustained against the appellants in terms of CR 26(g) regarding the request to report or record the CR 26(i) conference. Once again, in light of the foregoing points of law and analysis, it is clear the superior court abused its discretion when the court acted on untenable reasons and chose to erroneously interpret, misapply and ignore the governing law outlined and identified above. See, Gordon v. Gordon, supra, at 226-27; State v. Robinson, supra; In re Marr. of Tang, supra, at 654. By the same measure, any supposed factual determinations of the superior court which preceded the courts misapplication of the law throughout discovery constituted a manifest abuse of discretion warranting reversal of this matter on this appeal. See, In re Marr. of Spreen, 107 Wn.App. 341, 346, 28 P.3d 769 (2001).

Issue No. 6 Pertaining to Denial of Motion for Reconsideration

6. Denial of Defendants' Motion for Reconsideration by the Superior Court Was in Error [Issue No. 6].

In light of the foregoing errors committed by the superior court, the motion of appellants under

CR 59(a) [CP 133-135] should have been granted on the grounds that the challenged decision of the superior court was contrary to law as contemplated under CR 59(a)(7).

F. REQUEST FOR AWARD OF REASONABLE ATTORNEY FEES

In light of the foregoing legal analysis, appellants submit that plaintiffs and respondents, and their attorney, Marshall Casey, rather than appellants and their undersigned attorney, violated the strictures of CR 26(g), CR 30(h) and CR 37 when bringing respondents' "Motion and Memorandum for Sanctions Against Mr. Nayes and the Defendants," dated May 2, 2014 [CP 91-103]. Accordingly, this aspect of the appeal should be remanded to the superior court with direction that respondents and their attorney, Marshall Casey, are in violation of CR 26(g) and CR 30(h), that appellants, as prevailing parties, are entitled to sanctions and an award, against respondents and their attorney, Marshall Casey, of their reasonable attorney fees incurred in the superior court and on this appeal under CR 26(g) and CR

37(a)(4) for said violations, and that the superior court is to determine the amount to be awarded to appellants as attorney fees in this matter for said violations.

G. CONCLUSION

For the reasons set forth above, this Court should reverse the challenged decision of the superior court and remand this matter for a determination of the amount of reasonable attorney fees which appellants should be awarded under the provisions of CR 26(g) and CR 37(a)(4) in so far as the motion of the plaintiffs and respondents, and their attorney's conduct, before the superior court violated the civil rules set forth above.

Respectfully submitted this 12th day of January 2015.

The Nayes Law Firm, P.S.

By: 

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

MARISA WUNDERLICH and JOSEPH WONDERLICH, a married couple Respondents, v. JOHN P. ROUSE and KARMA ROUSE, a married couple, and THORPE-ABBOTT PROPERTIES, LLC Appellants.	No. 326551-III DECLARATION OF SERVICE OF BRIEF APPELLANTS

ERIC K. NAYES makes the following declaration:

1. I am the attorney for appellants, John P. Rouse and Karma Rouse, husband and wife, appellant, Thorpe-Abbott Properties, LLC, a Washington limited liability company, and myself, in the above entitled matter. The following is based upon my personal knowledge.

2. On January 12, 2015, I personally served a true and correct copy of a "Brief of Appellants" in the above entitled matter on Marshall Casey, of M Casey Law, PLLC, attorney for plaintiffs and

respondents, Marisa Wunderlich and Joseph Wunderlich, at 1318 West College Avenue, Spokane, Washington, by leaving the same at the offices of Marshall Casey at 1318 West College Avenue, Spokane, Washington, with the receptionist therein.

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

SIGNED in Spokane, Spokane County, Washington, on this 12th day of January 2015.

Eric K. Nayes, WSBA #2709

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