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I. INTRODUCTION

As will be shown in more detail below, this case involves a bizarre set of circumstances where the Trial Court, without rational explanation or reason, *sua sponte* reversed a portion of a sanction order entered by a previously assigned trial judge, and reinstated a previously stricken affirmative defense. The Trial Court did so despite the fact that the underlying order she modified had already been subject to challenge by the defense by way of two unsuccessful petitions for discretionary review, which generated two decisions by Court of Appeals Commissioner Skerlec, who under RAP 2.3 standards, upheld the sanctity of the prior Trial Judge's Orders. Yet, the currently assigned Trial Judge found such orders, despite the fact they had previously been subject to substantial scrutiny, and clearly understood by the parties, to be "inconsistent", thus justifying the reinstatement of the affirmative defense of "contributory negligence".

The referenced Court of Appeals Commissioner's Decisions, preliminarily upholding the sanctity of the previous Trial Court Judge's Orders, are attached hereto as Appendix Nos. 1 and 2. (C+ 4-7)

Attached hereto as Appendix No. 3 is a copy of Commissioner's Schmidt's "Ruling Granting Review", which is now currently before this Court. The analysis set forth within

Commissioner Schmidt's "Ruling" in many respects cannot be improved upon by the appellants/plaintiffs (hereafter plaintiffs). As discussed within Commissioner Schmidt's Order at Page 4, at the time the current Trial Judge *sua sponte* reversed the prior Trial Judge's Order with respect to the previously stricken affirmative defense of "contributory negligent", there was simply no rational basis for such a ruling. As Commissioner Schmidt observes, "contrary to her concern [the trial court judge's] about inconsistency between his oral opinion [previous trial judge] and his February 12, 2010 order, there is no inconsistency justifying revision of that order."¹

As adroitly observed by Commissioner Schmidt, there was simply no basis for such a "revision" because the underlying prejudice created by the discovery abuse perpetrated by Clarence Munce, had not been cured between the entry of the Trial Court's February 12, 2010 Order striking the affirmative defense of contributory fault and Judge Stoltz' May 23, 2011 letter ruling which "*sua sponte*" reinserted such a defense. Plaintiffs, despite the passage of time, still were in the exact same position of being

¹ It is noted that current trial judge, Judge Stoltz' order which reinstated the affirmative defense of contributory fault, was in response to a motion filed by the plaintiffs seeking summary judgment on the issues of Clarence Munce's negligence as well as the question of whether or not Clarence Munce's actions were the "proximate cause" of plaintiffs' decedent Gerald Munce's death. (CP 65, 66-68, 69-42). The defense had not sought "revision" pursuant to CR 54 of the prior trial judge's orders, thus, it can be said that Judge Stoltz's determination, related to matters clearly not framed within the pleadings, which were before her, and was "*sua sponte*".

prejudiced by Clarence Munce's discovery abuse which occurred not only during the course of his deposition, where he refused to take the oath to tell the truth, and when he refused to answer almost all questions, based on the Fifth Amendment privilege, but also discovery abuse as it related to written discovery.

Frankly, Plaintiffs are grasping at what more can be said in this appeal, other than that which has already been said by the Commissioner of this Court who granted review.

Finally, by way of introductory comments, it is noted that the "Ruling Granting Review" in this matter extremely narrowed the issues which are currently before this Court. Under the terms of Commissioner Schmidt's August 1, 2011 Order Granting Review, all that is currently before this Court is the propriety of Judge Stoltz' determination to reinstate the defense of "contributory negligence", which previously had been stricken by former Trial Judge, Judge Larkin. Also before the Court, is the related Motion for Reconsideration of that ruling. What is **not** before the Court, is the propriety of Judge Larkin's July 2, 2009 Order, which ordered that the deposition of Clarence Munce could go forward, nor the February 12, 2010 order which entered sanctions against defendant Munce for his discovery abuse. (Appendix Nos. 4 and 5).

As observed by Commissioner Schmidt, this is “because Judge Larkin’s February 12, 2010 order has already been subject to a Motion for Discretionary Review, ...” which was denied. The same is true with respect to the July 2, 2009 order.

As such, any attempts by the defendant/respondent to challenge the propriety of the underlying orders, should be rejected and not tolerated given the plain language of Commissioner Schmidt’s “Ruling Granting Review.”

II. ASSIGNMENTS OF ERROR

1. The currently assigned Trial Judge erred, as a matter of law, in the method and manner it went about interpreting an order of a previous trial judge and finding it to be “inconsistent”, when no such inconsistency existed between the prior Trial Court’s oral rulings, and the subsequently entered written finding of the facts and conclusions of law and order.

2. The Trial Court erred, as a matter of law, by failing to recognize that, even if there was an inconsistency between the previous Trial Judge’s oral rulings, and its final written findings of facts, conclusions of law and order, the written instrument controls over any of the trial court’s prior oral pronouncements.

3. The trial court erred and abused its discretion by “revising”, presumptively pursuant to CR 54, a previous Trial Judge’s written findings of facts and conclusions of law due to “inconsistency” with the prior Trial Judge’s oral ruling, when there was no tenable basis to find such an “inconsistency”, particularly given the fact that not only did the parties understand the terms of the previous Trial Judge’s order, but also this Court, whose Commissioner twice previously denied motions for discretionary review relating to the orders which were subject to the currently assigned Trial Judge’s *sua sponte* efforts at revision.

II. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the Trial Court abuse its discretion by reinserting the previously stricken affirmative defense of contributory negligence in this case?

2. Did the Trial Court err, as a matter of law, by reinserting the affirmative defense of contributory negligence based on alleged inconsistency between the prior trial judge’s oral pronouncements and findings, conclusions and order, which had previously stricken such a defense, when no such inconsistency existed, and even if it did, the Trial Court’s written unambiguous findings, conclusions and order should control over its preliminary oral pronouncements?

III. STATEMENT OF THE CASE

On June 21, 2008, the longest day of the year, Clarence Munce, at approximately 9:30 p.m., in broad daylight, shot and killed his son, Gerald, in the back while he was running away. (CP 126;327). This occurred immediately after Gerald was gravely wounded by Clarence, who had attacked him with a golf club. (CP 108-124).

There were no eye-witnesses to the shooting, or the events leading up to it. As a result, the only two witnesses to the events would have been Gerald and Clarence Munce, and it is undisputed that, as a result of Clarence's actions, Gerald perished, and was, (and is), unavailable to provide information. Thus, the primary source for information about the events is the statements made by Clarence Munce in the hours following Gerald's death. (CP 327). Ultimately, Clarence confessed, when formally interviewed by the police. He confessed that when Gerald arrived at his home to return a bulldog hood ornament, that Clarence attacked Gerald with a golf club, causing bilateral rib fractures, as well as a lacerated liver. *Id.* He confessed that after his vicious assault, and as Gerald was fleeing from Clarence, Clarence grabbed an M-1 Carbine Rifle, which he had hidden behind his front door, and shot Gerald in the back, in order to "scare" him. *Id.* Clarence disavowed an intent to actually strike Gerald

with the bullet, and indicated he intended to actually shoot away from Gerald. *Id.*

In the aftermath, Clarence was criminally charged with first degree homicide. Due to his age, and apparently his presentation during the pendency of these charges, he was subject to evaluations at Western State Hospital, in order to make a determination as to whether or not he was competent to stand trial in the criminal case. During the pendency of the competency evaluation, this lawsuit was filed.

Due to the pendency of the competency evaluation, an order was entered by the initially assigned trial judge, The Honorable Thomas Larkin, precluding only the Plaintiffs from conducting any discovery until that issue was resolved in the criminal case. Ultimately, Mr. Munce was found incompetent to stand trial, due to a preexisting Alzheimer condition, and his advanced age. In early March, 2009, an order was issued, lifting the stay. Within that order, it was noted that, upon lifting of the stay, previously served Interrogatories, Requests for Production and Requests for Admission were deemed served upon the Defendant on the date of the order. By that time, Michael Smith had been appointed as Clarence Munce's Litigation Guardian Ad Litem. ² (CP 84-87).

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During the pendency of the criminal charges, and as early as arraignment and bail determinations, criminal counsel for Clarence Munce began developing a "blame the

Also, following the lift of the discovery stay, Clarence's Litigation Guardian Ad Litem filed an Answer, which included Affirmative Defenses and a Counterclaim, (CP 702-707). Within the Answer, a number of affirmative defenses were alleged, including, "self-defense", contributory fault, apportionment, and assumption of risk. (CP 85). A Counterclaim was also brought, alleging that Gerald had engaged in "elder abuse", including an alleged assault which occurred contemporaneous with Clarence's killing of Gerald. *Id.*

Despite the fact that a Litigation Guardian Ad Litem had been appointed, in response to Plaintiffs' written discovery, numerous objections and denials were raised because of Clarence's "incompetency", and assertions of Clarence's Fifth Amendment privilege against self-incrimination. (CP 86).

Attempting to get to the bottom of Clarence's affirmative defenses and counterclaims, Plaintiffs noted Clarence's deposition.³ Defense counsel, resisted Plaintiffs' deposition notice, and on July 2, 2009, Judge

dead guy" defense, predicated on allegations that there had been previous isolated incidents, where Gerald had been physically abusive towards Clarence. (CP181-200). Also, at the same time, in support of a denial of bail, or a high bail, facts were developed indicating that Clarence, over the years, had been a dangerous individual, who had engaged in a number of provocative and/or violent acts. (CP 181-200).

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By this time, Clarence had been placed in a nursing home, as a "less restrictive alternative".

Larkin ordered that Clarence present himself for deposition the following day, July 3, 2009. (Appendix No. 3) (CP 1). When making such an order, Judge Larkin took into consideration defense counsel's arguments regarding Clarence's alleged incompetency and his need to assert Fifth Amendment privileges. In that regard, Judge Larkin permitted Erik Bauer, Mr. Munce's criminal defense lawyer, to attend the deposition. (*I.d.*) (CP 87-88).

The effort to take Mr. Munce's deposition occurred on July 3, 2009. Such an effort was fruitless, because, in willful violation of Judge Larkin's order permitting the deposition to move forward, Mr. Munce was instructed not to take the oath to tell the truth, and with respect to every question asked, beyond his name, his counsel asserted the Fifth Amendment privilege against self-incrimination. As a result, he did not answer even the most innocuous and non-incriminating questions.⁴ (CP 887). (CP 1048).

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In subsequent pleadings, defense counsel admitted that Mr. Munce was instructed not to answer, literally, any questions, because there was a concern that his answers could potentially establish his competency, thus exposing him to criminal prosecution. Throughout the proceedings below, the defense never produced any authority indicating that it is proper to invoke the Fifth Amendment, for the purposes of protecting a civil incompetency determination, which otherwise shielded a party from being criminally prosecuted.

In August of 2009, Plaintiffs, for the first time, filed a motion with the Trial Court, relating to the defense's discovery abuses, not only in the deposition, but also in responding to Plaintiffs' written discovery requests. On August 14, 2009, Judge Larkin heard the motion. At the conclusion of the motion hearing, Judge Larkin indicated that he felt sanctions were appropriate, but directed additional briefing on the issue of prejudice and remedy. (RP of 8-14-09, p., 27-28). In the interim, defense counsel sought Discretionary Review by this Court of Judge Larkin's July 2, 2009 Order compelling Clarence's production for deposition. That Motion for Discretionary Review was denied by Commissioner Skerlec, by an opinion which is attached hereto as Appendix No.1. During the pendency of Defendant's Motion for Discretionary Review, a stay of the case was ordered.

Following the resolution of initial Appellate proceedings, and lifting of stay, once again, Plaintiffs moved for discovery sanctions, this time, outlining in detail the prejudice suffered by the Plaintiffs as a byproduct of Defendant's discovery abuses. On December 18, 2009, Judge Larkin heard argument. Within his oral ruling, Judge Larkin indicated that he considered less severe sanctions, and after assessing the prejudice suffered by the Plaintiffs as a byproduct of the Defendant's actions, exercised his discretion, and granted some of the sanctions the Plaintiffs

had requested, but not others. Specifically, in his oral ruling, Judge Larkin indicated that an order should be entered, striking Defendant's Counterclaim and Affirmative Defenses, including the defenses of self-defense and contributory fault. ⁵ (RP of 12/18/09, P. 34-35). (CP 106).

Prior to Judge Larkin's entering formal Findings of Facts and Conclusions of Law, Defendants moved for reconsideration of Judge Larkin's oral ruling. In the interim, Plaintiffs prepared Proposed Findings of Facts and Conclusions of Law for presentment to Judge Larkin. On January 22, 2010, the parties presented themselves before Judge Larkin for the Motion for Reconsideration and for Entry of Findings and Conclusions. At that time, reconsideration was denied, detailed Findings of Facts and Conclusions of Law as well as an order striking Affirmative Defenses and the Counterclaim, were signed and entered by Judge Larkin. (CP 8-39).

Subsequently, the Defendant challenged the language within the Findings of Facts and Conclusions of Law, and Plaintiffs' counsel agreed to amend the Findings of Facts and Conclusions of Law, to more

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Judge Larkin declined to "enter a directed verdict in the case", in response to Plaintiffs' request that a default **judgment** be entered against the defendant for his failure to cooperate in the discovery processes.

accurately reflect Judge Larkin's orders.⁶ On February 12, 2010, Judge Larkin signed Amended Findings of Facts and Conclusions of Law, which not only struck Defendant's Affirmative Defenses and Counterclaim, but also ordered that all of Plaintiffs' Requests for Admissions would be deemed admitted. (Appendix No. 4); (CP 93-93).

Again, the defense sought Discretionary Review of Judge Larkin's order. This Motion for Discretionary Review was denied by a detailed order entered by Commissioner Skerlec on or about May 19, 2010. (Appendix No. 2).

Thus, until May 23, 2011, all the parties understood, (or should have), that the effect of Judge Larkin's February 12, 2010, Order, struck/dismissed, Defendant's Affirmative Defense of self-defense, contributory fault, and the like, as well as his Counterclaim, due to discovery abuses.

The last trial date set in this case was for July 11, 2011. In preparation for that trial, Plaintiffs *,inter alia,* moved for Summary Judgment on the issue of "negligence"/liability and proximate cause. (CP 66-420) Within such moving papers, Plaintiffs contended that there really were no issues of fact regarding "negligence", in that Clarence had

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Within both Findings of Facts and Conclusions of Law signed by Judge Larkin, he also entered an order striking Defendant's Answer.

admitted to the police that he had shot Gerald, while Gerald was running away, in order to “scare” him, and as such, he did not intentionally shoot Gerald. (CP 327). In addition, with respect to the issue of proximate cause, Plaintiffs contended, that based on the evidence developed pretrial, that there really was no issue regarding “proximate cause”, in that it was undisputed that, in an effort to scare Gerald, Clarence had shot Gerald, and his death was not a byproduct of any other source, such as illness or disease. (CP 107-124; 330-401).

On May 20, 2011, Plaintiffs’ Motion for Summary Judgment was argued. In ruling on this motion, on May 23, 2011, Judge Stolz, ruled in favor of the Plaintiffs on the issue of liability, but included within her letter of ruling, “**This does not preclude the defense from arguing that there was contributory negligence on the part of Gerald.**” (Emphasis added). (CP 905)

Naturally stunned by such language, Plaintiffs filed a Motion for Reconsideration. (CP 906-928). Within that motion, it was argued that such a ruling was directly contrary to Judge Larkin’s previous orders in the case, particularly the February 12, 2010, Amended Findings of Facts and Conclusions of Law and Order, which, from Plaintiffs’ perspective, should have been treated as “law of the case”. Within Plaintiffs’ Motion for Reconsideration, it was pointed out that Judge Larkin’s February 12,

order was a byproduct of at least 4 motion hearings, and a substantial expenditure of resources by both parties. *Id.*

On June 10, 2011, Judge Stolz heard Plaintiffs' Motion for Reconsideration, and indicated that it was her opinion, that Judge Larkin's Order was "inconsistent" because, within his oral ruling of December 18, 2009, he did not intend to "direct a verdict in the case", and in her opinion, the striking of the Affirmative Defenses and Counterclaim, somehow was tantamount to the same. (CP 1066-1070)

Plaintiffs responded, noting that, under the terms of Judge Larkin's Order, Plaintiffs still had the affirmative burden of proving negligence and damages, thus, there was simply no inconsistency within the terms of Judge Larkin's Order.

Given the fact that Plaintiffs, in reliance on Judge Larkin's prior sanction orders, had ceased discovery with respect to Affirmative Defenses and Counterclaims, and was not prepared to respond to such a defense of contributory negligence in the pending July 11, 2011 trial, Plaintiffs not only filed notice of this motion, but also sought a continuance of the trial date. On June 24, 2011, Judge Stolz granted Plaintiffs' Motion for Continuance, and indicated that she would be inclined to sign a CR 54(b) certification of Judge Larkin's orders and hers, to the extent that it would be helpful to facilitate Appellate Review, but the

parties could not come to an agreement as to the scope of such an order, so no certification order was ever entered.

On June 10, 2011 the trial court entered a formal order memorializing its May 23, 2011 letter opinion. Within that order which was entitled "Order on Plaintiff's Motion for Partial Summary Judgment" the Trial Court, consistent with its letter opinion of May 23, 2011 granted plaintiff's motion for partial summary judgment "on liability only" and formalized its reinstatement of the affirmative defense of contributory negligence utilizing the following language:

The percentage of fault attributed to Clarence Munce is a question of fact for the jury to determine at trial as defendants will be allowed to argue contributory negligence at trial and it will be for a jury to determine the relative percentage of fault between Clarence Munce and Gerald Munce.

(CP 1069-70)

On the same day the trial court entered an order denying Plaintiff's Motion for Reconsideration, which was filed in response to the May 23, 2011 letter opinion by Judge Stolz.

On June 14, 2011 plaintiff filed a notice of discretionary review with this court. By way of an order dated August 1, 2011,

Commissioner Schmidt granted review of the propriety of Judge Stoltz' *sua sponte* "revision" of Judge Larkins' sanction order which had previously stricken all affirmative defenses, including contributory negligence. Within the August 1, 2011 order Commissioner Schmidt, as indicated above limited review solely to the propriety of Judge Stoltz' most recent actions, and rejected efforts on the part of the defense to expand review to include review of the underlying sanction order, as well as, the earlier order requiring Clarence to present himself for deposition.

The defense sought modification of the limiting aspect of Commissioner Schmidt's ruling granting review. Such efforts at modification were rejected by a panel of this Court.

V. ARGUMENT

a. Applicable Standards of Review

Surprisingly, the appellate cases within the State of Washington which address a trial court's authority pursuant to CR 54(b) to revise its orders prior to entry of final judgment, do not explicitly address what standard of review would be applicable to a trial court's exercise of such authority. See, *Moratti ex rel. Tarutis v. Farmers Insurance Company*, 162 Wn. App. 495, 501-02, 254 P3d 939 (2001); see also *Washburn v.*

Beatt Equip. Co., 120 Wn2d 246, 300, 840 P2d 860 (1992). Presumptively, the standard of review of “abuse of discretion”, which is typically applied when a trial court exercises its authority under the terms of the civil rules, would have application. See, *Nakata v. Blue Bird, Inc.*, 146 Wn.App. 267, 276-77, 191 P3d 900 (2008); *Howard v. Royal Specialty Underwriting Inc.*, 121 Wn.App. 372, 380, 89 P3d 265 (2004) (abuse of discretion standard applicable to trial courts’ decisions relating to discovery); *Physicians Insurance Exchange v. Fisons Corp.*, 122 Wn2d 299, 338, 858 P2d 1054 (1993) (trial court’s decision to impose sanctions under Civil Rules reviewed under an abuse of discretion standard); *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn2d 674, 685, 41 P3d 1175 (2002) (abuse of discretion standard applied to motion for reconsideration made pursuant to CR 59); *Scheib v. Crosby*, 160 Wn.App. 345, 249 P3d 184 (2011) (abuse of discretion standard applicable to motions for continuance). Thus, the appellate court should review a trial court’s “revision” order made pursuant to CR 54(b) for an abuse of discretion. See, *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn.App. 457, 463, 232 P3d 591 (2010) (reviewing trial court’s evidentiary ruling for abuse of discretion).

Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *Id.* See, *State ex rel. Carroll v. Junker*, 79 Wn2d 12, 26, 482 P2d 775 (1971). When making such a determination the reviewing court must be mindful of the purposes for which the trial court's discretion exists. See, *Coggle v. Snow*, 56 Wn.App. 499, 507, 784 P2d 554 (1990). Judicial discretion was long ago defined by our Supreme Court in the *Carroll v. Junker* opinion at Page 26:

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; a means of sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrary or capriciously ... Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds for untenable reasons.

It has long been recognized that an erroneous interpretation of the law is an untenable reason for a ruling, thus constitutes an abuse of discretion. See *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn.App. at 463, citing to *State v. Tobin*, 161 Wn. 2d 517, 523, 166 P3d 1167 (2007). As discussed below, and observed by Commissioner Schmidt, it is clear that the Trial Court in this case, to the extent that it actually performed a "revision" pursuant to CR 54(b), abused its discretion by reaching a decision based on untenable grounds i.e. the existence of

“inconsistency” between the prior trial court judge’s oral ruling and its written order. Also, as shown below, the Trial Court, exercised its discretion based on an erroneous view of the law, particularly as it relates to the method and manner in which Courts go about interpreting trial court orders.

Thus, to the extent that Judge Stoltz’ “revision” decision was predicated on an interpretation of law, such an interpretation of law is subject to a *de novo* review. See, *White v. Salvation Army*, 118 Wn.App. 272, 276 75 P3d 990 (2003). See also, *Mains Farm Homeowners Association v. Worthington*, 121 Wn2d 810, 813, 854 P2d 1072 (1993).

Here, Commissioner Schmidt in granting discretionary review utilized language similar to that utilized within a “abuse of discretion standard” i.e. “in this case Judge Stoltz has had an untenable basis for revising Judge Larkins’ order”.

Despite such observation it is noted that this matter most properly should be categorized as one in which a trial court erroneously interpreted an order made earlier in the case by a different judge. Thus, what is at issue is the interpretation or construction of a trial court’s findings of facts, conclusions of law and orders which generally presents a question of law

for the Court which is subject to *de novo* review. See, *Callan v. Callan*, 2 Wn. App. 446, 448, 468 P2d 456 (1970). See also, 4 Wash. Prac., Rules of Practice CR 54, §14, “Interpretations of Judgment”, (Fifth Edition, 2011 Pocket Part).

As discussed in more detail below, had the Trial Court properly applied the rules applicable to the method and manner in which Trial Court’s decision should be interpreted, the Trial Court simply could not have reached the result that it did. As such, the Trial Court, whether as an abuse of discretion, or as an error on a matter of law, based its decision on an erroneous application of the law, thus warranting reversal and vacation of the Trial Court’s determination to reinstate the defense of contributory negligence in this case.

B. The Trial Court Abused Its Discretion By Finding An Inconsistency Between Judge Larkins’ Oral Pronouncements And Written Orders Where None In Fact Existed.

The February 12, 2010, Sanction Order entered by Judge Larkin in this case, was the byproduct of 4 to 5 court hearings, which generated hundreds of pages of pleadings, and encompassed dozens, if not hundreds, of hours of attorneys’ time. It suffered two challenges by way of Motions for Discretionary Review before this Court. Yet, with no motion before her, the currently assigned trial judge, arbitrarily and capriciously, significantly modified that order, to the grave detriment of the Plaintiffs in

this case. The actions of the trial judge, in reinstating an affirmative defense, (contributory/comparative fault), into this case, not only undermined the sanctity of Judge Larkin's February 12, 2010 Order, but failed to recognize the very foundations and reasons why such an order was entered. It placed Plaintiffs in the untenable position of having to prepare and proceed to trial, on issues which, due to the misconduct of the Defendant, discovery had been wholly and abusively denied.

The February 12, 2010 order entered by Judge Larkin, striking the Defendant's Affirmative Defenses, inclusive of "contributory negligence", was an entirely appropriate and justified Sanction Order. The standards for the imposition of the harsher sanctions authorized by CR 37(b) were most recently discussed in the case of *Blair v. TA-Seattle East # 176*, 171 Wn. 2d 342- P.3d - (2001); See also, *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 155 P.3d 978 (2007); *Smith v. Behr Process Corporation*, 113 Wn. App. 306, 54 P.3d 665 (2002). As discussed in *Blair*, when punishing discovery violations, (which clearly occurred herein), the sanctions imposed should be "the least severe sanctions that will serve the purposes of the particular sanctions, but not so minimal as to undermine the purposes of discovery." Citing to *Burnet v. Spokane Ambulance*, 131 Wn. 2d 484, 495-96, 933 P.2d 1036 (1997). In order to ensure a sanction order, pursuant to CR 37(b), withstands appellate

scrutiny, “the record must show 3 things - the Trial Court’s consideration of lesser sanctions, the willfulness of the violation, and substantial prejudice arising from it.” *Id.*

If one examines Judge Larkin’s Sanction Order of February 12, 2010, it is clear that all 3 criteria are met under the terms of that order. Here, Plaintiffs asked not only for the sanctions of striking Affirmative Defenses and Counterclaims, but also sought the entry of a default judgment, given the severity and willfulness of the discovery violation which had occurred. See, Appendix No. 5 (pages 10-11), (16-17). Thus, clearly, the Trial Court weighed and considered whether or not less severe sanctions should be imposed. Further, the willfulness of the violation becomes apparent, when one simply examines Judge Larkin’s July 2, 2009 Order, directing that Defendants present Clarence Munce for deposition at the behest of Plaintiffs, and what transpired when efforts were taken to take conduct the court ordered deposition. (Appendix Nos. 4 and 5). Mr. Munce, was directed not to take an oath, and clearly, as discussed in detail in Commissioner Skerlec’s Order Denying Discretionary Review dated May 19, 2010, blatantly abused the Fifth Amendment privilege against self-incrimination, when Clarence Munce was directed to not to answer even the most innocuous of questions, save for his name.

Finally, the existence of prejudice to the Plaintiffs' preparation of their case, particularly as it related to responding to the Defendant's Affirmative Defenses and Counterclaim, was best articulated within Commissioner Skerlec's Order of May 19, 2010:

Here, GAL Smith repeatedly asserted that evidence pertinent to the Counterclaim and Defenses was "solely in the possession" of Munce. [In a footnote, 3 Commissioner Skerlec provided "The GAL made that statement 22 times in response to Plaintiffs' Requests for Admissions]. **There was, in fact, no other direct evidence regarding the defenses, and the Counterclaim was partly based on things Munce had to say to others. In addition, the inability to question Munce denied Plaintiffs the opportunity to obtain other potential useful information about the incidents reported in the declaration of Munce's friend. Finally, this is not a case in which the civil trial can be stayed pending disposition of the criminal charges. Given Munce's condition, there will probably never be a criminal trial... (Emphasis added). (Appendix No. 2).**

Such prejudice to Plaintiffs' ability to prepare and respond to such Affirmative Defenses and Counterclaim did not change in the interim, between the entry of Judge Larkin's Order and Judge Stolz' sua sponte modification of that Order. If anything occurred, the situation became worse because Mr. Munce has a progressive disease, which clearly had not, and would not improve over time.

As it is, Judge Stoltz, in reinstating the defense of "contributory negligence" never found any fault with Judge Larkin's determination to

enter into a sanction order. Rather she found Judge Larkin's "order" to be "inconsistent" with his oral pronouncement that he was not going to enter into "a directed verdict" as part of his sanctioned order. However, as observed by Commissioner Schmidt, the mere fact that Judge Larkin **orally** indicated that he did not desire to direct a verdict in favor of the plaintiff, is simply not "inconsistent" with his orally pronounced determination that he was going to strike the defendant's affirmative defenses and counter-claims, a notion which was further memorialized within the February 12, 2010 Findings of Facts, Conclusions of Law and Order.

Indeed, the February 12, 2010 Amended Findings of Facts and Conclusions of Law unambiguously and repeatedly indicate that the Court, as a discovery sanction, intended to strike defendant's affirmative defenses and counter-claim:

The court having reviewed the files and records herein, and having heard the argument of counsel, has determined that under the facts and circumstances of this case, that the court in the exercise of its discretion shall impose some of the sanctions requested by the plaintiffs herein, but not others. Specifically, the court will impose sanctions as follows: (1) defendant's affirmative defenses and answers shall be stricken; (2) defendant's counter-claim shall be stricken and shall forthwith be dismissed; and (3) the plaintiff shall be awarded the costs of the court reporter and videographer who attended the unsuccessful efforts to take

the deposition of Clarence Muntz, which occurred on or about July 3, 2009.

(See CP 49-50 – Amended Findings of Fact and Conclusions of Law, p. 10-11).

Judge Larkin’s Order continues Conclusion of Law No. 5:

5. This court has considered and weighed whether or not a less severe sanction would be appropriate considering the prejudice of the plaintiffs’ ability to prepare for their case, both with respect to the plaintiffs’ ability to put on their case in chief, respond to defendant’s affirmative defenses and the defendant’s counter-claim. Given the nature and severity of the violations and the obvious prejudice to the plaintiffs, an award of monetary or other lesser sanction would not suffice to cure the prejudice suffered by the plaintiffs by the defendant’s discovery tactics, evasiveness and with respect to the deposition of Clarence Muntz, a complete failure to comply with this court’s order, and Mr. Muntz’s discovery obligations. Thus the court concludes, as a matter of law, and orders: (a) **because the defendant has failed to provide sufficient information to the plaintiffs regarding the factual background relating to key components of its counter-claim and its affirmative defenses, particularly those defenses asserted regarding contributory fault and self-defense, this court sees no alternative but to strike the defendant’s affirmative defenses, and dismiss the defendant’s counter-claim pursuant to CR 37 and CR 41(b).**

As should be self-evident, and as observed by Commissioner Schmidt, there is simply nothing “inconsistent” between the relief provided by Judge Larkin, and his desire not to direct a verdict against Muncie with respect to liability. Under Judge Larkin’s order, the plaintiffs were still obligated to prove all the elements of negligence

including duty, breach, proximate cause and damages. *See Reynolds v. Hicks*, 134 Wn. 2d 491, 495, 951 P.2d 761 (1998). As observed by Commissioner Schmidt at page 4 of the “Ruling Granting Review,” “contrary to your concern about inconsistency between his oral opinion and his February 12, 2010 order, there is no inconsistency justifying revision of that order. His order does not have the effect of directing a verdict for Gerald. Under that order, Gerald must still prove all the elements of his negligence claim against Clarence. Thus, Judge Stoltz committed probable error by reinstating Clarence’s affirmative defense of contributory fault.²

Procedurally, Judge Stoltz’ actions also cause exceptionally grave concerns. As Judge Stoltz “revised” Judge Larkin’s order, without having any prior motion before her, we can only assume that she intended to utilize what appears to be the , to date, unrestrained and unlimited authority conferred by CR 54(b) to revise previous trial court orders. However, such a proposition is purely speculative because Judge Stoltz never fully articulated the procedural authority for her actions. It is suggested, that such utilization of CR 54(b), (assuming that was Judge

² It is noted that it was Judge Stoltz herself, who made the determination to grant plaintiffs’ motion for summary judgment regarding liability. Thus, all that should remain for trial is a determination of those damages which were proximately caused by Clarence’s already determined breach of the standard of ordinary care. Clearly factually, Judge Stoltz’ determination was predicated on untenable grounds.

Stoltz intentions), was done in a fashion which in and of itself, is an abuse of discretion, given the probable purpose of the rule. It would appear the purpose of the rule is to allow the trial court to essentially “change its mind” as further information comes before it during the course of litigation at the procedurally appropriate times. For example, a prior denial of summary judgment does not preclude the granting of either a CR 41(b) Motion to Dismiss at the close of a Plaintiff’s case in chief nor an entry of a judgment as a matter of law pursuant to CR 50(b). It is suggested that the purpose of CR 54(b) is not to provide either the trial court, nor the parties, with the unfettered ability to file successive motions for “revision” outside of the timelines otherwise applicable to motions for reconsiderations under CR 59(b) (ten days after entry of judgment, order, or other decision), or the procedures for relief from judgment or order pursuant to the procedures set forth in CR 60. *See also* CR 41(b)(3) (defendant’s motion to dismiss after plaintiff’s rest), and CR 50 motions for judgment as a matter of law. Otherwise, CR 54(b) could be utilized in a manner which would evade and/or eviscerate the procedural requirements of the other court rules. Thus for the trial court to literally “out of the blue” to invoke its authority pursuant to CR 54(b), when the issue was not clearly before it by way of a motion of a party, or at a procedurally inappropriate time, in and of itself has the potential for

arbitrary capricious judicial action which by definition constitutes “an abuse of discretion.”

In fact, even the trial court’s “inherent authority” to waive the rules, is constrained by the notion that such inherent authority cannot be utilized in a manner that results in “an injustice.” See *Raymond v. Ingram*, 47 Wn. App. 781, 737 P.2d 314 (1987), in part superseded by statute, on other grounds, *Miller v. Campbell*, 137 Wn. App. 762, 767, 155 P.3d 154 (2007), see also *Ashley v. Superior Court*, 83 Wn. 2d 630, 636, 521 P.2d 711 (1974). Thus, even if the court was utilizing its “inherent authority” as opposed to the residual authority of CR 54(b), the trial court nevertheless abused its discretion, because its actions resulted in “an injustice.”

As previously noted, because of Judge Larkin’s orders was well justified under the circumstances, particularly because of the defendants’ denial of meaningful discovery directly related to the defendants’ affirmative defenses and counter-claim. After the entry of such an order all efforts toward discovery on such issues, by the plaintiffs ceased, because such affirmative defenses and counter-claim, having been dismissed, were no longer a matter of concern. Judge Stoltz, by “reopening the door” to the defense of contributory negligence exposed the plaintiff to the very prejudice which was the core basis for Judge

Larkin's order. It is suggested that such actions on the trial court was extremely detrimental and prejudicial to the plaintiffs' ability to prepare their case, and as such was a manifest abuse of discretion.

Further, it is suggested that it were extremely debatable as to whether or not CR 54(b) should be utilized at all, when one part of the Trial Court is addressing orders that had been entered by a previously assigned trial judge. As the Court can take note, it is generally inappropriate for one trial court to revisit or revise an order from another trial court judge which has been entered unconditionally. *See Raymond v. Ingram, supra.*; *see also 1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 127 Wn. App. 899, 906 n.10, 12 P.3d 1276 (2005).

Although Pierce County, unlike King County, does not have a specific local rule prohibiting "reapplication" such a notion is otherwise inherent within the time limits set forth within CR 59 and CR 60. Thus, it is noted that the plaintiffs disagree with Commissioner Schmidt's observation that "a trial judge generally has the authority to revise orders made earlier in the case by a different judge ...", particularly under the procedural posture of this case.

To permit such actions, could perpetuate a multitude of "reapplications" and/or motions for revision, that not only would undermine a number of other court rules, but could potentially undermine

collegiality among Trial Court Judge's, and could result in the vexatious multiplication of proceedings within litigation. It would foster disrespect for an interim Trial Court orders. Thus, it is suggested, from a rules purpose analysis, Judge Stoltz' actions, undermine the very purpose of our civil rules, and such a consideration should be a substantial factor in a determination that she abused her discretion.

C. The Trial Court Actions Were Contrary to the Rules Applicable to Interpretation of Court Orders and/or Judgment and as Such Was Erroneous as a Matter of Law.

As previously suggested, Judge Stoltz' actions in this case defy the rules of construction applicable to the orders and judgments of trial courts. *See Callan v. Callan, supra.*; *see also Dillenberg v. Maxwell*, 70 Wn. 2d 331, 422 P.2d 783 (1967). Here the February 12 sanction order from Judge Larkin was unambiguous as to its intent to strike all affirmative defenses, including the defense of contributory/comparative fault. Further to the extent that Judge Larkin's oral pronouncements were "inconsistent" with the terms of the written order, clearly the terms of the written order control. *See Ferree v. Doric Co.*, 62 Wn. 2d 561, 567, 383 P.2d 900 (1993); *see also, Pearson v. State Dept. of Labor and Industries*, ___ Wn. App. ___, 262 P.3d 837, 844 (10/24/2011). As noted in the recent *Pearson* case quoting the seminal *Ferree* opinion, "a trial judge's oral

decision is no more than a verbal expression of his informal opinion at that time. It ... may be altered, modified or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions and judgments.”

Stated another way a trial court’s oral findings or conclusions are not binding unless the judge incorporates them in a formal findings and conclusions. *See Huzzy v. Culbert Const. Co.*, 5 Wn. App. 581, 583, 489 P.2d 749 (1971). The written decision controls if the oral opinion conflicts with the written decision. *Ferree v. Doric Co.*, 62 Wn. 2d at 567. As a result, any objections to the court’s “oral musings” are not well taken. *See Huzzy*, 5 Wn. App. at 583.

As a matters of law, Judge Stoltz erred by failure to recognize that, **even if**, Judge Larkin’s oral pronouncements were somehow inconsistent with his written findings, she was nevertheless bound by the language set forth within the written instrument. Such a proposition is a well seasoned concept, and for Judge Stoltz to blithely ignore, it constitutes an obvious error of law.

Thus as such, Judge Stoltz whether utilizing an abuse of discretion standard, and/or as a matter of law, clearly erred by giving any credit to the existence of any inconsistency between Judge Larkin’s oral “opinions” versus that which were finally memorialized within his written findings.

As a matter of law the written findings controlled, and his “oral musings” should have been disregarded.

CONCLUSION

For the reasons stated above it is requested that this Court enter an order reversing Judge Stoltz’ determination to *sua sponte* reinsert into this case a previously stricken affirmative defense of contributory negligence. Judge Stoltz’ decision to reinsert such a defense was based on an untenable factual basis, and the misapplication of well established legal principles. An order should issue from this Court directing that on remand that this matter proceed to trial **without** the ability of the defendants to in any way claim contributory fault/negligence as an affirmative defense because it was appropriately stricken from this case due to the defendant’s misconduct and/or discovery abuse.

Dated this 1st day of December, 2011.


Paul Lindenmuth, WSBA# 15817
Attorneys for Appellant/Plaintiffs

DECLARATION OF SERVICE

I, Heather Toney, hereby declare under penalty of perjury that the following statements are true and correct:

I am over the age of 18 years and am not a party to this case.

On December 1, 2011, I caused to be served delivered to the attorney for the Respondents, a copy of Appellant's Opening Brief, and this Declaration of Service, and caused those same documents to be filed with the Clerk of the above-captioned Court. The address to which these documents were provided to Respondents' attorney:

Shellie McGaughey
McGaughey, Bridges, Dunlap, PLLC
325 -1 18th Avenue SE, Ste. 209
Bellevue, WA 98005

- by hand delivery
- via legal messenger (ABC Messenger Service)
- via facsimile
- via email
- First Class US Mail postage prepaid

COURT OF PIERCE COUNTY
CLERK OF COURT
11 FEB -1 11 PM '11
STATE OF WASHINGTON
BY _____
HEATHER TONEY

DATED this 1st day of December, 2011, at Tacoma, Pierce County,
Washington.


Heather Toney
Paralegal

Appendix 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KRISTY L. RICKEY and KELLEY R. CAVAR, individually, and as Co-Executrixes of the estate of Gerald Lee Munce, Deceased,

Respondents,

v.

CLARENCE G. MUNCE,

Defendant,

MICHAEL A. SMITH, as Litigation Guardian Ad Litem for CLARENCE G. MUNCE,

Petitioner.

No. 39531-2-II

RULING DENYING REVIEW

FILED
COURT APPEALS
NOV 13 PM 2:18
BY [Signature]

Michael B. Smith, litigation guardian ad litem for Clarence G. Munce, seeks review of a Pierce County Superior Court order denying a motion for a protection order and requiring Munce to submit to a deposition. Smith asserts that because Munce has been found to be incompetent to stand trial on criminal charges and has been appointed a GAL for this civil litigation, the court's order is clear and probable error. He also contends that the court's failure to personally interview Munce was a substantial departure from the usual and accepted course of judicial proceedings, justifying review under RAP 2.3(b)(1)-(3).

39531-2-II

FACTS

In June 2008, Clarence Munce shot his son, Gerald Munce in the back, killing him. The State charged Munce with first degree murder on June 25. On July 11, Gerald Munce's daughters filed this action for wrongful death against Clarence Munce, as individuals, and as representatives of their father's estate.

Clarence Munce, 81, suffers from dementia. A forensic psychologist from Western State Hospital evaluated him pursuant to court order in the criminal case and found that he had severe memory deficits and other related impairments, including confusion and confabulation. On December 30, 2008, based on the psychologist's findings, the court found that Munce was incompetent to stand trial and dismissed the criminal charges without prejudice.

Thereafter, the plaintiffs in the civil proceedings requested appointment of a litigation guardian ad litem for Munce. The court granted the request on January 9, 2009, appointing Michael B. Smith. These determinations by the civil and criminal courts notwithstanding, on June 17, 2009, plaintiffs issued a subpoena and notice of deposition for Munce. GAL Smith moved for a protection order. Following a hearing, the trial court denied the motion and ordered that the deposition be taken on July 3, 2009.

GAL Smith filed a notice for discretionary review of that order but did not seek a stay, and the deposition was held. However, Munce answered none of the questions asked, invoking the Fifth Amendment on the advice of his criminal

39531-2-II

defense attorney.¹ Plaintiffs have asked for sanctions for this conduct, in the form of dismissal of Munce's defenses and counter claims. This court stayed proceedings with regard to that motion pending consideration of this motion for discretionary review.

ANALYSIS

Petitioner asserts that the court obviously or probably erred in ordering the deposition despite the prior findings of incompetency. He argues that at least, the court should have personally questioned Munce. That would certainly have been the appropriate way to proceed had the issue been Munce's ability to testify at the trial. See *State v. Moorison*, 43 Wn.2d 23, 30-31, 259 P.2d 1105 (1953). However, discovery is not limited to admissible evidence. CR 26 permits discovery of any relevant evidence, as long as it is not privileged. There is no ground for objection that the information sought will be inadmissible at the trial if the information appears reasonably calculated to lead to the discovery of admissible evidence.

Petitioner has cited no case that requires a determination of competency before a discovery deposition may be taken. In fact, such a requirement appears to be inconsistent with the purposes of discovery. In *McGugart v. Brumback*, 77 Wn.2d 441, 445, 463 P.2d 140 (1969), the court described that purpose as "[m]utual knowledge of all the relevant facts gathered by both parties." (Quotation omitted). It held that the "mutual access to knowledge, secured by

¹ Virtually all of the questions asked were general personal questions, such as whether or not Munce had been employed in the past, whether he was married, where he was born, and whether he knew any of the people present in the room.

39531-2-II

discovery, is a basic premise upon which civil litigation is now conducted and its availability should not be strictly contingent upon the rules of evidence or competency as are applied at trial." *McGugart*, 77 Wn.2d at 445 (holding that the dead man's statute was no bar to discovery, and not waived by questions asked in depositions).

It may indeed be true that Munce was incompetent at the time of his deposition, and had he provided any testimony, the trial court would have addressed that issue when and if the testimony was offered as evidence at trial. See *Moorison*, 43 Wn.2d at 30-31 (competency determination is to be made when person is offered as a witness); and *Sumerlin v. Department of Labor and Industries*, 8 Wn.2d 43, 48, 55-57, 111 P.2d 603 (1941) (court does not necessarily have to see and question witness; review of deposition may be adequate), *overruled on other grounds*, *Windust v. Department of Labor and Industries*, 52 Wn.2d 33, 39, 323 P.2d 241 (1958).

Petitioner has not satisfied any of the requirements of RAP 2.3 (b).

Accordingly, it is hereby

ORDERED that review is denied.

DATED this 13TH day of October, 2009.



Ernetta G. Skerlec
Court Commissioner

cc: Shellie McGaughey
Steven T. Reich
Benjamin F. Barcus
Hon. Thomas P. Larkin

Appendix 2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KRISTY L. RICKEY and KELLEY R. CAVAR, individually, and as Co-Executrixes of the estate of Gerald Lee Munce, Deceased,

Respondents,

v.

CLARENCE G. MUNCE,

Defendant,

MICHAEL A. SMITH, as Litigation Guardian Ad Litem for CLARENCE G. MUNCE,

Petitioner.

No. 40377-3-II

RULING DENYING REVIEW

FILED
COURT OF APPEALS
10/15/19 PM 1:57
STAFFORD
BY *Wp*

Michael B. Smith, litigation guardian ad litem (GAL) for Clarence G. Munce, seeks review of a Pierce County Superior Court order striking Munce's affirmative defenses and counterclaim as a sanction for discovery violations. Smith asserts that because Munce has been diagnosed with Alzheimer's disease and progressive dementia, found not to be able to distinguish between truth and fiction, and determined to be incompetent to stand trial on criminal charges, the court's order is obvious and probable error and a substantial departure from the usual and accepted course of judicial proceedings. RAP 2.3(b)(1)-(3).

40377-3-II

FACTS

In June 2008, Clarence Munce shot his son, Gerald Munce in the back, killing him. The State charged Munce with first degree murder on June 25. On July 11, Gerald Munce's daughters filed this action for wrongful death against Clarence Munce, as individuals, and as representatives of their father's estate.

Clarence Munce, who was 81 at the time of the shooting, suffers from dementia. A forensic psychologist from Western State Hospital evaluated him pursuant to court order in the criminal case and found that he had severe memory deficits and other related impairments, including confusion and confabulation. On December 30, 2008, based on the psychologist's findings, the court found that Munce was incompetent to stand trial and dismissed the criminal charges without prejudice.

Thereafter, the plaintiffs in the civil proceedings requested appointment of a litigation guardian ad litem GAL for Munce. The court granted the request on January 9, 2009, appointing Michael B. Smith. These determinations by the civil and criminal courts notwithstanding, on June 17, 2009, plaintiffs issued a subpoena and notice of deposition for Munce. GAL Smith moved for a protection order. Following a hearing, the trial court denied the motion and ordered that the deposition be taken the next day, on July 3, 2009.¹

Munce appeared for the deposition, but his criminal defense attorney refused to allow him to be sworn. He asserted that Munce had a constitutional

¹ GAL Smith filed a notice for discretionary review of that order but did not seek a stay, and the deposition was held. This court ultimately denied review.

40377-3-II

right to remain silent as to "any question that [might] impact him in his civil commitment proceeding," and he would invoke that right "generically." Resp. to Mot. for Disc. Rev., Appendix at 302. Munce answered a question about his name (*providing the wrong name*), and thereafter, counsel invoked the Fifth Amendment as to every other question.² When challenged on this conduct, counsel replied that it was "kind of ridiculous" and "quite silly" to depose a person who had been declared to be incompetent due to dementia. Resp. to Mot. for Disc. Rev., Appendix at 313.

Plaintiffs asked for sanctions in the form of dismissal of Munce's defenses and counter claims, attorney fees, and a default judgment. The trial court dismissed the defenses and counterclaims but declined to enter judgment.

ANALYSIS

Petitioner asserts that the court could not properly sanction an incompetent person's inability to take the oath and answer questions.

The trial court has broad discretion to manage discovery, and its decision regarding sanctions will not be reversed absent abuse of that discretion. *Rhinehart v. Seattle Times, Co.*, 98 Wn.2d 226, 232, 654 P.2d 673 (1982), *aff'd* by, 467 U.S. 20 (1984). The court does not abuse its discretion unless its decision is manifestly unreasonable or based on untenable grounds. *King v.*

² Most of the questions asked were general personal questions, such as whether or not Munce had been employed in the past, whether he was married, where he was born, whether he knew any of the people present in the room, whether he knew certain other people, and whether he knew why his deposition was being taken. Resp. to Mot. for Disc. Rev., Appendix at 302-13.

40377-3-II

Olympic Pipeline, Co., 104 Wn. App. 338, 348, 16 P.3d 45 (2000), *review denied*, 143 Wn.2d 1012 (2001).

There is no statute or case law barring the deposition of an incompetent person. “[M]utual access to knowledge, secured by discovery, is a basic premise upon which civil litigation is now conducted and its availability should not be strictly contingent upon the rules of evidence or competency as are applied at trial.” *McGugart v. Brumback*, 77 Wn.2d 441, 445, 463 P.2d 140 (1969) (holding that the dead man’s statute was no bar to discovery, and not waived by questions asked in depositions).

It is not clear on this record that Clarence Munce was incapable of taking the oath. Among the abilities found to be “intact” in his 2008 evaluation were “[l]ogical and goal directed thought processes.” Clerk’s Papers (CP) at 120. The purpose of the oath is to impress upon the witness the need to be truthful. See ER 609; *State v. Dixon*, 37 Wn. App. 867, 876, 684 P.2d 725 (1984). Munce may have understood that requirement, even though he may not always have been able to distinguish what was true from what was not. However, his criminal counsel refused to let him answer a question about whether he understood what an oath was.

In any case, the trial court’s primary concern was with the unqualified refusal to let Munce answer any questions. See Resp. to Mot. for Disc. Rev., Appendix at 739-40. That refusal was based, not on incompetence, but on the Fifth Amendment. Sanctions are properly imposed upon the misuse of that right. See *Lyons v. Johnson*, 415 F.2d 540 (6th Cir. 1969) (dismissing all of Lyons’s

40377-3-II

claims after she replied to every question at her deposition by invoking the Fifth Amendment), *cert. denied*, 397 U.S. 1027 (1970). The *Lyons* court noted that discovery is essential in accomplishing a just result, and observed that “[t]he scales of justice would hardly remain equal in these respects, if a party [could] assert a claim against another and then be able to block all discovery attempts against him by asserting a Fifth Amendment privilege to any interrogation whatsoever upon his claim.” *Lyons*, 465 F.2d at 542.

The right to silence applies only in a criminal proceeding. To be sure, it can be invoked in civil proceedings to protect rights in a criminal proceeding. However, its invocation may require the relinquishment of civil claims and defenses. There are cases where the evidence possessed by the one claiming the Fifth Amendment privilege is so important that there is no alternative remedy that is adequate to prevent prejudice to the other party. See *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518 (1st Cir. 1996).

Here, GAL Smith repeatedly asserted that evidence pertinent to the counterclaim and defenses was “solely in the possession” of Munce.³ There was, in fact, no other direct evidence regarding the defenses. And the counterclaim was partly based on things Munce had said to others. In addition, the inability to question Munce denied plaintiffs the opportunity to obtain other potentially useful information about the incidents reported in the declarations of Munce's friends. Finally, this is not a case in which the civil trial can be stayed

³ The GAL made that statement 22 times in response to the plaintiffs' requests for admissions.

40377-3-II

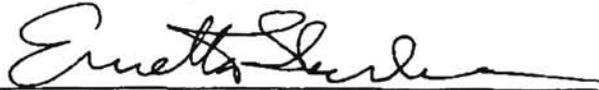
pending disposition of the criminal charges. Given Munce's condition, there will probably never be a criminal trial.

All of these considerations provide tenable bases for the trial court's decision. Petitioner has not satisfied any of the requirements of RAP 2.3(b).

Accordingly, it is hereby

ORDERED that review is denied.

DATED this 19th day of May, 2010.



Ernetta G. Skerlec
Court Commissioner

cc: Shellie McGaughey
Dan'l Wayne Bridges
Bradley A. Maxa
Benjamin F. Barcus
Hon. Thomas P. Larkin

Appendix 3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KRISTY L. RICKEY and KELLY R. CAVAR, individually and as Co-Executrixes of the Estate of Gerald Lee Munce, Deceased,

Petitioners,

v.

MICHAEL B SMITH, as Litigation Guardian Ad Litem for CLARENCE G. MUNCE,

Respondent.

No. 42245-0-II

RULING GRANTING REVIEW

HILARY
COURT OF APPEALS
DIVISION II
11 AUG - 1 PM 1:18
STATE OF WASHINGTON
BY DEPUTY

The Estate of Gerald Lee Munce (Gerald) seeks discretionary review of the trial court's order reinstating a defense pleaded by Clarence Munce (Clarence), which had previously been stricken by a different judge. Concluding that review is appropriate under RAP 2.3(b)(2), this court grants review.

Clarence shot and killed Gerald. The State charged Clarence with first degree murder. The court in the criminal case found Clarence incompetent to stand trial and the State dismissed its charge without prejudice.

Gerald sued Clarence for negligence. Clarence pleaded affirmative defenses, including contributory fault, and brought a counterclaim against Gerald, alleging elder abuse. Gerald sought to take Clarence's deposition Clarence

resisted the deposition on grounds of incompetence and asserting his Fifth Amendment right against self-incrimination. Gerald successfully moved for an order compelling Clarence to be deposed. Clarence sought discretionary review of that order, but this court denied review.

At Clarence's deposition, his criminal trial counsel instructed him not to take the oath. Except for being asked his name, which he apparently answered incorrectly, Clarence did not answer any questions at the deposition. Instead, his criminal trial counsel invoked his right against self-incrimination.

Gerald asked the trial court to impose sanctions for Clarence's non-participation in the deposition and in other discovery requests, including a request for a default judgment. Judge Larkin declined to enter a default judgment or to direct a verdict for Gerald. Instead, he imposed the sanction of striking Clarence's affirmative defenses and counterclaims. He entered findings and an order on February 12, 2010. Clarence sought discretionary review of that order, but this court denied review.

The trial was reassigned to Judge Stolz. Gerald moved for summary judgment on liability. Judge Stolz granted Gerald's motion, but in her letter ruling of May 23, 2011, stated *sua sponte* "This does not preclude the defense from arguing that there was contributory negligence on the part of Gerald." Mot. for Disc. Rev., Appendix 16 at 1.. Gerald moved for reconsideration of this portion of Judge Stolz's ruling, arguing that it contradicted Judge Larkin's February 12, 2010 order striking that affirmative defense. Judge Stolz denied Gerald's motion, concluding that Judge Larkin's order was inconsistent with his earlier oral opinion

in which he declined to direct a verdict for Gerald. Gerald seeks discretionary review of Judge Stolz's May 23, 2011 ruling and her subsequent order denying reconsideration.

This court grants discretionary review only when:

(1) The superior court has committed an obvious error which would render further proceedings useless;

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

Gerald seeks discretionary review under RAP 2.3(b)(1), (2) and (3).¹ He contends that by entering her *sua sponte* order reinstating the affirmative defense that Judge Larkin had stricken, Judge Stolz committed either obvious error, probable error, or an act outside the accepted and usual course of proceedings. He contends that it is generally inappropriate for one judge to revisit an order entered by an earlier judge in the case. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 127 Wn. App. 899, 906 n.10, 112 P.3d 1276 (2005), *aff'd*, 158 Wn.2d 566 (2006). Clarence responds that any interlocutory order is "subject to revision at any time before entry of final judgment as to all claims and the rights

¹ The trial court indicated its willingness to enter a certification order under RAP 2.3(b)(4), but the parties were unable to agree as to the scope of such an order.

and liabilities of all parties.” *Moratti ex rel. Tarutis v. Farmers, Inc. Co.*, 2011 WL 2611763, *2, ___ Wn. App. ___, ___ P.3d ___ (2011) (quoting *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 300, 840 P.2d 860 (1992)).

While a trial judge generally has the authority to revise orders made earlier in the case by a different judge, in this case Judge Stolz had an untenable basis for revising Judge Larkin’s order. Contrary to her concern about inconsistency between his oral opinion and his February 12, 2010 order, there is no inconsistency justifying revision of that order. His order does not have the effect of directing a verdict for Gerald. Under that order, Gerald must still prove all of the elements of his negligence claim against Clarence. Thus, Judge Stolz committed probable error by reinstating Clarence’s affirmative defense of contributory fault.

Further, Judge Stolz’s ruling substantially alters the status quo. As Commissioner Skerlec described in detail in her ruling denying Clarence’s motion for discretionary review of Judge Larkin’s February 12, 2010 order, Gerald’s ability to defend against Clarence’s affirmative defenses and counterclaim was significantly impaired by Clarence’s non-participation in discovery as a result of his medical condition and his invocation of the right against self-incrimination. And there is no possibility that Clarence’s condition will improve so as to allow him to participate in discovery.² Reinstating Clarence’s affirmative defense of

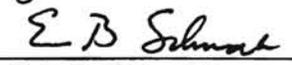
² Clarence’s counsel notes that Clarence is equally unavailable to both her and to Gerald as a result of his medical condition. But she should have considered that problem before asserting the affirmative defense and the counterclaim, both of which she had the burden to prove.

42245-0-II

contributory fault at this point would again significantly impair Gerald's ability to defend against that defense and so substantially alters the status quo. Discretionary review of Judge Stolz's ruling is appropriate under RAP 2.3(b)(2). Accordingly, it is hereby

ORDERED that Gerald's motion for discretionary review is granted. Because Judge Larkin's February 12, 2010 order has already been subject to a motion for discretionary review, review is limited to the propriety of Judge Stolz's ruling. RAP 2.3(e). The Clerk will issue a perfection schedule.

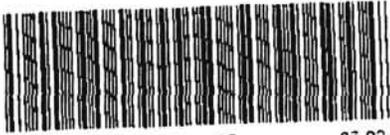
DATED this 15th day of August, 2011.



Eric B. Schmidt
Court Commissioner

cc: Paul A. Lindenmuth
Shellie McGaughey
Hon. Katherine M. Stolz

Appendix 4



08-2-10227-6 32374099 OR 07-02-09



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

KRISTY L RICKEY,

Plaintiff(s)

vs.

CLARENCE G MUNCE,

Defendant(s)

Cause No: 08-2-10227-6

ORDER

(OR)

ordered the deposition of Clarence munce will go forward on July 3, 2009 @ Gordon Thomas Honeywell @ 10:00am. Mr Bauer, Mr. munces criminal Attorney, will be in attendance and may instruct and assert privileges accordingly.

The motion for protective order on Requests for admission and Interrogatories is hereby reserved.

DATED this 2nd day of July, 2009.

[Signature] JUDGE THOMAS F. LARKIN

[Signature] Attorney for Plaintiff/Petitioner WSBA# 11176

[Signature] Attorney for Defendant/Respondent WSBA# 16809

Appendix 5



08-2-10227-6 33763476 OR 02-16-10

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The Honorable Thomas P. Larkin
Remann Hall
Hearing date: February 12, 2010 at 10:00 a.m.



**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

KRISTY L. RICKEY and KELLEY R.
CAVAR, individually, and as Co-Personal
Representatives of the Estate of Gerald Lee
Munce, Deceased,

Plaintiffs,

v.

CLARENCE G. MUNCE,
Defendant.

NO. 08-2-10227-6

**(Proposed) AMENDED FINDINGS OF
FACT AND CONCLUSIONS OF LAW
AND ORDER ON PLAINTIFFS'
MOTION FOR A DETERMINATION
OF DISCOVERY SANCTIONS**

THIS MATTER comes on before the Court on Plaintiffs' Motion for Determination of Discovery Sanctions and for a Protective Order. This Motion is done pursuant to the Court's Order of August 14, 2009, wherein the Court continued the Plaintiffs' Motion to Strike Affirmative Defenses and Counter-claims so that the Court could consider additional submissions regarding the prejudice to Plaintiffs' case caused by the discovery violations found by this Court. In the interim, the Defendant sought discretionary review in the Court of Appeals, Division II, regarding the Court's Order requiring the production of Defendant Clarence Munce to be deposed by the Plaintiffs on July 3, 2009. As part of that process, the Court of Appeals entered a Stay Order in this

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW AND ORDER
ON PLAINTIFFS' MOTION FOR A
DETERMINATION OF DISCOVERY
SANCTIONS- 1**

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2 matter. On December 8, 2009, file with this Court was the Court of Appeals Certificate of Finality
3 relating to the Defendant's effort to seek discretionary review relating to discovery issues, which
4 was denied by the Court of Appeals. Thus, this matter is ripe and properly before this Court for
5 consideration. The Court also considered all materials submitted regarding Defendants' Motion for
6 Reconsideration, including attachment.

7
8 In this matter, Plaintiffs seek severe discovery sanctions for violations of a number of
9 Court Rules, including but not limited to violations of CR 26(g), relating to interrogatory answers;
10 (CR 30 (h) (3) relating to depositions; CR 36, relating to Requests for Admissions; and CR 37
11 (b)(1),(2),(A-D); CR 37 (c)and (b); and CR 41 (b), dismissal for violation of Court order.

12 This Court, having considered the submissions of the parties, and in particular the
13 Defendant's responses to Plaintiffs' Interrogatories and Requests for Production, the Defendant's
14 Answers to Plaintiffs' Requests for Admissions (or lack thereof); and a transcript of the deposition
15 of Clarence Munce, as well as the files and records herein, and concludes that based on the
16 discovery abuses outlined within Plaintiffs' submissions, and as set forth in the below Findings of
17 Fact and Conclusions of Law, severe discovery sanctions are warranted in this case, and as outlined
18 below. In addition, the Court finds that given the severe discovery sanctions set forth below, the
19 Plaintiffs and their counsel are entitled to an award of monetary terms, including the costs of the
20 presence of the court reporter, and videographer during the unsuccessful effort to ake Mr. Munce's
21 deposition on July 3, 2009.

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23 ///

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**FINDINGS OF FACT
AND CONCLUSIONS OF LAW AND ORDER
ON PLAINTIFFS' MOTION FOR A
DETERMINATION OF DISCOVERY
SANCTIONS- 2**

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2 In this matter, the Court makes the following Findings of Fact and Conclusions of Law:

3 **I. FINDINGS OF FACT.**

4 1. On or about June 21, 2008, Clarence Munce fatally shot his son, Gerald Munce.

5 The only two witnesses to the shooting of Gerald Munce by Clarence Munce were Gerald and
6 Clarence Munce. Gerald Munce is now deceased, and as such Clarence Munce is the sole living
7 witness to the events that transpired that evening and which resulted in the death by gun shot
8 wound of Gerald Munce;

9
10 2. Immediately following the shooting of Gerald Munce (and his death), there was
11 a substantial investigation by the Pierce County Sheriff's Office, who were in contact with
12 Clarence Munce immediately following the shooting. Mr. Munce made various statements to
13 members of the Sheriff's Office. As a result of the Sheriff's Office investigation of the death of
14 Gerald Munce, Clarence Munce was charged with Murder in the First Degree under Pierce County
15 Cause No. 08-1-03011-5;

16 3. During the course of criminal proceedings involving Clarence Munce, efforts were
17 made to determine whether or not Clarence Munce was mentally competent to stand trial on the
18 First Degree Murder charges lodged against him relating to the death of his son. By way of an
19 Order dated December 30, 2008, the criminal charges pending against Clarence Munce were
20 dismissed without prejudice because Clarence Munce was found to lack the competency to stand
21 trial;

22
23 4. While the criminal charges were pending, this case was filed. The initial
24 Complaint was filed under this cause number on July 11, 2008, and within the Complaint, the

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2 Plaintiffs (above named) brought claims individually as the daughters of Gerald Munce, and as Co-
3 Executrixes of his Estate, for all relief available under Washington's wrongful death and survival
4 statutes. This Complaint was subsequently amended on August 14, 2008, and currently the
5 Amended Complaint is the operative pleading on behalf of the Plaintiffs;

6 5. Due to the pendency of the competency determination of Clarence Munce, which
7 was occurring during the course of criminal proceedings, this Court entered an Order on November
8 7, 2008, precluding Plaintiff from taking discovery for 120 days, but allowed the Defendant in this
9 matter to propound discovery to the Plaintiffs;

10
11 6. On January 9, 2009, an Order was entered appointing Michael Smith as Guardian
12 Ad Litem, pursuant to RCW 4.08.060. Mr. Smith, on behalf of Defendant Clarence Munce, on
13 January 29, 2009, filed an Answer to Plaintiffs' Amended Complaint, which included the
14 Affirmative Defenses of self-defense, assumption of risk, apportionment, and comparative fault.
15 In addition, within the Answer, Michael Smith, on behalf of Clarence Munce, asserted a counter-
16 claim for assault and battery;

17 7. On or about March 6, 2009, this Court entered an Order lifting the discovery stay
18 as it applied to the Plaintiffs. At that time, Plaintiffs had outstanding discovery to the Defendant,
19 including Requests for Admissions, and Interrogatories and Requests for Production. In April or
20 May, 2009, Defendant timely served upon Plaintiffs answers to their Requests for Admissions and
21 Interrogatories and Requests for Production, which were signed by Mr. Smith as Litigation
22 Guardian Ad Litem;

23
24 8. With respect to Plaintiffs' Requests for Admissions, despite the fact that Mr. Smith

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2 had been appointed Litigation Guardian Ad Litem, and having the authority within his
3 representative capacity to make a determination as to what facts should be admitted or denied in
4 response to Plaintiffs' Requests for Admissions, the defense nevertheless objected to the vast
5 majority of Plaintiffs' Requests for Admissions and/or provided equivocal admissions and/or
6 denials based on the assertion of Mr. Munce's Fifth Amendment privilege against self-
7 incrimination and/or an inability to respond due to Mr. Munce's alleged mental incompetency. In
8 addition, with respect to Plaintiffs' Interrogatories and Requests for Production, Defendant
9 inappropriately interjected a boiler-plate objection to all Interrogatories and Requests for
10 Production asserting that Mr. Munce lacked the mental capacity to assist the defense, or to provide
11 information in response to Plaintiffs' Interrogatories and Requests for Production, and only that
12 responses would be made "where possible" given such alleged disadvantage.

14 The Interrogatories propounded by the Plaintiffs were specifically designed to ascertain
15 Clarence Munce's understanding of the facts and circumstances surrounding his son's death, and
16 those supporting his claims of comparative and/or contributory fault, the defense either asserted
17 Mr. Munce's Fifth Amendment privilege as a basis for non-answering, or his mental incapacity to
18 provide such answers, but nevertheless asserted a number of facts which arguably could have been
19 gleaned from the police report as being true, even through Plaintiffs, within their Requests for
20 Admissions, requested that the Defendant admit or deny factual allegations set forth within the
21 police reports, the defense asserted either Fifth Amendment privilege and/or Mr. Munce's mental
22 incapacity as a basis for denying or equivocally responding to Plaintiffs' Requests for Admissions.
23

24 In other words, it appears there has been a calculated effort on the part of the defense in

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2 this matter to use as allegedly established fact matters within the police reports which tend to
3 support their defense, while at the same time denying or equivocally responding to those allegations
4 which tend to favor Plaintiffs' theory of the case, based on alleged Fifth Amendment privilege
5 and/or Mr. Munce's alleged mental incapacity. Such an inconsistent approach to Plaintiffs'
6 Requests for Admissions, and response to Plaintiffs' Interrogatories, is indicative of bad faith, the
7 failure to engage in reasonable inquiry as required by CR 26 (g), and a lack of fairness and
8 forthrightness, which a party is obligated to engage in when answering discovery under the Civil
9 Rules;

10
11 9. In addition, the Defendant has attempted to supplement its answers to
12 Interrogatories to include such things as their Supplemental Answer No. 4, which is descriptive of
13 the alleged testimony, which will be provided by defense expert Conte. Within such a
14 supplemental disclosure, it is also apparent that the defense has taken a bad faith approach to
15 discovery in that that which can be gleaned from the police report, which tends to favor the
16 Defendant's theory of the case, are being taken as established fact, while those facts which tend to
17 favor Plaintiffs' theory of the case and undercut the Defendant's Affirmative Defenses and counter-
18 claim are subject to denial based on Mr. Munce's alleged mental incompetency and/or assertion
19 of Fifth Amendment privilege;

20
21 10. On or about July 2, 2009, this Court entered Orders which denied Defendant's
22 Motion for a Protective Order Quashing a Deposition Notice Issued by Plaintiff to Clarence Munce.
23 On that date, this Court entered and Order, which is attached hereto as Exhibit "1", which provided
24 the following:

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW AND ORDER
ON PLAINTIFFS' MOTION FOR A
DETERMINATION OF DISCOVERY
SANCTIONS- 6**

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2 *Ordered the deposition of Clarence Munce will go forward on*
3 *July 3, 2009 at Gordon, Thomas, Honeywell at 10:00 a.m. Mr.*
4 *Bauer, Mr. Munce's criminal attorney, will be in attendance and*
5 *may instruct and assert privileges accordingly. The motion for*
6 *protective order and requests for admissions and interrogatories*
7 *is hereby reserved.*

8 Despite the fact that the Court reserved on Defendants' request for a Protective Order, as
9 quoted above, the Defendant did not re-note this Motion nor make any effort to once again place
10 the issue before the Court.

11 11. On July 3, 2009, Mr. Munce presented himself for deposition at The Law Offices
12 of Ben F. Barcus, PLLC (by agreement). In attendance at the deposition was Mr. Barcus, his co-
13 counsel, Paul A. Lindenmuth, Mr. Munce, defense counsel Shellie McGaughey, and Mr. Munce's
14 criminal defense attorney, Erik Bauer. At the commencement of the deposition, Mr. Bauer
15 instructed Mr. Munce to refuse to take an oath. In addition, Mr. Bauer, save for one question,
16 instructed Mr. Munce not to answer any questions on the grounds of the Fifth Amendment privilege
17 against self-incrimination, even though not a single question propounded by Plaintiffs' counsel
18 during the course of this aborted effort at a deposition, could in any way incriminate, or lead to
19 incriminating evidence, against Mr. Munce. It is clear that Mr. Bauer's efforts were inappropriate
20 and prevented Plaintiffs from taking any meaningful discovery with respect to Defendant Munce's
21 Affirmative Defenses and/or Counter-claims in this action. Mr. Bauer's actions and objections also
22 prevented Plaintiffs' counsel from gathering any information from which they could develop
23 subsequent arguments to the Court (when and if the Court was called upon to make a competency
24 determination), from which to argue that Mr. Munce was competent to testify in this matter;

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2 12. The Court specifically finds that the blanket assertion of Fifth Amendment
3 privilege as to all questions is inappropriate and improper in a civil case, where the Fifth
4 Amendment privilege can only be asserted on a question by question basis. Further, as observed
5 by the Court of Appeals Commissioner's decision in this matter, which is attached hereto and
6 incorporated by this reference as Exhibit "2," even if it was ultimately determined that Mr. Munce
7 was incompetent to testify at time of trial, his deposition testimony may nevertheless have led to
8 relevant and admissible evidence. As the defense in this case has failed to allow the Plaintiffs to
9 conduct a meaningful deposition, it is unknown as to what information Mr. Munce could or could
10 not have provided, had he been permitted to properly answer questions;
11

12 13. Based on the above, Plaintiffs' ability to prepare for trial, particularly as it relates
13 to the Affirmative Defenses asserted by the Defendant and his Counter-claims, have been
14 substantially prejudiced. This is particularly so in light of the fact that, at the time of the shooting
15 of Gerald Munce, Clarence Munce was the only eye-witness, and his defense of self-defense
16 ultimately could turn on the reasonableness of his subjective belief as to what was occurring at the
17 time. In addition, Mr. Clarence Munce would be the best source of information with respect to any
18 prior events between himself and his son, and if he suffered any personal injury and/or damages
19 as a result thereof;
20

21 14. Many of the assertions made by the defense in this case, and their alleged experts,
22 are speculative and cannot be substantiated without the testimony of Clarence Munce. Without the
23 testimony of Clarence Munce, Plaintiffs' ability to respond to any expert opinions propounded by
24

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2 the defense experts in this matter, including but not limited to defense expert Conte, has been
3 substantially prejudiced;

4 15. Further, the Court finds that defense's response to Plaintiffs' Interrogatory Nos.
5 11 and 17 were made in violation of CR 26(g) due to the absence of reasonable inquiry, and were
6 so evasive as to be non-responsive. In addition, given the presence of the above-referenced
7 Affirmative Defenses and Counter-claims, Defendant's Answers to Requests for Admissions,
8 which asserted mental incapacity and Fifth Amendment privilege as a basis for non-responsiveness
9 are inadequately responded to, and shall be deemed admitted in their entirety. The Defendant
10 cannot in good faith admit only those facts which favors its position, while denying or equivocating
11 those facts which do not;
12

13 16. It is also the finding of this Court that the method and manner in which the
14 deposition of Clarence Munce was conducted was in willful violation of this Court's Order of July
15 2, 2009, which permitted the taking of the deposition of Clarence Munce for the purpose of
16 determining whether or not any admissible evidence could be gathered therein, or lead to the
17 discovery of other and further relevant and admissible evidence. The refusal to allow Mr. Munce
18 to take the oath was improper and the instruction to him to not answer but one question, due to the
19 assertion of Fifth Amendment privileges, was highly improper in a civil case, and was tantamount
20 to a willful refusal to participate in the deposition, despite this Court's Order, without reasonable
21 justification and/or excuse;
22

23 17. Each discovery violation outlined above, in and of themselves warranted of
24 sanctions, cumulatively and in combination with the willful violation of this Court's Order,

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2 permitting the deposition of Clarence Munce, the imposition of severe sanctions is necessary to
3 curb such abuse and to ameliorate the prejudice suffered by the Plaintiffs' herein;

4 18. In addition, the Court finds that the ability of Plaintiffs to prepare for trial has been
5 substantially prejudiced by the Defendant's discovery abuses, and the Court is very mindful that
6 Clarence Munce is a party to this action, and the sole eye-witness to the events that transpired on
7 June 21, 2008, which resulted in the death of Gerald Munce;

8 19. The Court has considered whether or not a less severe sanction would suffice,
9 given the nature of the discovery violations at issue in this matter. Mindful of the purposes of
10 discovery sanctions, the Court finds that the only way to ameliorate the prejudice suffered by the
11 *Plaintiffs in the preparation of their case for trial, is to impose some of the more severe sanctions*
12 *authorized by CR 37. Plaintiffs request that the sanctions should include the following: 1)*
13 *Defendant's Affirmative Defenses and Answer shall be stricken; 2) Defendant's Counter-claims*
14 *shall be forthwith dismissed; 3) with respect to Plaintiffs' claims, Defendant should be deemed in*
15 *default; 4) all Requests for Admissions subject to denial or equivocal admissions should be deemed*
16 *admitted; 5) Plaintiffs' counsel shall be awarded costs and terms related to this motion and the*
17 *aborted deposition of Clarence Munce in an amount to be determined at a subsequent hearing; and*
18 *6) a Protective Order should enter precluding the Defendant from taking any additional discovery*
19 *in this matter.*

20
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22 The Court having reviewed the files and records herein, and having heard the argument
23 of counsel, has determined that under the facts and circumstances of this case, the Court in the
24 exercise of its discretion shall impose some of the sanctions requested by the Plaintiffs herein, but

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not others. Specifically, the Court will impose sanctions as follows: (1) Defendant's Affirmative Defenses and Answers shall be stricken; (2) Defendant's Counter-claim shall be stricken and shall forthwith be dismissed; and (3) the Plaintiff shall be awarded the cost of the court reporter and videographer who attended the unsuccessful effort to take the deposition of Clarence Munce, which occurred on or about July 3, 2009.

The Court in the exercise of its discretion shall not award the following sanctions requested by the Plaintiff in this matter: (1) the Court shall not enter an Order of Default, which would be tantamount to a directed verdict on the issue of liability in this matter; (2) in addition, the Court shall not award attorney's fees to the Plaintiffs for the bringing of this motion and for counsel's attendance at the unsuccessful effort to take the deposition of Clarence Munce, which occurred on or about July 3, 2009; and (3) the Court will not enter an Order precluding further discovery on behalf of the defense in this case in that such an Order would be essentially moot because discovery cut-off has already occurred in this case.

II. CONCLUSIONS OF LAW AND ORDER

1. To the extent such a determination involves a conclusion of law, this Court finds as a matter of law that there has been a willful violation of this Court's discovery Order of July 3, 2009, and violation of the certification requirements of CR 26 (g). In addition, this Court finds as a matter of law that the violation of this Court's Order and the requirements of the discovery rules substantially prejudiced the Plaintiffs' ability to appropriately prepare for trial with respect to their claims, responding to the Defendant's Affirmative Defenses, and in order to defend against Defendant's Counter-claims. In addition, this Court has considered whether or not a lesser sanction

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2 would suffice versus some of the more severe sanctions authorized by CR 37 (b), and this Court
3 specifically finds as a matter of law that they would not.

4 2. Under CR 26 (g), it is not necessary that in order to establish a willful violation
5 of this rule, that the Defendant violated a previous Court Order. With regard to Defendant's
6 response to Plaintiffs' Requests for Admissions, and Plaintiffs' Interrogatories and Requests for
7 Production, this Court concludes that the Defendant's responses were a willful effort to stonewall
8 and obfuscate Plaintiffs' efforts at legitimate discovery. Mr. Smith was appointed as Litigation
9 Guardian Ad Litem for the very purpose of acting in Mr. Munce's stead, given concerns about his
10 competency. Mr. Smith, through counsel, had the obligation to make a reasonable inquiry prior
11 to responding to Plaintiffs' Interrogatories and Requests for Production and Requests for
12 Admissions, and the Court finds that such reasonable inquiry is lacking. Otherwise, there is no
13 basis for the defense to have attempted to utilize Mr. Munce's incompetency and Fifth Amendment
14 privilege as a vehicle for denying Plaintiffs necessary discovery, particularly when Mr. Munce has
15 raised a number of Affirmative Defenses and a counter-claim, which in many respects is factually
16 based on his personal knowledge and his personal knowledge, alone.

17
18 3. Requests for Admissions, which in boiler-plate fashion assert either Mr. Munce's
19 Fifth Amendment privilege or his incompetency as a basis for denial, and/or providing equivocal
20 admissions to Plaintiffs' Requests for Production is inappropriate considering the fact that the
21 defense has raised a number of Affirmative Defenses and a counter-claim upon which Mr. Munce's
22 personal knowledge and/or ability to relate facts are critical to their foundation. This Court finds
23 that the Defendant's responses to Plaintiffs' Requests for Admissions were done in bad faith, and
24

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW AND ORDER
ON PLAINTIFFS' MOTION FOR A
DETERMINATION OF DISCOVERY
SANCTIONS- 12**

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2 as a matter of law pursuant to CR 36 and CR 37 (c), all Requests for Admissions should be deemed
3 admitted. The Requests for Admissions propounded by the Plaintiffs in this matter were in part
4 designed to address the factual basis for Defendant's Affirmative Defenses and Counter-claims in
5 this matter. The method and manner in which the Defendant responded to Plaintiffs' Requests for
6 Admissions and other discovery are indicate of an effort on the part of the defense to purposely
7 obfuscate, in that Defendant is apparently are willing to admit facts set forth within the police and
8 other reports which tend to favor the Defendant's position, but are unwilling to admit the facts
9 which favor the Plaintiffs' position set forth within the exact same materials. The Defendant
10 cannot have it both ways, and the purposes of the Civil Rules is to prevent such efforts at engaging
11 in the "sporting theory of justice," and is unfair.
12

13 4. The Court also concludes that the Defendant willfully violated this Court's Order
14 permitting the Plaintiffs to take the deposition of Clarence Munce, by instructing him not to take
15 an oath, and by asserting his Fifth Amendment privilege against self-incrimination, and directing
16 him not to answer questions, in response to questions that in no way could be construed as possibly
17 leading to an incriminating response on behalf of Clarence Munce. The Court finds that the
18 Defendant's obstruction of the deposition of Clarence Munce was a willful violation of this Court's
19 Order, and was tantamount to a failure to appear for his deposition, sanctionable under CR 37 (b).
20

21 5. This Court has considered and weighed whether or not a less severe sanction
22 would be appropriate considering the prejudice of the Plaintiffs' ability to prepare their case, both
23 with respect to the Plaintiffs' ability to put on their case in chief, respond to Defendant's
24 Affirmative Defenses and the Defendant's Counter-claim. Given the nature and severity of the

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2 violations and the obvious prejudice to the Plaintiffs, an award of monetary or other lesser
3 sanctions would not suffice to cure the prejudice suffered by the Plaintiffs by the Defendant's
4 discovery tactics, evasiveness and with respect to the deposition of Mr. Munce, a complete failure
5 to comply with this Court's Order, and Mr. Munce's discovery obligations. Thus the Court
6 concludes, as a matter of law, and Orders:

- 7
- 8 a. Because the Defendant has failed to provide sufficient information to the Plaintiffs
9 regarding the factual background relating to key components of its Counter-claim
10 and its Affirmative Defenses, particularly those defenses asserted regarding
11 contributory fault and self-defense, this Court sees no alternative but to strike the
12 Defendant's Affirmative Defenses, and dismiss the Defendant's Counter-claim
13 pursuant to CR 37 and CR 41 (b);
- 14 b. In addition, Plaintiffs should be awarded all court reporter and videographer costs
15 and expenses incurred as a result of their efforts to conduct the deposition of
16 Clarence Munce pursuant to this Court's Order. The amount of such terms shall
17 be determined upon subsequent submissions by Plaintiffs' counsel; and
- 18 c. To the extent that these Conclusions of Law should have been most properly been
19 designated as Findings of Fact, or the above Findings of Fact should have been
20 designated Conclusions of Law, this Court directs that they shall be treated as if
21 they were appropriately designated.
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DATED this 12 day of February 2010.

Th P Larkin
The Honorable Thomas P. Larkin
Department 3



Presented by:

Paul A. Lindenmuth

Paul A. Lindenmuth, WSBA # 15817
Attorney for Plaintiffs

Approved as to form and content,
Notice of presentation waived SUS

Shelley McGaughey

Shelley McGaughey, WSBA # 16809
Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

KRISTY L. RICKEY and KELLEY R. CAVAR,)	
Individually, and as Co-Executrixes)	
of the estate of Gerald Lee Munce,)	
deceased,)	
)	
Plaintiffs,)	
)	
vs.)	No. 08-2-10227-6
)	
CLARENCE G. MUNCE,)	
)	
Defendant.)	

VERBATIM TRANSCRIPT OF PROCEEDINGS

DECEMBER 18, 2009
Pierce County Courthouse
Tacoma, Washington
Before the
Honorable Thomas P. Larkin

Jennifer L. McLeod, RPR, CCR #2156
Official Court Reporter
Department 3 Superior Court
(253) 798-7475

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1 **APPEARANCES**

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7 **FOR THE PLAINTIFFS:**

8 **BY: PAUL LINDENMUTH**

9 **BEN BARCUS**

10 **ATTORNEYS AT LAW**

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12 **FOR THE DEFENDANT:**

13 **BY: SHELLIE MCGAUGHEY**

14 **STEVE REICH**

15 **ATTORNEYS AT LAW**

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1 to have a pleasant outcome for them. But, Your Honor, I

2 would suggest that their behavior in that regard is worthy

3 of sanction.

4 **THE COURT:** Anybody want to respond to that?

5 **MS. MCGAUGHEY:** Your Honor, I'm Shellie McGaughey.

6 I represent Mr. Clarence Munce through his guardian Michael

7 Smith. To my right is Steve Reich.

8 As the Court knows from last Tuesday, we filed a

9 motion for order shortening time to request the Court to

10 consider this motion on January 8 or at least set it over a

11 week. I understand the Court is headed out of town and you

12 did not grant the motion and order shortening time. That's

13 of the record.

14 At that point in time, it's my understanding that

15 they sought sanctions. I think I should point out you

16 didn't enter sanctions at that time. That's perfectly

17 within my right to bring that motion. I don't do it

18 eagerly. I don't do it without thought.

19 I called counsel. I asked for professional

20 courtesy. The week before at the last minute I rescheduled

21 depositions for them. So for them to articulate, number

22 one, a motion for sanctions and terms for filing a motion

23 for shortening terms isn't even before you, Your Honor. So

24 that's not even at issue. I did not hear you indicate last

25 week or on Tuesday in any way that that was being held over

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1 **BE IT REMEMBERED** that on **FRIDAY, DECEMBER 18,**

2 **2009,** the above-captioned cause came on duly for motion

3 before the Honorable Thomas P. Larkin, Judge of the Superior

4 Court in and for the County of Pierce, State of Washington;

5 the following proceedings were had, to wit:

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7 <<<<<< >>>>>>

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9 **MR. LINDENMUTH:** Good morning, Your Honor. Paul

10 Lindenmuth here on behalf of the plaintiffs in this case.

11 This is our motion for determination of discovery sanctions

12 and for protective order.

13 The Court's familiar with this file. I would

14 suggest one of the issues I think we do now need to take up

15 is what level of terms should be awarded to the plaintiffs

16 in this case for having to be here Tuesday. Whether the

17 Court wants to take that up to begin with, I would suggest

18 the terms are obviously needed in this case given the fact

19 that they disrupted our ability to conduct our business

20 without any reasonable justification and excuse. And,

21 obviously, they had the ability to respond to this motion

22 given the extensive response which was filed with this

23 court.

24 They drug us in here Tuesday trying to avoid this

25 motion for, I think, obvious reasons; because it's not going

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1 or reserved for today. So I'm surprised that they're

2 bringing it.

3 **THE COURT:** Well, I indicated on Tuesday, it's my

4 recollection, that I would reserve ruling and hear the whole

5 thing and then make a decision. So I haven't heard the

6 whole thing yet, so that's where we're going. That's what I

7 said on Tuesday, and that's the way I feel today.

8 **MS. MCGAUGHEY:** And just in response to the reply,

9 counsel had to work, you know, 'round the clock into the

10 night. I don't think that's at issue and I don't think the

11 Court is considering that in its discretion as well. So I

12 take that at face value.

13 **THE COURT:** That's the nature of the practice of

14 law at times.

15 **MS. MCGAUGHEY:** It is.

16 **MR. LINDENMUTH:** It was an unnecessary and

17 frivolous motion designed simply to delay and had no basis,

18 Your Honor.

19 Be that as it may, if I may, on June 21, 2008,

20 Gerald Munce arrived at his father's home, and based on a

21 confession that Clarence Munce provided to the police after

22 these events, responded to him arriving at the home by

23 striking him with a golf club, fracturing his ribs,

24 lacerating his liver.

25 According to Clarence Munce, who we don't

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1 necessarily have to believe because his statements are not
 2 under oath and have never been tested by under oath
 3 examination, as Gerald was running away, ten feet away from
 4 him, he threw back an item and may have hit him with that
 5 item; he may not have.
 6 But we do know in response to that or perhaps in
 7 some kind of a fit of anger, Clarence Munce took out an M1
 8 carbine rifle as his son was running down the driveway away
 9 from him and fired a shot.
 10 If I recall correctly, that shot entered through
 11 Gerald's shoulder blade. And because he was stooped down
 12 and ducking away from his father, it went up through his
 13 neck and exited out his jaw.
 14 According to his father in statements he made to
 15 the police, Gerald was running away like a stripped ape when
 16 he shot that bullet. He indicated that he was laying on the
 17 ground bleeding like a stuck pig.
 18 Within a short time after this death, the
 19 daughters of Gerald Munce and the granddaughters of Clarence
 20 Munce filed this lawsuit. The death occurred on June 21.
 21 The lawsuit was filed July 11. The offer of pleading is an
 22 amended complaint filed on August 14.
 23 Because of the pendency of murder charges against
 24 Clarence Munce, first degree homicide, that was brought by
 25 the prosecutor's office, Mr. Munce was subject to a

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1 competency investigation in the criminal proceeding.
 2 Despite our grave concerns about the potential
 3 dissipation of any funds available to compensate the
 4 daughters of Gerald Munce, the Court was inclined to provide
 5 a stay of discovery in this case only affecting the
 6 plaintiffs, our clients, so that the criminal proceedings
 7 could run their course and there could be a determination as
 8 to whether there'd be criminal charges filed against
 9 Mr. Munce or maintained.
 10 Ultimately those charges did not move forward.
 11 The case was dismissed without prejudice because of the
 12 determination that Clarence was not competent to stand
 13 trial.
 14 Because of this concern, on January 9, 2009, this
 15 Court entered an order appointing Michael Smith as
 16 litigation guardian, pursuant to RCW 4.08.060. In other
 17 words, Mr. Smith was there to act in Mr. Munce's stead -
 18 Defendant Munce's stead in order to make sure that this case
 19 get processed correctly and act in a representative capacity
 20 for Mr. Munce.
 21 On January 29, 2009, an answer was filed to
 22 plaintiff's amended complaint. Within that answer, a
 23 counterclaim was brought against Gerald Munce, his estate,
 24 the son who had been shot and killed by his father.
 25 Affirmative defenses were brought including assumption of

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1 risk, apportionment, comparative fault, and self-defense.
 2 On or about March 6, this Court entered an order
 3 lifting the discovery stay. During the course of those
 4 discussions, I recall specifically the Court indicated that
 5 it was inclined to allow us to move forward with the
 6 deposition of Clarence Munce to make a determination as to
 7 what, if any, evidence he could provide. Also, it was to be
 8 a discovery deposition as pointed out by the court of
 9 appeals commissioner.
 10 What we were talking about was doing discovery to
 11 make a determination as to what he could provide us and to
 12 make a determination whether he could lead us to any
 13 relevant evidence.
 14 Obviously, Your Honor, in a civil case where you
 15 have two parties, the plaintiff and the defendant, in the
 16 preparation of the plaintiff's case, one of the most key
 17 components to that preparation is taking the deposition of
 18 the defendant, and particularly in this case.
 19 The plaintiff, once the discovery stay was lifted,
 20 issued interrogatories and requests for admissions of the
 21 defendant. Despite the fact that Mr. Smith had been
 22 appointed guardian ad litem, the interrogatories were
 23 responded to with a boilerplate objection that they could
 24 not be answered because Mr. Munce lacks the mental capacity
 25 to assist the defense or to provide any information in

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1 response to the interrogatories.
 2 So right from the beginning, in reviewing those
 3 interrogatory answers, every single question now and every
 4 single answer to those questions is rendered suspect by this
 5 boilerplate objection.
 6 We have a counterclaim here, and we have a claim,
 7 and we have affirmative defenses. Interrogatory No. 11,
 8 trying to find information that will aid us in establishing
 9 our claim asks the very simple question, "State how and when
 10 and where the incident giving rise to this action took place
 11 being specific as to date, hour, and your recollection of
 12 the events surrounding this incident."
 13 The response to it is: "Objection because it
 14 requires personal feedback from Mr. Munce and because he has
 15 a mental incapacity and Fifth Amendment privileges. We're
 16 not going to answer that question."
 17 Now, in this case, they're not only responding to
 18 our claims, but they're also saying that they have a
 19 counterclaim based on the exact same facts.
 20 So their response is that, we're not going to
 21 answer your questions because he's mentally incompetent,
 22 despite the fact we have guardian Smith who's to act in his
 23 stead and because he has alleged Fifth Amendment privileges.
 24 And it's to be reminded at this point in time
 25 Mr. Munce is now living in a nursing home like any other

1 senior citizen in this state. And Ms. McGaughey, during the
2 course of Mr. Munce's aborted deposition, admitted on the
3 record that she had not spoken to him at any point in time.
4 So, in other words, she hadn't even interviewed Mr. Munce to
5 see whether or not he could assist in providing her answers
6 to these interrogatories.

7 So we have these boilerplate objections to our
8 interrogatories. We go on to ask them the factual basis for
9 their allegations of contributory or comparative fault under
10 the circumstances where we have someone shot in the back
11 running away.

12 The response to that is that he's unable to
13 provide information, and, yet, they come up with a reply
14 that they're going to prove that Gerald arrived at
15 Clarence's house unannounced while intoxicated. Well,
16 without Clarence's testimony, we don't know whether it was
17 announced, unannounced, preplanned, or otherwise. We can't
18 explore that issue.

19 They provide that Mr. Munce was likely asleep.
20 Well, Mr. Munce has never said he was asleep under oath. We
21 do know that when the police arrived at the scene and were
22 investigating, they walked back to his bedroom and there was
23 a large flat screen TV blaring at a high volume. So was he
24 asleep? What were the circumstances of this death? We
25 can't even find out those basic facts because they're saying

1 he can't provide that information; nevertheless, they're
2 going to allege it.

3 So we go ahead and provide them with request for
4 admissions asking them for basic information regarding - or
5 to admit facts that are set forth within the police
6 report - which it's interesting what they've done in
7 discovery in this case in all their positions. They'll take
8 the police report. If they like what it says, they're
9 telling this Court that that's a fact. If they don't like
10 what it says, they won't admit to it. They will provide
11 equivocal denials and say, we can't really answer that
12 because we don't have Clarence Munce available or his Fifth
13 Amendment privileges are implicated.

14 Request for admissions: They answer or asserted
15 incompetency as the basis for denial in the requests for
16 admission 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14. And that
17 can go on.

18 Okay. Well, we're not getting information that
19 way. They're not properly responding to our request for
20 admissions, even though Mr. Smith has been appointed as
21 guardian ad litem to act as the representative for Gerald
22 Munce. In other words, in that capacity, he has the
23 authority to answer these request for admissions. Absence
24 of personal knowledge is not a basis for not answering a
25 request for admission. It's based on reasonable inquiry.

1 But nevertheless, they also object to them because
2 it may also call for hearsay. Well, whose hearsay? It's
3 Clarence Munce's hearsay. And it goes on and on as every
4 opportunity to avoid providing discovery on the core facts
5 of this case. It's not provided.

6 This Court previously indicated that it would
7 allow us to take Mr. Munce's deposition to see what we could
8 get. On July 2, despite the Court had already indicated at
9 an earlier hearing, they move for a protective order trying
10 to prevent us from taking Clarence's deposition. The Court
11 took note of that. And on June 2, the Court -- on July 2,
12 the Court entered an order very specifically permitting us
13 to take the deposition of Clarence Munce. Within that
14 order, the Court did allow Mr. Munce to have criminal
15 counsel available to potentially protect his Fifth Amendment
16 privileges.

17 But I would suggest that by allowing him to have
18 criminal counsel available, the Court surely did not intend
19 to have happen which did. And what happened was, is that at
20 July 3, 2009, after Mr. Barcus diligently prepared for that
21 deposition that evening, that Mr. Munce is presented at our
22 office, and the response to our efforts to take his
23 deposition was to immediately instruct him not to take the
24 oath to tell the truth.

25 I would suggest, Your Honor, if you're ordering

1 them to allow us to take a deposition, what is a deposition
2 but a statement in front of a court reporter taken under
3 oath. So if they're not going to allow him to take an oath,
4 we are not having a deposition.

5 Their direction to him to not take the oath to
6 tell the truth was a willful violation of this Court's order
7 permitting us to take that deposition. It was a waste of
8 our time; and, frankly, I've never seen anything like that
9 before in doing discovery in a civil case.

10 But it gets worse. One question is answered. And
11 then questions like, "Do you own property?" "Do you
12 recognize people in the room?" "Have you ever been
13 married?" In response to every single one of those
14 questions - every one of them is not going to lead to
15 anything incriminating or possibly could lead to anything
16 incriminating with respect to Fifth Amendment issues -
17 Mr. Bower directed Mr. Munce not to answer the question.

18 This is a Court-ordered deposition. It wasn't a
19 game. It wasn't for any improper purpose on our part. We
20 need the information from Clarence Munce to explore his
21 counterclaims, to explore what happened in this case and to
22 address his affirmative defenses. We got none of that.

23 In response, we filed the motion with this Court
24 for sanctions as well as to compel discovery with respect to
25 what was outstanding and to look at these objections that

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1 were provided.
2 On August 14, the Court ruled that the sole issue
3 really remaining is, what is your prejudice and what should
4 the sanctions be.
5 When we look at what occurred here, Your Honor, I
6 think the prejudice is self-evident and obvious. First of
7 all, let's start out with the claim as opposed to the
8 counterclaims and the affirmative defenses.
9 We had two people at this location. One of them's
10 dead because of what the other one did. We have a claim
11 based on — and taking at face value that Clarence was
12 shooting at him to scare him — we have a transaction. Some
13 kind of factual transaction occurred here. The only person
14 who has personal knowledge regarding that transaction is
15 Clarence Munce.
16 Now let's look at the affirmative defenses. They
17 raise comparative or contributory fault as an affirmative
18 defense. All right. "Mr. Munce, under oath, tell us what
19 Gerald may have done that in any way caused or contributed
20 to his own injury other than showing up in your house trying
21 to return an item that you wanted only to be greeted by
22 having a golf club — and remember, the golf club was broken
23 in two — propelled in his ribcage lacerating his liver.
24 What did he do that warranted that kind of behavior? Tell
25 us, Clarence, tell us under oath what he did." And we get

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1 nothing. They raise self-defense as an affirmative defense.
2 Self-defense in a case where someone was shot running away;
3 shot in the back.
4 Okay. "Tell us what subjective belief you may
5 have had, Mr. Munce, that made you think that this was a
6 good idea to shoot your son. Tell us about that." We get
7 nothing. Critical evidence. Absolutely necessary evidence.
8 And whether or not there might be alternatives
9 available is not the standard. The standard is whether
10 we've been prejudiced in the ability to prepare our case.
11 I've not had a case in years in a contested
12 liability case where I haven't called the defendant as an
13 adverse witness. Can I call him as a witness and nobody's
14 going to say in advance, I can't get a deposition of him? I
15 can't even explore whether or not he can provide me proper
16 and cogent information.
17 Just a host of allegations have been lodged by
18 these defendants in a shotgun manner. "Gerald did this."
19 "Gerald did that." "Well, Clarence told me this about what
20 Gerald did one time."
21 "Can we talk to Clarence? Get him under oath?
22 See what happened here as to whether or not what this person
23 says Clarence said is what Clarence told them?"
24 THE COURT: Well, I know that. I know that they
25 haven't made him available to you and he hasn't answered any

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1 questions. I already know that.
2 MR. LINDENMUTH: And they've done it improperly.
3 THE COURT: Every step of what you've presented to
4 me, I already know. It's not like I don't see this case on
5 a regular basis.
6 MR. LINDENMUTH: You do. Your Honor, how can we
7 properly prepare our case without the necessary discovery
8 and proper discovery?
9 THE COURT: That's what discovery is all about.
10 I've already said that.
11 MR. LINDENMUTH: Your Honor, I think, then, let's
12 talk about remedy.
13 THE COURT: That's what I want to hear about.
14 MR. LINDENMUTH: I thought you wanted to talk
15 about prejudice first. But remedy in this case is obvious.
16 We have a couple things we're looking at. The affirmative
17 defenses have to be stricken. They're not providing us
18 basic discovery on the affirmative defenses, comparative
19 fault, self-defense. They have to be stricken.
20 With respect to their counterclaim, it must be
21 dismissed. They failed to provide us reasonable discovery
22 on the counterclaim which is predicated on actions that only
23 Clarence Munce — well, Clarence Munce is the best evidence
24 on the death day events and is the best evidence with
25 respect to the other allegations that are being made.

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1 So the counterclaim must be dismissed. And it
2 should be dismissed not only under CR37 but also under
3 CR41(b) because it's an affirmative claim being brought by
4 them in a capacity of a plaintiff. So CR41(b) applies and
5 it should be done for willful violation of this Court's
6 order. And also 26(g) is applicable because, of course, the
7 interrogatory answers which were not properly responsive.
8 We suggest that at this point in time that because
9 the ability — our ability to prepare our case has been
10 impacted that there must be a sanction relative to our
11 claims. The severe sanction of an entry of a default
12 judgement or a default order is, I suggest, appropriate
13 because that's the only real remedy on our claims.
14 The striking of the affirmative defenses and the
15 counterclaim resolves the issue about what we do about their
16 claims. But when it comes to our claims and the prejudice
17 that we've had to suffer through the remedy, is entry of a
18 default order.
19 With respect to the deposition of Mr. Munce —
20 well, it wasn't a deposition because he never took the oath,
21 so I guess I can't call it that. But with respect to those
22 events, we obviously should be awarded all of our costs and
23 preparation time. We had a videographer there. We were
24 ready to go. We had to pay that videographer. We had to
25 pay the court reporter. We should get terms for that.

1 All of discovery, all requests for admissions as
2 part of the order on default should be deemed as admitted.

3 Also, of course, we should get terms for last
4 Tuesday, which was absolutely unnecessary. Everybody knows
5 what the issues have been for a long time in this case
6 regarding discovery. There's no excuse for the disruption
7 caused last Tuesday. Thank you, Your Honor.

8 THE COURT: You want to respond?

9 MS. McGAUGHEY: Absolutely. This is a very
10 serious motion. We don't take it lightly and I know the
11 Court doesn't either.

12 First of all, I think there's something a fallacy
13 as far as foundation goes. There has been no prior entry by
14 this Court that the defendant has willfully or intentionally
15 violated any court order or violated discovery. That's
16 absolutely incorrect. What the Court said in its order is,
17 I'm going to give you the opportunity to come back, and you
18 said come back on August 28, and describe any prejudice, if
19 any exists, and I'll discuss a potential remedy. That is
20 what the status of the case is.

21 There's several things I want to comment on. I'm
22 going to tell you from the get-go that there's five simple
23 reasons why the Court should not respond to their request
24 for the extreme and punitive sanctions that are requested.

25 First of all, as I've already eluded to,

1 described -- and he went through a myriad of deficits of
2 Mr. Clarence Munce including thinking his son had died of
3 cancer three years before, thinking it was the year 1993,
4 thinking his wife had died 30 or 40 years ago when she had
5 died five to six years ago.

6 And Dr. Ward indicated that Mr. Munce and his
7 deficits would grossly interfere with his ability to relate
8 the facts to counsel, his ability to benefit from
9 preparation, his ability to testify, his ability to weigh
10 options. It does not appear that Mr. Munce has even the
11 minimal capacities we require for competence.

12 It is with this as the backdrop and the foundation
13 that defense counsel undertook the representation in defense
14 of Mr. Munce.

15 I want to talk about interrogatories and requests
16 for admissions because that touches upon the second prong of
17 why this request should not be granted. As I said, there's
18 no discovery misconduct, violation of court order by this
19 court, or that there's any sanctionable activity. If the
20 Court is looking for a remedy for an incompetent man who has
21 pled the Fifth Amendment and how that affects -- because you
22 do have the discretion to exercise fairness. But pleading
23 the Fifth Amendment does not come without consequences. It
24 does.

25 The Court, counsel, when we get to trial when we

1 prejudice: There is no prejudice. The prejudice that I
2 know that the Court wants to hear from is how has -- for
3 example, because there's three prongs of this; there's
4 interrogatories, there's request for admissions, and then
5 there's, of course, the deposition. The Court is most
6 intimately familiar with the deposition because I know
7 you've read the transcript and you know the record.

8 The only order that was in place by this Court is
9 the order that you entered on July 2 compelling Mr. Munce to
10 a deposition on July 3. He was, as you know, produced for
11 deposition and has the high constitutional right to have his
12 criminal lawyer present, which you indicated in that order.

13 You allowed Mr. Bower to be present. I have to
14 say just as a brief aside that I take great exception to the
15 fact that they have indicated that somehow on the record I
16 intimated, said, or suggested that I had not even met and
17 conferred with my client. That is absolutely in correct. I
18 had met with Mr. Munce.

19 What they may be referring to is the issue of
20 competency. And the fact that the Court through motion and
21 agreement to a large part by defense counsel when Dr. Ward
22 hired by the State issued its first order of competency,
23 that I know the Court is familiar with, Dr. Ward, who was
24 hired by the State, indicated on September 15, 2008, that
25 although the bar for competency is low, the deficits

1 get to the jury, we know and the case law is clear that you
2 get to infer certain things from pleading the Fifth
3 Amendment. You can even go so far as arguing it.

4 The second remedy that I would suggest, although I
5 don't agree that there's been any discovery violations
6 whatsoever, but if the Court is looking to the specific acts
7 and how that has affected the ability to defend the
8 counterclaims or prosecute their claim in light of the
9 affirmative defenses, we've already indicated to the Court,
10 and I certainly would think it would be appropriate,
11 although I don't believe it's on discovery because I don't
12 think you can penalize somebody for being incompetent, but
13 Mr. Munce will not be testifying at the time of trial. And
14 without that testimony, the claims will either fall or rise
15 on other evidence, circumstantial evidence other lay witness
16 evidence. Whatever the evidence may be.

17 THE COURT: The problem I have with this is, him
18 blanketing saying, "I'm not going to take an oath. I'm not
19 going to answer any questions," is unacceptable. That's
20 number one. Unacceptable. I emphasize that. Unacceptable.
21 I'll say it many times.

22 It is unacceptable because -- and I would agree,
23 probably wouldn't allow him to testify if they wanted to
24 call him or if you wanted to call him. And I've indicated
25 that before. I don't know yet, but that's my thinking at

1 this time.

2 There is a finding that he's incompetent in the
3 criminal case. I've read those materials, the determination
4 of competency and what the basis of it for. But they need
5 and can still ask questions that might lead them to evidence
6 that could support a defense against the counterclaims and
7 against the affirmative defenses, and they're not getting
8 that. And that's what bothers me about this.

9 MS. McGAUGHEY: Your Honor, that happened in the
10 deposition. That did not happen in interrogatories and it
11 did not happen --

12 THE COURT: It doesn't matter where it happened.
13 It's happened. And that's what bothers me about it.

14 MS. McGAUGHEY: Well, I can understand you being
15 bothered by it, but we cannot run afoul of the constitution.
16 He has a right to plead the Fifth Amendment.

17 THE COURT: He has the right to plead the Fifth
18 Amendment, but that doesn't give him a blanket right to not
19 answer question. People can't just come into this courtroom
20 or any courtroom or anywhere they take an oath and say, "I'm
21 going to plead the Fifth on this. I'm going to plead the
22 Fifth on that. I'm going to plead the Fifth on that." If
23 I'm hearing them in court, I'd say, "Fine. Go sit in jail
24 for a while and when you want to answer some of these
25 general questions, let us know." And if he was sitting

1 on top of that, but he pled the Fifth Amendment, which I
2 think you've articulated and directed me to.

3 And in that case they said that the plaintiff in
4 that particular case -- so CBS was trying to defend the
5 libel case -- and I guess one distinction with that is
6 obviously truth is a total defense to libel -- but there was
7 a very specific -- and the cases are somewhat similar, that
8 there was a very specific finding that although you have the
9 Fifth Amendment right to remain silent and exercise that
10 privilege against self-incrimination, you also have the
11 constitutional right to prosecute your claims. And in that
12 case, the Court ended up staying the discovery for the
13 statute of limitations to run on the libel case and he was
14 being investigated by the grand jury.

15 I'm not suggesting that because we don't have that
16 situation here that you could possibly weigh and balance the
17 factors by staying this case for an inordinate period of
18 time. What I can suggest is, as I've already suggested,
19 that number one, Mr. Munce will not be allowed to testify at
20 trial. And I would also secondly suggest that this isn't a
21 motion for summary judgement. So the validity of whether or
22 not these claims can stand at the time of trial is not
23 before this Court today.

24 So for them to argue that everything should be
25 thrown out does not take into consideration Mr. Munce's

1 before congress, that's what they would do in any court in
2 this country and any judge would do that. I've never seen
3 or heard of a blanket Fifth Amendment to every question
4 being asked, including instructions to refuse to take the
5 oath.

6 MS. McGAUGHEY: Your Honor, I am not an expert in
7 criminal law and I don't purport to be. But that's why I --

8 THE COURT: I understand that, but that's why I'm
9 bothered in this case. And so here we are. And I'm going
10 to impose sanctions. As so I want to know what's
11 reasonable.

12 MS. McGAUGHEY: Well, as I've indicated --

13 THE COURT: And that's why I've asked for this
14 information. There's been a lot of road blocks in this
15 case, and we haven't played fair. And that's my take on it.

16 MS. McGAUGHEY: Let me respond and let me address
17 the issues you have highlighted.

18 THE COURT: I'm listening.

19 MS. McGAUGHEY: First of all, I don't know of an
20 appropriate sanction for being incompetent, but I do know
21 that the caselaw that we cited, the Wehling versus CBS case,
22 which was a U.S. Fifth Circuit Court of Appeals case, does
23 give the Court some guidance in a situation where -- it was
24 a libel case against CBS, but the plaintiff who was
25 asserting complaints had pled the Fifth. Competency wasn't

1 civil rights to prosecute his claim and balance the
2 incompetency and the Fifth Amendment Factor.

3 I would also suggest to you that there's ample
4 case law that talks about when somebody does plead the Fifth
5 Amendment, what inferences you can make from that.

6 So it doesn't address the oath situation, which I
7 will briefly comment on, but it does address and has
8 authority and basis and case law as to what we do when
9 somebody pleads the Fifth Amendment. They will make these
10 arguments, I assume, at trial and in the same passion and
11 sense that they present to the Court.

12 They're going to be able to make those arguments
13 and the jury will ultimately decide. And that's where it
14 should be decided because, as I said, this is not a motion
15 for summary judgement.

16 Let me just touch upon the competency issue for a
17 second because you mentioned the qualm and concern that you
18 had with the oath.

19 Again, I'm not the one that instructed him in that
20 regard. But I am his defense counsel. And if you have an
21 individual who is presented to you that they don't know what
22 year it is, they don't know what day it is, just like you
23 have a child -- I know you've brought children up to
24 determine right from and wrong and can they tell the truth,
25 and they can't provide that you to, if they don't understand

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1 the oath, how can you instruct them to take it. I don't ask
2 you to take that at face value or to use that in once sense
3 or another.

4 I only presented to you that in a situation like
5 this, where you do have an incompetent individual that has
6 recently been deemed incompetent with everything from
7 confabulation to memory problems and he cannot articulate
8 the ability to understand the nature of the oath, I don't
9 think we can penalize somebody for being incompetent. And I
10 haven't seen any case authority provided by adverse counsel
11 that would allow the Court to do that.

12 So when you come around full circle, the prejudice
13 -- okay, I know you want to hear about the prejudice. We
14 don't know what Mr. Munce is going to say. So then we talk
15 about, well, how is he going to be able to articulate, for
16 example, his counterclaim. That is obviously going to have
17 to come in through witnesses that they do have availability
18 for; that they have had contact with; that they could have
19 deposed; that they could have inquired further. We
20 presented declarations. We've answered interrogatories.

21 Let me just give you one example of the request
22 for admission that they say have so apparently not divulged
23 the information in regards to. And I think that was Request
24 for Admission No. 7. We went into great detail because when
25 you look at discovery violations -- I mean, we've all seen

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1 been deemed mentally incapacitated. This request cannot be
2 fully answered.

3 But then as is typical in almost every
4 interrogatory and almost every request for admission without
5 waiving, and subject to those objections we provide the
6 police report. We admit that prior to the shooting,
7 Clarence Munce had requested that Gerald Munce return the
8 bulldog hood ornament. Those are the things where we can
9 get to for alternative means. We did admit and/or deny.
10 Was he hit by a golf club? Yes. Was it weighted? Well, we
11 don't know. I've looked at the evidence. It doesn't look
12 like it's weighted.

13 So there is absolutely nothing they can point to
14 as it relates to interrogatories and request for admissions
15 that there is any kind of a discovery violation.

16 So we have the protective order. Your Honor, I
17 came before you on July 2, seeking a protective order on the
18 issue of three things; request for admissions,
19 interrogatories, and the deposition. You ordered the
20 deposition; no doubt about that.

21 The request for admissions and the interrogatories
22 you, quote, reserved on. To date, that has not been ruled
23 on and has not been decided. The discovery cutoff expires
24 on Monday and that issue is still before the Court.

25 So we ask you to issue an order of protection on

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1 the new Hyundai case. We know Fizzons. We know the
2 landmark cases. We do not take this lightly.
3 Interrogatories and requests for admissions were signed and
4 certified by the guardian. Inquiry was made. The things
5 that could be admitted were made. The response to request
6 for No. 7 is not boilerplate as is eluded to. And you've
7 seen them before you and I'm not going to go through them.

8 But if the Court is considering any kind of -- and
9 I don't know where you're inclined as it relates to
10 interrogatories or request for admission -- but those are
11 distinctly different than the deposition because they were
12 answered. They were not boilerplate. All the case law
13 cited by plaintiff really stands and supports the defense in
14 this where they're talking about the Gonzaga case or you're
15 talking about the Johnson versus Jones case. Those are
16 where you either don't ask, you make no inquiry, you make no
17 efforts, or you just give vague and ambiguous or overly
18 burdensome answers and you don't attempt to respond.

19 Our response to Request for Production No. 6 and
20 incorporated into response for -- I'm sorry. I think I said
21 request for production. I meant request for admission No. 6
22 and 7 -- is that we put them on notice that we were seeking
23 a protective order, that it calls for hearsay, requires a
24 response based on information and knowledge solely within
25 the possession of Mr. Munce, an individual who has presently

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1 the interrogatories and the request for admission as it was
2 consistent with our prior motion that was argued before you
3 on July 2; that we will continue clear up until Monday as we
4 have -- I think we've had five supplemental answers to
5 interrogatories. We have continued to submit declarations,
6 we have continued to supplement interrogatories by new
7 evidence. If at the end of the day, that doesn't carry
8 Mr. Munce's case without his testimony and without or in
9 balance with them being able to argue the inferences from
10 pleading the Fifth Amendment, then that's what happens at
11 trial. But that shouldn't be the sanctions for today.

12 Also, too, CR26 requires discovery on
13 matters, quote, not privileged. I don't think anybody is
14 disputing that the Fifth Amendment is a privilege that you
15 have a right to assert. So I fully believe that the Court
16 follows that argument and embraces that.

17 The idea or what I want to kind of end with or
18 leave for your consideration is the idea of the deposition.
19 How do we or how do you reconcile the deposition because I
20 see that you want to hear from me on the issue of the
21 deposition. I can't do or take actions that are not in the
22 best interest of Mr. Munce, if it is in his best interest,
23 to plead the Fifth Amendment, then so be it. That's what
24 he'll have to do. And as far as how I prove his defense,
25 the intoxication through evidence of the toxicology report

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1 and experts, that certainly can happen.

2 But there was no ill intent with the deposition.
3 In fact, you said — they talked about things that you've
4 said that haven't been in orders or in court record — you
5 said when we came back in here on August 14, "Well, it
6 pretty much happened as I thought it would. It's what I
7 expected."

8 Well, if it's what you expected and it's pretty
9 much what you thought it would be, then it signals to me
10 that that Fifth Amendment right is something that you
11 anticipated. It's something that we put them on notice. We
12 suggested that it would be a short deposition.

13 I know Mr. Bower had conversations with
14 Mr. Barcus. So there was no ill will and there was no
15 intent. So if you find sanctions — discovery sanctions for
16 that deposition, you're penalizing him for being incompetent
17 and pleading the Fifth Amendment when I'm suggesting the
18 balancing and the less restrictive way is to combine an
19 order, if you deem it appropriate, that Mr. Munce, if he
20 miraculously restored his competency, would not be allowed
21 to present any evidence or to testify in any way on his
22 behalf.

23 Also, too, they forget that the complaint is
24 phrased in a negligence claim. So contributory negligence
25 is very much far and apart from self-defense. So when

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1 you're even considering or looking at a penalty or a
2 sanction, you need to make sure, I would suggest you need to
3 make sure, that it's not a blanket dismissal and directing
4 liability on actions on all affirmative defenses or on the
5 counterclaim as a whole or as a blanket.

6 The Hyundai case that just came out is the most
7 egregious and extreme of circumstances for a directed
8 verdict. There are other directed verdict cases in the
9 state of Washington. I haven't seen a single one that deals
10 with competency or incompetency, but I would respectfully
11 request this Court way less restrictive sanction if you are
12 inclined to order a sanction for the deposition at all.

13 I don't think there can be any sanctions for the
14 request for admissions or the interrogatories when there's a
15 protective order pending and the matters not answered were
16 privileged and they were honestly reasonably responded to
17 and with the assistance of the guardian.

18 So to sum it up, I don't think that — the
19 sanctions must be justified and they must be a resistance to
20 discovery, although I don't agree that the deposition was a
21 resistance to discovery because Mr. Munce had his
22 constitutional right to assert his Fifth Amendment and he
23 was incompetent. The Court should not allow any kind of
24 sanctions for request for admissions or interrogatories and
25 consider the least restrictive sanctions possible in

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1 balancing the parties' rights and interests.

2 MR. LINDENMUTH: Your Honor —

3 THE COURT: Briefly.

4 MR. LINDENMUTH: Very briefly. There is no
5 constitutional right to have a criminal defense lawyer at a
6 civil deposition. That's nonsense. You have a
7 constitutional right, perhaps, to assert Fifth Amendment
8 privileges to questions that might lead to incriminating
9 information. But you don't have the right to assert your
10 Fifth Amendment privileges when the questions are innocuous
11 when you're engaging inconsistent positions where you're
12 clearly waiving it in order to bring those positions. And
13 you don't have a right to defy a court order requiring a
14 deposition by directing the individual to not even take the
15 oath. You don't have the right to do that.

16 The Fifth Amendment is a separate issue as to
17 whether or not there's been discovery violations as — well,
18 it's only a small piece of it. We got discovery violation
19 under our court rule that go well beyond Fifth Amendment
20 privileges.

21 I'm looking at Mr. Munce's deposition and the
22 comment by Ms. McGaughey during the deposition, and she
23 stated at page 24, line 22, "I've never been able to
24 interface with my client because of incompetency. Was not
25 aware of the nature and extent of what the responses to the

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1 questions would be."

2 So she's never made inquiry of him of what his
3 responses would be to questions relating to the facts and
4 circumstances to this case. She never asked him.

5 The reasonable inferences, I would suggest from
6 their behavior in this case, is they want to have their cake
7 and eat it too. They've got this determination that Mr.
8 Munce is incompetent to stand trial in the criminal case.
9 They're trying to protect that. But by trying to protect
10 that, they're denying us our basic discovery in a civil
11 case. They can't have it both ways. There are penalties
12 for not playing by the rules. There are penalties for
13 playing games in discovery. There are penalties for making
14 the playing field so uneven that the plaintiff can't even
15 get the basic discovery necessary to respond to their
16 allegations.

17 They brought up the issue of intoxication. That's
18 an issue in the air right now because we can't get the basic
19 discovery as to what happened at the site of the events. We
20 don't know if that had any interplay in this at all or
21 whether or not the son who had the right to be at his
22 father's home, because he requested him to be there, had
23 anything other than a greeting him with a golf club when the
24 door was opened. We don't know any of this because they've
25 denied us that opportunity to explore those issues.

1 Sanctions have to be severe.

2 This case from the outset should have been about
3 damages. That's the only thing that should be left to
4 litigate, Your Honor. That's fair, given the fact they've
5 denied us all discovery.

6 THE COURT: Okay. My turn. You know, we have
7 discovery rules for a reason. And it's a pretty good reason
8 because we really work hard to have fair trials. And fair
9 trials require that you get all the information you can get,
10 and fair trials require that we don't try cases by ambush or
11 surprise. Shouldn't try it by neglect as well. And that's
12 why we have these rules, and it's important that they're
13 enforced.

14 Now, Mr. Lindenmuth talks about you can't have
15 your cake and eat it too, and that's kind of, I think, not a
16 bad comment in this particular case. You don't get to hide
17 behind it and then get to use at the same time is kind of my
18 thoughts on this. And that's what's happening because there
19 is prejudice; prejudice trying to respond to counterclaims
20 and now defend their client, who is the plaintiff and trying
21 to respond to affirmative defenses when you're not getting
22 information that could lead you to other information in the
23 case.

24 And the problem with the timing of all of this is,
25 there's a trial date on February 8. And this case has been

1 dragging around a few stays and appeals and other things
2 that are going on. And so when this case gets to trial on
3 February 8, there should be a level playing field for
4 everyone involved in this case.

5 And I am going to impose sanctions. I do agree
6 with you that the sanction should be the least restrictive
7 that there are to try and balance things out.

8 And it would take an extreme case, in my opinion,
9 to then just impose additional sanctions for the punitive
10 value of the whole thing. And though I'm not happy with
11 what took place on that deposition on July 3, I did say it
12 didn't surprise me that that was going to happen. It
13 didn't. But it doesn't mean that I thought that was the
14 right thing in any way because it isn't the right thing to
15 move forward and to try and get some information.

16 So what am I going to do. I am going to impose
17 some sanctions. I am going to strike the counterclaims and
18 the affirmative defenses.

19 I'm not going to grant your request for some kind
20 of a directed verdict in the case.

21 I am going to impose the costs for the court
22 reporter and the videographer for the deposition itself as
23 terms.

24 MR. LINDENMUTH: What about attorneys' fees, Your
25 Honor?

1 JUDGE LARKIN: I'm just going to impose those
2 costs.

3 MR. LINDENMUTH: How about for Tuesday? I'm still
4 angry about Tuesday.

5 JUDGE LARKIN: I understand you are.

6 MR. LINDENMUTH: That just destroyed my calendar.

7 JUDGE LARKIN: Maybe it did. But as a result,
8 other people's lives and calendars got destroyed too. I'm
9 not going to impose terms there.

10 MR. LINDENMUTH: Your Honor, we have findings that
11 were submitted earlier. They are a little broader because I
12 think we did include the default judgement language,
13 etcetera, etcetera. You've got other people in the
14 courtroom.

15 JUDGE LARKIN: I understand that. Why don't you
16 take a look and see what you agree on.

17 (Proceedings at recess.)
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1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON.
2 IN AND FOR THE COUNTY OF PIERCE
3
4
5

6 REPORTER'S CERTIFICATE
7
8

9 STATE OF WASHINGTON)
10) ss
11 COUNTY OF PIERCE)

12 I, Jennifer L. McLeod, Official Court Reporter in the
13 State of Washington, County of Pierce, do hereby certify
14 that the foregoing transcript is a full, true, and accurate
15 transcript of the proceedings and testimony taken in the
16 matter of the above-entitled cause.

17 Dated this ____ day of _____, 2009.
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Jennifer L. McLeod, RPR, CCR
Official Court Reporter
CCR #2156