

No. 72946-2-I
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

NANCY LOE
Appellant/Cross-Respondent,

v.

BENSON VILLAGE ASSOCIATES, a Washington Corporation;
CAPINITO & GOODWIN dba BENSON VILLAGE APARTMENTS I, a
Washington Partnership; OLYNPIC MANAGEMENT COMPANY, a
Washington Corporation; JOSEPH CARPINITO and JANE DOE
CARPINITO, individually and as a marital community; and WILLIAM
CARPINITO and JANE DOE CARPINITO, individually and as a marital
community,

Respondents/Cross-Appellants.

REPLY/RESPONSE BRIEF OF APPELLANT

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A. INTRODUCTION

In response to Appellant Loe's Opening Brief, Respondent/Cross-Appellant Benson Village *et. al.* (Defendants) make several arguments. First, Defendants assert that because Appellant Loe did not identify the Order Granting Sanctions specifically as one of the orders she was appealing, Appellant Loe's appeal is moot and she cannot now challenge the Order Granting Sanction.¹

Second, should this court address the arguments in Appellant Loe's Opening Brief, Defendants argue that the trial court did not abuse its discretion in granting Defendants' motion for a trial de novo and awarding only monetary sanctions because Appellant Loe cannot satisfy the *Burnet* factors.²

On cross-appeal, Defendants first argue that the trial court abused its discretion in granting Appellant Loe's Motion for Sanctions because the trial court did not enter findings of fact pursuant to *Burnet* and because the trial court relied on *Carlson v. Lake Chelan Community Hospital*, 116 Wn. App. 718, 75 P.3d 533 (2003) but "did not examine the requirement of willfulness described in *Carlson*."³

¹ Brief of Respondent, p. 13-16.

² Brief of Respondent, p. 17-34.

³ Brief of Respondent, p. 34-37.

Defendants next argue on cross-appeal that the trial court abused its discretion in denying Defendants' Motion for Reconsideration because "the arbitration would have occurred regardless of the discovery issues."⁴

All of Defendants' arguments are based on the assumption that *Burnet* applies to this case. As will be discussed further below, *Burnet* ***does not*** apply to this case and, as a result, all of Defendants arguments fail.

Appellant Loe submits the following argument in reply and cross response to Defendants' response and cross-appeal.

B. RESPONSE/REPLY

1. Appellant Loe properly appealed the trial court's order awarding sanctions.

In her Notice of Appeal, Appellant Loe indicated that she was seeking review, "of the judgment and verdict, and every part thereof."⁵ Defendants argue that, "Because Loe did not timely or actually appeal the order granting sanctions, her entire appeal is moot."⁶ Defendants' argument fails.

- i. The orders awarding sanctions and granting a trial de novo have been properly appealed because they are orders affecting the order that was designated in the Notice of Appeal.*

⁴ Brief of Respondent, p. 37-41.

⁵ CP 333.

⁶ Brief of Respondent, p. 13.

RAP 2.4(b), provides, in relevant part:

Order or Ruling Not Designated in Notice. The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

The application of this rule was discussed in *Franz v. Lance*, 119 Wn.2d 780, 836 P.2d 832 (1992). In that case, the appellants contended that because they timely filed a Notice of Appeal from an order imposing sanctions against them, the appellate court could also consider the underlying judgment finding them liable to respondents. The Supreme Court agreed:

A party need not file a Notice of Appeal within 30 days of every appealable order or judgment but may instead await the final decision in the case. If a timely Notice of Appeal is filed from that decision, the appellate court will review *prior* orders and judgments, even those which were immediately appealable, if they prejudicially affect the final judgment.⁷

[U]nder *Franz*, the previous order prejudicially affects the order designated in the Notice of Appeal if the order appealed cannot be decided without considering the merits of the previous order. This requires some connection between the two other than that the appealed order would not have occurred if the earlier order had been decided differently. The issues in the two orders must be so

⁷ *Franz v. Lance*, 119 Wn.2d 780, 781, 36 P.2d 832 (1992) (citations omitted) (emphasis added).

entwined that to resolve the order appealed, the court must consider the order not appealed.⁸

Here, the jury verdict and the entire trial could not have occurred if the trial court had denied Defendants' motion for trial de novo as the sanction imposed pursuant to Appellant Loe's Motion for Sanctions. The merits of Appellant Loe's Motion for Sanctions in which she requested denial of Defendants' motion for trial de novo as the proper sanctions must necessarily be considered along with the jury verdict because the trial court's decision to impose only monetary sanctions and grant the motion for new trial is intertwined with the existence of the jury verdict. Appellant Loe has properly appealed the trial court's decisions on her Motion for Sanctions and the motion for trial de novo under RAP 2.4(b) and *Franz*.

ii. The orders awarding sanctions and granting a trial de novo have been properly appealed because Appellant Loe has assigned error to and presented argument regarding the propriety of those orders in her Opening Brief.

RAP 1.2(a) states that “[c]ases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands.”

⁸ *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 105 Wn. App. 813, 819, 21 P.3d 1157, 1161 (2001), review granted 145 Wn.2d 1001, 35 P.3d 381, remanded 146 Wn.2d 370, 46 P.3d 789, certiorari denied 124 S.Ct. 1147, 540 U.S. 1149, 157 L.Ed.2d 1043, rehearing denied 124 S.Ct. 1708, 541 U.S. 957, 158 L.Ed.2d 394.

RAP 1.2(a) makes clear that technical violation of the rules will not ordinarily bar appellate review, where justice is to be served by such review. In these circumstances, where the nature of the challenge is perfectly clear, and the challenged finding is set forth in the appellate brief, we will consider the merits of the challenge.⁹

Relying on *Daughtry*, we reached the same conclusion regarding the effect of RAP 1.2(a) in *State v. Williams*, 96 Wash.2d 215, 220, 634 P.2d 868 (1981), and *State v. Estrella*, 115 Wash.2d 350, 355, 798 P.2d 289 (1990). In fact, every case in which we have considered a technical noncompliance with the rules concerning appellate briefing or Notice of Appeal in light of RAP 1.2(a), we have decided to reach the merits of the case or issue. See *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wash.2d 50, 64 n. 1, 882 P.2d 703 (1994), *National Fed'n of Retired Persons v. Ins. Comm'r*, 120 Wash.2d 101, 116, 838 P.2d 680 (1992), *State v. Schaupp*, 111 Wash.2d 34, 39 n. 1, 757 P.2d 970 (1988), *Green River Comm'ty College v. Higher Educ. Personnel Bd.*, 107 Wash.2d 427, 431, 730 P.2d 653 (1986).

It is clear from the language of RAP 1.2(a), and the cases decided by this Court, that an appellate court may exercise its discretion to consider cases and issues on their merits. This is true despite one or more technical flaws in an appellant's compliance with the Rules of Appellate Procedure. This discretion, moreover, should normally be exercised unless there are compelling reasons not to do so. **In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.**¹⁰

⁹ *State v. Olson*, 126 Wn.2d 315, 322, 893 P.2d 629, 632-33 (1995), citing *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 710, 592 P.2d 631 (1979).

¹⁰ *State v. Olson*, 126 Wn.2d 315, 322-23, 893 P.2d 629, 633 (1995) (emphasis added).

Assuming, arguendo, that Appellant Loe's Notice of Appeal was insufficient to preserve the issues of the correctness of the trial court's order on the Motion for Sanctions and motion for trial de novo, under RAP 1.2(a) this court has the discretion to consider the merits of Appellant Loe's appeal. Any technical error in the Notice of Appeal should not bar review of Appellant Loe's appeal and justice would be served if this court addresses the merits of Appellant Loe's appeal. Appellant Loe's Opening Brief clearly establishes the nature of her appeal and the issues present in her appeal. Appellant Loe's Opening Brief contains clear issue statements and relevant argument with citations to the record and to relevant and applicable law.

This Court was not inconvenienced and the Defendants were not prejudiced by any purported technical deficiency in Appellant Loe's Notice of Appeal. Should this Court find that Appellant Loe's Notice of Appeal was somehow deficient, this Court should exercise its discretion under RAP 1.2(a), *Daughtry*, and *Olson*, and consider the issues clearly raised and argued in Appellant Loe's Opening Brief. There are no compelling reasons for this Court not to do so.

- iii. *Clark County v. Western Washington Growth Management Hearings Review Board* is factually distinguishable from and does not apply to this case.

Defendants argue that the Washington Supreme Court's decision in *Clark County v. Western Washington Growth Management Hearings Review Board*¹¹ "compels [this] Court to disregard Loe's entire brief because Loe did not appeal the order granting her Motion for Sanctions."¹² Defendants' reliance on this case is misplaced.

In *Western Washington Growth Management Hearings Review Board*, the Supreme Court held that the Court of Appeals had erred by sua sponte reversing orders of the trial court to which neither party had assigned error and about which neither party had presented any argument:

The question is whether the Court of Appeals erred by reviewing separate and distinct claims that had been resolved below and were not raised on appeal. The parties were not challenging the disposition of those claims, and thus, the claims had been finally adjudicated. The Court of Appeals nevertheless addressed the abandoned claims sua sponte and reversed the lower court's unchallenged rulings. In order to promote finality, judicial economy, predictability, and private settlement of disputes, and to ensure vigorous advocacy for appellate review, we prohibit review of separate and distinct claims that have not been raised on appeal. We thus vacate the portion of the Court of Appeals' opinion reversing the superior court's unchallenged rulings.¹³

In *W. Washington Growth Mgmt. Hearings Review Bd.*, the Court of Appeals, on its own motion, ordered the appellants to provide briefing

¹¹ 177 Wn.2d 136, 298 P.3d 704 (2013).

¹² Brief of Respondent, p. 15.

on issues that had not been designated in the appellants' Notice of Appeal and had not been briefed in the appellants' briefing.¹⁴ The appellants informed the court that the parties had entered a stipulation regarding the issues about which the court wanted additional briefing and that the issues were moot.¹⁵ The appellants explained that the issues the Court of Appeals wanted briefed were not "encompassed in their petition of appeal," that the appellants "did not ... intend to seek review related to those [issues]" and "did not include argument related thereto in their briefing."¹⁶ Despite this, the Court of Appeals ordered additional briefing on the issues even though the appellants noted that they had not challenged the issues before the superior court.¹⁷

Despite acknowledging that both parties had objected to the Court of Appeals considering the issues and had stated that the issues were not properly before the Court, the Court of Appeals ultimately ruled on the issues and reversed several orders of the trial.¹⁸ The decision of the Court of Appeals was appealed and the Supreme Court accepted review and framed the issue before it as, "whether the Court of Appeals erred by

¹³ *Clark Cnty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 139, 298 P.3d 704 (2013).

¹⁴ *Clark Cnty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 142, 298 P.3d 704.

¹⁵ *Id.* at 141.

¹⁶ *Id.* at 141-142.

¹⁷ *Id.* at 142.

¹⁸ *Id.* at 142.

addressing sua sponte the [issues], which had been resolved below and remained unchallenged on appeal.”¹⁹

The Washington Supreme Court reversed the Court of Appeals’ decision, holding that “The Court of Appeals erred by adjudicating claims that were resolved below, were not raised on appeal, and remained separate and distinct from the claims that the parties raised on appeal.”²⁰ In so ruling, the Supreme Court noted that under *Olson*,²¹ *supra*, a court will consider an issue on appeal, notwithstanding technical violation of the procedural rules, when the nature of challenge has been made clear without prejudice to opposing party, and that under the Notice of Appeal must properly designate the decision or part of the decision that the party wants reviewed but that under RAP 2.4(b) this designation also subjects to potential review any related order that “prejudicially affected the designated decision and was entered before review was accepted.”²² The Supreme Court further held that, “After a decision or part of a decision has been identified in the Notice of Appeal, the assignments of error and substantive argumentation further determine precisely which claims and issues the parties have brought before the court for appellate review” and

¹⁹ *Id.* at 143.

²⁰ *Id.* at 143.

²¹ 126 Wn.2d 315, 318–24, 893 P.2d 629.

²² *Clark Cnty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 144-145, 298 P.3d 704.

that “Appellate courts do retain wide discretion in determining which issues must be addressed in order to properly decide a case on appeal. *See*, e.g., RAP 12.1(b); RAP 7.3; RAP 1.2.”²³

The Supreme Court ultimately held that,

The Court of Appeals erred in this case by addressing the resolved [issues] which were not raised on appeal. Those [issues] had been resolved by stipulation, dismissal, and reversal, and no challenge was presented to the Court of Appeals regarding those [issues]. Further, those [issues] had no bearing on the claims and issues that actually were presented to the Court of Appeals.²⁴

The facts of *Clark Cnty. v. W. Washington Growth Mgmt.*

Hearings Review Bd are drastically different from the facts of this case.

The entirety of Appellant Loe’s Opening Brief is dedicated to discussing the issues Appellant Loe wishes this Court to review. The issues raised by Appellant Loe have not been resolved by stipulation, dismissal, and reversal and Appellant Loe has most definitely challenged those issues in her briefing.

The Supreme Court’s ruling that the Court of Appeals erred in *Clark Cnty. v. W. Washington Growth Mgmt. Hearings Review Bd* by considering issues and orders not identified in the appellant’s Notice of Appeal is logical and correct **given the facts of that case**. The Court of Appeals sua sponte *forced* the parties to brief issues that neither party

²³ *Id.* at 145-147.

sought review regarding and that both parties told the court were moot. In such circumstances it was error for the Court of Appeals to consider the issues and orders that had not been identified in the appellant's Notice of Appeal.

As discussed above and as acknowledged by the Supreme Court, under *Olson* and RAP 1.2, Appellant Loe's Notice of Appeal was sufficient to challenge the orders regarding the motion for sanction and motion for trial de novo on appeal and even if Appellant Loe's notice was technically insufficient, this court has discretion to consider the issues that were raised and fully briefed in Appellant Loe's Opening Brief.

The facts of *Clark Cnty. v. W. Washington Growth Mgmt. Hearings Review Bd* are egregious and the Supreme Court was correct in holding that the Court of Appeals improperly considered the issues and orders that had not been included in the appellant's Notice of Appeal. However, the facts of this case are markedly different than those of *Clark Cnty. v. W. Washington Growth Mgmt. Hearings Review Bd.* and render that case inapplicable to this one.

Defendants' argument that Appellant Loe did not appeal the order granting sanctions²⁵ and that Defendants had no notice that the order

²⁴ *Id* at 147.

²⁵ Brief of Respondent, p. 13-15.

granting sanctions would be the subject of the appeal²⁶ is specious. As recognized by the Washington Supreme Court, the Notice of Appeal is not the sole document that frames the issues presented in an appeal: “After a decision or part of a decision has been identified in the Notice of Appeal, **the assignments of error and substantive argumentation further determine precisely which claims and issues the parties have brought before the court for appellate review**” and “appellate courts do retain wide discretion in determining which issues must be addressed in order to properly decide a case on appeal.”²⁷

If the fact that the Defendants themselves have appealed the order granting sanctions²⁸ was not sufficient to give Defendants notice that the order would be the subject of the appeal, then Appellant Loe’s Opening Brief should have made it abundantly clear to Defendants that the orders regarding the motions for sanctions and for trial de novo were the subject of Appellant Loe’s appeal. Appellant Loe has properly challenged the orders granting sanctions and trial de novo in her Appeal and the assignments of error and argument presented in her Opening Brief make it patently obvious that challenges to those orders are the subject of this appeal.

²⁶ Brief of Respondent, p. 15.

²⁷ *Clark Cnty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d at 145-147, 298 P.3d 704. Emphasis added.

2. Defendants fail to address the standard of review applicable to the issue of whether the trial court abused its discretion in imposing only monetary sanctions for Defendants' discovery violations.

As discussed by Appellant Loe in her Opening Brief, a trial court's decisions on (1) whether sanctions for discovery violations are warranted and, (2) if sanctions are warranted, the nature and amount of such sanctions, are reviewed for abuse of discretion.²⁹

The purpose of imposing discovery sanctions generally is to deter, to punish, to compensate, and to ensure that the wrongdoer does not profit from the wrong.³⁰ A discovery sanction should be sufficient to further the goals of discovery and insure that there is no profit from the violation.³¹ How to sanction a person for a discovery violation is left to the discretion of the trial judge, who is to consider the least severe sanction necessary to support the purpose of the sanction.³²

Ms. Loe has challenged the nature of the sanctions imposed by the trial court on Defendants based on Defendants' discovery violations, specifically, Ms. Loe argues that the proper sanction should have been denial of the Defendants' Motion for Trial de Novo rather than a monetary

²⁸ Brief of Respondent, p. 15.

²⁹ *Idahosa v. King County*, 113 Wn.App. 930, 939, 55 P.3d 657 (2002) review denied 149 Wn.2d 1011, 69 P.3d 874 (2003), citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 355, 858 P.2d 1054 (1993).

³⁰ *Fisons*, 122 Wn.2d at 355-356, 858 P.2d 1054.

sanction of \$3500 because the monetary sanction was insufficient to support the purpose of the sanction.³³

Instead of addressing the standard of review applicable to the trial court's determination of the appropriate nature of the sanctions to be imposed on Defendants, Defendants spend the bulk of their brief discussing the *Burnet* factors that are applicable when a trial court imposes sanctions more severe than monetary sanctions.³⁴

i. Neither Appellant Loe on appeal nor the trial court were required to "establish the Burnet factors."

In granting Appellant Loe's motion for discovery sanctions, the trial court found that

the subject of the Plaintiff's discovery and Request for Production was readily available to the Defendants. The attorney certification to the responses to interrogatories and requests for production was not made after reasonable inquiry and the initial responses were not consistent with the letter, spirit, and purpose of the rules...Defendants violated discovery rules by failing to timely and completely produce responsive documents to Plaintiffs' [sic] Request for Productions.³⁵

The trial court chose to sanction the Defendants by requiring the Defendants to pay Plaintiff's reasonable attorney fees and costs for the

³¹ *Washington Motorsports Ltd. Partnership v. Spokane Raceway Park, Inc.* 168 Wn.App. 710, 715, 282 P.3d 1107, (2012).

³² *Washington Motorsports Ltd. Partnership*, 168 Wn.App. at 715, 282 P.3d 1107.

³³ Appellant's Opening Brief, p. 8-11.

³⁴ Brief of Respondent, p. 17-34.

³⁵ CP 260.

arbitration, the total cost for the arbitration proceedings, the total amount of the arbitrator's fees and costs, and Plaintiff's attorney fees and costs associated with bringing the Motion for Sanctions, all purely monetary sanctions.³⁶

Defendants spend the bulk of their brief discussing the *Burnet* factors, but such discussion is irrelevant to this case.

ii. *Because the trial court imposed only monetary sanctions, it was not necessary for the trial court to make findings regarding the Burnet factors.*

When the trial court “chooses one of the harsher remedies allowable under CR 37(b), ... it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed,” and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial.³⁷

“[N]othing in *Burnet* suggests that trial courts must go through the *Burnet* factors every time they impose sanctions for discovery abuses. Nor does *Burnet* indicate that a monetary compensatory award should be treated as ‘one of the harsher remedies allowable under CR 37(b).’”³⁸

“[T]he reference in *Burnet* to the ‘harsher remedies allowable under CR 37(b)’ applies to such remedies as dismissal, default, and the exclusion of testimony—sanctions that affect a party's ability to present its

³⁶ CP 260-261.

³⁷ *Burnet v. Spokane Ambulance*, 131 Wash.2d 484, 494, 933 P.2d 1036 (1997).

³⁸ *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115, 121 (2006).

case—but does not encompass monetary compensatory sanctions under CR 26(g) or CR 37(b)(2).”³⁹

Because the trial court imposed only monetary sanctions, it was not necessary for the trial court to enter findings regarding the *Burnet* factors and it was not error for the trial court to not enter such findings. Had the trial court chosen to impose a sanction harsher than monetary sanctions, the lack of *Burnet* findings would be error. However, in this case no *Burnet* findings were necessary.

iii. *Appellant Loe does not need to “establish the Burnet factors” to establish the trial court abused its discretion in imposing only monetary sanctions.*

Citing *Blair v. Ta-Seattle East No. 176*, 171 Wn.2d 342, 352, 254 P.3d 797 (2011) and *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012), Defendants appear to argue that Appellant Loe must “establish the *Burnet* factors” to prevail on appeal. Again, Defendants argument is not supported by law.

As discussed above, a *trial court* must conduct an on-the-record analysis of the *Burnet* factors only when it imposes a sanction for discovery violations that is harsher than monetary sanctions. However, where only monetary sanctions are imposed, no *Burnet* analysis is necessary. The trial court here did not err in not conducting a *Burnet*

³⁹ *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 690, 132 P.3d 115, 121 (2006).

analysis and Appellant Loe certainly had no burden to “establish” any of the *Burnet* factors at trial or on appeal.

The correct standard of review for a trial court’s decision on whether sanctions are warranted, and, if they are, the nature and amount of such sanctions is abuse of discretion, not whether the appellant can “establish the *Burnet* factors.”⁴⁰ A legal analysis of whether the trial court’s choice of sanctions is sufficient to support the purpose of the sanction for a discovery violation is a wholly different analysis than whether the trial court’s *Burnet* analysis was sufficient to support the sanctions actually imposed by the trial court. Appellant Loe has no burden on appeal to “establish the *Burnet* factors.” In fact, the Defendants acknowledge on pages 19-21 of their Response Brief that the Washington Supreme Court has found that it is error for the Court of Appeals to “consider the facts in the first instance as a substitute for the trial court [*Burnet*] findings that our precedent requires.”⁴¹

Appellant Loe’s burden on appeal in challenging the sanctions imposed by the trial court is only to demonstrate that the sanction imposed by the trial court was an abuse of discretion in that the sanction was insufficient to support the purpose of the sanction.

⁴⁰ *Idahosa v. King County*, 113 Wn. App. 930, 939, 55 P.3d 657 (2002) review denied 149 Wn.2d 1011, 69 P.3d 874 (2003), citing *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 355, 858 P.2d 1054 (1993).

3. The trial court did not abuse its discretion in granting Ms. Loe's Motion for Sanctions.

- i. *Defendants do not address how the trial court's finding that Defendants violated CR 26 was an abuse of the trial court's discretion.*

Defendants arguments about why the trial court abused its discretion in finding that Defendants had violated CR 26 are all based on an application of *Burnet* to this case. However, as will be discussed further below, because the sanctions in this case were awarded under CR 26(g), *Burnet* does not apply to any analysis of the sanctions in this case. All of Defendants argument as to why the trial court abused its discretion in granting Appellant Loe's Motion or Sanctions address *Burnet* but fail to address how the trial court erred in finding a violation of CR 26.

- ii. *Upon finding a violation of CR 26, the trial court had no discretion about whether to impose a sanction.*

Ms. Loe moved for sanctions against the Defendants pursuant to CR 26(g).⁴² Under CR 26(g), the signature by an attorney representing a party on that party's answers to interrogatories

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:

⁴¹ *Blair v. TA–Seattle E. No. 176*, 171 Wn.2d at 351, 254 P.3d 797.

⁴² CP 10-20.

(1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(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 or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

CR 26(g) further provides, “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.”
Emphasis added.

“Reasonable inquiry” is judged by an objective standard.⁴³ CR 26(g) parallels CR 11. Its purpose is to deter discovery abuses, which include delaying tactics, procedural harassment, and mounting legal costs.⁴⁴ Subjective belief and good faith alone does not shield an attorney from sanctions.⁴⁵

⁴³ *Washington State Physicians Ins. Exchange & Ass'n v. Fisons*, 122 Wn.2d 299, 343, 858 P.2d 1054 (1993).

⁴⁴ *Fisons*, 122 Wn.2d at 341, 343, 858 P.2d 1054.

⁴⁵ *Fisons*, 122 Wn.2d at 341, 343, 858 P.2d 1054.

The trial court granted Ms. Loe's Motion for Sanctions.⁴⁶ Under CR 26(g), sanctions were mandatory. The trial court had no discretion regarding whether to impose sanctions once it had found a violation of CR 26(g). No finding of willfulness or deliberateness was necessary.

iii. *Defendants misunderstand the scope of the applicability of Burnet and their challenge to the correctness of Carlson v. Lake Chelan Community Hosp. is legally baseless.*

Defendants argue that the trial court abused its discretion in granting the Motion for Sanctions because the trial court relied solely on *Carlson v. Lake Chelan Community Hospital*⁴⁷ and that *Carlson* was wrongly decided because the *Carlson* court failed to apply the “*Burnet* rule” when analyzing sanctions imposed under CR 26.⁴⁸ Defendants’ argument reveals a lack of understanding of the applicability of *Burnet* and a lack of understanding of the facts of this case.

As discussed above, the sanctions in this case were imposed under CR 26(g). Recently, in *Foss Mar. Co. v. Brandewiede*, 71611-5-I, 2015 WL 5330483 (2015), this court explained the applicability of *Burnet* to sanctions imposed under CR 26:

Mayer v. Sto Industries, Inc. held that a trial court need not apply the *Burnet* factors when imposing lesser sanctions, e.g., monetary sanctions, but must do so when imposing severe sanctions under CR 37(b). *Mayer* refused to apply

⁴⁶ CP 259-261.

⁴⁷ 116 Wn. App. 718, 75 P.3d 533 (2003).

⁴⁸ Brief of Respondent, p. 30-37.

Burnet to a CR 26(g) violation because *Fisons* governed CR 26(g) violations, and *Burnet* is limited to CR 37(b)(2) violations....

Washington courts have applied *Burnet* to a trial court's orders excluding witnesses, dismissing claims, and granting a default judgment. But “nothing in *Burnet* suggests that trial courts must go through the *Burnet* factors every time they impose sanctions for discovery abuses.” And no case law suggests that a trial court must apply *Burnet* for discovery sanctions based on a CR 26(b) violation. ***Burnet* is limited to CR 37(b)(2) sanctions.**⁴⁹

No matter how much Defendants protest, *Burnet* simply does not apply to the sanctions imposed in this case and has no applicability to any issues raised in either party’s appeal. All arguments made by Defendants, including their arguments that *Carlson* was wrongly decided and that the trial court erred by relying on *Carlson*, are legally incorrect and irrelevant.

4. The trial court did not abuse its discretion in denying Defendants’ Motion for Reconsideration.

Defendants argue that the trial court abused its discretion in denying Defendants’ Motion for Reconsideration because the arbitration would have occurred without Defendants’ violation of CR 26,⁵⁰ and because “the motion process was abused by Loe to make money from collateral discovery disputes...and to conduct a fishing expedition.”⁵¹

⁴⁹ *Foss Mar. Co. v. Brandewiede*, 71611-5-I, 2015 WL 5330483, at *3 (2015) (internal citations omitted) (emphasis added).

⁵⁰ Brief of Respondent, p. 37.

⁵¹ Brief of Respondent, p. 39.

- i. *Defendants' argument that Appellant Loe conducted a "fishing expedition" was not made to the trial court below and should not be considered by this court on appeal.*

Defendants moved for reconsideration of the order granting sanctions under CR 59(a)(7), that there was no evidence or reasonable inference from the evidence to justify the decision.⁵² In the motion for reconsideration, Defendants argued that sanctions should not have been imposed for a single reason: "there [was] no causal link between the attorney's fees and costs incurred by plaintiff in attending the arbitration and the defendants' alleged delay in producing documents."⁵³

For the first time on appeal, Defendants accuse Plaintiff Loe of going on a "fishing expedition" but fail to provide any citations to authority or the record to support this claim.

"A party who fails to raise an issue at trial normally waives the right to raise that issue on appeal. RAP 2.5(a)."⁵⁴ Defendants did not raise their "fishing expedition" argument in the trial court and therefore cannot raise it now for the first time on appeal.

- ii. *The fact that the arbitration would have occurred without Defendants discovery violation is irrelevant for purposes of imposing sanctions under CR 26(g).*

⁵² CP 284-285.

⁵³ CP 284.

⁵⁴ *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879, 886 (2008)

Again, Defendants ignore that sanctions are mandatory where a violation of CR 26(g) is found. What ultimately occurred at trial has nothing to do with the Defendants violation of CR 26 during discovery.

Whether or not the arbitration would have occurred without the Defendants' violation of CR 26 is also irrelevant. The purpose of imposing discovery sanctions generally is to deter, to punish, to compensate, and to ensure that the wrongdoer does not profit from the wrong.⁵⁵ Defendants *did* commit a discovery violation during arbitration and Plaintiffs would not have a second chance at arbitration. CR 26(g) states that if the rule is violated the court *shall* sanction the person who made the certification and the sanction "*may* include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee."⁵⁶

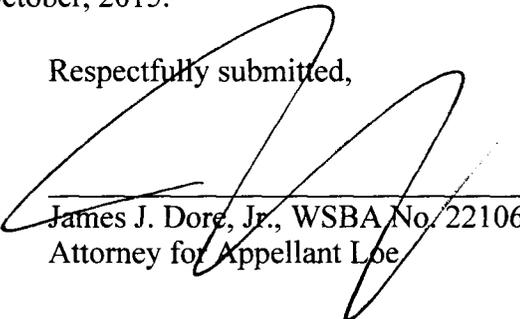
The trial court was not required to equate the sanctions imposed to the costs incurred by Ms. Loe in attending and preparing for the arbitration. The trial court was free to craft whatever sanction it saw fit in order to serve the purposes of the sanctions, which include to deter, to punish, to compensate, and to ensure that the wrongdoer does not profit from the wrong. The trial court was well within its discretion to decide that the appropriate punishment for Defendants' discovery violation was

for Defendants to pay the total amount of the arbitrator's fees and costs, reasonable attorney's fees and costs for Appellant Loe's counsel to attend the arbitration, and to pay reasonably attorney's fees and costs associated with Appellant Loe having brought the Motion for Sanctions.

Defendants fail to mount any legally supportable attack on the trial court's ruling that Defendants violated CR 26 and should have been sanctioned. Further, Defendants fail to make any legally supportable argument that the trial court abused its discretion in granting Appellant Loe's Motion for Sanctions and denying Defendants' motion for reconsideration.

DATED this 30 day of October, 2015.

Respectfully submitted,



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⁵⁵ *Fisons*, 122 Wn.2d at 355-356, 858 P.2d 1054.

⁵⁶ CR 26(g) (emphasis added).