

No. 64199-9-1

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

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BRE PROPERTIES, INC.,

Appellant,

v.

NORTHWEST TOWER CRANE SERVICE, INC.,

Respondent/Cross-Appellant.

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RESPONDENT/CROSS APPELLANT'S REPLY BRIEF

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## I. REPLY

### 1. **Introduction**

The pertinent Case Scheduling Order for the BRE litigation was issued on April 28, 2008. It required the parties to disclose primary witnesses on May 11, 2009 and additional witnesses on June 22, 2009. BRE's Disclosure of Primary Witnesses did not disclose one single lay or expert witness with respect to liability. *CP 516-519*. BRE never served a Disclosure of Additional Witnesses. In fact, BRE conducted virtually no formal discovery and rarely attended the nearly 80 depositions conducted with respect to the In Re Tower Crane Collapse matter. BRE refused to consolidate into the In Re Tower Crane Collapse matter, and intentionally spent no discovery resources in this matter. BRE's responses to NWTC's contention interrogatories merely state, "BRE incorporates the expert materials prepared by the experts for all plaintiffs in the consolidated crane case collapse litigation." *CP 221-230*. These disclosures do not meet the requirements of King County LR 26(b).

The sole plaintiff in this action was BRE Properties. *CP 3*. Codefendant LCL filed cross-claims and a third-party complaint against the other defendants specifically limited to the claims and allegations contained in BRE's Complaint. *CP 30-46*. LCL's Cross-Complaint stated:

In the event [BRE] prevail[s] on [its] claims for relief against Lease Crutcher Lewis, the claims for relief in this Cross-Claim and Third-Party complaint should be granted. *CP 45.*

Critically, however, BRE could not prevail on its claim against LCL or any other party because BRE purposefully chose not to disclose any liability witnesses. *CP 516-519.* Accordingly, NWTC filed a Motion to Strike precluding BRE from calling any liability witnesses; lay, expert or otherwise. *CP 504-512.* In its motion for summary judgment, NWTC argued that without any liability witnesses whatsoever BRE's negligence claims against all parties, including LCL, must fail as a matter of law on summary judgment or upon directed verdict at trial. *CP 443-473.*

The trial court denied NWTC's Motion to Exclude Any and All Nondisclosed BRE Witnesses and Strike Any Reference to Nondisclosed Testimony in BRE's Opposition to NWTC's Motion for Summary Judgment. Failure to strike BRE's witnesses under such circumstances constitutes an abuse of discretion.

## **2. BRE Admits That It Failed To Disclose Its Own Liability And Expert Witnesses**

While BRE claims that it "properly filed its disclosure of possible primary witnesses on May 11, 2009," it admits that its disclosure of witnesses did not list one single liability expert or liability witness by name.<sup>1</sup> Despite this admission, BRE argues that "[i]n an effort to avoid

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<sup>1</sup> Appellant BRE's Reply to Respondent/Cross-Appellant NWTC's Opening Brief ("BRE Reply"), p. 30.

repetitive and unnecessary costs to all parties, BRE reserved the right to call ‘any and all witnesses in other party’s answers and responses to discovery.’”<sup>2</sup> BRE admits that the entirety of its disclosure of expert and liability witnesses was specifically limited to this ineffective reservation of rights.<sup>3</sup>

BRE’s admission proves Respondent’s contention that BRE purposefully and tactically chose not to disclose any experts or liability witnesses in this matter to save money by piggybacking off of the other plaintiffs who expended massive resources in preparation for trial, including participating in over 80 depositions and retaining numerous technical expert witnesses in the In Re Tower Crane Collapse matter. BRE couches its admission with the qualifying disclaimer that its expert disclosures were limited to the above-quoted reservation of rights in an effort to “avoid repetitive and unnecessary costs.”

BRE’s explanation is a thinly-veiled attempt to avoid the harsh realities of its purposeful non-disclosure of experts. BRE did not participate in the extensive discovery process and chose not to consolidate this case to avoid **any and all** litigation costs, not “repetitive costs.” BRE’s explanation is a red herring and BRE cannot explain (nor does it try to explain) its failure to participate in any depositions or to consolidate into the In Re Tower Crane Collapse matter.

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<sup>2</sup> BRE Reply, p. 30.

<sup>3</sup> *Id.*, p. 32.

### 3. Washington Law Mandates Exclusion Of Experts Not Specifically Listed In The Witness Disclosure

Washington law clearly states that BRE can only call experts to testify at trial **if such experts are specifically identified in discovery.**<sup>4</sup> In Allied Financial Services v. Magnum, 72 Wn.App. 164, 167-68, 864 P.2d 1 (Div. 1 1993), the trial court refused to allow the Magnum defendants to call any witnesses at trial for failing to submit a witness list required by the trial court's pretrial order. On appeal, the Mangums argued that the right to call witnesses listed by the opposing party is implicit in the court's local rules and, at a minimum, they should have been allowed to call those witnesses disclosed on Allied's witness list.

Division One ruled that the Mangums' position is contrary to the plain language of LR 16(a)(3) and the official comment to LR 16(a)(3), which states: "*All* witnesses must be listed, including those whom a party plans to call as a rebuttal witness." Thus, the court held that in order to call witnesses at trial, a party must list any and all witnesses, including those listed by the opposing party, unless the court orders otherwise for good cause." *Id.* at 168 (emphasis in the original). Thus, a blanket reservation is insufficient and one party is not allowed to call witnesses disclosed on another party's witness list.

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<sup>4</sup> BRE's reliance on Aircraft Radio Industries v. M.V. Palmer, 45 Wash.2d 737, 277 P.2d 737 (1954) is misguided and Aircraft is distinguishable from this case. Aircraft did not deal with the issue of whether a party can call another party's expert witnesses simply by relying on a blanket reservation of rights; rather, the Aircraft court decided the issue of whether deposition testimony could be used in lieu of live testimony at trial and the propriety of taking depositions.

Here, BRE admits, and the court record indicates, that it did not specifically list any liability experts or liability witnesses. King County LR 4(j) and LR 26 both require BRE to specifically identify any and all witnesses, even those witnesses named in other party's (LCL's) witness disclosure lists. BRE failed to do so and has no basis to argue that its reservation of rights is sufficient to allow it to call any and all witnesses named by any other party, in lieu of making specific designations of experts.

**4. Good Cause Standard Not Met: BRE Has No Reasonable Excuse**

BRE's explanation for its failure to specifically disclose one single liability expert or liability witness (to avoid "unnecessary costs") does not rise to the level of good cause. No unnecessary costs were saved through BRE's lack of disclosure of expert witnesses. BRE's nondisclosure was not for the purpose of conserving resources; instead, it was tactical. Such tactical strategic decisions are presumptively willful. Exclusion is mandated under Blair v. T.A. Seattle, 150 Wn. App. 904, 210 P.3d 326 (Div. 1 2009), and Lancaster v. Perry, 237 Wn. App. 826, 113 P.3d 1 (Div. 1 2005).

Astonishingly, BRE asserts that its lack of expert disclosures in its discovery responses is sufficient to give notice to NWTC of the experts and liability witnesses it intended to call at trial.<sup>5</sup> BRE's Reply Brief

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<sup>5</sup> BRE Reply, p. 32.

states: “Rather than ignoring the issue of expert witnesses, as NWTC asserts, BRE specified that expert witnesses had not been designated and such information would be provided in accordance to CR 26(e).”<sup>6</sup> BRE’s argument goes so far as to admit that it failed to designate any expert witnesses, again, with the caveat that its failure was “in an effort to avoid repetitive and unnecessary costs to **all parties**.” (emphasis added). It is unfathomable how BRE’s failure to list any expert witnesses saved any party from repetitive and unnecessary costs. Rather, it is apparent that BRE was trying to save itself all costs associated with experts, which is why it failed to list any expert by name, so as not to have to pay the expert for its services. This was clearly prejudicial to NWTC and all other parties and antithetical to the spirit of the rules of discovery. Not knowing which liability experts or liability witnesses BRE intended to call at trial is unduly burdensome; it would require NWTC to prepare its defense as if any and all experts named by any party would be testifying on behalf of BRE. This would be unfairly expensive and time consuming and would require NWTC and the other parties to guess about the identity of BRE’s experts and the content of their testimony. Such gamesmanship is not tolerated by Washington law.

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<sup>6</sup> *Id.*

**5. BRE's Nondisclosure Of Experts Meets The Definition Of "Willful"**

In Blair v. T.A. Seattle, 150 Wn. App. 904, 210 P.3d 326 (Div. 1 2009) this Court held that "[a] violation of a court order without reasonable excuse will be deemed willful." *Id.* at 910. In *Blair*, the plaintiff was unable to provide any legitimate reason for its failure to comply with the deadline. Therefore, Division One deemed the violation of the applicable deadline "willful" and upheld the trial court's striking of witnesses not properly disclosed by the deadline. *Id.* at 911.

Here, BRE was well aware of the Case Scheduling Order's May 11, 2009 deadline to disclose primary witnesses and experts. BRE purposefully chose not to disclose any liability experts or liability witnesses. BRE does not state that it accidentally failed to identify the specific experts and liability witnesses it intended to call at trial. BRE's sole defense is that the reservation of rights in its primary witness disclosure list satisfies the requirements of King County LR 26(b). BRE has no justifiable excuse for its failed expert disclosures, other than to posit that by failing to identify any expert witnesses, it was conserving resources and avoiding repetitive discovery for all parties. This is nonsensical and is not supported by the record, which shows BRE's repeated course of conduct in not participating in discovery and the

consolidation of cases to save **itself** money. This is the quintessential definition of a "tactical nondisclosure" as discussed in the *Blair* decision. Such a tactical nondisclosure cannot qualify as a "legitimate reason" or "reasonable excuse" for failing to comply with the deadline for the Disclosure of Primary Witnesses required by LCR 26 (b).

**6. BRE Raised The KCLR 26(I) Argument For The First Time In Its Reply Brief**

Appellate courts generally will not consider issues raised for the first time on appeal. Although exceptions may be made (as where injustice would otherwise result, or where proper resolution of the issue is beyond doubt), the general rule is that an issue must be presented to, considered by, and decided by the trial court before it will be reviewed by an appellate court. "ER 103 requires all objections to be timely and specific. Failure to raise an objection at the trial court precludes a party from raising it on appeal." *Dehaven v. Gant*, 42 Wn. App. 666, 669, 713 P.2d 149 (1986).

BRE never raised the issue of the lack of a CR 26(i) conference in its Opposition to NWTTC's Motion to Exclude Expert Witnesses at the trial court level. *CP 911-918*. Because BRE never briefed or argued this issue at the trial court, it cannot raise this issue for the first time on appeal.

**7. KCLR 26 Inapplicable To Violation Of Scheduling Orders**

Additionally, the court must disregard BRE's argument related to the lack of CR 26(i) conference because the rules related to compliance

with the Order Setting Case Schedule are borne in King County LR 4, which states:

(1) Failure to comply with the case schedule may be grounds for imposition of sanctions, including dismissal, or terms.

(2) The Court, on its own initiative or on motion of a party, may order an attorney or party to show cause why sanctions or terms should not be imposed for failure to comply with the Case Schedule established by these rules.

BRE failed to abide by the Order Setting Case Schedule, through which the court imposed deadlines for serving each party with the witness disclosure list. While primary witness disclosure lists are governed by King County LR 26(b), the Order Setting Case Schedule imposing the deadline for complying with the witness disclosure list is found in LR 4. LR 4 (because it does not fall within King County LR 26 through 37) does not require the parties to meet and confer prior to a party bringing a motion to impose terms for the non-movant's failure to abide by the Case Schedule. Here, BRE failed to abide by the Case Schedule because it did not disclose any liability expert or liability witnesses prior to the deadline imposed by the Case Schedule. NWTC properly objected and moved to exclude any expert testimony on behalf of BRE. NWTC need not confer pursuant to CR 26(i) prior to bringing the motion to exclude BRE's expert witnesses or the present appeal.

To allow a losing party in a discovery motion to object to a court's ruling on the basis that the prevailing party did not strictly comply with CR 26(i) undermines the efficient use of often scarce judicial resources. *Amy v. Kmart of Washington, LLC*, 153 Wn. App. 846, 858, 223 P.3d 1247 (2009). A trial judge is in the best position to determine whether and to what extent to get involved in discovery disputes in a particular case. Moreover, whether to hear a motion in the absence of strict compliance with CR 26(i) has nothing to do with the jurisdiction of the court. *Id.* BRE's argument that the **appellate** court should dismiss NWTC's appeal because the parties did not "meet and confer" under CR 26(i) must fail where (1) BRE raised this issue for the first time in the appeal; (2) King County LR 4 does not require the parties to confer prior to bringing a motion for sanctions for violating the Order Setting Case Schedule; and (3) the trial court maintains jurisdiction to rule on motions related to discovery matters, regardless of whether the parties conferred prior to filing the discovery motion.

**8. The Court Must Disregard Appellant's Reply Brief Because It Does Not Cite To The Record**

RAP 10.4(f) states:

**(f) Reference to Record.** A reference to the record should designate the page and part of the record. Exhibits should be referred to by number. The clerk's papers should be abbreviated as "CP"; exhibits should

be abbreviated as “Ex”; and the report of proceedings should be abbreviated as “RP.” Suitable abbreviations for other recurrent references may be used.

An assignment of error must comply with the requirements of RAP 10.4(f) by referring to the record before it can be considered on review. *Stewart v. State*, 92 Wash.2d 285, 597 P.2d 101 (1979). Appellate courts are not required to search the record to locate the portions relevant to a litigant's arguments. *Mills v. Park*, 67 Wn.2d 717, 721, 409 P.2d 646 (1966).

RAP 10.3(5) states: “Statement of the Case....**Reference to the record must be included for each factual statement.**” (Emphasis added). Appellant has violated this rule by repeatedly referencing the incorrect record throughout its responsive brief.

Reference to the correct record is fundamental to appellate briefing and a requirement of the Rules of Appellate Procedure. The citations to the Clerk's Papers in Appellant's Reply Brief are **all** incorrect. The incorrect citations to the Clerk's Papers are significant because this is a large and complex case, with many motions, declarations and exhibits, encompassing over 1000 pages.

By way of example, BRE made the following incorrect citations:

1. BRE Reply Brief p. 28: “...BRE submitted its disclosure of primary witnesses on May 11, 2009, as specified by the Case Schedule.” CP 201.

- CP 201 is the last page of the deposition transcript of Buford Phillips, a crane technician who testified as a fact witness.
2. BRE Reply Brief p. 29: “NWTC incorrectly continues to rely on the *Blair* case to establish that BRE failed to abide by the Court’s Case Schedule.” CP 181-182.
    - CP 181-182 is the deposition transcript of Dan Schaefer, an ironworker who testified as a fact witness.
  3. BRE Reply Brief p. 30: “BRE reserved the right to call ‘any and all witnesses in other party’s answers and responses to discovery.’” CP 201.
    - CP 201 is the last page of the deposition transcript of Buford Phillips, a crane technician who testified as a fact witness.
  4. BRE Reply Brief p. 31: “NWTC failed to depose and proceed with discovery with regard to most witnesses for approximately two months.” CP 204.
    - CP 204 is a blank Exhibit Page.
  5. BRE Reply Brief p. 33: “NWTC’s assertions are heavily based on the argument that BRE purposefully and willfully held back information for the sake of tactics.” CP 183-184.

- CP 183-184 is the deposition transcript of Dan Schaefer, an ironworker who testified as a fact witness.
6. BRE Reply Brief p. 35: “...NWTC essentially presents identical arguments, asserting that BRE’s ‘tactical non-disclosure’ is impermissible under the standards set forth in *Blair* and *Lancaster*.” CP. 178.
- CP 178 is the deposition transcript of Chris Harr, a construction assistant superintendant who testified as a fact witness.

There is no question that BRE’s Reply Brief contains incorrect citations to the record. Because not one citation to the Clerk’s Papers is correct, the court must disregard BRE’s Reply Brief in its entirety. With incorrect citations, BRE cannot substantiate any of its claims, assertions or allegations in its Reply Brief. Without correct citations to the record, the court has no factual foundation to support BRE’s contentions or opposition.

## II. CONCLUSION

This Court should grant Cross-Appellant’s appeal and rule that:  
(1) BRE could not call any liability witnesses at trial, expert or otherwise;  
and (2) BRE may not rely on the testimony of experts or liability

witnesses it failed to disclose in its Disclosure of Possible Primary Witnesses.

BRE has offered no credible evidence that its nondisclosure of liability experts or liability witnesses was not tactical and willful and under the holding in Allied, it is reversible error for the court to allow BRE to rely upon experts not named in BRE's witness disclosure list.

RESPECTFULLY SUBMITTED May 20, 2010.

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**CERTIFICATE OF SERVICE**

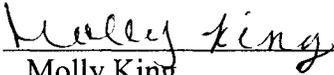
The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the date given below I caused to be served, by legal messenger and email, the foregoing **RESPONDENT'S / CROSS-APPELLANT'S REPLY BRIEF** upon the following persons:

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