NO. 326551-III

SUPREME COURT

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,

Petitioners

PETITION FOR REVIEW

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PETITION FOR REVIEW

A. Identity Of Petitioners

Appellants, John P. Rouse and Karma Rouse, husband and wife, Thorpe-Abbott Properties, LLC, a Washington limited liability company, and the undersigned attorney for appellants, Eric K. Nayes, as Petitioners, ask this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this Petition.

B. Court Of Appeals Decision

The unpublished decision of the Court of Appeals, Division III, was entered under Appeal No. 32655-1-III and filed on November 15, 2015. A Motion for Reconsideration Or, in the Alternative, to Publish Opinion filed by Petitioners. Said Motions were denied by an Order Denying Motion for Reconsideration and Denying Motion to Publish of said Court filed on January 21, 2016, and finally served on the parties on March 11, 2016.

A copy of the decision is in the Appendix at pages A-1 through A-12. A copy of the Order Denying Motion for Reconsideration and Denying Motion to Publish is in the Appendix at page A-13.

C. Issues Presented For Review

1. Is the decision of the Court of Appeals in conflict with numerous decisions of the Supreme Court and other divisions of the Court of Appeals, when the Court of Appeals refused to review claims of error of the trial court regarding the proper interpretation and application of court

rules de novo as issues of law, but rather reviewed said claims of error on the basis that the trial court has the discretion to ignore the plain meaning of the language of court rules when interpreting and applying the same? [RAP 13.4(b)(1) - (2)].

2. Is a significant constitutional law question regarding due process under Article I, section 3, of the Washington State Constitution, and the fifth and fourteen amendments to the United States Constitution, presented when the decision of the Court of Appeals refuses to give effect to the language of Superior Court Civil Rules plain on their face but rather determines that it can defer to the discretion of the trial court to ignore the plain meaning of the language of court rules when interpreting and applying the same? [RAP 13.4(b)(3)].

3. Is the decision of the Court of Appeals in conflict with decisions of the Supreme Court and other Courts of Appeal, when the Court of Appeals declined to either review claims of error de novo regarding issues that the superior court refused to decide or to remand the matter to the superior court to determine the issues originally ignored? [RAP 13.4(b)(1) - (2)].

D. Statement Of The Case

1. Parties

Petitioners, John P. Rouse and Karma Rouse, are husband and wife. Petitioner, Thorpe-Abbott Properties, LLC, is a Washington limited liability company, of which John P. Rouse and Karma Rouse are the only

members. The undersigned petitioner, Eric K. Nayes, is the attorney for the petitioners.

Respondents, Marisa Wunderlich and Joseph Wunderlich, are wife and husband and residents of Spokane County, Washington.

2. Facts and Procedure in Superior Court Relevant to Issues Presented For Review

The primary subject matter of the underlying action was a claim of adverse possession by respondents to real estate owned by petitioner, Thorpe-Abbott Properties, LLC. [CP 288-293]. However, the appeal to the Court of Appeals and the within Petition for Review are directed only to specific issues of law that arose during the course of discovery in the action.

In particular, by 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 [hereinafter sometimes referred to as "Plaintiffs' First Set"], Marshall Casey, the attorney for respondents, purportedly propounded **jointly** to the named petitioners thirteen (13) statements denominated as an "interrogatory" and seven (7) statements denominated as a "request for production." [CP 141-158]. The undersigned attorney, Eric K. Nayes, on behalf of petitioners, timely objected to "Plaintiffs' First Set" by two separate pleadings, one directed to the purported interrogatories [CP 160-167] and one directed to the purported requests for

production [CP 169-180]. Among the grounds for objection to the purported interrogatories were (1) that the purported interrogatories did not comply with the plain language of CR 33 in that the same were not directed to a single party, and (2) that the purported interrogatories did not comply with the plain mandatory language of CR 33(a) which 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." [CP 161]. Among the grounds for objection to the purported requests for production was that the purported requests did not comply with the plain mandatory language of CR 34(b)(2)(B) which specifies that the request "shall specify a reasonable time, place and manner of making the production and performing the related acts." [CP 180]. In addition, objections were made to the purported interrogatories [CP 160-167] and the purported requests [CP 169-180] on numerous separate and specific grounds well supported by prevailing case law. [CP 197-198].

A CR 26(i) conference was held at the offices of Marshall Casey regarding "Plaintiffs' First Set" and the objections of petitioners. The undersigned attorney, Eric K. Nayes, requested that the CR 26(i) conference be recorded for enumerated reasons; petitioners agreed to pay the appearance fee for a court reporter but not any fees for transcription. [CP 184-186]. The CR 26(i) conference was held at the offices of

Marshall Casey, the attorney for respondents, and recorded by Dorothy Stiles, RMR, CRR. [CP 58].

Thereafter, Mr. Casey moved for sanctions [CP 91-103] against the undersigned attorney and his clients regarding the objections to the purported interrogatories, the objections to the purported requests for production, and the recording of the CR 26(i) conference, on the grounds the same all violated CR 26(g). After a hearing, but without seeing or reviewing any of the objections to "Plaintiffs' First Set," the court entered its "Order for Sanctions Against Mr. Nayes" on May 30, 2014, determining that the unseen objections to "Plaintiffs' First Set" and the request for recording the CR 26(i) conference all violated CR 26(g). The court awarded sanctions against Mr. Nayes in the amount of $1401.30 for said ostensible CR 26(g) violations. Petitioners timely filed a "Motion for Reconsideration of Order for Sanctions," [CP 133-135], which motion was denied by the superior court. [CP 286-287]. Thereafter, the superior court entered a monetary "(Proposed) [sic] Judgment Against Eric KNayes [sic]" on March 13, 2015. [CP 576-577] based on the same sanctions.

3. Procedure and Decision in Court of Appeals Relevant to Issues Presented For Review

On July 24, 2014, Petitioners filed a "Notice of Appeal to Court of Appeals, Division III" of (1) the "Order for Sanctions Against Mr. Nayes," entered on May 30, 2014 [CP 126-130], and (2) the "Order on Reconsideration," entered on July 15, 2014 [CP 286-287], bringing those orders before the Court of Appeals. [CP 277-287]. On March 26, 2015,

Petitioners filed a "Supplemental Notice of Appeal to Court of Appeals, Division III" of the "(Proposed)[sic] Judgment Against Eric KNayes [sic]" entered on March 13, 2015 [CP 576-577], bringing that judgment before the Court of Appeals.

On November 15, 2015, the Court of Appeals filed an unpublished decision on review of this case. [Appendix, pp. A-1 through A-12]. Thereafter, petitioners timely filed a Motion for Reconsideration Or, in the Alternative, to Publish Opinion. Said motions were denied by an Order Denying Motion for Reconsideration and Denying Motion to Publish filed on January 21, 2016, and finally served on the parties on March 11, 2016. [Appendix, p. A-13]. Petitioners now seek review by the Supreme Court of the decision of the Court of Appeals terminating review.

E. Argument

1. Why Review Should Be Accepted

RAP 13.4(b) provides:

> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The above criteria are satisfied in the present case. First, the criteria under subsections (1) and (2) above are satisfied based upon the clear conflict between the decision of the Court of Appeals for which review is sought and the cases of the Supreme Court and other divisions of the Court of Appeals which are cited in this Petition for Review. Second, as evidenced by in the issues presented for review, significant and serious questions of law involving both the State and Federal Constitutions exist with respect to enumerated aspects of the decision for which review is sought, and which questions have far reaching effects upon the lives and assets of attorneys and their clients in this State. Accordingly, the criteria under subsection (3) above is satisfied. Finally and furthermore, all the issues presented in this Petition for Review are clearly a matter of substantial public interest and concern to attorneys and their clients in this State, especially since the issues presented involve, as a matter of first impression, the proper interpretation and application of the plain meaning of certain of the Superior Court Civil Rules. Consequently, the criteria under subsection (4) above is satisfied. Hence, the Supreme Court should accept review.

2. Legal Argument In Support Of Review

a. Court of Appeals Refused to Review De Novo as Issues of Law the Claimed Errors of the Trial Court Regarding the Proper Interpretation and Application of Superior Court Civil Rules, Which Refusal Renders the Decision of the Court of Appeals in Conflict with Numerous Decisions of the Supreme Court and Other Divisions of the Court of Appeals

The appeal of petitioners and their attorney of the sanctions imposed by the superior court court, ostensibly under CR 26(g), regarding the objections of petitioners to "Plaintiffs' First Set" and petitioner's request to have the CR 26(i) conference recorded, and the assignments of error and issues presented to the Court of Appeals regarding said sanctions, were based on the undeniable fact that first Marshall Casey, the attorney for respondents, in preparing and serving "Plaintiffs' First Set," as a matter of law, did not comply with the plain language CR 33(a) and CR 34(b)(2)(B) regarding interrogatories and requests for production. Second, assignments of error and issues presented to the Court of Appeals were based on the fundamental fact that the superior court, as a matter of law, improperly and erroneously refused to apply the plain language and meaning of CR 26(g), CR 33(a) and CR 34(b)(2)(B) to actual facts and circumstances of this matter. In addressing these assignments of error and issues regarding the interpretation and application of the Superior Court Civil Rules, the Court of Appeals stated "This court reviews discovery sanctions rulings for abuses of discretion." [Appendix, p. A-5]. In other words, since sanctions were involved, the Court of Appeals refused to review de novo as issues of law the proper interpretation and application by the superior court of the contested Superior Court Civil Rules. Rather, in reaching its decision, the Court of Appeals apparently erroneously reviewed these assignments of error and issues of petitioners on the grounds that the superior court has the discretion to apply or not to apply

the plain language and meaning of Superior Court Civil Rules as the superior court sees fit.

This decision of the Court of Appeals is in conflict with every decision of the Supreme Court and every decision of other divisions of the Court of Appeals that petitioners could find. Claims of error regarding questions of law are reviewed de novo. Sunnyside Valley Irrigation District v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Issues regarding the construction or interpretation of a statute or court rule are questions of law. See, State v. Greenwood, 120 Wn.2d 585, 592, 845 P.2d 971 (1993); State v. McIntyre, 92 Wn.2d 620, 622-23, 600 P.2d 1009 (1979); City of Spokane v. Spokane County, 158 Wn.2d 661, 673, 146 P.3d 893 (2006); W. Telepage, Inc. v. City of Tacoma Department of Finances, 140 Wn.2d 599, 607, 998 P.2d 884 (2004); State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003); In re Matter of Kistenmacher, 134 Wn.App. 72, 79 n.5, 138 P.3d 648 (2006); and In re Marriage of Wilson, 117 Wn.App. 40, 45, 68 P.3d 1121 (2003). Accordingly, claims of error regarding the proper application and interpretation of court rules are to be independently reviewed and decided by the Court of Appeals on a de novo basis. See, generally, State v. Karp, 69 Wn.App. 369, 372, 848 P.2d 1304 (1993). Furthermore, when the meaning of a statute or court rule is apparent on its face, a reviewing court must give effect to that plain meaning. See, McGinnis v. State, 152 Wn.2d 639, 645, 99 P.3d 1240

(2004). "Language which is clear upon its face does not require or permit any construction." State v. McIntyre, supra, at 622.

In reference to this matter, petitioners objected to the purported interrogatories on the grounds that the same were in the form of a single document directed to jointly to all parties. 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]. Without dispute, the purported interrogatories did not comply with the plain language of CR 33(a) regarding the clearly singular word "party." [CP 141-158]. Petitioners timely objected to this failure of respondents to comply with the foregoing clear and plain provision of CR 33(a). [CP 161]. Notwithstanding, the Court of Appeals construed the plain, clear and singular word "party" in CR 33(a) to include any married couple, as well as any entity owned by them, that were parties to an action. Consequently, the Court of Appeals decided that, under those circumstances, interrogatories could be contained in a single document directed to multiple parties regardless of the plain and clear language of CR 33(a). Hence, the Court of Appeals likewise decided that the timely objection of petitioners to the interrogatories on the foregoing basis violated CR 26(g) and was therefore subject to the sanctions awarded. [Appendix, p. A-9 through A-10].

In addition, petitioners objected to purported interrogatories of respondents on the grounds that said purported interrogatories did not

comply with a mandatory provision of CR 33(a), which provision states:

> 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].

Without dispute, the record discloses that none of the purported interrogatories propounded by respondents to petitioners [CP 141-158] came close to complying with the foregoing mandatory provision of CR 33(a), and that petitioners timely objected, in accordance with CR 33(a), to this failure of respondents to comply with said mandatory provision. [CP 161]. Notwithstanding, the decision of the Court of Appeals determined (1) that there was no actual necessity that Marshall Casey, the attorney for respondents, comply with this mandatory provision of CR 33(a), (2) that any failure to comply should be informally pointed to a non-complying opposing attorney, and (3) that any timely objection under CR 33(a) to the failure to comply with this mandatory provision is therefore improper and subject to sanctions under CR 26(g), as such an objection causes delay and added expense. [Appendix, p. A-9].

The foregoing enumerated applications and interpretations of CR 33(a) by the Court of Appeals are in conflict with all of the cases of the Supreme Court and other divisions of the Court of Appeals cited above. The language of CR 33(a) is plain and clear on its face. Marshall Casey, the attorney for respondents, absolutely did not comply with the quoted provisions of CR 33(a), including the plain, clear and mandatory language

contained therein. The objections of petitioners to said failure of Mr. Casey to comply were timely, otherwise consistent with CR 33(a) and warranted by existing law. Since the language is plain and clear, the construction of CR 33(a) by the Court of Appeals (1) that the word "party" includes any married couple and any entity owned by them, (2) that any mandatory provision is actually optional, (3) that informal objections to non-compliance with CR 33(a) are required of parties or an attorney before the expiration of 30 days, and (4) that timely objections to non-compliance with CR 33(a) are improper and subject to sanctions under CR 26(g), is not permissible. Hence, the decision of the Court of Appeals is clearly in conflict with the cited decisions of the Supreme Court and other Courts of Appeal.

Furthermore, petitioners responded to the purported requests for production of respondents and objected, in part, on the grounds that said purported requests for production did not comply with the mandatory provision of CR 34(B)(2)(b), which provision states that the request "**shall specify a reasonable time, place and manner** of making the production and performing the related acts." [Emphasis added]. The decision of the Court of Appeals determined that the objection by petitioners to the failure of Marshall Casey, the attorney for respondents, to comply with this mandatory requirement of CR 34(B)(2)(b) bordered on the frivolous, that there was no requirement that Marshall Casey, the attorney for respondents, comply with this mandatory requirement, and that any timely

objection under CR 34(b) to the failure of Mr. Casey to comply with this mandatory provision is improper and subject to monetary sanctions under CR 26(g). [Appendix, p. A-10].

Again, the foregoing enumerated application and interpretation of CR 34(B)(2)(b) by the Court of Appeals is also in conflict with all of the cases of the Supreme Court and other Courts of Appeal cited above. The language of CR 34(B)(2)(b) is plain and clear on its face. Marshall Casey, the attorney for respondents, absolutely did not comply with said quoted mandatory provision of CR 34. Again, the response and objection of petitioners to this failure of Mr. Casey to comply was timely, otherwise consistent with CR 34 and warranted by existing law. Since the language is plain and clear, the construction of CR 34(B)(2)(b) by the Court of Appeals that said mandatory provision is actually optional, and that a timely response and objection by petitioners to non-compliance with the provision is therefore improper and subject to sanctions under CR 26(g), is not permissible. Accordingly, the decision of the Court of Appeals regarding CR 34(B)(2)(b) is clearly in conflict with the cited decisions of the Supreme Court and other Courts of Appeal. Hence, for all the reasons stated, acceptance of review by the Supreme Court is fully warranted under RAP 13.4(b)(1) and (2).

Additionally, the determinations of the Court of Appeals concerning the proper interpretation and application of the plain and clear language of CR 26(g), CR 33(a) and CR 34(B)(2)(b) are determinations of

first impression in this State and, as near as can be ascertained, of first impression in these United States, and, additionally, implicitly reverse long established principles of law. Thus, said determinations of the Court of Appeals involve issues of substantial public interest that should be determined by the Supreme Court. Therefore, acceptance of review by the Supreme Court is fully warranted under RAP 13.4(b)(4) as well.

b. Court of Appeals Denied Petitioners Due Process By Refusing to Give Effect to the Language of Superior Court Civil Rules Plain on Their Face

The Court of Appeals deprived petitioners of due process of law under Article I, section 3, of the Washington State Constitution, and the fifth and fourteen amendments to the United States Constitution, by refusing to give effect to the plain and clear language of Superior Court Civil Rules at issue, namely CR 26(g), CR 33(a) and CR 34(b)(2)(B), in complete derogation of the published Superior Court Civil Rules and corresponding case law. As stated in the legal argument under 2.a. above, the Court of Appeals determined that there was no necessity for either opposing counsel to comply with, nor the superior court to give effect to or apply, the plain language of CR 33(a) or CR 34(b)(2)(B). Rather, the Court of Appeals determined that any objection by Eric K. Nayes, attorney for petitioners, to the fact that Marshall Casey, the attorney for respondents, did not follow applicable Superior Court Rules was improper regardless of the plain and clear language of said rules, and that Eric K. Nayes, the attorney for petitioners, was therefore subject personally to the

payment of monetary sanctions awarded by the superior court under CR 26(g).

Contrary to the determination of the Court of Appeals, petitioners, including their attorney, Eric K. Nayes, all have an unqualified, due process right to expect the superior court and the Court of Appeals to follow the rules and procedures, including the Superior Court Civil Rules, promulgated and adopted by the Supreme Court. Once a court rule has been promulgated and adopted, petitioners, as litigants to a controversy, have a clear right under the due process clauses of the state and federal constitutionals to expect the superior court and the Court of Appeals to follow that rule and the express procedures adopted thereunder. U.S.Const., amend. 5 and 14; Wash.St.Const., Art. I, sec. 3; see also, United States v. Ferretti, 635 F.2d 1089, 1093 (3rd Cir. 1980).

Since a rule promulgated by the Supreme Court carries with it the full force and effect of law [see, State v. McIntyre, supra, at 622-623; State v. Greenwood, supra, at 592], the superior court and the Court of Appeals have absolutely no discretion or leeway as to whether abide by and follow the same. Generally, Ferretti, at 1093. Stated differently, a rule, once enunciated, cannot "then be blithely ignore[d] . . . thereby leading astray litigants who depend upon it." Nat'l Labor Relations Bd. v. Horn & Hardart Co., 439 F.2d 674, 679 (2nd Cir. 1974). In this vein, established rules of procedure or protocol cannot be set aside simply for purposes of momentary expediency. Accord, United States v. Diaz-Villafane, 874

F.2d 43,46 (1st Cir.), cert. denied, 493 U.S. 862, 107 L.Ed.2d 133, 110 S.Ct. 177 (1989). Consequently, the superior court and the Court of Appeals in this matter were obligated to act and decide the issues raised by petitioners regarding the Superior Court Civil Rules within the parameters of said rules as established by the Supreme Court, unless or until such rules are either revised or repealed by that Court. See, Ferretti, at 1093; see also, Service v. Dulles, 354 U.S. 363, 1 L.Ed.2d 1403, 77 S.Ct. 1152 (1957); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 265, 98 L.Ed. 681, 74 S.Ct. 499 (1954); Nat'l Labor Relations Bd. v. Campbells Prod. Dept., 623 F.2d 876, 880-81 (3rd Cir. 1980); Nat'l Labor Relations Bd. v. Pincus Bros., Inc. - Maxwell, 620 F.2d 367, 378-79 (3rd Cir. 1980)(Garth, J. concurring); Horn & Hardart Co., at 679; Schmidt v. Silver, 89 F.R.D. 519, 520 (E.D. Pa. 1981). The failure to do so deprives petitioners, including their attorney, Eric K. Nayes, of due process of law.

Hence, in summary, the Court of Appeals determined that no necessity existed for either opposing counsel nor the superior court to give effect to or apply the plain language of Superior Court Civil Rules, namely CR 26(g), CR 33(a) or CR 34(b)(2)(B)3(a), as adopted by the Supreme Court. Further, the Court of Appeals determined that Eric K. Nayes, as the attorney for petitioners, by objecting to the failure of opposing counsel and the superior court to follow said court rules, was personally subject to monetary sanctions under CR 26(g). Under the constitutional provisions and law cited above, such determinations of the Court of Appeals clearly

deprived petitioners, including their attorney, Eric K. Nayes, of due process of law. Accordingly, because the decision of the Court of Appeals clearly deprives petitioners of due process of law under the both the Washington state and federal constitutions, acceptance of review by the Supreme Court is fully warranted under RAP 13.4(b)(3).

c. Court of Appeals Refused to Properly Address Objections and Arguments of Petitioners That Some Interrogatories and Requests for Production Were Broad, Vague or Otherwise Deficient on Grounds Supported by Fact and by Law, Which Refusal Renders the Decision of the Court of Appeals in Conflict with Decisions of the Supreme Court and Other Divisions of the Court of Appeals

The Court of Appeals stated, on page 10, in footnote 6 [Appendix, p. A-10]:

> In this light, we do not address the arguments that some of the interrogatories were broad, vague, or otherwise deficient. The trial court did not address any of those specific complaints, so this court is not in a position to address the merits of them. They apparently were lost in the sound and fury of the other arguments.

By this footnote, the Court of Appeals clearly admits it does not understand its proper role on appeal in addressing the assignments of error, issues and arguments of petitioners. Petitioners submit that this clear admission of the Court of Appeals maybe clarifies the further erroneous decisions of said Court set forth above determining that the clear and plain meaning of Superior Court Civil Rules do not necessarily have to be followed by Marshall Casey, attorney for respondents, nor the superior court, and that any objections by petitioners, and in particular their

attorney, Eric K. Nayes, to the failure of Marshall Casey to follow the clear and plain meaning of said rules is improper and subject to monetary sanctions under CR 26(g).

This Court of Appeals is correct that petitioners objected to individual statements contained in the "Petitioners First Set" and denominated as an "interrogatory" on separate and specific grounds supported by fact and by law. Likewise, petitioners objected to individual statements denominated as a "request" on separate and specific grounds supported by fact and by law. Additionally, the Court of Appeals is correct that petitioners brought these objections before the trial court [CP 197-198, CP 200] and that the trial court refused to address the same. Regardless, and again, the decision of the Court of Appeals, in refusing to address said arguments, is in conflict with every decision of the Supreme Court and every decision of other divisions of the Court of Appeals that petitioners could find.

First, applicable case law provides that if the superior court refuses to decide an issue (the situation in this case), the Court of Appeals may do so de novo if the case was decided solely on the basis of written material (again, as is the situation in this matter). See, generally, Sarruf v. Miller, 90 Wn.2d 880, 883, 586 P.2d 466 (1978); Simpson v. State, 26 Wn.App. 687, 691, 615 P.2d 1297 (1980). Second, in the alternative, the Court of Appeals may remand the matter back to the superior court to determine the specific issues which the superior court originally ignored. See, generally,

Holzer v. Rhodes, 24 Wn.2d 184, 163 P.2d 811 (1945). However, no law whatsoever allows the Court of Appeals to ignore its duty and just refuse to address the issues.

Accordingly, the decision of the Court of Appeals to not address clear issues and arguments that some purported interrogatories and requests for production were broad, vague, or otherwise deficient, and to either decide the issues de novo or remand the same to the superior court, is further clearly in conflict with the cited decisions of the Supreme Court and another division of the Court of Appeals. Thus, for the reasons stated, again acceptance of review by the Supreme Court is fully warranted under RAP 13.4(b)(1) and (2).

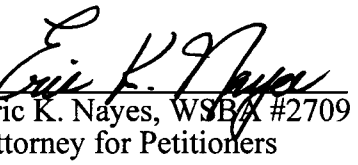
F. Conclusion

The Supreme Court should not condone the use by the Court of Appeals of an "Unpublished Opinion" to purportedly apply the certain Superior Court Civil Rules against petitioners, and more particularly, against Eric K. Nayes, the attorney for petitioners, when the reasons and rationale underlying said opinion and the application of said rules are not supported by any law or precedent whatsoever. Accordingly, given the points and authorities contained in this "Petition for Review," John P. Rouse and Karma Rouse, husband and wife, Thorpe-Abbott Properties, LLC, a Washington limited liability company, and the undersigned attorney for petitioners, Eric K. Nayes, as Petitioners, respectfully request

that review of the designated decision of the Court of Appeals be accepted by the Supreme Court.

Respectfully submitted this 11th day of April 2016.

The Nayes Law Firm, P.S.

By: 

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MARISA WUNDERLICH and JOSEPH WUNDERLICH, a married couple,	)	No. 32655-1-III
Respondents,	)	
v.	)	UNPUBLISHED OPINION
JOHN P. ROUSE and KARMA ROUSE, a married couple, THORPE-ABBOTT PROPERTIES LLC, and DOES 1-10,	)	
Appellants.	)	

KORSMO, J. — Attorney Eric Nayes appeals the sanction imposed on him for his actions during the discovery phase of the underlying case. We conclude that the motions judge did not abuse her discretion and affirm the sanction order.

FACTS

Mr. Nayes represented Thorpe-Abbott Properties, LLC and its owners, John and Karma Rouse. Mr. Marshall Casey represented Marisa and Joseph Wunderlich. The Wunderlichs sued the Rouses and their company in the Spokane County Superior Court claiming that the plaintiffs had adversely possessed some of the land belonging to the defendants. John Rouse and Marisa Wunderlich are second cousins.

After the discovery disputes at issue here were resolved by the Honorable Maryann Moreno the case ultimately proceeded to bench trial before the Honorable Michael Price. Judge Price ruled for the defendants and entered judgment in their behalf, including an award of attorney fees for the successful defense. That ruling was not appealed to this court. Nonetheless, some discussion of the facts of the underlying case is necessary to put the discovery sanction ruling in context.

The suit involved ownership of land that has been in the family since 1967. The land was originally purchased by Romyne Rouse, John Rouse's grandfather, and at some later point was placed into trust. The Rouses acquired the land in 2001 by quitclaim deed, granted by the trustees, which included Ellen Heinemann—Romyne Rouse's sister and Marisa Wunderlich's grandmother. Ms. Heinemann also owned a farm immediately adjacent to the land at issue, which was acquired by the Wunderlichs.

The Rouses acquired the land intending to build a manufacturing facility and placed it into the ownership of Thorpe-Abbott Properties, LLC. In 2003, they succeeded in getting the land rezoned to light industrial, but ran into other delays stalling construction until 2013. Meanwhile, the Wunderlichs filed the present action asserting property rights to the land through adverse possession. They claimed to have been raising crops and grazing cattle on the land for at least 10 years with Ms. Heinemann, as their predecessor in interest, doing the same before. In response, Mr. Rouse claimed to have given Ms. Heinemann permission to farm the land until he was able to build his

factory. Shortly after this case was initiated, John Rouse filed a petition for guardianship of Ellen Heinemann, alleging that she was incapacitated and needed a professional guardian to manage her legal and financial decisions.

During the deposition of John Rouse, Mr. Casey asked a series of questions about Ms. Heinemann's alleged incapacity relating to her ability to care for herself. He then asked, "Does she have a demonstrated inability to adequately provide nutrition for herself?" to which Mr. Nayes objected and instructed his client not to answer, on the grounds that it is irrelevant to a claim of adverse possession.

In the Rouse's answer to the complaint they denied that any crops had been raised or cattle grazed on the land. During the deposition Mr. Rouse admitted that some hay had been raised on the land, but stated, "it's not a crop of any kind or size or value." Clerk's Papers (CP) at 18. Mr. Casey then asked him, "So if the Complaint had said they raised hay on the property, you wouldn't have denied that?" to which Mr. Rouse responded, "Probably not." *Id.* Mr. Casey then asked "If the Complaint had said they put cattle on the property versus grazed," at which point Mr. Nayes interjected asserting that these were purely hypothetical questions without foundation. *Id.* Mr. Nayes then became belligerent, and it does not appear that Mr. Casey was able to ask any rephrased version of the question.

Mr. Casey filed a motion to compel and request for sanctions. The motions judge determined that there was no basis for instructing Mr. Rouse not to answer the questions

and compelled answers to them. Additionally, the court determined that sanctions were appropriate, but reserved an award for another time. *Id.*

Following that, on the 21st of February, 2014, the Wunderlichs served a set of interrogatories and requests for document production addressed jointly to John and Karma Rouse and Thorpe-Abbott Properties, LLC. After the full 30 days allowable Mr. Nayes served a response containing only a laundry list of objections. To the interrogatories he generally objected to all the interrogatories on the grounds that they were not numbered in the proper sequence (no number 3 and two number 12s), that they were propounded jointly to the defendants and not individually, and that there was insufficient blank space to answer the interrogatories. He then objected individually to some of the interrogatories. He also objected to each request for production on some combination of the same eight objections. He then generally objected again to the request being submitted jointly to the defendants as well as objecting on the grounds that the requests did not specify a time, place, or manner for the production.

Mr. Casey immediately sent a request to discuss the issues under CR 26(i). Mr. Nayes responded that a full afternoon would be necessary and demanded that the conference be recorded by a court reporter. The conference failed to resolve matters, so Mr. Casey filed a new motion to compel. Judge Moreno granted the motion and imposed

sanctions on Mr. Nayes for both motions to compel.[1] A total of $1,401.30 was entered pursuant to CR 26(g) and an additional $275 was entered pursuant to CR 37.[2]

Mr. Nayes appealed both the sanction order and, by supplemental notice, the sanction award, to this court.

ANALYSIS

Mr. Nayes challenges both the sanction awarded for the deposition dispute and the sanction awarded over the interrogatories. Both parties also seek attorney fees for this appeal. We turn to those contentions in the order stated.

This court reviews discovery sanction rulings for abuse of discretion. *Blair v. TA-Seattle E. No. 176*, 171 Wn.2d 342, 348, 254 P.3d 797 (2011); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

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[1] Although it appears from the ruling that Mr. Nayes ultimately responded to the discovery requests prior to the hearing, our record does not indicate whether a ruling was ever entered on his individual objections.

[2] Judge Price also deducted the time Mr. Nayes spent on the discovery disputes from the attorney fees awarded in the judgment in favor of the Rouses. Neither Mr. Nayes nor his clients have appealed this ruling.

Deposition

CR 37(a)(2) authorizes a party to move for an order compelling discovery whenever, *inter alia*, a person fails to answer a question propounded in a deposition. If a motion to compel is granted

> the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

CR 37(a)(4).[3]

Mr. Nayes contends that the challenged deposition questions were irrelevant and improper argumentative/hypothetical questions to a lay witness. Therefore, he contends that his objections were proper and not sanctionable.

However, the limits of relevancy are much broader in discovery than under the rules of evidence. *Barfield v. City of Seattle*, 100 Wn.2d 878, 886, 676 P.2d 438 (1984). Discovery broadly permits investigation into any information "reasonably calculated to lead to the discovery of admissible evidence." CR 26(b)(1). Given the context of the litigation, where the defense sought to have one of the plaintiffs' key witnesses declared legally incapacitated, the trial court's determination that questions in discovery

[3] The following paragraph of the rule is largely parallel and permits an award of fees and costs when a motion to compel is denied.

examining the scope of the alleged incapacity were relevant cannot be considered untenable. Whether the questions would have been relevant at trial would present a different question. ER 401. The trial court, however, could understandably conclude that they were a relevant topic of discovery.

Mr. Nayes also objected to a question on the grounds that it was hypothetical and argumentative. Again, he only points to law disallowing such questions on evidentiary standards at trial. *See Glazer v. Adams*, 64 Wn.2d 144, 150, 391 P.2d 195 (1964). While the question may have been unartfully phrased as a hypothetical "if the complaint had said they put cattle on the property instead of grazed," the substance of the question was whether Mr. Rouse would agree that the plaintiffs had put cattle on the property. As their possession and use of the property was a key fact underlying a claim of adverse possession, this was certainly a relevant inquiry for discovery. Again, the trial court's determination that this question sought appropriate material for discovery is tenable.

Having tenable bases for finding the challenged questions were discoverable the trial court did not abuse its discretion in imposing the sanction related to the deposition.[4] There was no error.

[4] It also should be noted that the sanctions imposed by the trial court were minimal, only covering the attorney's fees and costs associated with bringing the motion to compel and conducting an additional deposition of Mr. Rouse.

Response to Interrogatories and Request for Documents

Mr. Nayes also argues that he should not have been sanctioned over the interrogatory responses, contending that not enough space was provided to answer the questions and that it was improper to ask three parties to respond to a single request for production. He also argues that requiring a court reporter for the conference was not prohibited conduct. We agree with the trial court that counsel's behavior reflected "complete lack of cooperation in the discovery process" and that these responses were unreasonable and made for the purpose of delay. CP at 286-287.

CR 26(g) states in part:

> Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. . . . The signature of the attorney or party constitutes a certification that the attorney or the party has read the request, response, or objection, and that to the best of their knowledge, information, and belief formed after a reasonable inquiry it is:
>
> (1) consistent with these 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. . . .
>
> If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, . . . an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

Responses in discovery "must be consistent with the letter, spirit and purpose of the rules." *Fisons*, 122 Wn.2d at 344.

Nothing could be further from complying with the spirit and purpose of the rule than the objection that insufficient space was provided in which to answer the questions asked. In an earlier time when typewriters ruled law offices, it was quite simple to respond "see attached" and type answers on the appropriate amount of paper. With modern word processing, even that approach would be quaint and seldom necessary.[5] In the rare instance where a request did not give space in which to answer, the remedy is to point out the deficiency to opposing counsel and ask for a properly formatted discovery request. The solution is not to await the end of the answer period and then non-responsively complain about the format. The trial court's determination that counsel acted for the purposes of delay and added expense was well supported by the evidence.

Similarly, the complaint that the three defendants were jointly requested to answer a single set of interrogatories borders on the frivolous. While the rule is written in the singular, as Mr. Nayes stresses in his arguments, they were essentially one party—a married couple and their LLC—and it could be reasonably assumed that they had one answer. Mr. Nayes represented all defendants, so we imagine that there was no conflict of interest among them or counsel could not have ethically represented all of them. In the event that more than one of the defendants would have to answer a question, the

[5] We note that the defendants were able to expand the answer space sufficiently to raise all of their objections.

responding party easily could be identified for each question. In light of the response given, we again understand why Judge Moreno ruled as she did.

The argument that there was no due date for the production of the documents—as required by CR 34(b)(2)(B)—likewise borders on the frivolous. The request indicated that the documents could be produced at a mutually convenient time. This apparent effort by the plaintiffs to accommodate the defense stands in stark contrast to the objection filed. But, again, if this open-ended accommodation created a difficulty for the defense, the easy answer was to point out why this approach was a problem and ask for a due date or else simply produce the material at a convenient time. However, Mr. Nayes and his clients did not follow either of those options.

Finally, Mr. Nayes contends that there was nothing improper in demanding that the CR 26(i) conference be reported. While we agree with his argument that there is no rule impediment to recording a CR 26(i) conference, the remainder of his argument founders on the trial court's conclusion that his motives[6] were impure—the purpose of the request, in the trial court's view, was simply to increase the costs of the litigation and delay resolution of the underlying case. If there was such a breakdown of trust between the opposing attorneys that recording the conference was necessary, an explanation of

[6] In this light, we do not address the arguments that some of the interrogatories were broad, vague, or otherwise deficient. The trial court did not address any of those specific complaints, so this court is not in a position to address the merits of them. They apparently were lost in the sound and the fury of the other arguments.

that need could have been put forth in response to the sanctions argument in order that the trial judge could consider the argument. That did not happen here.

In all, the trial court had very tenable reasons for imposing the sanctions, which were specifically tied to the costs of the sanctionable conduct. There was no abuse of the court's considerable discretion.

Attorney Fees

Mr. Nayes asks for attorney fees due to the need to pursue this appeal, while respondents seek fees for addressing the supplemental notice of appeal. We deny both requests.

RAP 18.1(a) allows this court to grant attorney fees if applicable law grants the right to such recovery. Attorney fees are available on appeal from a discovery sanction order. CR 37(d); *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 592-593, 220 P.3d 191 (2009). Mr. Nayes, however, was unsuccessful in this appeal and is not entitled to an award of fees.

The respondents seek fees only for the need to file a supplemental brief after the supplemental notice of appeal. While they properly complain that the appellant designated a far greater supplemental record than was needed, that expense did not fall on the respondents and is not a basis for granting any relief. The reduction of the sanction award to a judgment compelled the supplemental appeal and assignment of error. It would have been a hollow victory for Mr. Nayes to have prevailed on the sanction order

if he also had failed to challenge the judgment and been bound by it regardless of the outcome of the appeal. It was not improper to file the supplemental appeal and supplemental brief.

Accordingly, both requests for attorney fees are denied. The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.

FILED
JAN. 21, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

MARISA WUNDERLICH and JOSEPH WUNDERLICH, a married couple, Respondents, v. JOHN P. ROUSE and KARMA ROUSE, a married couple, THORPE-ABBOTT PROPERTIES LLC, and DOES 1-10, Appellants.	)	No. 32655-1-III ORDER DENYING MOTION FOR RECONSIDERATION AND DENYING MOTION TO PUBLISH

THE COURT has considered appellant's motion for reconsideration or, in the alternative, to publish opinion [RAP 12.4(a); RAP 12.3(e)] and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration or, in the alternative, to publish opinion [RAP 12.4(a); RAP 12.3(e)] of this court's decision of November 10, 2015, is hereby denied.

PANEL: Judges Korsmo, Fearing, Lawrence-Berrey

FOR THE COURT:

LAUREL H. SIDDOWAY, Chief Judge

No. 326551-III

SUPREME COURT

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 Petitioners.	DECLARATION OF SERVICE OF PETITION FOR REVIEW

ERIC K. NAYES makes the following declaration:

1. I am the attorney for petitioners, John P. Rouse and Karma Rouse, husband and wife, petitioner, 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 April 11, 2016, I personally served a true and correct copy of a "Petition for Review" in the above entitled matter on Marshall Casey, of M Casey Law, PLLC, attorney for 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, on the desk of 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 11th day of April 2016.

Eric K. Nayes, WSBA #2709

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