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WASHINGTON STATE SUPREME COURT
Court of Appeals II 52080

Jacob Cuzdey,

Petitioner

vs.

Darryl Druzianich et ux.,

Respondents

BRIEF OF RESPONDENTS IN RESPONSE TO APPELLANT'S
PETITION FOR REVIEW

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Table of Contents

I. INTRODUCTION.....	1
II. COUNTER-STATEMENT OF CASE	3
III. ARGUMENT.....	11
1. Standard of Review	11
2. Mr. Cuzdey’s Intransigence Necessitated Dismissal After all Reasonable Lesser Sanctions Were Implemented to no Avail	11
IV. CONCLUSION	13

Table of Cases and Authorities

Cases

Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997).10,11

Cedell v. Farmers Ins. Co. of WA, 176 Wn.2d 686 295 P.3d 239 (2013)..11

Jones v. Allstate Ins Co 146 Wn.2d 291, 45 P.3d 1068 (2002).....11

Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 132 P.3d 115 (2006).....12

Statutes

CR 26.....6, 9

CR 37.....6

I. INTRODUCTION

As indicated in Petitioner Jacob Cuzdey's petition, he seeks relief from decisions rendered by Division II of the Court of Appeals that, in turns, affirmed dismissal of the underlying action by the Honorable Grant Blinn and then denied Mr. Cuzdey's motion for reconsideration. Respondents Darryl and Carol Druzianich raise no issues of their own for review. By this response, the Druzianiches respectfully request that the Supreme Court deny Mr. Cuzdey's petition for review.

It should be noted at the outset that the lone issue in Mr. Cuzdey's petition is presented as follows: "Should a claim for future economic damages be denied when a patent has been issued to manufacture a product and the proof of future economic damages will be provided by an expert opinion." *Br. of Petitioner*, p. 2. This sole issue is irrelevant to the circumstances that warranted dismissal of the lawsuit with prejudice. Moreover, it identifies an alleged patent for the first time, and refers to an unidentified expert witness who Mr. Cuzdey assures will eventually provide an opinion on future economic loss. Neither of these contentions find evidentiary support anywhere in the case record. This is noteworthy, as it reflects Mr. Cuzdey's continued evident failure to understand the dismissal of the lawsuit was not occasioned by his failure to make big enough promises about his evidence. Dismissal was occasioned by Mr. Cuzdey's

persistent failure to litigate in good faith by submitting to the authority of the trial court and the rules of civil procedure pertaining to discovery. The sanction of dismissal was employed as a last resort. Lesser sanctions were tried first, and Mr. Cuzdey ignored several warnings about the possible dismissal of his case in the event he refused to comply before dismissal was eventually ordered.

It should also be noted that Mr. Cuzdey once again inaccurately recites the procedural history of this case, and misstates the standard of review. This is not an appeal from an order on motion for summary judgment. This is a petition for review of an order that dismissed Mr. Cuzdey's lawsuit in its entirety and with prejudice only after Mr. Cuzdey supplied ample justification for the sanction to be levied against him. Mr. Cuzdey did this first by ignoring the rules governing discovery. He then ignored multiple court orders compelling compliance and awarding lesser sanctions, before the trial court finally determined that lesser sanctions had failed to garner Mr. Cuzdey's cooperation and dismissed the matter outright. Therefore, the Druzianiches reiterate for the third time in an appellate brief in this action that the Court's scope of review should only be for manifest abuse of discretion. Mr. Cuzdey has yet to rebut the applicability of this standard on substance, but he nevertheless continues to misrepresent to the Court that its review should be de novo.

II. COUNTER-STATEMENT OF CASE

Mr. Cuzdey wishes to rewrite the history of his conduct in order to make it appear as if this case only ended up being dismissed because of a misunderstanding. His petition omits any citation to the case record or any verbatim reports of proceedings, which is understandable because his argument is not supported by evidence. There was no misunderstanding. Mr. Cuzdey's case was not thrown out because he was asked to produce documents he did not possess. Mr. Cuzdey's case was dismissed with reluctance by the trial court only after multiple warnings and lesser sanctions were attempted to remedy Mr. Cuzdey's refusal to respond substantively to discovery. Mr. Cuzdey's insistence on litigating in bad faith was costly and time-consuming for the Druzianiches. His continued bad faith in making novel and unsupported arguments to revive his case at the Supreme Court level leaves little room to doubt the wisdom of the trial court's decision.

The procedural history of this matter is dispositive, and operates to debunk Mr. Cuzdey's fictional re-telling:

On March 22, 2017, just over two months after Mr. Cuzdey filed his Complaint, Defendants Druzianich propounded written interrogatories and requests for production on Mr. Cuzdey (and related plaintiff entities). CP 307, 315, 319-340. Over two months later, on May 4, 2017, Mr. Cuzdey

submitted an unsigned, undated document purporting to be “Defendants’ First Interrogatories and Requests for Production of Documents to Plaintiffs’; Responses Thereto.” CP 342-364. Far from being responsive to the March 22, 2017 discovery requests, the document provided by Mr. Cuzdey contained numerous absurd objections and otherwise reflected a lack of effort to engage in discovery as contemplated by the applicable Court Rules. Id. This included blanket objections to all requests for production of documents that would substantiate Mr. Cuzdey’s claim that he lost millions of dollars as a result of the conduct of the Druzianiches Id. For illustrative purposes, one example of Mr. Cuzdey’s May 4, 2017 so-called responses is provided here:

REQUEST FOR PRODUCTION NO. 3: Produce, for the period of July 1, 2011 through the present, all documents that you have filed with, or otherwise provided to, the Washington Department of Revenue, Department of Labor & Industries, and Employment Security Department relating to:

- (a) Jacob Cuzdey,
- (b) Cuzdey Manufacturing Technologies, LLC, and
- (c) Cuzdey Enterprises, Inc.

RESPONSE: Objection. Information regarding tax returns, including income tax returns, W-2 and/or 1099 forms, is privileged under federal and state law.

As indicated, Mr. Cuzdey responded substantially the same way to all such requests by the Druzianiches for records and information pertaining to Mr. Cuzdey’s business activities and income during the time period referenced in Mr. Cuzdey’s Complaint. Id.

On July 19, 2017, the Druzianiches' counsel sent a detailed letter to Mr. Cuzdey's counsel, identifying with particularity the issues with Mr. Cuzdey's responses to written discovery. After setting forth the deficiencies in Mr. Cuzdey's responses, the Druzianiches' attorney issued a plea to Mr. Cuzdey's counsel: "For the two of us to make any meaningful sense of this case, we really need to hone the claims down by the facts at hand. I appreciate your assistance in this regard." CP 366-369. In the letter, counsel further indicated a desire to obtain the requested materials from Mr. Cuzdey before August 10, 2017, and to take the deposition of Mr. Cuzdey on August 22, 2017. Id. The letter enclosed a deposition notice to Mr. Cuzdey for that date, and closed with the following: "If this date is not workable for your schedule, please let me know and we can adjust accordingly." Id.

As of September 6, 2017, Mr. Cuzdey had failed to take any meaningful action to provide useful discovery responses. CP 377-378. The Druzianiches' counsel wrote a letter to Mr. Cuzdey's counsel on that date, noting the lack of a response. Id. Also in the letter, the Druzianiches' counsel offered to give Mr. Cuzdey an additional three weeks to respond. Id. Following Mr. Cuzdey's continued failure to respond, the Druzianiches filed their first motion to compel on September 28, 2017. CP 80-85. As noted therein, the Druzianiches' counsel had conferred on at least three

separate occasions with Mr. Cuzdey's counsel regarding the overdue discovery, in accordance with CR 37 and CR 26(i). Id.

The hearing on the Druzianiches' first motion to compel was scheduled to occur on October 6, 2017. However, on October 4, 2017, Mr. Cuzdey's attorney filed a notice of intent to withdraw. CP 611. Consequently, the motion was set over to November 3, 2017 by an amended note filed on October 4, 2017. Thereafter, on November 1, 2017, Mr. Cuzdey's new counsel made an arrangement whereby Mr. Cuzdey would issue payment of \$1,000.00 in terms in exchange for cancellation of the hearing on the Druzianiches' motion to compel. CP 380-381.

Mr. Cuzdey's new counsel submitted a supplemental offering of discovery responses on January 16, 2018. CP 377-508. In it, Mr. Cuzdey withdrew his objection to providing Plaintiffs' current addresses, offering in its place a business address for Cuzdey Manufacturing Technologies, LLC, and Mr. Cuzdey's attorney's address. Id. Additionally, Mr. Cuzdey supplemented his responses to Requests for Production 1 and 2 which had requested any and all documentation pertaining to the formation of Cuzdey Manufacturing Technologies, LLC and Cuzdey Enterprises, Inc. Id. Mr. Cuzdey also responded to a request for all facts leading Mr. Cuzdey to believe the Druzianiches had sold Mr. Cuzdey's machinery and tools by providing a series of photographs of tools and equipment in a shop setting.

Id. Mr. Cuzdey then provided a list of potential fact witnesses, and copies of cancelled rent checks that had been requested. Id.

In response to Request for Production No. 7, wherein Mr. Cuzdey was requested to produce “true and correct copies of all agreements, contracts, invoices, work orders, change orders, and receipts for any and all repairs and improvements to 4751 State Route 12, Elma, Washington,” Mr. Cuzdey provided 73 pages of receipts, the bulk of which were non-responsive to the request. Id. These included receipts for food items, disposable dishes, miscellaneous office equipment and work materials. Id. Also included were substantial invoices from a company called Tristar for repairs to Mr. Cuzdey’s own CNC Mill Machine. Id. Mr. Cuzdey essentially admitted that these materials had nothing to do with the request in his deposition, taken February 28, 2018:

Q. Okay. You included invoices of theirs in your response to Request for Production Number 7. So my question to you is: How is an invoice for work that was done on your CNC mill machine responsive to a request for agreements, contracts, invoices, work orders, change orders and receipts for any and all repairs and improvements to 4751 State Route 12, Elma, Washington?

A. It's possible that's an oversight of mine. Going through dozens of receipts and paperwork middle of the night.

Q. And many of those other receipts also include food items, temporary items, coffee filters, things of that nature. Do you believe that those are also responsive to a request that asks you for proof of repairs and improvements to the address?

A. No.

CP 518-519.

Finally, Mr. Cuzdey provided what appear to be three IRS Forms 1040 purporting to reflect Mr. Cuzdey's personal earnings from 2013-2015. CP 526-531. The 2015 form was unsigned, but Mr. Cuzdey attested in his deposition that to the best of his knowledge all three had been filed on or around the same date in March of 2016. CP 515. No other financial records of any kind have been provided by Appellants, and no financial records of any kind have been provided concerning any business entity Mr. Cuzdey claims affiliation with. This action alleged only economic loss, and Mr. Cuzdey's only response to multiple requests for evidence pertaining to the core issue of this case—aside from three dubious 1040 forms—was an objection on the general basis that financial information is privileged.

At his deposition, Mr. Cuzdey testified that he had at least some portion of these records available to him, but offered no substantive explanation as to why he had made no effort to disclose them. CP 517-523. On the record at that deposition, Mr. Cuzdey and his counsel were requested to immediately comply with their obligation to respond to the March 22, 2017 discovery. Id.

Following the deposition, Mr. Cuzdey's attorney supplied a document intended to support his claim of having served in the U.S. military as an enclosure to a March 1, 2018 letter. CP 533. The undersigned responded to this letter on the same date with yet another demand to provide complete discovery responses. CP 535-536. This time, the undersigned offered Mr. Cuzdey until March 22, 2018 to comply. Id. Mr. Cuzdey provided nothing. CP 317. On March 23, 2018, the Druzianiches conducted their fourth CR 26(i) conference with Mr. Cuzdey's counsel, and provided a summary of the conversation immediately after. CP 538. As indicated both in the March 1 and March 24 correspondence to Mr. Cuzdey's counsel, the Druzianiches stated that if discovery could not be provided after over a year of requesting it, they would seek dismissal with prejudice as sanction for Mr. Cuzdey's failure to adhere to his discovery obligations and/or to make any effort to share information. Id.

Mr. Cuzdey's refusal to participate in discovery concerning the central matters pertaining to their claims was unreasonable. After over a year of effort and expense incurred by the Druzianiches in seeking to compel Mr. Cuzdey to provide meaningful evidence for his otherwise highly dubious claims, it became evident that Mr. Cuzdey would not comply. The Druzianiches believed then and believe now that the sanction

of dismissal of this lawsuit with prejudice was the only reasonable option left to the trial court.

At hearing on April 27, 2018, the trial court declined the Druzianiches' first request for dismissal, noting its reluctance to levy so harsh a sanction even in the face of Mr. Cuzdey's persistent misconduct. RP (April 27, 2018), p. 10, ln. 15- p. 13, ln. 2. Lesser terms were awarded and Mr. Cuzdey was placed on clear notice that continued refusal to participate in discovery would subject his claim to dismissal in its entirety. Id. Though ordered to produce complete responses without objection, Mr. Cuzdey produced almost nothing while reiterating a prior objection to one of the document requests in violation of the trial court's order. RP (June 8, 2018), p. 4, ln. 2- p. 7, ln. 11. The Druzianiches were therefore forced once again to bring yet another motion for imposition of sanctions. At hearing on June 8, 2018, the Druzianiches counsel provided a recitation of factors supporting dismissal on the record at the request of the trial court. RP (June 8, 2018), p. 4, ln. 18- 22. The it. Id. at p. 4, ln. 23- p. 7, ln. 22. The trial court then articulated its findings as to why lesser sanctions than dismissal would not foreseeably remedy Appellants' intransigence as this Court instructed in *Burnet v. Spokane Ambulance*. Id. at p. 8, ln. 7- p. 9, ln. 8. The dismissal order was then entered.

This matter has been reduced to a money judgment against Mr. Cuzdey in the amount of awarded sanctions. Mr. Cuzdey has failed to pay any portion of the judgment, and has failed to post a supersedeas bond.

III. ARGUMENT

1. Standard of Review

As indicated above, Mr. Druzianich has once again misstated the standard of review to be applied on appeal of the dismissal order. In arguing for de novo review, he cites to *Jones v. Allstate Insurance Company* (146 Wn.2d 291, 45 P.3d 1068 (2002)), which involved an appeal of a trial court's order on motion for summary judgment. 146 Wn.2d at 299-300.

In the present instance, Mr. Cuzdey seeks review of an order dismissing the underlying lawsuit as a sanction for flouting the Court Rules and the trial court's orders compelling them to comply. This Court's inquiry is therefore not de novo, as Mr. Cuzdey argues, but is instead confined to whether the trial court abused its discretion in dismissing the matter. See, e.g., *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

2. Mr. Cuzdey's Intransigence Necessitated Dismissal After all Reasonable Lesser Sanctions Were Implemented to no Avail.

Mr. Cuzdey seeks to manufacture an inference that he did not fail to comply with the discovery rules and court orders after all. Mr. Cuzdey urges the Court to ignore all available evidence and take him at his word that he

responded to discovery, but that he simply did not possess all of the materials requested thereby. In so doing, Mr. Cuzdey continues to advertise his evident lack of good faith.

As demonstrated above, Mr. Cuzdey displayed a consistent unwillingness to engage in discovery in good faith throughout the life of this matter. This was not simply a matter of not possessing certain documents; Mr. Cuzdey refused to respond one way or another about the nature of his claims and the support, if any, that he had for them. Had Mr. Cuzdey stated no responsive materials were in his possession, there would have been no basis for the Druzianiches to seek sanctions. Mr. Cuzdey was obligated to provide substantive answers to reasonable discovery requests, and for whatever reason he steadfastly refused despite actual notice it would result in dismissal of his case. Nearly 500 days elapsed from Mr. Cuzdey being served with reasonable discovery and the dismissal of this case for Mr. Cuzdey's failure to respond to it. He now disingenuously urges this Court to deem a non-response to be a response and give him a "do over." Mr. Cuzdey's petition is bereft of any indication that, if given yet another chance, Mr. Cuzdey intends to conduct himself any differently. This is not without serious consequences to otherwise undeserving good faith litigants. "Discovery abuse is by definition prejudicial and can, in extreme cases, make litigation prohibitively expensive." *Mayer v. Sto Industries, Inc.*, 156

Wn.2d 677, 690, 132 P.3d 115 (2006). There has never existed a reasonable justification for Mr. Cuzdey's behavior in this case, which may explain why Mr. Cuzdey keeps changing his explanation for flouting the rules and flouting lawful court orders. While Mr. Cuzdey's excuses may have changed over time, his lack of good faith in maintaining this action has been the picture of consistency. Consequently, the dismissal entered on June 8, 2018 was warranted. Mr. Cuzdey's petition should be denied.

IV. CONCLUSION

The Druzianiches went to considerable expense and effort to engage in discovery and assess the merits of Mr. Cuzdey's allegations. Mr. Cuzdey, who filed the action, could not be bothered to participate. The rest is history. Mr. Cuzdey's petition should be denied.

RESPECTFULLY SUBMITTED this 1st day of June, 2020.

MIX SANDERS THOMPSON, PLLC

s/ Michael G. Sanders

Michael G. Sanders, WSBA #33881

Attorney for Respondents

CERTIFICATE OF MAILING

I certify that on the 1st day of June, 2020, I caused to be served by email a copy of the Brief of Respondents in Response to Appellant's Petition for Review to the individual at the address below:

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