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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Appellant,

v.

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

RESPONDENTS' OPENING BRIEF

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1. INTRODUCTION TO RESPONSE

This is an appeal that ultimately can be decided based on Appellant's non-compliance with the Rules of Appellate Procedure. The vast majority of Appellant's appeal, challenges two orders of the trial court, both of which, (as required), were supported by "findings of fact and conclusions of law". In particular, the "orders" at issue are the trial court's January 22, 2010 "Findings of Fact and Conclusions of Law and Order on Plaintiff's Motion for a Determination of Discovery Sanctions" (CP1376-1407; 1418-1442; 3359-3366), as amended, on February 12, 2010, and the trial court's "Revised Findings of Fact and Conclusions of Law and Judgment," entered on August 8, 2013. (Appendix Nos. 1 and 2)

On review of Appellant's "Amended Opening Brief", what are noticeably absent are any Assignments of Error specifically addressing these findings of fact and conclusions of law. RAP 10.3(g), under the heading of "special provisions for assignments of error", provides:

A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. **A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The Appellate Court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.** (Emphasis added).

Here, clearly the appellant has failed to assign any error to the relevant findings of fact or conclusions of law. Additionally, in non-compliance with RAP 10.3(a)(4), Appellant failed to include with its appellant's brief, "issues pertaining to assignment of error", instead, cavalierly asserting the "issues" would be "needlessly duplicative". (Appellant's Amended Opening Brief hereafter "AB", P. 1).

Appellant cannot take advantage of the "escape hatch", set forth within RAP 10.3(g), which permits consideration of issues, if they are "clearly disclosed in the associated issue pertaining thereto." When an appellant does not assign error to any of the trial court's findings of fact, the findings of fact are verities on appeal. *Pelino v. Brink's Inc.*, 164 Wn.App. 668, 682, 267 P. 383 (2011), citing to *Moreman v. Butcher*, 126 Wn.2d 36, 39, 891 P.2d 725 (1995).

Additionally, Appellant's brief violates RAP 10.3 because it makes a number of self-serving factual statements that are unsupported by any citation to the record before the trial court. See, *Housing Authority of Grant County v. Newbigging*, 105 Wn.App. 178, 184, 19 P. 1081 (2001) (Appellate court will disregard self-serving statements in Appellant's brief which are unsupported by the record). Under the terms of RAP 10.4(f) a party is obligated to appropriately cite to the record. The purpose of RAP 10.3 and RAP 10.4 is to enable the court, and opposing counsel, to

efficiently and expeditiously review the accuracy of the factual statements made in briefs. See, *Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wn.App. 286, 305-06, 991 P.2d 638 (1999).

The failure to cite to the record is of critical importance when analyzing Appellant's alleged "Statement of Fact" set forth at pp. 2-4 of Appellant's Opening Brief. There are a number of factual assertions made within such factual recitations that have absolutely no citation to the record below. This is critically important because a number of the assertions set forth within Appellant's Opening Brief appear to be nothing more than speculative, argumentative assertions with respect to Clarence Munce's intentions and/or mental state in the moments preceding him taking a loaded M1 carbine rifle and shooting his son in the back as he was running away.

For example, at p. 2 of Appellant's Opening Brief it is stated that Clarence Munce was "medicated" without any citation to the record. Additionally, Appellant's exceptionally biased, self-serving, and argumentative statement of fact goes on to assert, among other things, that "Mr. Munce took that as a threat Gerald would get his gun and shoot him". However, there was simply no evidence presented below that Clarence acted based on such concerns, or for that matter, that he even knew that Gerald routinely kept a licensed firearm in his car. The physical facts at

the crime scene indicated that Gerald had ran past his car, which was parked on Clarence's property, and was heading out into the street, before he was shot.

Such issues are covered within the trial court's Findings of Fact and Conclusions of Law which were entered at the time of entry of judgment. Thus, given the absence of an assignment of error such factual findings are, as discussed above, verities on appeal. Such argument, in the guise of a statement of fact, shall be disregarded.

Nevertheless, to the extent that the Court is inclined to entertain such argument, it is noted that, if anything, such argumentative statements tend to establish that Plaintiff was gravely prejudiced from the discovery abuse perpetrated by Clarence Munce in this case.

It is undisputed that there were only two witnesses to the death of Gerald Munce. One witness would be Gerald Munce who perished at the scene, and the other would be Clarence Munce, who refused to testify in a court-ordered deposition. (Appendix No. 3) Without Clarence's deposition, Respondents were hopelessly prejudiced in their ability to explore the facts and circumstances surrounding Gerald's death, and in particular issues with respect to what were or were not Clarence Munce's mental state, intentions and actions in relation to his shooting of Gerald.

At the scene, Clarence gave conflicting statements with respect of

the sequencing events leading up to Gerald's death. In an interview which was conducted once he was transported to a Pierce County Sheriff's Office substation, Clarence provided:

The interview with Clarence began at approximately 2335 hours. Detective Benson began by reading Clarence's Miranda warnings from an advisement of rights form. Clarence stated he understood his rights and wished to speak to us. Clarence began by telling us how his son was a thief and had sold things including guns from him in the past.¹ Clarence said that earlier in the day he ran into Gerald at the bar where he drank quite often. Clarence said he confronted Gerald about a hood ornament that he wanted back from him that he claimed Gerald stole. However they left each other on good terms. **Later in the evening, Gerald showed up at Clarence's front door banging on it. The two got into an argument and a short scuffle ensued. Clarence said that he hit Gerald with a putter. Gerald got about ten feet away and threw the hood ornament or statue at him. The statue hit Clarence in the left arm. Clarence then said that Gerald was running "like a striped ape" when he pulled out his rifle and shot at Gerald. Clarence said he claimed that he was only trying to scare him and was aiming at the blacktop. This is the shot that struck and killed Gerald.** (Emphasis added).

¹ In the summer of 2007 Gerald took away Clarence Munce's guns for safekeeping, out of a concern that he was unsafe to possess firearms, due to his aberrant behaviors and dementia. Apparently Gerald did so, in part, because Clarence had previously threatened gun violence against other relatives. Ultimately, a sheriff's deputy intervened to determine whether or not the guns were stolen and determined that they were not. At that time, then his client, a nephew of Clarence's and a cousin of Gerald's, promised the deputy sheriff that he would take custody of the guns, hold them and arrange for their sale. Instead Mr. Cline returned the guns to Clarence Munce. Mr. Cline's actions resulted in a separate suit against him which was pursued under a negligent entrustment and/or negligent performance of a gratuitous undertaking theory. That case was assigned Pierce County Cause No. 08-2-1227-6. That case was tried in 2013 and an appeal from that trial is currently before this Court under Court of Appeals, Division II, Cause No. 458730-II.

(CP1603).

The autopsy evidence established that as a result of being hit by Clarence with a golf putter, Gerald suffered fractured ribs and a lacerated liver. (CP2780). Such injuries were inflicted prior to Clarence shooting Gerald, who, it is undisputed at the time of the shooting, was running down the slope of Clarence's driveway in a crouched position, and who was well past his automobile heading out into the street at the time the fatal shot struck.

Obviously, the sequencing of the events occurring prior to the shooting would be a critical inquiry, and pivotal, with respect to liability and potential defenses available to Clarence Munce. Clarence also was the only eyewitness to Gerald's pre-death pain and suffering.

Unfortunately, Clarence refused to testify regarding such issues, denying plaintiff the benefit of information from the only eyewitness to the events.

Appellant has also failed to provide an adequate record to consider the issues which are currently pending before this Court. Commencing at p. 17 of Appellant's Opening Brief, a rather unfocused argument is made suggesting that the trial court, as opposed to imposing sanctions, should have compelled Mr. Munce to respond to plaintiff's questions, despite the events which had already occurred during the course of a **court ordered**

deposition. Unfortunately, in making such argument, Appellant failed to place before the Court transcripts from all the hearings involved in the trial court's entry of its' sanction order. Appellants ignore the fact that on August 14, 2009, after the aborted effort to take Clarence Munce's deposition, the parties came before the trial court on Plaintiff's motion to "compel answers to the interrogatories, deposition testimony; obtain requests for admissions admitted and/or for sanctions for discovery abuse". (CP467-734; 769-784). On that date, Judge Larkin, the then assigned trial judge, entered an order indicating that "this matter shall be set over for two weeks for further submission regarding the prejudice to plaintiffs relating to discovery violations of the defendant. The matter shall be further considered on August 28, 2009-9:00 a.m. ruling on plaintiff's motion is reserved at this time."² (CP785). During the course of the August 14, 2009 hearing counsel for Clarence Munce, Shellie McGaughey, was provided a full and complete opportunity to show to the court that should he order a re-deposition of Clarence Munce that there would not be a repetition of the same sanctionable conduct. No such assurances were provided to the trial court, thus it moved forward with the notion that severe sanctions should be entered, due to the willful violation

² Ultimately such hearing did not occur until December 18, 2009, when the court determined that sanctions were appropriate.

of its order requiring the production of Clarence Munce for deposition, and for other discovery abuses.

A party presenting an issue for review has the burden of providing an adequate record to establish the existence of error. See, *State v. Sisouvanh*, 175 Wn.2d 607, 619, 29 P.3d 942 (2012). The appellate court can decline to address a claimed error when faced with a material omission in the record. *State v. Wade*, 138 Wn.2d 460, 465, 979 P.2d 850 (1999). When an appellant is seeking reversal of a particular trial court order and/or ruling it is the obligation of the party seeking review to provide a full record of all relevant proceedings. *State v. Wade*, 138 Wn.2d at 465.

Here, Clarence Munce is asking the Court to review the trial court's determination to enter findings of fact and conclusions of law and order imposing severe sanctions for discovery abuse. It was, and is, the obligation of Appellant to provide a **full record** if it desires to have the Court fully consider this issue.

Finally, by way of introductory consideration it is noted that oftentimes not only does Appellant fail to cite to the record, but also fails to cite to, or meaningfully analyze authority. The Court, within its discretion, can refuse to consider issues that are not adequately briefed and supported by citations to authority. See, *Cowiche Canyon Conservancy v.*

Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument not supported by authority). Appellants' Opening Brief is similar to the opening brief addressed in *Durand v. HIMC Corp.*, 151 Wn.App. 818, 828, n. 6, 214 P.3d 189 (2009):

Appellant's brief often fails to justify our review under the Rules of Appellate Procedure. See, RAP 10.3(n), 18.1(b). The appellants frequently failed to assign error to the trial court's ruling, do not cite authority for argument, improperly make argument in the statement of case, do not properly request attorney fees, and seem to ask us to review non-appealable issues simply because the trial court did not rule in their favor...

Here, unlike *Durand*, the Court should exercise its discretion and decline to review some, if not most of the issues raised in Appellant's Opening Brief. It is not the obligation of Respondents, nor the appellate court, to hunt and peck through Appellant's Opening Brief, and the record, to make a determination as to whether or not argumentative factual assertions, which are being posed as "fact", are supported by the record. Nor should the respondent and the appellate court have to guess as to exactly what authority is supportive of Appellant's arguments.

II. COUNTER STATEMENT OF ISSUES

1. Did the trial court err by imposing severe sanctions under the terms of CR 37 against the defendant for discovery abuse, when the undisputed facts establish that, despite the trial court's order directing the

deposition of the defendant, Plaintiffs efforts to take the deposition were thwarted by defense counsel, who instructed Defendant not to take the oath to tell the truth and who asserted the Fifth Amendment privilege against self-incrimination with respect to every question asked, save for one?

2. Did the trial court err by ordering the deposition of Clarence Munce, who previously had been found “incompetent to stand trial” in a criminal proceeding, when under the facts and circumstances of this case, the information held by Clarence, the only living eyewitness to the death of his son, was essential on liability issues, damage issues and the affirmative defenses and/or counter-claims asserted by the defendant?

3. Did the trial court err by imposing the sanction of “default” against the defendant when in a previous sanction order it had stricken the defendant’s affirmative defenses, counter-claim and answer, given the entry of a default was the inevitable conclusion from the striking of the answer?

4. Did the trial court appropriately exercise its discretion under CR 55(b)(2) by holding a default judgment “reasonableness hearing”, as opposed to a jury or bench trial?

5. Did the trial court in any way err in entering a judgment against the defendant following a default judgment reasonableness hearing

when the substantial evidence presented during the course of such hearing fully supported the court's awarded damages?

6. As discussed above, can the defendant challenge the trial court's sanction order and default judgment, following reasonableness hearing, which were fully supported by findings of facts and conclusions of law, when the defense within its "assignment of error" failed to assign error to any findings of fact?

7. Did the trial court somehow misapply the law when entering a judgment supported by substantial evidence against the defaulted defendant?

8. Do the technical deficiencies within Appellants' opening brief preclude the court from considering some and/or all of the issues raised by the defense in this appeal?

9. Should Respondents be awarded attorney's fees on appeal?

III. COUNTER STATEMENT OF FACTS.

Unlike the defendant in this case, Plaintiff will do everything possible to avoid asserting argument before this Court under the guides of "a statement of facts". As indicated above, this case involves the June 21, 2008 death of Gerald Munce, who was shot in his back by his father, Clarence, as he was running away from the front porch of his father's residence. According to Clarence, in his statement to the police, he

intended merely to scare Gerald when he fired the deadly shot. There were no other witnesses. The State charged Clarence with first degree murder because of this event. During the course of the police investigation, which occurred at the scene, and which culminated in the above-referenced confession by Clarence, Clarence made a number of conflicting and argumentative statements with respect to what transpired that evening. (CP2812-2817) Despite information available within police reports, it was and continues to be unclear as to the exact sequencing of events which lead up to Clarence's killing Gerald. As should be self-evident, particularly as it relates to the affirmative defenses counter-claims the timing and sequencing of such events were critical to the issues. Additionally, as Clarence was the only actual eyewitness of Gerald's death, he alone possessed actual personal knowledge with respect to whether or not Gerald was conscious and suffering in the minutes prior to his expiration.

While criminal proceedings were pending, Gerald's daughters, Kristy L. Rickey and Kelly R. Cavar, both individually and as co-personal representatives of Gerald's estate, filed this lawsuit against Clarence in Superior Court under Washington's wrongful death and survival statutes. (CP1-7) In his answer to Plaintiff's complaint, Clarence asserted several affirmative defenses including self-defense, assumption of risk,

apportionment and comparative fault. He also asserted claims for assault and battery. (CP13-18)

Given criminal proceedings pending against Clarence, who was undergoing a competency evaluation at Western State Hospital, the original Superior Court Judge in the wrongful death action entered an order precluding Gerald's estate from requesting discovery from Clarence for 120 days. Once Mr. Munce was found incompetent to stand trial in the criminal case, the original trial court lifted the discovery stay in Gerald's estate civil action against him, and appointed Michael Smith as Clarence's litigation guardian ad litem.

On March 6, 2009 the trial court (Judge Larkin) entered an order lifting the previously mentioned discovery stay. Under the terms of the order previously served request for admissions and interrogatories and requests for production would be deemed served as of the date of the order.

In the interim, Tacoma attorney Michael B. Smith was appointed as a **litigation guardian ad litem** for the person of Clarence Munce in this lawsuit.³ As such Mr. Smith had "complete statutory power to represent the interest of the ward [Clarence Munce]. See *In Re Dependency of P.H.V.S.*, Wn. App. –, – P.3d – (12/08/2014), citing to *In re Miller* 26

³ Mr. Smith was appointed as a litigation guardian ad litem under RCW 4.08.060.

Wn.2d. 202, 173 P.2d 538 (1946).

Despite the appointment of Mr. Smith as litigation guardian ad litem, the defendant unreasonably resisted written discovery by hiding behind his incompetency and his Fifth Amendment privilege against self-incrimination. For example, the responses to interrogatories received from defendant assert, “Mr. Munce is unable to respond due to his mental incapacity” as opposed to an answer. (CP467-734) In response to request for admissions defendant repeatedly objected “on the grounds this request implicates Mr. Munce’s Fifth Amendment privileges” and based on the fact that the request requires a response based on information and knowledge solely in the possession of Clarence Munce, an individual who has presently been deemed mentally incapacitated and incompetent to testify at trial implicate Mr. Munce fifth amendment privileges. Id.

As stated by this court in its unpublished opinion already on file in this matter:

“Munce timely responded to Gerald’s estate pending discovery requests but he provided little to no substantive information. Instead he objected to most of the requests for admissions and provided equivocal admissions and denials for the interrogatories based on his assertion of Fifth Amendment privilege against self-incrimination and his alleged mental incompetency.”

(Appendix No. 4).

Frustrated by defendant’s obfuscation and unreasonable resistance

to discovery, plaintiff's counsel issued a deposition notice directing that Clarence Munce, who had been released to the less restrictive alternative of a secured nursing home, be produced for deposition testimony. In response defense counsel moved for a protective order and an order quashing the deposition notice. (CP19-32); (CP196-447). Within the moving papers relative to this motion, the trial court was fully informed regarding the defense counsel's concerns regarding the potential assertions of privileges, as well as concerns regarding Mr. Munce's competency to provide testimony.

Nevertheless, on July 2, 2009 the trial court ordered that on the following day, July 3, 2009, Mr. Munce should present himself for deposition with the attendance of Mr. Bauer, his criminal law attorney, in attendance. (CP464) (Appendix No. 5).

Attached hereto as Appendix No. 3 is a transcript of plaintiff's counsel's attempt to take Clarence Munce's deposition, which was a fiasco, and a total waste of time, due to defense counsel obstructive tactics of refusing to permit Mr. Munce to take the oath to tell the truth, as well his assertion of the Fifth Amendment privilege against self-incrimination (no matter how unincriminating the question may be), in response to plaintiff's counsel's questions.

As stated in the unpublished opinion previously filed in this case:

The original court ordered Munce to present himself for deposition; it also allowed Munce's criminal defense attorney Erik Bauer, to attend the deposition with Munce to instruct and assert privileges". During Munce's deposition, Bauer instructed him to refuse to take the oath and, except for one question, not to answer any questions, based on Fifth Amendment privilege against self-incrimination.

As pointed out in the previous appellate opinion in this case, in response Plaintiffs moved for discovery sanctions against Munce based on his inadequate response to discovery requests and his abuse of the Fifth Amendment privilege during the deposition; (CP786-787); (788-839).

Gerald's estate asked the original court to strike Munce's Answer, affirmative defenses, and to dismiss his counter claim, and deemed that he be in default, based on his failure to provide any meaningfully substantive responses to discovery requests. Id.

The genesis of the trial court discovery sanction orders in this case occurred over four hearings, only some of which the defendant has provided a transcript. The first hearing occurred on August 14, 2009. In that hearing the defendants asserted that their behavior during the course of the deposition was entirely appropriate and provided the court no guarantees that should it order a re-deposition, that the same misbehavior would not repeat itself. Thus on that date the court rendered an order "on plaintiff's motion to strike affirmative defenses and counter-claims, setting the matter over for additional submissions regarding prejudice plaintiff has

suffered relating to the discovery violations of the defense.” (CP785).

Prior to that hearing, defendant Munce sought discretionary review in this Court of the court’s order requiring that Clarence’s deposition take place. (Appendix No. 6) In denying discretionary review, a commissioner of this Court noted that, prior to the deposition, the defendants never sought a stay. In denying review the commissioner observed:

“Petitioner asserts that the court obviously or probably erred in ordering the deposition in spite the prior finding 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 trial**. See *State v. Morrison*, 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 if the information sought will be inadmissible at trial if the information appeared reasonably calculated to lead to 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 period could be inconsistent with the purpose of discovery. See *McGugat v. Brumback*, 77 Wn. 2d 441, 445, P.2d 140 (1969) the court described the purpose as “the mutual knowledge of all relevant facts gathered by both parties.” (quotation omitted). It held that mutual acts as to knowledge, secured by discovery, is a basic premise upon which civil litigation is now conducted and its availability to not be strictly contingent upon the rules of evidence or competency as applied at trial. *McGugat*, 77 Wn. 2d at 445 (holding that the dead man’s statute was not a bar to discovery, and not weighed by questions asked in deposition). 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 Industry*, 8 Wn. 2d 43, 48, 55-57, 111 P.2d 603 (1941) the 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 Industry*, 52 Wn. 2d 33, 39, 323 P.2d 241 (1958). (Emphasis added).⁴

After receiving the order denying review, on December 10, 2009 plaintiff's counsel renewed its motion for the imposition of discovery sanctions. (CP786-839) At that time, Plaintiff submitted a substantial submission and documentation supporting the prejudice suffered as a result of the defense's discovery abuse and urged that the court not only strike the defendant's affirmative defenses and counter-claim, but also that it should enter an order of default against the defense, due to the multiplicity of its violations and the number of rules which were violated.

Id.

On December 18, 2009, following a full hearing, Judge Larkin ruled that Plaintiff was entitled to sanctions, including the striking of defendant's affirmative defenses and counter-claim. (RP12-18-09 P.34-

⁴ Unlike the unpublished opinion in this case it is unlikely that a denial of review necessarily would be "law of the case" binding the parties. See generally *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 416, 161 P.3d 406 (2007) (finding prior ruling on discretionary review to be irrelevant in an insurance bad-faith case). Nevertheless, the observations of this Court's commissioner should be viewed at a minimum as being persuasive.

35). As stated in the unpublished opinion in this case:

Gerald's estate moved for sanctions against Munce based on his inadequate responses to discovery requests and his abuse of the Fifth Amendment privilege during his deposition: Gerald's estate asked the original court to strike Munce's affirmative defenses and answer, and dismiss his counter-claims, and to deem him in default based on his failure to provide any meaningful substantive answers or responses to discovery requests. The original Superior Court ruled that Munce's blanket assertion of the Fifth Amendment privilege during his deposition was inappropriate and improper. Because Munce has failed to allow Gerald's estate to depose him in any meaningful way, Gerald's estate was unable to learn what relevant evidence his deposition could have provided had he answered the questions.

The original court also ruled that:

I'm going to impose some sanctions, I'm going to strike the counter-claim in the affirmative defenses [but I'm not going to grant your request for some kind of default in the case...]

As further indicated within the unpublished opinion in this case, there was a subsequent hearing on January 22, 2010 where the court entered its initial sanction order. (CP1376-1407). (The court also, at that time, considered Defendant's objection in opposition to proposed findings of fact and conclusions of law, as well as the defendant's motion for reconsideration.) (CP1363-1370).

Once the findings were entered on January 22, 2010, the defense filed a "motion to modify findings" (a second motion for reconsideration),

and subsequent proceedings ultimately resulted in an amended order regarding discovery sanctions which was entered on February 12, 2010. (Appendix No. 1). As pointed out in the unpublished opinion, said proceedings ultimately resulted in the entry of an order striking Munce's answer, as well as his affirmative defenses and counter-claims, "The original court acknowledged Munce's argument, but signed Gerald's estate's proposed order striking Munce's answer, including his affirmative defenses and counter-claims".

These sanctions orders were also subject to a second motion for discretionary review. (Appendix No. 7) The commissioner's order denying review with respect to this second motion is also informative and persuasive:

"Munce appeared for his deposition but his criminal defense attorney refused to allow him to be sworn. He asserted that Munce had a constitutional right to remain silent as to 'any question that [might] impact him in his civil competency proceedings,' and that he would invoke the right 'generically'. Munce answered a question about his name (providing the wrong name), and thereafter, counsel invoked the Fifth Amendment as to every other question. [No matter how non-incriminating.] When challenged on his conduct, counsel replied that it was 'kind of ridiculous' and 'quite silly' to depose a person who has been declared incompetent due to dementia. Plaintiff asked for sanctions in the form of dismissal of Munce's defenses and counterclaims, attorney's fees and for default judgment. The trial court dismissed the defenses of counterclaims but declined to enter judgment."

(Appendix No. 7).

The court of appeals went on to analyze the defendant's assertions that defense counsel somehow had the "right" to thwart Plaintiff's taking of this court-ordered deposition:

"It is not clear on this record that Clarence Munce was incapable of taking the oath. Amongst the abilities found to be 'intact' in his 2008 evaluation were 'logical and goal-directed thought processes.' 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 truth 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. The refusal was based, **not on incompetence**, but on the Fifth Amendment. Sanctions were properly imposed upon the misuse of that right. See *Lyons v. Johnson*, 415 F.2d 540 (6th Cir. 1969) (dismissing all of Lyons' claims after she replied to every question at deposition by invoking Fifth Amendment), cert. denied 397 U.S. 1027 (1970). The *Lyons* court noted that discovery is essential to accomplishing a just result, and observed that 'The 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 remain silent only applies in criminal proceedings. 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 asserted that evidence pertinent to the counterclaim and defenses was ‘solely in possession of Munce’. There was, in fact, no other direct evidence regarding the defenses. And the counterclaim was partly based on things Munce said to others. In this, the inability to question Munce denied plaintiff the opportunity to obtain other potentially useful information about the incidents reported in the declaration of Munce’s friends. Finally this is not the case where the civil trial can be safe pending disposition of criminal charges. Given Munce’s condition, there probably never will be a criminal trial. (Emphasis added) (Footnotes omitted).

Subsequently, despite the clear intent of Judge Larkin to strike all defenses, including contributory fault, a subsequent trial judge, under rather strange circumstances, reinserted the defense of “contributory fault”. This was the subject of this Court’s unpublished opinion in this matter, and will not be further addressed. (Appendix No. 4). It is safe to note that the court of appeals found that it was the clear intent of the original trial judge to strike Munce’s Answer.

Given the fact that the striking of the defense’s answer was now “law of the case”, after remand, Plaintiff filed a motion for entry of an order of default. Plaintiff reasoned that the necessary effect of the trial court striking the answer is that the case was ripe for entry of an order of default. (CP2491-2523).

Interestingly, the then-assigned trial judge, (who was different

from the trial judge who had reinstated the above-referenced affirmative defense), exercised his discretion and returned this motion to the original trial judge - Judge Larkin. (RP6-14-13 P.1-20). Judge Larkin logically acknowledged that the effective of striking of the defense's answer was to make the issue ripe for the entry of a "default" and on June 26, 2013 specifically held "My decision is as follows that an order of default will be entered". Thereafter such an order was entered. (CP2699-2700).

After default was entered, Plaintiff's counsel set the matter on the trial court's calendar for a "reasonableness hearing". Defendant objected to the reasonableness hearing, arguing that it was entitled to a jury trial, despite the fact of the discovery abuse default, an order of default had been entered against the defendant. (CP3272-3287); (3299-3305).

On August 5, 2013 the trial judge held the default judgment reasonableness hearing. The court rejected the defendant's assertion that it had an entitlement to a "jury trial" in the default judgment setting but nevertheless permitted defense counsel to provide legal authority with respect to the issue of damages, and to participate in a manner which aided the trial judge in assuring that the law was being correctly applied. (RP of 8-5-13 P. 8-401) (CP3367-3376). At the hearing, Plaintiff's counsel called seven witnesses to discuss the damages suffered by the estate beneficiaries, Kristy Rickey and Kelly Cavar. (CP3347) Additionally, the

court was presented with substantial written submissions for its consideration including, inter alia, the deposition of Donald T. Reay, the former King County Medical Examiner, who provided forensic opinions with respect to cause of death and the medical probability that the shot which ultimately killed Gerald would have been painful and he would have suffered conscious pain and suffering for a period of time. (CP2796). Additionally, Plaintiff's counsel presented a number of judgments from other cases involving wrongful death of a loved one, where the judgments in those cases were well in excess of the amount ultimately awarded by the trial court in this case.⁵ (CP3226).

Following the presentation of proof, the trial court took the matter under advisement. On August 8, 2013, the trial court entered "revised by the facts, conclusions of law and judgment awarding a total of \$2,048,975.94 to the estate and its beneficiaries – a substantially smaller amount than that requested by Plaintiff's counsel. (Appendix No. 2; (CP3359-3366). Within its findings of fact, the court specifically found at Paragraph 2.10:

"Gerald Munce, prior to his death, suffered severe and excruciating pain, and severe anxiety, humiliation and emotional stress, all as a direct result of Clarence Munce's negligent actions."

⁵ In *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 33, 404-05, 161 P.3d 406 (2007) this Court approved the use of verdicts and results in other cases by a trial court when making a damage determination in the context of a "reasonableness hearing".

This appeal followed thereafter. For the reasons discussed below, all issues raised by the respondent should be rejected by this Appellate Court and in the wise exercise of its discretion, the plaintiffs should be awarded their costs and attorney's fees pursuant to RAP 18.7 (CR 11) and as an extension of the application of the court rules upon which sanctions are based.

IV. ARGUMENT

A. Standards of Review.

The standard review applicable to discovery sanctions is "abuse of discretion". *Jones v. City of Seattle*, 179 Wn2d 322, 337, 314 P.3d 380 (2013) citing to *Mayer v. Sto Industries, Inc.*, 156 Wn2d 677, 684, 132 P.3d 1115 (2006). Discretion is abused when it is exercised on untenable grounds, or for untenable reasons. *Minehart v. Morning Star Boys Ranch, Inc.*, 156 WnApp 457, 463, 232 P.3d 591 (2001). Thus, even when an appellate court disagrees with the trial court's decision, it may not subject its judgment for that of the trial court unless the basis for the trial court's ruling is otherwise "untenable". *Id.*⁶ As indicated in *Smith v. Behr Process Corp.*, 113 WnApp 306, 324, 554 P.2d 665 (2012):

CR37(b)(2) authorizes a variety of sanctions for discovery violations, from the exclusion of evidence to a default

⁶ The same standard of review applies to a trial court's rulings regarding the admission of evidence. *Id.*

judgment. **We review the use of sanctions under an abuse of discretion standard than give the trial court wide latitude in determining appropriate sanctions, reduces trial court reluctance to impose sanctions, and recognizes that the trial court is in a better position to determine this issue. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 112 Wn2d 299, 338-39, 858 P.2d 1054 (1993). (Footnote omitted.)**

CR37 confers broad discretion to the trial court as to the choice of sanctions. *Associated Mtg. Invest. v. G.P. Kect Const. Co., Inc.*, 115 WnApp 223, 229, 548 P.2d 558 (1976).

Under the terms of the CR55(b)(2), a trial court is vested discretion in determining what kind of proof and/or "hearings" "are deemed necessary" in making a determination as to an amount of a default judgment when an amount is "uncertain".

As discussed above, as there have been no errors assigned to any "findings of fact", they are verities on appeal. Even if, the appellant had properly preserved error with respect to any of the trial court's "finding of facts," such findings are entitled to deference on review, while conclusions of law are subject to review de novo. See *Gormley v. Robertson*, 120 WnApp 31, 36, 83 P.3d, 1042 (2004). Findings of fact will not be disturbed if they are supported by substantial evidence. *Walsh v. Reynolds* – WnApp – 335 P.3d 984 (9/30/14). "Substantial evidence is evidence in sufficient quantum to persuade a fair minded person of the truth of the

declared premise.” *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn2d 693, 712, 732 P.2d 974 (1987).

As discussed above, there has already been an unpublished opinion in this case. As such, the "law of the case" doctrine is clearly implicated. Under the law of the case doctrine, the decision within a prior appeal becomes "law of the case" which is "effective and binding on the parties to the review and governing all subsequent proceedings in the action in any court." RAP 12.2; *See also State v. Strauss*, 119 Wn.2d 401, 412-13, 832 P.2d 78 (1992); *Shepler Const., Inc. v. Leonard*, 175 Wn.App. 239, 249, 306 P.3d 988 (2013). Under the law of the case doctrine, an appellate court will generally refuse to consider issues that were decided in a prior appeal. *See Folsom v. County of Spokane*, 111 Wn.2d 256, 263-64, 759 P.2d 1196 (1988). Where there has been a determination of law in a prior appeal, the law of the case doctrine ordinarily precludes re-deciding the same legal issues in a subsequent appeal. *See State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996). The doctrine applies to issues that were actually considered or issues which "might have been determined" in the second appeal. *See Sambasiban v. Cadlec Medical Center – Wn.App. –* (11/18/14). Although the law of the case doctrine is "discretionary," in this case there is simply no reason to ignore prior appellate proceedings or to question their validity.

B. The Trial Court Had Ample Justification For Imposing Sanctions Due To Abusive Assertion Of The Fifth Amendment Privilege.

As indicated in the above commissioner's ruling, the justification for the defense's obstruction of Clarence Munce's deposition had very little to do with his competency but rather related to his abuse of the Fifth Amendment privilege against self-incrimination. What transpired in this case as it relates to the assertion of Fifth Amendment privilege by this defendant hardly can be characterized as reasonable resistance to discovery. Defense counsel asserted the "Fifth Amendment privilege" with respect to every question but one. On review of the subject deposition, it would be hard to imagine that any answer to the questions posed in any way could be "incriminating" in any way, shape or form.

Contrary to the criminal law context, in a civil proceeding a party can "pay a price" for asserting the Fifth Amendment privilege. As early as 1976 the United States Supreme Court recognized in *Baxter v. Palmigiano*, 425 U.S. 380 (1976) that when Fifth Amendment privileges are asserted in a civil proceeding, and the party asserts the right to remain silent, an adverse inference can be drawn from such silence. In other words, in a civil case, it can be inferred from the assertion of such privilege that the answer to the question to which privilege was asserted would likely be incriminating or adverse.

Over the years, the principle first articulated in the *Baxter* opinion has been substantially amplified and as a result, a wide variety of what could be characterized as discovery sanctions, have been approved and imposed. For example, in *Serafino v. Hasbro, Inc.*, 82 F.3d 515, (1st Cir. 1996) the court determined that a plaintiff's assertion of Fifth Amendment privileges warranted a complete dismissal of the plaintiff's case. The *Serafino* court, in its analysis noted that in a civil context the right of the party to assert Fifth Amendment privilege against self-incrimination must be balanced against the right of the opposition to properly prepare their case.

As noted in *Serafino*, the *Baxter* case indicated that "the assertion of the privilege may sometimes disadvantage a party," and "not every undesirable consequence which may follow from the exercise of the privilege against self-incrimination can be characterized as 'penalty'". In addressing the balancing, the *Serafino* court provided at Page 518 the following:

"We think that in a civil context, where, systematically, the parties are on somewhat equal footing, one party's assertion of his constitutional right should not obliterate another party's right to a fair proceeding. In other words, where a trial court is trying to accommodate a party's Fifth Amendment interest, it must also ensure the opposing party is not unduly disadvantaged. (Citation omitted). After balancing the conflicting interests, dismissal may be the only viable alternative."

In *Serafino* the court ultimately determined that dismissal was the only viable remedy because the information sought was significant and no reasonable alternative means were available to gather such information. The same issues are present in this case. *See also SEC v. Graystone Nash, Inc.*, 25 F.3d 187 (3rd Cir. 1994) ("The principle that the invocation of the privilege may not be too costly does not mean it must be 'costless.'"). In the *Graystone Nash* opinion, the 3rd Circuit, after a brief survey of the case law, opined that it was "apparent that the effects that an invocation of the privilege against self-incrimination will have in a civil suit depends to a large extent on the circumstances of the particular litigation." *See also Nationwide Insurance v. Richards*, 541 F.3d 903 (9th Cir. 2008) (striking a plaintiff's testimony following an assertion of Fifth Amendment privilege and affirming the district court's use of an adverse inference against the plaintiff for asserting such a privilege with regard to key questions of fact).

Ultimately as noted in *SEC v. Merrell Scott and Associates, LLT*, 505 F.Supp.2d 1193, 1208-09 (USDC Utah 2007), The Supreme Court has also noted that the fact that a litigant may be forced to choose between complete silence and forego a defense has never been thought an invasion of the principle against self-incrimination." As noted in the *Merrell Scott*

case "In a civil trial, a party invocation of privilege may be proper, but does not take place in a vacuum, the rights of other litigants are entitled to consideration as well." *Id.* citing to *Graystone Nash Inc.* 25 F.3d at 191. Stated another way "Sanctions for failure to comply with discovery due to invocation of Fifth Amendment privilege against self-incrimination must be tailored to provide equitable treatment to the adversary, as well as accommodating the Fifth Amendment right to the party invoking the privilege." *See* 81 Am.Jur.2d *Witnesses*, § 122 (2009).

Again it is emphasized that there are no living eyewitnesses, other than Clarence Munce, as to what transpired on June 21, 2008. Thus, there is no other alternative evidence available, other than that which could be provided by Clarence Munce relating to defendant's affirmative defenses such as comparative fault and self-defense. As pointed out by the Commissioner of this Court that that is true as well with respect to Mr. Munce's counterclaim.

Also, the absence of such evidence clearly impacted the plaintiff's ability to prove issues regarding both liability and damages. By asserting his Fifth Amendment privilege, Mr. Munce essentially denied plaintiff all firsthand information with respect to critical events at issue as well as what, if any, mental state Clarence Munce may have had at the time the events were unfolding. It is hard to imagine how plaintiff could, for

example, address a claim of "self-defense" without such information.

It is further noted that the defendant's assertion of Fifth Amendment privileges is inconsistent with its pursuit of a counterclaim and the various affirmative defenses which were asserted. Generally a party cannot engage in inconsistent litigation practices. *See Lybbert v. Grant County*, 140 Wn.2d 129, 1 P.3d 1124 (2000) (waiver due to inconsistent positions in litigation). Further, by raising such defenses and counterclaims, Mr. Munce necessarily placed his mental state at issue and "the Supreme Court also recognizes the defendant who asserts a mental status defense lacks the Fifth Amendment right to remain silent regarding the mental status that he has placed at issue.". *See Pawlyk v. Wood*, 248 F.3d 815, 824 (9th Cir. 2001) citing *Buchanon v. Kentucky*, 483 U.S. 402, 422-23 (1987).

Finally, it is well-established that in the civil context the Fifth Amendment privilege must be asserted with respect to each question and there cannot be a blanket assertion of privilege as was attempted by Mr. Bauer. *Glanzer v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000); citing *U.S. v. Bowaell*, 66 F.3d 1000, 1001 (9th Cir. 1995).

There is simply no question, as previously observed by a Commissioner of this Court, that Mr. Munce, through his counsel, profoundly abused the Fifth Amendment privilege against self-

incrimination by refusing to answer even the most innocuous of questions. Given such abuse, Mr. Munce's actions invited, if not demanded, that he be subject to sanctions. Obviously Mr. Munce made an election between his freedom and his ability to properly cooperate in this lawsuit. He simply should not be permitted to have it both ways under the facts and circumstances of this case. Thus his actions warranted the entry of severe sanctions.

C. Mr. Munce's Alleged Lack Of Competency Does Not Justify The Discovery Abuse Which Was Perpetrated In This Case.

As indicated within the court commissioner's ruling, there is simply no case law within the State of Washington, nor known requirement that, prior to the taking of a discovery deposition, there has to be any kind of a determination of "competency". The criminal cases relied on by the defense are not on point.

Under Washington law it is well settled that insanity and other mental incapacities are not recognized as a defense to negligence. See *Ramey v. Knorr*, 130 Wn.App. 672, 676-77, 124 P.3d 314 (2005); see also *Kusah v. McCorkle*, 100 Wn. 318, 170 P. 1023 (1918) (An insane person is personally liable for assault and battery). *Id.* Even persons who have already been judicially determined to be insane or mentally incompetent, are capable of entering into a personal contracts, so long as the contract

was made during a lucid interval, or if the act is not affected by delusions which were the basis for the determination of incompetency. See *Maitlen v. Haizen*, 9 Wn.2d 113, 113 P.3d 1008 (1941).

Even a person who has previously been adjudicated of being of unsound mind, is competent to be a witness if, on examination, it is found to be of sufficient mental capacity to understand that the nature of the given oath, i.e., that it is morally and legally wrong to swear falsely, he understands that false swearing is punishable as a crime, and if he possesses sufficient mind and memory to reserve, recollect and narrate things that he saw or heard. See *State v. Morrison*, 403 Wn.2d 23, 259 P.2d 1105 (1953) (Witness previously adjudicated to be insane could nevertheless testify the showing of such a foundation).

Here, in outlandish defiance of the court's order, "expert defense attorney Bauer denied Plaintiff all opportunity to gather information that subsequently could be used to establish a testimony of competency at the time of trial. Generally, the burden of proof is on the party contending that the person is incompetent to testify as a witness to establish the line of competency. *Id.*; see also, RCW 5.60.050 (which requires that either the person of unsound mind, or "appeared to be incapable of receiving just impressions of facts, in respect to which they examine, or of relating to them truly"). The statutory prohibition against incompetent testimony

only applies to those who are without comprehension at all and not those whose comprehension is merely limited. See *State v. Thach*, 5 Wn.App. 194, 199, 486 P.2d 1146 (1971); see also *McCutchbon v. Brownfield*, 2 Wn.App. 348, 468 P.2d 8668 (1970).

Here, plaintiffs were denied (improperly) any opportunity to explore issues relating to Mr. Munce's competency when he was directed not to answer any questions by his counsel. Such a total denial of discovery cannot stand without sanctions, despite contentions on the part of his counsel that Mr. Munce's lack "competency" to testify. Plaintiff's counsel is simply not required to take such assertions at face value, particularly in light of a court order directing that Mr. Munce be subject to a deposition, which by definition requires that he take the oath to testify. See CR 30(c) ("the officer for whom the deposition is to be taken shall put the witness on oath..."). By declining to permit Mr. Munce to be placed under oath defense willfully defied the trial court's order.

D. The Defendant Violated a Number Of Court Rules and Substantial Sanctions Were Essential.

1. The Defendants Violated the Court's Order On July 2, 2009, which permitted Plaintiffs to take the deposition of Clarence Munce.

On July 2, 2009, this Court entered an order permitting Plaintiff to take the deposition of Clarence Munce. Although that order also permitted Mr.

Bauer to instruct and assert “privileges” during the course of that deposition, clearly Mr. Bauer’s actions were well beyond what was contemplated by the Court in its order. Such a court order was fully, willfully and completely stymied by Mr. Bauer’s obstructionist tactics of asserting Fifth Amendment privilege to questions which otherwise could in no way be construed as incriminating or possibly leading to an incriminating response. It is suggested that such actions on the part of Mr. Bauer, clearly were violative of CR 41(b) which authorizes the court to dismiss an action for noncompliance with court orders. Under such a rule, the court is fully authorized to dismiss an action (in this instance the defenses and counter-claims of Defendant Munce) when it is determined that there has been an effort at “disregarding a trial court’s order without reasonable excuse or justification”, i.e. a willful violation of such order. See *Johnson v. Horizon Fisheries, LLC*, 148 Wn.App. 628, 638-39, 201 P.3d 346 (2009). See also, *Apostolis v. City of Seattle*, 101 Wn.App 300, 304, 3 P.3d 198 (2000). In this instance, it is without question that Mr. Bauer abused the privilege against self-incrimination by asserting it under circumstances to question where no privileges were implicated. Again, without question, Mr. Bauer asserted privilege obviously in order to protect a prior incompetency finding which, as discussed above, is not an appropriate basis for the assertion of such privilege. It is suggested that

the aborted attempt to take Mr. Munce's deposition, was tantamount to Mr. Munce's not appearing at his deposition. Nonappearance can be subject to severe sanction under CR 37(d). Under such circumstances, the court was authorized to make such orders as was just. Under the circumstances, where multiple rule violations had occurred, the only just order in this case was to lodge severe sanctions against the defense in this case, including the dismissal of affirmative defenses and striking Defendant's counter-claims and Answer.

2. Defendant's Failure to Respond to Plaintiff's Discovery Request Were Violations of CR26(g).

In this case, Defendant's responses to Interrogatories No. 11, 17 and 20 (as well as others) include inappropriate assertions of Fifth Amendment privilege and as such are incomplete and evasive responses. As such, Defendant's prior answers to Plaintiff's discovery request based on an inappropriate assertion of privilege, were violative of CR 26(g). See *WSPIEA v. Fisons*, 122 Wn.2d 299, 858 P.2d 1054 (1993). Prior to making a determination as to whether or not to impose severe sanctions including striking of testimony, dismissal of claims and/or entry of default judgments, the court must consider if less severe sanctions suffice. See also, *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.3d 115 (2006).

In this instance, the only remedy available, due to Defendant's

discovery abuse and given the context of this case, i.e., complete denial of discovery on core issues, was striking the Answer, dismissal of the counter-claim and striking of affirmative defenses.

3. Defendant's Requests for Admissions, Which Were Inappropriately Subject to Objection, Should be Deemed Admitted.

The purpose for Requests for Admission are to narrow issues that are likely to occur at time of trial. In this instance, Mr. Munce's Litigation Guardian Ad Litem, was fully competent to make a determination as to what issues are, or are not, subject to dispute, or otherwise should be subject to admission. This is true even if the request is directed to matters which otherwise would constitute objectionable hearsay (which is otherwise fully waivable). See, *Booth Oil Site Administrative Group v. Safety-Kleen*, 194 FRD 76 (WDNY 2000). Further, when the ability to determine information sought by requests for admission is within the reasonable reach of the answering party, lack of personal knowledge is an insufficient response to the request. *Criterion Music Corp. v. Tucker*, 45 FRD 534 (S.D. Ga 1968). See also, *Herrera v. Scully*, 143 FRG 545 (S.D.N.Y. 1992). See also, *E.H. Tate Company v. Jiffy Enterprises*, 610 FRD 571 (E.D. Pa 1954). Thus, Defendant's Answers to Requests for Admission denying admission because of the need for the personal knowledge of Clarence Munce is simply an inappropriate and evasive

response. Further, as a litigation guardian has been appointed, there is simply no basis for refusal to answer Requests for Admissions because the Defendant is technically otherwise incompetent. See, *Metropolitan Life Insurance Company v. Karr*, 169 F.Supp 377 (D.C. Md. 1959). In other words, Mr. Smith is fully authorized as Litigation Guardian to make a determination as to whether to admit or deny Plaintiffs' Requests for Admissions. The entire purpose for Requests for Admissions is simply to narrow the issues presented at the time of trial, and to preserve the scarce resources of the Court, and the parties.

Unfortunately, all efforts on the part of Plaintiffs in that regard were thwarted by Defendant's blanket assertion of Fifth Amendment privilege and Mr. Munce's incompetency as a grounds for failure to answer. Such efforts on the defense's part was simply erroneous, and worthy of sanction.

4. The Only Remedial Alternative Under the Circumstances of This Case, was the Striking of Defendant's Answer, Affirmative Defenses and the Counter-Claims.

As discussed above, even though Defendant Munce had the right to assert his Fifth Amendment privileges, the Court still must take into consideration, and accommodate the needs of the Plaintiffs in pursuing their claims. While under some circumstances, there may be instances where very little need be done in order to accommodate the Plaintiffs' interests. However, that was not the case in this matter. This is

particularly so given the fact that the Defendant has asserted affirmative defenses, including comparative fault and self-defense, which are inherently inconsistent with Mr. Munce's desire to maintain his Fifth Amendment privileges. This is no doubt equally as true, if not more, with respect to Mr. Munce's efforts to seek affirmative relief by way of a counter-claim, which in part is based on the very events which resulted in the death of his son. While not wanting to beat a dead horse, it is once again suggested that the Defendant cannot have it both ways.

The civil rule violations relating to discovery are multiple in this case. While with respect to the aborted deposition of Mr. Munce, an award of attorney's fees and expenses, is clearly something that would be appropriate and sufficient. Unfortunately, award of the lesser sanction of attorney's fees and costs, with respect to all other discovery issues would provide no cure, and would be essentially meaningless. Under the unique circumstances of this case, it is suggested that the only meaningful remedies were those set forth in CR 37 (b)(2)(B) and (C). Under these provisions, the Court, as a discovery sanction, can enter an Order "refusing to allow the disobedient party support or oppose designated claims or defenses, or prohibiting him from introducing designated matters into evidence." In addition, under subsection (C), the Court can enter an Order "striking out pleadings

or parts thereof.. or dismissing the actions or proceedings or any part thereof..”

The requested sanctions admittedly were amongst the “harsher remedies” available under CR 37 (b). The Trial Court followed the guidance and principles articulated in the case of *Burnet v. Spokane Ambulance*, 131 Wn.2d 44, 933 P.2d 1036 (1997), which were most recently explored by our Supreme Court in the case of *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 320 P.3d 115 (2006).⁷

Under the *Burnet* case:

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

See, *Mayer v. Sto Industries, Inc.*, 156 Wn.2d at 687, quoting *Burnet v. Spokane Ambulance*, 131 Wn.2d at 494.

As explained in the *Sto* opinion at page 688, in order for a severe sanction to be entered, the Court must do three things: 1) consider a lesser sanction; 2) assess the willfulness of the violation; and 3) determine

⁷ While it could be argued that different standards are applicable depending on which specific discovery rule is subject to violation, it is suggested that following the guidance of the *Burnet* case is the most conservative and an appropriate approach.

whether or not substantial prejudice arising from the violation has been suffered by the opposing party. The Trial Court considered all these elements and did not grant all sanctions requested by the Plaintiffs. Rather, the Trial Court independently exercised its discretion and fashioned an appropriate remedy. (753;754).

When considering whether or not to impose a lesser sanction, the Court ultimately must look at the practical impact of the violation. See generally, *Smith v. Behr Process Corp.*, 113 Wn.App 306, 54 P.3d 665 (2002) (trial judge engaged in detailed analysis of the impact of the discovery violation on the opposing party's ability to prepare their case).

Here, the practical impact of the Mr. Munce's assertion of Fifth Amendment privileges and the assertion of incompetency as a defense, is that Plaintiff has been denied any ability to respond to Defendant's affirmative defenses, and his counter-claim. It also affected proof on liability and damages. Again, without wanting to beat a dead horse, it is absolutely essential that Plaintiff be able to depose Mr. Munce about the events surrounding the death of his son, in order to make a determination as to whether there is a reasonable basis for a self-defense claim, and whether or not there is any basis for a counter-claim. Ultimately, such issues will turn on such matters as to who was the aggressor, who struck whom first, and such issues which are solely within the knowledge of Mr.

Munce. Without such information, it is impossible for Plaintiffs to respond to such an affirmative defense, or to prepare a defense to the counter-claim asserted by Defendant Munce regarding the events surrounding the death of his son.

For the purposes of discovery violations, and determining what sanctions should be applied, “willfulness” simply means that the violation of a discovery obligation or rule was done without reasonable excuse. *Id.*, at 677. With respect to violations of a discovery order, if it is done without reasonable excuse or justification, it is deemed to be willful. See, *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002).

In this case, as discussed above, placed in context, it is clear that the Defendant has failed to comply with its discovery obligations “without reasonable excuse,” and the fanciful justifications asserted based on defense counsel’s inaccurate views of the law, provide no excuse. While one could argue and debate whether or not it would be appropriate for Mr. Munce to assert his Fifth Amendment privilege against self-incrimination, in this instance, the Defendant has abusively utilized such privilege to preclude Clarence Munce from answering even the most innocuous and non-incriminating of questions. Further, it defies common sense for the defense in this case to be asserting a self-defense affirmative defense and a

counter-claim in part based on the events surrounding Gerald Munce's death, while at the same time refusing to recognize that in order to pursue such matters, almost necessarily will require Mr. Munce to talk and to provide information by way of formal discovery, and to answer appropriate questions in deposition. Again, the inconsistent position taken by the defense in this case, and the failure to acknowledge it, should be deemed sufficient to meet the willfulness requirements of the imposition of harsher remedies.

With respect to prejudice, it was self-evident that Plaintiffs' ability to prepare to respond to the affirmative defenses of comparative fault and self-defense has been completely stymied. It was clearly reasonable for the Trial Court to find as such.

It is respectfully suggested that the defense in this case has left the Court with no alternative or choice as to how to address this issue. Under the unique circumstances, it is suggested that justice and equity compels the Court to strike the Defendant's Answer, affirmative defenses and to dismiss his counter-claim. It was the only option available.

5. The Trial Court Was Justified In Striking the Defendant's Answer

Given the severity of the discovery being perpetrated by the defense, certainly striking the striking affirmative defenses and counter-

claims, alone, were not sufficient sanctions, and the trial court was justified in striking the defendant's Answer in its entirety. In *Peterson v. Cuff*, 72 Wn.App. 596, 865 P.2d 555 (1994) the appellate upheld the striking of pleadings as a discovery sanction when it was obvious that the offending party was playing games in the discovery process. In that case, the defendant failed to appear for deposition, despite reasonable efforts on the part of the opposing party to schedule the deposition, and the court's intervention. The court found that such willful intransigence justified the striking of pleadings. See also *Apostolis v. City of Seattle*, 101 Wn.App. 300, 3 P.3d 198 (2000).

Here, given the fact that defense counsel blatantly disregarded the court's order, such a severe sanction was entirely warranted in this case. Discovery is not a game. When a party has dedicated itself to a path of obstruction and defiance, as occurred in this case, they invite the entry of severe sanctions. Judge Larkin acted within his discretion in striking the defendant's Answer in its entirety.

6. The Trial Was Justified In Entering A Default And Order Of Default

As noted above, the trial court, in its Findings of Fact relating to sanctions, addressed all of the *Burnet* factors. Thus, the foundation for the entry of an Order of Default was present. Such an Order of Default

naturally is reserved for rare circumstances where discovery abuse has been palpable. See *Smith v. Behr Process Corp.*, 113 Wn.App. 306, 54 P.3d 665 (2002); *RCL Northwest, Inc. v. Colorado Resources Inc.*, 172 Wn.App. 265, 864 P.2d 12 (1993) and *Delany v. Canning*, 84 Wn.App. 498, 929 P.2d 475 (1997).

Here, as in the above-cited cases, the defendant's misconduct was extreme. As in *Delany*, the defense appeared to engage in a calculated effort to keep facts from the plaintiff, and to impede the determination of the case by engaging in "stonewalling, foot dragging and obfuscation...". It did so based on unsupportable arguments related to the Fifth Amendment privilege, which was clearly abused by the defense.

This case involves an unfortunate and extreme set of circumstances where "the death penalty" was clearly warranted due to extreme discovery abuse.

E. The Trial Court Appropriately Exercised Its Discretion in the Method and Manner in Which It Held the Default Judgment Hearing in this Case.

It has been recognized in other context that a party is not entitled to a jury trial, when a trial court is conducting a "reasonableness hearing". See *Bird v. Best Plumbing Group, LLC* 175 Wn. 2d 756, 27 P. 3d 551 (2012) (reasonableness determination under RCW 4.22.060). Further, as noted above, under the terms of CCR 55(b)(2), discretion is vested within

the trial court with respect to what kind of hearing it may deem necessary in order to establish the amount of damages in a case where a default judgment has been entered but when the amount of damages is otherwise uncertain. As indicated by *Smith v. Behr Process Corp.* 131 Wn. App. 306, 54 P. 3d 665 (2002), the scope of such a hearing, and the ability of the sanctioned party to participate, is a matter vested within the trial court's discretion and ultimately is shaped by what the trial court believes it needs in order to come to an informed and proper decision. Ultimately such issues are a matter of the trial court's "election".

In this case, defense counsel was allowed to have greater participation than plaintiff's counsel was advocating for. In fact, it was plaintiff's position below that the defense counsel should not be permitted to even address the court, given the fact that the defendant was in default, and given the nature and extent of the discovery abuse which had previously been perpetrated. Nevertheless, the trial court permitted participation by defense counsel to ensure that it entered a proper judgment under the facts of this case.

With respect to the defense's concern with regard to due process, as indicated in *Smith v. Behr Processing Corp.*, supra, such concerns fall away once there has been a determination that a party has engaged in significant sanctionable conduct and that the entry of the order of default

was not a matter of "mere punishment", but a necessary remedy given the willful and deliberate acts leading to sanction and the substantial prejudice that it imposed upon the opponent's ability to prepare for trial.

Here, the acts of the trial court were not punitive, but were a necessary response to the discovery abuse which had been perpetrated and the prejudice suffered. The trial court's conduct of the default judgment hearing was in no way erroneous.

F. There Were No Evidentiary Errors Which Occurred During Trial and Even if There Were Said Errors Were Waived by the Defense's Failure to Assign Error to the Trial Court's Findings of Fact.

As indicated above the trial court's findings of facts, which went along with its judgment in this case, were not subject to assignment of error and are verities on appeal. Even if such technical deficiencies did not exist it is respectfully noted that the court's findings were supported by substantial evidence.

Below, plaintiff presented a number of witnesses supportive of the plaintiff beneficiary's loss of parental consortium which is clearly recoverable under Washington State's wrongful death laws. Under the terms of RCW 4.20.020 plaintiff's beneficiaries (his children) were statutory beneficiaries under the terms of Washington's wrongful death and survival laws. There is nothing in the law indicating that such a

beneficiary is limited only to "minor" children, as covertly suggested by the defense. Under Washington wrongful death laws children are entitled to loss of their parental consortium and damages for loss of the love, affection, care, companionship, protection, guidance, and moral and intellectual training and instruction of the parent. See *Ueland v. Reynolds Metals Co.* 103 Wn. 2d 131, 691 P. 2d 190 (1984); *Ebsary v. Pioneer Human Services* 59 Wn. App. 218, 796 P. 2d 769 (1990) ("love, affection, care, companionship, protection, guidance and moral and intellectual training and instruction"); *Cornejo v. State* 57 Wn. App. 314, 788 P. 2d 554 (1990) ("support, love, care, guidance, training instruction and protection").

With respect to the award of Gerald Munce's pre-death pain and suffering, such an award was supported by "substantial evidence" in the form of the deposition testimony of Dr. Donald Reay, the former King County Medical Examiner, which was before the court at the time of the reasonableness hearing. (See P. 2796) (Given the location of gunshot wound no indication that Gerald Munce would have immediately lost consciousness). According to Dr. Reay given the location of the gunshot wound which disrupted Gerald's ability to breathe he would have been in considerable pain and suffered extreme anxiety prior to death. (CP2798). Such evidence, alone, rationally justifies the trial court's award of pre-

death pain and suffering in this case.

Further with respect to the estate's economic losses plaintiff also presented to the trial court an economic loss report from Richard W. Parks PhD. which established an economic loss in the amount awarded by the trial court. (CP2827-2839).

The defense's challenge to Judge Johnson's rather conservative award in this case does not withstand scrutiny.⁸

G. The Trial Court Did Not Err in Failing to Recuse Himself.

In this case Judge Johnson's former partner, Peter Kram was a lawyer representing the plaintiffs in a case relating to the estate of Clarence Munce. Mr. Kram **did not represent anybody in this case. Thus, the defense's argument that Judge Johnson should have been subject to disqualification under CJC Canon 2.11 is without merit.**

Beyond that, the defense is incapable of articulating or pointing out any fact which would in any way indicate that Judge Johnson was biased against them or otherwise unfair. A different judge entered the order of default. Judge Johnson allowed the defense to participate in the case, to a limited degree, over plaintiff's counsel's objection. Judge Johnson awarded damages in an amount substantially less than that requested by

⁸ As previously indicated the court's consideration of results in other cases was approved in the *Sharbono*, supra, opinion.

the plaintiff.

In the recent case of *Kok v. Tacoma School Dist., No. 10*, 179 Wn. App. 10, 24, 317 P. 3d 481 (2013) this court looked to the ultimate result of the case in making a determination as to whether or not a trial court judge had abused its discretion by refusing to recuse itself given the interrelationship between the judge, (her husband), and one of the parties. The court looked to the actual outcome of the case to make a determination as to whether or not the party requesting recusal had been subject to unfair treatment.

Here, as in *Kok*, any reasonably prudent person would conclude that both parties obtained a fair hearing. Judge Johnson did not abuse his discretion by refusing to recuse himself.

PLAINTIFF'S REQUEST FOR ATTORNEY'S FEES ON APPEAL

A party under the terms of RAP 18.1(a) "fees may be awarded as part of the cost of litigation when there is a contract, statute or recognized ground in equity for awarding such fees." *Thompson v. Lennox* 151 Wn. App. 479, 491, 212 P. 3d 597 (2009). In general when a prevailing party is entitled to attorney's fees in the trial court they are also entitled to attorney's fees if they prevail on appeal. *Sharbono v. Universal Underwriters Insurance Co.* 139 Wn. App. 383, 161 P. 3d 406 (2007).

Under the terms of CR 26(g); CR 36 and CR 37, at a minimum,

plaintiff is entitled to an award of attorney's fees should the trial courts sanction order be upheld.

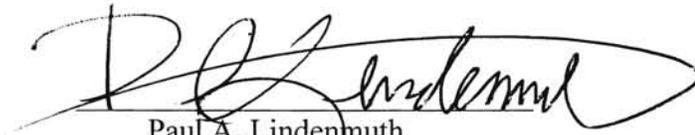
Additionally, under the terms of RAP 18.9 attorney's fees should be awarded because defendant's appeal is absolutely devoid of merit. This is a case where the defendant, at the direction of his counsel, engaged in egregious discovery abuse. The sanctity of the trial court's orders relating to such discovery abuse have already twice been vetted by the commissioner of this court, and in an unpublished opinion which both directly and indirectly upheld the sanctity of such rulings.

The defendant also makes meritless allegations with respect to damages, without even assigning error to the trial court's findings of facts relating to such issues. Substantively, the defenses arguments are devoid of merit. The court, within its discretion would be more than justified in finding a RAP 18.9 violation, and awarding fees.

CONCLUSION

The decision of the trial court should be affirmed.

Dated this 15th day of December, 2014 at Tacoma Washington.

A handwritten signature in black ink, appearing to read "P. A. Lindenmuth". The signature is written in a cursive style with a large, sweeping flourish at the end.

Paul A. Lindenmuth
WSBA No. 15817
Of Attorneys for Appellant
4303 Ruston Way
Tacoma, Washington 98402
253-752-4444
paul@benbarcus.com

2014 DEC 17 PM 1:18

STATE OF WASHINGTON

BY _____
DEPUTY

DECLARATION OF SERVICE

I, **SHERI MCKECHNIE**, hereby declare under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. That I am over the age of 18 years of age, have personal knowledge of the facts herein, and am competent to testify thereto.

2. I am a paralegal working for the *The Law Offices of Ben F. Barcus & Associates, PLLC*.

3. On the 15th day of December, 2014, a true and correct copy of the **RESPONDENT'S OPENING BRIEF** was filed U.S. Mail (original and one copy), as indicated to the Court of Appeals, Division II, at:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402
coa2filings@courts.wa.gov

In addition, a true and correct copy was sent via U.S. Mail to:

Gregory J. Wall, Esq.
Law Office of Gregory J. Wall, PLLC
1521 SE Piperberry Way, Suite 102
Port Orchard, WA 98366
gregwall@gjwlaw.com
donnaterryll@wllps.com
sandyrivas@wllps.com

DATED this 15th day of December, 2014.


Sheri McKechnie, Paralegal

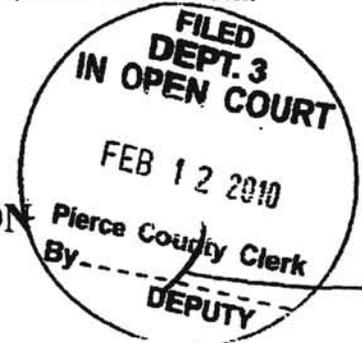
APPENDIX 1



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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**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;

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

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.

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*
 protective order and requests for admissions and interrogatories
 is hereby reserved.

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

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

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW AND ORDER
ON PLAINTIFFS' MOTION FOR A
DETERMINATION OF DISCOVERY
SANCTIONS- 7**

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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

1
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,

1
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
21

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

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW AND ORDER
ON PLAINTIFFS' MOTION FOR A
DETERMINATION OF DISCOVERY
SANCTIONS- 10**

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

7
8 The Court in the exercise of its discretion shall not award the following sanctions
9 requested by the Plaintiff in this matter: (1) the Court shall not enter an Order of Default, which
10 would be tantamount to a directed verdict on the issue of liability in this matter; (2) in addition, the
11 Court shall not award attorney's fees to the Plaintiffs for the bringing of this motion and for
12 counsel's attendance at the unsuccessful effort to take the deposition of Clarence Munce, which
13 occurred on or about July 3, 2009; and (3) the Court will not enter an Order precluding further
14 discovery on behalf of the defense in this case in that such an Order would be essentially moot
15 because discovery cut-off has already occurred in this case.

16 II. CONCLUSIONS OF LAW AND ORDER

17 1. To the extent such a determination involves a conclusion of law, this Court finds
18 as a matter of law that there has been a willful violation of this Court's discovery Order of July 3,
19 2009, and violation of the certification requirements of CR 26 (g). In addition, this Court finds as
20 a matter of law that the violation of this Court's Order and the requirements of the discovery rules
21 substantially prejudiced the Plaintiffs' ability to appropriately prepare for trial with respect to their
22 claims, responding to the Defendant's Affirmative Defenses, and in order to defend against
23 Defendant's Counter-claims. In addition, this Court has considered whether or not a lesser sanction
24

1
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

1
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

1
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 11 day of February 2010.

TH L
The Honorable Thomas P. Larkin
Department 3



Presented by:

PA Lindenmuth
Paul A. Lindenmuth, WSBA # 15817
Attorney for Plaintiffs

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

SMcGaughey
Shellic McGaughey, WSBA # 16809
Attorney for Defendant

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW AND ORDER
ON PLAINTIFFS' MOTION FOR A
DETERMINATION OF DISCOVERY
SANCTIONS- 15**

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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

Page 2

APPEARANCES

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6
7 FOR THE PLAINTIFFS:
8 BY: PAUL LINDENMUTH
9 BEN BARCUS
10 ATTORNEYS AT LAW
11
12 FOR THE DEFENDANT:
13 BY: SHELLIE MCGAUGHEY
14 STEVE REICH
15 ATTORNEYS AT LAW
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Page 4

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

Page 3

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:
6
7 <<<<<< >>>>>>
8
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

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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

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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.

Page 12

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

Page 13

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

Page 15

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

Page 16

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.

Page 17

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

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

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

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

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 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 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 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.

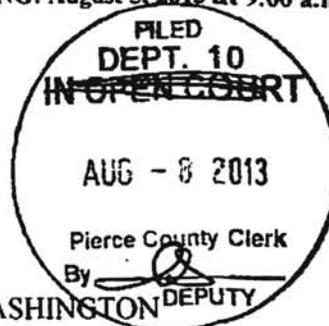
17 Dated this _____ day of _____, 2009.
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Jennifer L. McLeod, RPR, CCR
Official Court Reporter
CCR #2156

APPENDIX 2



THE HONORABLE GAROLD E. JOHNSON, DEPT. 10
REASONABLENESS HEARING: August 5, 2013 at 9:00 a.m.



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

KRISTY L. RICKEY and KELLEY R.)
CAVAR, individually, and as Co-Executrixes) NO. 08-2-10227-6
of the Estate of Gerald Lee Munce, Deceased,)

Plaintiffs,)

vs.)

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

Defendant.)

**REVISED FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND JUDGMENT**

I. JUDGMENT SUMMARY

- | | |
|----------------------------------|--|
| 1. Judgment Creditor: | Kristy L. Rickey and Kelley R. Cavar,
Individually and as Co-Executrixes of
The Estate of Gerald Lee Munce, Deceased |
| 2. Judgment Creditor's Attorney: | Ben F. Barcus, Esq. |
| 3. Judgment Debtor: | Clarence Munce |
| 4. Judgment Debtor's Attorney: | Shellie McGaughey, Esq. |
| 5. Principal Judgment Amount: | \$ 2038691.16 |
| 6. Interest to Date of Judgment: | N/A |

JUDGMENT SUMMARY AND FINDINGS OF
FACT AND CONCLUSIONS OF LAW - I

THE LAW OFFICES OF BEN F. BARCUS
& ASSOCIATES
4303 RUSTON WAY
TACOMA, WA 98402
P: (253) 752-4444 F: (253) 752-1035

ORIGINAL

1 7. Interest Rate After Judgment: 5.25% per annum
 2 8. Statutory Attorney Fees: \$200.00 (RCW 4.84.00)
 3 9. Statutory Costs: \$ 10,284.78 (RCW 4.84.010)
 4 10. Other Recovery Amounts: \$ -0-
 5 10. Total Judgment: \$ 2,048,975.94
 6
 7

8 **THIS MATTER** having come on regularly before the undersigned this date, the
 9 Plaintiffs

10 appearing personally by and through Kristy L. Rickey and Kelley R. Cavar, as the Co-Personal
 11 Representatives of the Estate of Gerald Munce, and as daughters of Gerald Lee Munce, and
 12 additionally, appearing by and through their attorney of record, Ben F. Barcus of the Law Offices
 13 of Ben F. Barcus and Associates, P.L.L.C.; and the Defendant, Clarence Munce, appearing by
 14 and through is attorney of records, Shellie McGaughey of McGaughey Bridges Dunlap, PLLC.
 15 Defendant having been provided prior notice of these proceedings, having been served with
 16 notice of these proceedings for Entry of Judgment; and having been previously found in Default,
 17 the Court finds that there is no just reason for delay in entering judgment and that judgment shall
 18 be entered against the above-named Defendant at this time; the Court now, therefore, makes the
 19 following:
 20
 21

22 **II. FINDINGS OF FACT**

23 2.1 Plaintiffs are residents of Tacoma, Pierce County, Washington. Plaintiffs Kristy
 24 Rickey and Kelley Cavar, are the daughters of Gerald Lee Munce, and are the
 25 duly appointed Co-Personal Representatives of the Estate of Gerald Lee Munce.
 Gerald Munce was born on June 6, 1950 and 58 years-old on June 21, 2008, when
 he was injured and shot by Defendant, Clarence Munce. The bullet fired from the
 gun entered Gerald Munce's back, causing fatal injuries.

- 1
- 2.2 At the time of the events described herein, Defendant Clarence Munce was a
 2 resident of Pierce County, Washington. All actions hereinafter alleged to have
 3 been performed by Defendant were performed in an individual capacity and for
 4 and on behalf of his marital community composed of him and "Jane Doe" Munce.
- 5 2.3 The uncontested evidence presented in this case reveals that on or about June 21,
 6 2008, the Defendant apparently wanted his son to return a "bulldog" hood
 7 ornament, which had apparently come off a "Mac truck". The Defendant had
 8 given the hood ornament to his son many years prior. Apparently upset by
 9 Plaintiff Gerald Munce's failure to immediately return such hood ornament on
 10 request, Clarence Munce began driving back and forth in front of a tavern where
 11 Gerald was visiting with friends. After Gerald had completed his evening out, he
 12 returned home to find a voice message from Clarence on his home recorder
 13 asking Gerald to bring the hood ornament to him. Gerald then gathered the hood
 14 ornament and attempted to return it to his father. Gerald, according to the
 15 statements made by Clarence Munce, knocked on Clarence's door in order to
 16 return the hood ornament. Thereafter, Clarence Munce hit his son with a golf
 17 club and then shot his son, Gerald Munce, in the back as he was running away.
 18 This gunshot to the back eventually caused Gerald Munce's death. The
 19 Defendant, Clarence Munce, knew, or should have known, that injuring and/or
 20 shooting a person would likely result in death.
- 21 2.4 An Order of Default was entered in this case on July 2, 2013, at the request of
 22 Plaintiffs, after the Court struck the Defendant's Affirmative Defenses and
 23 Counter-Claims in this matter due to the Defendant's denial of Plaintiff's efforts
 24 to engage in fundamental discovery.
- 25 2.5 On Monday, August 5, 2013, Plaintiffs appeared and presented evidence and
 testimony of Kristy Rickey, Kelley Cavar, and others. The Court considered
 further testimony and evidence presented in written form, as well as through a
 photo montage depicting Gerald Munce's life.
- 2.6 On August 5, 2013, evidence was also presented regarding damages sustained by
 Gerald Munce, as well as Gerald Munce's daughters, Kristy Rickey and Kelley
 Cavar. Testimony was presented, as was documentary evidence and materials
 which reveals that Gerald Munce was a very caring man, a beloved father ~~and~~
~~grandfather~~, and was held dearly in the hearts of his daughters, ~~other family~~
~~members and friends.~~
- 2.7 The evidence reveals that Gerald Munce was an outstanding man who enjoyed a
 strong and beautiful relationship with his children ~~and grandchildren.~~

2.8 ~~The loss of a parent, (father), is an immense loss and one of the most difficult losses a person can experience in a lifetime.~~ In this case, the evidence reveals that the parent-child relationship was exceptionally strong and the loss is therefore immense. The evidence reveals that Kristy Rickey and Kelley Cavar were deeply and profoundly devastated as a result of the death of their father and they have not recovered, nor will they likely ever recover from the death of their father. The acts of the Defendant ~~have caused profound, emotional anguish and has tremendously added to the damages that Kristy Rickey and Kelley Cavar, have suffered, and continue to suffer.~~ ^{loss of love & lack of companionship} *and evidence* ^{otherwise continued to receive from their deceased father}

2.9 Gerald Munce's net economic loss has been ^{accurately} ~~conservatively~~ calculated by Economist, Richard W. Parks, Ph.D., which reflects a loss to the Estate of \$132,267.00 A copy of Dr. Parks' report is filed in this matter, detailing his economic loss calculations.

2.10 Gerald Munce, prior to his death, suffered severe and excruciating pain, and severe anxiety, humiliation and emotional distress, all as a direct result of Clarence Munce's negligent actions.

THE COURT, HAVING entered the foregoing FINDINGS OF FACT, now makes the following:

III. CONCLUSIONS OF LAW

3.1. The Defendant's Negligent Conduct Caused Gerald Munce Severe Emotional And Physical Distress, Resulting In His Death

The Defendant is liable for negligence because he breached his duty to Gerald Munce and his conduct caused Gerald Munce's injuries and death. The elements of negligence are: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. *DeGel vs. Majestic Mobile Manor*, 129 Wn2d 43, 48, 914 P2d 728 (1996). A duty may be predicated upon statutory or common law principals. *Id.*, at 49. By common law, a Defendant has a duty to avoid causing foreseeable harm to a Plaintiff. *Marzolf vs. Stone*, 136 Wn2d 122, 126, 960 P2d 424 (1998). Proximate cause consists of cause in fact and legal causation. *Hertog vs. City of Seattle*, 138 Wn2d 265, 282, 979 P2d 400 (1999). Cause in fact is "but for" causation, and legal causation is a legal judicial determination as to "how far the Defendants' responsibly for the

1 consequences of its action should extend". *Id.*, at 282-83. ~~Although breach and proximate cause~~
 2 ~~are usually questions for the trier of fact, they may be determined as a matter of law if reasonable~~
 3 ~~minds could not differ as to their existence. *Id.*, at 275.~~ *BE*

4 The Defendant owed Gerald Munce a duty to avoid injuring him, and shooting him in the
 5 back, because that conduct created a foreseeable risk that Gerald Munce would be emotionally
 6 and physically injured. The Defendant breached that duty by unreasonably, negligently and
 7 recklessly shooting Gerald Munce in the back. Gerald Munce suffered emotional distress, as
 8 well as substantial pain and suffering after being beaten, shot and eventually killed by the
 9 Defendant. The Defendant proximately caused those injuries because Gerald Munce's injuries
 10 would not have occurred, but for the Defendant's conduct, and Gerald's injuries were a
 11 foreseeable result of that wrongful conduct.
 12

13
 14 **3.2 The Defendant Is Liable To Plaintiff For**
 15 **The Wrongful Death Of Gerald Munce.**

16 RCW 4.20.020 is not limited to claims brought by minor children, but also includes loss
 17 of parental consortium beyond the age of majority. *Id.*, citing to, *Kramer v. Portland-Seattle*
 18 *Auto Freight, Inc.*, 43 Wn.2d 386, 397, 261 P.2d 692 (1953). Further, under RCW 4.20.046, "all
 19 causes of action by a person...against another person or persons shall survive to the Personal
 20 Representatives of the former and against the Personal Representatives of the latter".
 21

22 Furthermore, as Gerald Munce's daughters, Kristy Rickey and Kelley Cavar, are the Co-
 23 Personal Representatives of his Estate, they may bring this survival action to recover for all
 24 Gerald Munce's causes of action against the Defendant.
 25

1 The Estate is also entitled to an award of \$ 400,000.00 for
2 Gerald's pre-death pain and suffering, anxiety, emotional distress and personal humiliation.

3 VI.

4 The Court additionally awards \$ 132,267.00 for Gerald Munce's
5 economic losses based upon the report of Economist Richard W. Parks, Ph.D. and the economic
6 loss evidence introduced at the hearing. +\$6,424.16 of Funeral expenses awarded
7 to the Estate.

8 BASED ON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF
9 LAW MADE PURSUANT TO CR 55(B)(2), THIS COURT DETERMINES THAT
10 JUDGMENT SHOULD BE ENTERED AGAINST THE DEFENDANTS, CLARENCE
11 MUNCE AND "JANE DOE" MUNCE, AND THAT THERE IS NO REASON FOR DELAY
12 IN ENTERING THIS JUDGMENT AGAINST THE DEFENDANTS AND THAT
13 JUDGMENT SHOULD BE ENTERED AT THIS TIME: IT IS THEREFORE,
14

15 **ORDERED, ADJUDGED AND DECREED** that Plaintiffs Kristy Rickey and Kelley
16 Cavar, individually, and as Personal Representative of the Estate of Gerald Munce, are hereby
17 granted judgment for general damages, ^① in the amount of \$ 750,000.00
18 to Plaintiff, Kristy Rickey; and, ^② in the amount of \$ 750,000.00 to
19 Plaintiff, Kelley Cavar; and, ^③ for pre-death damages to the Estate of Gerald Munce in the amount
20 of \$ 400,000.00; and, ^④ for economic loss to the Estate of Gerald Munce
21 in the amount of \$ 132,267.00 + 6,424.16, for a total of 138,691.16 together with statutory costs and
22 attorney fees in the amount of \$ 110,284.78; and it is further
23
24

25 **ORDERED, ADJUDGED AND DECREED** that responsibility for Judgment should be
as follows:

1 **Defendant:** Clarence Munce, as well as his respective marital community, if any, shall
2 be each, jointly and severally responsible for the sum of
3 \$ 2,048,975.94 and this Judgment shall remain in effect until such
4 amounts are fully paid and in accordance with the laws of the State of Washington; and it is
5 further

6 **ORDERED, ADJUDGED AND DECREED** that the name of the "Jane Doe" in this
7 Judgment may be included in this Judgment once that name is determined, and that this
8 Judgment shall lie against the Defendants individually and any respective marital community;
9 and it is further;

10 **ORDERED, ADJUDGED AND DECREED** that nothing in this Judgment shall affect
11 any parties' legal right of contribution against any other Defendant; and it is further,

12 **ORDERED, ADJUDGED AND DECREED** that the Judgment herein shall bear
13 interest at the highest statutory amount until satisfied in full, (currently 5.25%).

14 DONE IN OPEN COURT THIS 8 day of August, 2013.

15
16
17 
18 _____
19 The Honorable Garold E. Johnson
20 Pierce County Superior Court Judge, Dept. 10

21 Presented by:

22
23
24 _____
25 Ben F. Barcus, WSBA #15576
Paul A. Lindenmuth, WSBA# 15817
Attorneys for Plaintiffs



APPENDIX 3

Clarence G. Munce

Vol. 1

07/03/2009

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IN THE SUPERIOR COURT OF PIERCE COUNTY, WASHINGTON

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

VIDEOTAPED DEPOSITION OF CLARENCE G. MUNCE
Friday, July 3, 2009

APPEARANCES

For Plaintiffs: Ben F. Barcus and
Paul A. Lindenmuth
Ben F. Barcus & Associates
4303 Ruston Way
Tacoma, Washington 98402

For Defendant: Shellie McGaughey
McGaughey Bridges Dunlap
325 118th Avenue SE
Suite 209
Bellevue, Washington 98005

Erik L. Bauer
Law Office of Erik L. Bauer
215 Tacoma Avenue South
Tacoma, Washington 98402

Reported by: Lori A. Porter, CCR-RPR
License No. 299-06

1	APPEARANCES CONTINUED	
2		
3		
4	Also present:	T.J. Peitz, Videographer
5		Kristy L. Rickey
6		Kelley R. Cavar
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1 BE IT REMEMBERED that the videotaped deposition
2 upon oral examination of CLARENCE G. MUNCE was taken on
3 Friday, July 3, 2009, at Ben F. Barcus & Associates, 4303
4 Ruston Way, Tacoma, Washington, commencing at the hour of
5 10:32 a.m., before Lori A. Porter, Notary Public in and for
6 the State of Washington.

7
8 (Exhibit Nos. 1-2 marked for identification.)
9

10 THE VIDEOGRAPHER: This is a videotaped deposition.
11 Today's date is July 3, 2009, and the time is 10:32 a.m.

12 My name is T.J. Peitz. I own and operate Sound Vision
13 Video Production, 4821 North 14th Street, Tacoma, Washington
14 98406; phone number, 253-759-0676.

15 The deposition is being held at 4303 Ruston Way, Tacoma,
16 Washington. The case is Munce, et al., versus Munce.

17 Present for the plaintiff and noticing the deposition
18 are Paul Lindenmuth and Ben Barcus. Present for the defense
19 are Shellie McGaughey and Erik Bauer. The witness is
20 Clarence Munce. Lori Porter, court reporter and notary
21 public, will now swear in the witness.

22 MS. MCGAUGHEY: Before you swear in the witness --
23 Shellie McGaughey on behalf of Clarence Munce -- I have an
24 objection.

25 Mr. Munce has been deemed incompetent both in a criminal

1 court and pursuant to order of this court. The oath or
2 affirmation as required by civil rule and statute requires
3 that the witness be able to even express the ability to
4 testify, that they understand the significance of the
5 events, and can impress on the conscious and their mind the
6 difference between the truth and the lack thereof.

7 According to the Order Appointing Litigation Guardian in
8 this case, which I've marked as Exhibit 1, this court in
9 this civil proceeding has deemed Mr. Munce incapacitated for
10 purposes of this litigation.

11 The Department of Social & Health Services Forensic
12 Psychological Report prepared by Dr. Ward, dated September
13 15, 2008, and which has been a document and record filed in
14 this civil litigation, has deemed Mr. Munce baffled,
15 confused, incapacitated, lacking sound mind, diagnosed with
16 dementia, although stable, to be progressive. The prognosis
17 for improvement was bleak. He confabulates. He has
18 deficits grossly -- or gross deficits -- excuse me -- which
19 grossly interfere with his ability to even assist his
20 counsel.

21 This deposition has been ordered by the court and by
22 Judge Larkin, and we are here proceeding in good faith based
23 on that order, but it is our position that Mr. Munce cannot
24 even adequately do or have the ability to take the oath or
25 affirmation.

1 We're proceeding with the deposition without waiving any
2 of our rights or any of our objections accordingly.

3 MR. BARCUS: Based upon that statement, we
4 believe -- this is Ben Barcus on behalf of the plaintiff.

5 We believe that the defense has asserted counterclaims
6 and defenses in bad faith, knowing full well that their
7 client is supposedly incompetent.

8 MS. MCGAUGHEY: And for the record, I would
9 indicate that affirmative defenses and/or counterclaims do
10 not even require the testimony of the witness, no different
11 than if you had a decedent.

12 MR. BARCUS: We respectfully agree -- disagree with
13 the issues in this case that have been asserted.

14 Do you want to say something too?

15 MR. BAUER: Yeah, of course.

16 For the record, I'm Erik Bauer, one of Clarence Munce's
17 attorneys.

18 And as indicated by co-counsel, on December 30, 2008,
19 the Honorable Judge Ronald Culpepper at the Pierce County
20 Superior Court declared my 82-year-old client, Mr. Munce, to
21 be incompetent to participate in legal proceedings against
22 him due to a serious case of dementia which he suffers from.

23 Judge Culpepper found that because of this mental
24 disease or defect that Mr. Munce does not have a rational
25 nor a factual understanding of these legal proceedings

1 against him, and the court also noted that he does not have
2 the ability to rationally assist his legal counsel.
3 Mr. Munce is accordingly incapable of testifying or even
4 understanding the oath that is required.

5 He has a constitutional right to remain silent as to any
6 question that may impact him in his civil commitment
7 proceedings or any other proceedings which the State may in
8 the future bring against him, and he hereby will invoke that
9 right generically and that's -- I intend to be asserting
10 that right as often as necessary. My understanding is
11 that's a very broad-based right given the nature of these
12 proceedings.

13 And with that, we can go ahead and proceed.

14 MR. BARCUS: So that there's no question or
15 misperception whatsoever, it's the plaintiffs' position in
16 this matter that to the extent that the defense decides to
17 or elects to assert such rights and not provide discovery to
18 the plaintiff, they are doing so at their own peril with
19 regard to any defenses in this matter.

20 MS. MCGAUGHEY: We'd also add for the record that
21 we're allowing this deposition to proceed without waiving
22 any of our objections as to how, if, and whether it can be
23 used for any purpose in these proceedings or at the time of
24 trial.

25 MR. BAUER: And, again, just to really clarify the

1 record, we have an incompetent client here who's been deemed
2 incompetent of understanding questions, understanding these
3 proceedings. That's a separate basis -- a basis separate
4 from other constitutional rights which he also has.

5 And as long as that's noted and understood by the
6 plaintiffs, I think we're good to go.

7 MR. BARCUS: The plaintiffs note and understand
8 that Mr. Munce, through his counsel, is trying to deprive
9 plaintiffs of discovery in this matter. And the bottom line
10 is he can't have his cake and eat it too.

11 Swear in the witness please.

12 Mr. Munce, it might be helpful with our video here --

13 THE WITNESS: I can't hear you.

14 MR. BARCUS: Okay. It might be helpful with our
15 video here if you didn't have your cane right there next to
16 your face because it might obscure the --

17 THE WITNESS: Oh, okay.

18 MR. BARCUS: -- picture. So maybe Mr. Bauer can
19 help you with that, with your cane so it's not --

20 THE WITNESS: Yeah, well, it's here.

21 MR. BARCUS: -- right there in front of your face.

22 MR. BAUER: He can have his cane right there.

23 MR. BARCUS: If you can't hear me on anything, just
24 let us know. Okay?

25 THE WITNESS: Yeah.

1 MR. BARCUS: Okay. Go ahead and swear the witness,
2 if you would.

3 MR. BAUER: The witness will not be sworn.

4 MR. BARCUS: You can't deny that a person can be
5 sworn. We're asking that he be sworn.

6 MR. BAUER: He doesn't understand it.

7 MR. BARCUS: Okay. Are you -- are you instructing
8 the witness not to take the oath here --

9 MR. BAUER: Correct.

10 MR. BARCUS: -- or affirmation?

11 MR. BAUER: That's correct.

12 MR. BARCUS: Okay. We believe that you're
13 absolutely violating the rules of procedure and discovery
14 here, and it's extremely sanctionable. We will advise the
15 court accordingly.

16 Mr. Munce, are you refusing to take the oath or
17 affirmation to tell the truth here today?

18 MR. BAUER: Mr. Munce, you don't need to answer
19 that question.

20 THE WITNESS: I don't understand you anyway.

21 MR. BARCUS: Do you know what an oath is, to raise
22 your right hand and swear to tell the truth?

23 MR. BAUER: I'm instructing my client to invoke his
24 right to remain silent to that question.

25 MR. BARCUS: About whether or not he knows what an

1 oath is?

2 MR. BAUER: I'm instructing my client to remain --
3 invoke his right to remain silent.

4 EXAMINATION

5 BY MR. BARCUS:

6 Q. Mr. Munce, state your full name please.

7 A. Jim Erickson Pardue, I think.

8 Q. What is your name?

9 A. Pardue.

10 Q. What is your name, sir?

11 A. Dick Pardue.

12 Q. What name were you given at birth?

13 A. I don't remember.

14 Q. What is your date of birth?

15 MR. BAUER: I'm instructing my client to invoke his
16 right to remain silent.

17 MR. BARCUS: On what his date of birth is?

18 MR. BAUER: That's correct.

19 MR. BARCUS: What's the basis?

20 MR. BAUER: I've already given a generic basis at
21 the beginning of this deposition.

22 MR. BARCUS: And you're instructing him not to
23 answer the question --

24 MR. BAUER: That's correct.

25 MR. BARCUS: -- as to what his date of birth is?

1 MR. BAUER: That is correct.

2 Q. What is your Social Security number?

3 MR. BAUER: I'm instructing my client to invoke his
4 right to remain silent.

5 Q. Where were you born, sir?

6 MR. BAUER: I'm instructing my client to invoke his
7 right to remain silent.

8 Q. Have you ever been married?

9 MR. BAUER: I am invoking -- instructing my client
10 to invoke his right to remain silent.

11 Q. What city is this?

12 MR. BAUER: I am instructing my client to invoke
13 his right to remain silent.

14 Q. What state is this?

15 MR. BAUER: I am instructing my client to invoke
16 his right to remain silent.

17 Q. Do you know where you are, sir?

18 MR. BAUER: I am instructing my client to invoke
19 his right to remain silent.

20 Q. Do you know anyone present in the room?

21 MR. BAUER: I am instructing my client to invoke
22 his right to remain silent.

23 MR. BARCUS: Mr. Bauer, are you going to instruct
24 your client to remain silent on each and every question that
25 I ask him today?

1 MR. BAUER: That's very likely.

2 MR. BARCUS: Likely or yes or no?

3 MR. BAUER: It's very likely.

4 Q. Do you know Mr. Bauer?

5 MR. BAUER: I'm instructing my client to invoke his
6 right to remain silent.

7 Q. Do you have an understanding as to why this deposition is
8 being taken today?

9 MR. BAUER: I am instructing my client to invoke
10 his right to remain silent.

11 Q. Do you have any understanding of the proceedings in this
12 case, sir?

13 MR. BAUER: I'm instructing my client to invoke his
14 right to remain silent.

15 Q. Do you know if this is a civil or criminal matter?

16 MR. BAUER: I am instructing my client to invoke
17 his right to remain silent.

18 Q. Have you ever been married, sir?

19 MR. BAUER: I am instructing my client to invoke
20 his right to remain silent.

21 Q. Do you have any children?

22 MR. BAUER: I am instructing my client to invoke
23 his right to remain silent.

24 Q. Do you have any grandchildren?

25 MR. BAUER: I am instructing my client to invoke

1 his right to remain silent.

2 Q. Do you have any brothers?

3 MR. BAUER: I'm instructing my client to invoke his
4 right to remain silent.

5 Q. Do you know who Dennis Cline is?

6 MR. BAUER: I'm instructing my client to invoke his
7 right to remain silent.

8 Q. Do you know who Barbara Griebe is?

9 MR. BAUER: I'm instructing my client to invoke his
10 right to remain silent.

11 Q. Do you know who Kim Taft is?

12 MR. BAUER: I'm instructing my client to invoke his
13 right to remain silent.

14 Q. Do you know who Allen Key is?

15 MR. BAUER: I'm instructing my client to invoke his
16 right to remain silent.

17 Q. Have you ever worked before?

18 MR. BAUER: I'm instructing my client to invoke his
19 right to remain silent.

20 Q. Where have you worked, sir?

21 MR. BAUER: I'm instructing my client to invoke his
22 right to remain silent.

23 Q. Have you ever been subject to a disability claim?

24 MR. BAUER: I'm instructing my client to invoke his
25 right to remain silent.

1 Q. Have you ever been engaged in the buying and selling of real
2 property in your lifetime?

3 MR. BAUER: I'm instructing my client to invoke his
4 right to remain silent.

5 Q. How many pieces of real property have you either bought or
6 sold in your lifetime?

7 MR. BAUER: I'm instructing my client to invoke his
8 right to remain silent.

9 Q. When was the last transaction that you have made with regard
10 to any real estate?

11 MR. BAUER: I'm instructing my client to invoke his
12 right to remain silent.

13 MS. MCGAUGHEY: And I'm also objecting to form.
14 It's not relevant.

15 Q. Do you have any knowledge of your current medical condition?

16 MR. BAUER: I'm instructing my client to invoke his
17 right to remain silent.

18 Q. Do you have any diagnosed medical conditions of which you
19 are aware?

20 MR. BAUER: I'm instructing my client to invoke his
21 right to remain silent.

22 Q. Have you ever suffered cancer?

23 MR. BAUER: I am instructing my client to invoke
24 his right to remain silent.

25 Q. Have you ever suffered from Alzheimer's disease?

1 MR. BAUER: I am instructing my client to invoke
2 his right to remain silent.

3 Q. Have you ever suffered from dementia?

4 MR. BAUER: I am instructing my client to invoke
5 his right to remain silent.

6 Q. Have you ever suffered from difficulty with forgetfulness or
7 memory problems?

8 MR. BAUER: I am instructing my client to invoke
9 his right to remain silent.

10 And, Mr. Barcus, if we could take a brief break here off
11 the record please.

12 THE VIDEOGRAPHER: Agreed?

13 MR. BARCUS: Yes.

14 THE VIDEOGRAPHER: I'm off the record.

15 (Off the record.)

16 THE VIDEOGRAPHER: I'm back on the record.

17 MS. MCGAUGHEY: Mr. Barcus, it appears that it is
18 the direction of Mr. Munce's criminal lawyer that he is
19 going to be instructing him not to answer any questions
20 other than I guess apparently he had no objection to his
21 name and he is instructing him to remain silent.

22 It's my understanding that will be a continuing line of
23 objections in this case. As such, we believe it's
24 appropriate and prudent to discontinue the deposition.

25 MR. BARCUS: Is it your position that Mr. Munce is

1 not going to answer each and every question that I ask him
2 other than his name?

3 MS. MCGAUGHEY: I don't know because I am not
4 invoking that privilege. His criminal lawyer is doing that.
5 And it appears as if thus far the questions are all invoking
6 that response. The only one I didn't hear an objection to
7 was his name. I understand that based on his constitutional
8 rights that all of these questions lead to a position or
9 place where he cannot testify or is being instructed not to
10 answer.

11 MR. BARCUS: And is that because there's a fear
12 that there may be a discovery of some level of competence of
13 Mr. Munce to your understanding?

14 MS. MCGAUGHEY: No. I believe it's based on what
15 the testimony is -- or the objections have been so far is
16 that he has very principled constitutional rights that are
17 being invoked and that are his right to do so.

18 The nature and extent of where your questions are
19 going -- I'm not saying that they're objectionable questions
20 with somebody of sound mind at all. That's not what I'm
21 inferring. It's just based on his unsound mind, inability
22 to take the oath, his medical condition, and -- you know,
23 I'm no -- I'm not a criminal expert. Obviously that's why I
24 wanted his criminal counsel here. So --

25 MR. BARCUS: Well, you're saying "it appears."

1 Mr. Bauer is here. Maybe he can give us some insight as to
2 whether or not he is going to instruct his client -- or
3 Mr. Munce not to answer any question other than his name.

4 MR. BAUER: For the record, again, Erik Bauer.

5 Actually, I told you yesterday in court, both you and
6 Mr. Lindenmuth, that I would be taking this position, that
7 Mr. Munce was not going to be answering any questions other
8 than his name.

9 MR. BARCUS: I never heard that at all --

10 MR. LINDENMUTH: Nor did I.

11 MR. BAUER: It was in a conversation --

12 MR. BARCUS: -- that he wouldn't be answering
13 anything other than his name.

14 MR. BAUER: -- that we had.

15 MR. LINDENMUTH: But not this broad-based --

16 MR. BAUER: Well, it's broad-based.

17 One thing you need to understand -- one thing you need
18 to understand is that he has constitutional rights in
19 conjunction with any case the State has brought against him
20 including the civil commitment case, including any other
21 case that the Pierce County prosecutors may or may not file.

22 I mean they've dismissed one at this point because he
23 essentially has dementia so bad that the court actually has
24 declared him incapable of assisting his own lawyer,
25 incapable of understanding what's going on here, incapable

1 of understanding really questions. He doesn't know what's
2 going on. The court has found that. The court has made a
3 ruling to that effect.

4 And, you know, when I couple that finding by the court
5 together with his constitutional rights, which are still
6 intact on both -- both his cases, at that point I need to
7 take a cautious tact with that, and that's why I'm giving
8 these objections.

9 And I did tell you that yesterday and let you know.

10 MR. LINDENMUTH: Well, you said you'd be asserting
11 these privileges but not on this broad-based --

12 MR. BAUER: Very broadly. I did.

13 MR. LINDENMUTH: Not in this manner.

14 MR. BAUER: Well, it's kind of ridiculous to depose
15 a guy that's been declared incompetent due to dementia.

16 MR. LINDENMUTH: Not necessarily, Counsel.

17 MR. BAUER: Yeah, it's quite silly actually.

18 MR. LINDENMUTH: Frankly, you're dealing with
19 rather different standards with respect to his competency as
20 opposed to whether he can stand trial. He may be lucid as
21 to some things; he may not be lucid as to others. There are
22 so many issues here that you're interfering with that it's
23 rather preposterous.

24 MS. MCGAUGHEY: I think it's important -- excuse
25 me, Paul.

1 MR. LINDENMUTH: You know, the thing about it is
2 that, look, if you're asserting that these basic questions
3 could lead to a criminal prosecution, alls you're doing is
4 telling us that he really is competent.

5 MR. BAUER: Well, actually, I'm not saying that at
6 all.

7 MR. LINDENMUTH: When we discover that he is
8 competent and because of that, you're afraid that he's going
9 to be subject to a criminal prosecution.

10 MR. BAUER: Well, that's what you say.

11 MR. LINDENMUTH: That's the only --

12 MR. BAUER: That's what you say.

13 Actually, we wanted -- we wanted to be able to assert
14 his rights because he had a great self-defense case, a
15 wonderful self-defense case. If my client could testify,
16 I'm quite sure a jury would find that you guys are
17 completely on the wrong side of the fence here --

18 MR. LINDENMUTH: Well, the problem is --

19 MR. BAUER: -- absolutely. I mean Clarence --

20 MR. LINDENMUTH: -- no self-defense.

21 MR. BAUER: -- when he's attacked in his own home
22 by someone who has attacked him multiple times in the
23 past -- I mean --

24 MR. LINDENMUTH: Sure.

25 MR. BAUER: -- when you attack people that have a

1 huge level --

2 MR. LINDENMUTH: We disagree with that.

3 MR. BAUER: -- of dementia, problems can happen at
4 times and it's too bad.

5 MR. LINDENMUTH: We disagree with your defense. We
6 disagree with your denial of discovery with respect to your
7 counterclaim, which is predicated on the exact same events
8 that are being discussed here today.

9 Obviously whether there's a self-defense claim, who was
10 the aggressor, those kind of issues, require a detailed
11 analysis of the events as they occurred and unfolded at the
12 time. And you're denying us information with respect to
13 that.

14 We're being placed in a position where we have to -- we
15 cannot properly address the counterclaim nor can we prove
16 our claim. So this is troubling and extremely problematic,
17 particularly given the counterclaim --

18 MS. MCGAUGHEY: I have to --

19 MR. LINDENMUTH: -- particularly given the
20 counterclaim.

21 MS. MCGAUGHEY: I need to indicate for the record
22 that as far as the proceedings as well, Mr. Munce to date
23 has not been able to assist me with the defense thus far in
24 the civil proceeding, so not only has the competency and the
25 lack of sound mind been articulated as a privilege, it has

1 also prohibited the ability for me to interface with my
2 client in a meaningful way. So it's manifested itself in
3 both the criminal and the civil case.

4 But for my purposes for the civil case, we came in good
5 faith with the intention of presenting the client pursuant
6 to order of the court, which I believe was, you know, not
7 based on sound law, and certainly we have the ability to
8 seek discretionary review or a stay for that.

9 But be that as it may, we presented him in good faith.
10 And based on the articulations by Mr. Bauer, it appears as
11 if the entire line of questioning is going to invoke a
12 privilege and an instruction not to answer.

13 MR. BAUER: With that, I think we should --

14 MR. BARCUS: We're not going to adjourn. We're not
15 agreeing. We're going to ask questions.

16 MR. LINDENMUTH: If you had been inclined to seek a
17 stay pending interlocutory review, you should have asked the
18 court yesterday to postpone this deposition on that basis
19 instead of wasting our time and money and our clients' time
20 when they could be at work, doing other things in their
21 lives instead of sitting here waiting, you know, just in an
22 exercise that is absolutely a waste of our time --

23 MS. MCGAUGHEY: Well --

24 MR. LINDENMUTH: -- absolutely.

25 MS. MCGAUGHEY: -- with all due respect, I'm not

1 the criminal --

2 MR. LINDENMUTH: And then the preparation time and
3 the --

4 MS. MCGAUGHEY: I'm not the criminal law lawyer.

5 MR. LINDENMUTH: We want compensation for our time.

6 MS. MCGAUGHEY: With all due respect, I'm not the
7 criminal law lawyer. I did not know what specifically would
8 be invoked or wouldn't -- would not be invoked.

9 I did know and I made it perfectly clear that Mr. Munce
10 was not of sound mind, that he was incompetent, that he'd
11 been rendered in two -- three courts of law incompetent and
12 incapacitated.

13 So -- this is also, according to you, a holiday, so I'm
14 sure your clients haven't missed work opportunities.

15 MR. BARCUS: We're here today, as you've noted,
16 upon order of the Honorable Thomas Larkin of the Pierce
17 County Superior Court. We believe the defense is in
18 contempt of that order by instructing the client not to
19 answer even basic questions that the court did a clear
20 analysis and ordered us to -- ordered you to present him for
21 deposition here.

22 And, again, we believe that failure to answer the
23 questions puts the defense here in grave peril, also any
24 defenses, and we think that a default should be entered in
25 this matter. And that's what we're going to be asking for

1 and so that there's no question whatsoever.

2 Also, I think that the record should reflect here that
3 there's another person that we're here about. It's not just
4 Mr. Munce. We're here about Gerald Munce too. And he has a
5 constitutional right to life, liberty, and the pursuit of
6 happiness that was taken away by the defense when he was
7 shot in the back running away at 20 feet. And there is no
8 self-defense. It's preposterous that there is any
9 self-defense here.

10 So we are going to continue --

11 MR. BAUER: He was running towards the car that --

12 MR. BARCUS: Excuse me, Counsel. I'm speaking.

13 MR. BAUER: -- had the gun he brought --

14 MR. BARCUS: I'm speaking right now. I'm
15 speaking --

16 MR. BAUER: -- with him to that house --

17 MR. BARCUS: -- right now, Counsel. I'm not
18 finished.

19 MR. BAUER: -- legally drunk. He arrived legally
20 drunk at my client's house when he was asleep in his bed.

21 MR. BARCUS: Counsel, you can be a good defense
22 attorney. This is a civil action.

23 MR. LINDENMUTH: You don't even get the speculative
24 inference.

25 MR. BARCUS: We're going to answer the questions.

1 If you're going to leave, then you're going to do so at your
2 own peril also. If you want to leave, Mr. Bauer, you can.
3 I'm going to ask questions. We have a right to ask
4 questions. If you're going to assert privileges or instruct
5 him not to answer --

6 MR. BAUER: Perhaps you would like to give me a
7 list of all your questions at this point in time and I can
8 determine --

9 MR. BARCUS: No, I'm not going to give you my work
10 product. I don't have a list. I have an outline. I'm not
11 going to give you my work product.

12 MS. MCGAUGHEY: Yeah, I think -- I think we need to
13 adjourn with all due respect. If you felt that you had a
14 valid basis for dismissal of the affirmative defenses or the
15 counterclaims, I suspect you'd bring a motion for summary
16 judgment. Perhaps this is one purpose for it.

17 I'd stand by the position that we've articulated
18 previously that affirmative defenses and counterclaims do
19 not have to be articulated through a defendant that is
20 incapable of testifying. We have other witnesses and
21 circumstantial evidence.

22 I, never having been able to interface with my client
23 because of his incompetency, was not aware of the nature and
24 extent of what the responses to the questions would be. And
25 it appears clear that all of these questions, based on

1 advice of criminal counsel, are going to be objected to.

2 MR. LINDENMUTH: You know, the whole notion of
3 self-defense is predicated on your client's mental state.

4 You're denying us every and all efforts in discovery towards
5 what his mental state actually was.

6 MS. MCGAUGHEY: Well, I think actually you may have
7 an --

8 MR. BAUER: It's dementia.

9 MS. MCGAUGHEY: You may have an opportunity --

10 MR. LINDENMUTH: You can't have your cake and eat
11 it too.

12 MR. BAUER: I suggest you read the medical
13 literature on the subject.

14 MR. LINDENMUTH: Yeah, and there is --

15 MR. BAUER: You may not --

16 MR. LINDENMUTH: -- no such thing as rapid onset of
17 dementia, that's for sure.

18 MS. MCGAUGHEY: And I'm certainly not denying
19 discovery. I've answered interrogatories, requests for
20 admissions. You certainly can probably have the ability to
21 bring a CR 35 exam if you want. I don't know where that
22 would go.

23 But you can't -- you know, with all due respect, you
24 can't expect a mentally incapacitated man of unsound mind to
25 be able to ask even the most simple of questions.

1 MR. BARCUS: If you're going to bring counterclaims
2 and assert affirmative defenses, we have a right to conduct
3 discovery. But you can't have your cake and eat it too.
4 You can't assert offenses -- affirmative defenses or
5 counterclaims and deny the other party discovery, which is
6 effectively what you're doing completely in this case.

7 On that basis we are going to move for a default in this
8 matter, which is --

9 MS. MCGAUGHEY: You've already said that once. I
10 heard you the last time.

11 MR. BARCUS: I'd like to ask my questions now. If
12 you're going to instruct him not to answer any questions
13 whatsoever, you can do so at your peril, but I have a whole
14 lot of questions that I'm going to ask.

15 Yes, I think you're in contempt of the court's order by
16 doing so. And I think that Judge Larkin will find, based
17 upon his orders, not only of yesterday, but before, because
18 he clearly told us that we could take this deposition and he
19 did not say -- and you did not say in court yesterday that
20 you were going to instruct him not to answer any questions.
21 I don't think that Judge Larkin is going to be amused.

22 MR. BAUER: Judge Larkin also indicated I was able
23 to invoke my client's rights at any time during this
24 proceeding, which is what I'm doing right now.

25 I'm in a very delicate position of defending a man who

1 the courts, the Superior Court, has held to be absolutely
2 incompetent due to a serious case of dementia.

3 Now, as you may or may not know, dementia makes people
4 forget. They are easily confused --

5 MR. BARCUS: Okay. Mr. Bauer --

6 MR. BAUER: -- et cetera, et cetera.

7 MR. BARCUS: -- we know what Alzheimer's and
8 dementia is, and we don't need these speeches.

9 MR. BAUER: He can't remember things. He doesn't
10 understand things --

11 MR. BARCUS: That's what you say.

12 MR. BAUER: -- including -- well, it's what the
13 court says --

14 MR. BARCUS: We have -- Judge Larkin has told us --

15 MR. BAUER: -- what the Superior Court has said.

16 MR. BARCUS: Judge Larkin has told us in this civil
17 action --

18 MR. BAUER: And what you want to do is
19 essentially tee off under -- on an incompetent person, an
20 82-year-old man who has a serious case of dementia.

21 MR. BARCUS: I resent the inference. I'm not
22 teeing off on anybody. I'm being as professional and as
23 courteous as I can to Mr. Munce.

24 MR. BAUER: And sit here and ask a raft of
25 questions which he really doesn't have the capacity to --

1 MR. BARCUS: That's what you say.

2 MR. LINDENMUTH: And we don't know that until he
3 tries to answer them, now do we?

4 MR. BAUER: Well, we -- actually, the court knows
5 that. It's been determined. We've got --

6 MR. BARCUS: Not the court in this civil action.

7 MR. LINDENMUTH: Not this civil action.

8 MR. BAUER: -- res judicata. On that issue it's
9 res judicata. It has been decided.

10 MS. MCGAUGHEY: Let's just adjourn this.

11 MR. BAUER: Let's go.

12 MR. BARCUS: Are you going to instruct Mr. Munce
13 not to answer any of my questions? We need a record on
14 that.

15 MR. BAUER: So far every question you've asked that
16 I have instructed him to remain silent on --

17 MR. BARCUS: That doesn't answer my question
18 because if -- if you're going to instruct him not to answer
19 any of my questions, then perhaps your fidgetiness and
20 trying to get up and leave may have some merit. But,
21 otherwise, I'm going to ask the questions and make you
22 assert the privilege.

23 (Mr. Bauer and Ms. McGaughey conferring.)

24 MR. BAUER: Based on what you've asked so far, I
25 will be instructing him to remain silent.

1 MR. BARCUS: And not to answer any of my questions
2 today?

3 MR. BAUER: That's very likely, yes.

4 MR. BARCUS: Not very likely. It is or it isn't?

5 MR. BAUER: Well, you've got your answer, and
6 we're --

7 MR. BARCUS: No, we don't have an answer.

8 MR. BAUER: -- going to adjourn at this point.

9 MR. BARCUS: We're not adjourning. If you're
10 leaving, I'm not -- I'm not excusing the witness.

11 Are you instructing him not to answer any of my
12 questions? It's a simple question.

13 MR. BAUER: I think we need to bring this entire
14 issue back before the court.

15 MR. BARCUS: Counsel, can you answer my question?
16 Are you instructing him today --

17 MR. BAUER: I think we need --

18 MR. BARCUS: -- not to answer my questions?

19 MR. BAUER: -- to bring this matter back before the
20 court.

21 MR. BARCUS: Mr. Bauer, Ms. McGaughey, are you
22 instructing your client not to answer any questions today?

23 MS. MCGAUGHEY: Your honor -- oh, your honor.
24 Mr. Barcus I should say.

25 MR. BARCUS: I'll take that.

1 MS. MCGAUGHEY: I'll give a little levity.

2 I am obviously deferring to the criminal attorney based
3 on this issue because of the very high rights and principles
4 of the constitution. And thus far he's instructed him not
5 to answer, and as I understand the proceedings, he's going
6 to instruct him not to answer any further questions.

7 MR. BARCUS: Okay. Well, then let's hear that.

8 MR. LINDENMUTH: Let's say that.

9 MR. BARCUS: Let's say that. Quit playing games
10 with us. If you're going to instruct him not to answer,
11 then say that.

12 MR. BAUER: Yeah, we're doing that, and we'll be
13 adjourning now.

14 MR. BARCUS: Okay. We'll seek appropriate
15 sanctions, and we'll bring a motion before Judge Larkin. We
16 believe the defense is in contempt of the judge's order at
17 this time. And we will also be seeking dismissal of all the
18 defenses in this matter. We just want to make sure the
19 defense is very well aware. I know I've said it several
20 times.

21 MR. LINDENMUTH: And enter a default judgment
22 pursuant to CR 26(g).

23 THE VIDEOGRAPHER: This will mark the end of the
24 deposition. The time is 11:02.

25 (Proceedings adjourned 11:02 a.m.)

1 DEPOSITION FILING NOTICE

2

3 Date: July 6, 2009

4 To: Pierce County Clerk
County-City Building
5 930 Tacoma Avenue South
Tacoma, Washington 98402

6

7 Case Name: Rickey, et al., vs. Munce
Venue and No.: Pierce County Superior Court, 08-2-10227-6
Deposition/Date Taken: Clarence G. Munce, July 3, 2008

8

9 Original deposition filed with Ben F. Barcus, Ben F. Barcus
& Associates, 4303 Ruston Way, Tacoma, Washington 98402.

10 _____ Filed with signature. Change sheet attached.

11 X Filed without signature.

12 _____ Signature waived.

13 _____ Not signed within 30 days of notice.

14 _____ Trial/arb. date imminent.

15

16

17 Lori A. Porter, CCR-RPR

18 James, Sanderson & Lowers

19 307 29th Street NE, Suite 101

20 Puyallup, Washington 98372-6718

21

22 cc: Ben F. Barcus

23 Paul A. Lindenmuth

24 Shellie McGaughey

25 Erik L. Bauer

APPENDIX 4



08-2-10227-6 40207238 CPOPn 03-20-13

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

KRISTY L RICKEY,

Plaintff(s)

vs

CLARENCE G MUNCE,

Defendant(s)

Cause No 08-2-10227-6

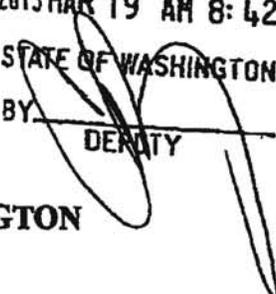
UNPUBLISHED OPINION FROM
THE COA, DIVISION II

FILED
DEPT. 2
IN OPEN COURT
MAR 20 2013
Pierce County Clerk
By *[Signature]*
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

2013 MAR 19 AM 8:42

STATE OF WASHINGTON

BY 
DEPUTY

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,

No. 42245-0-II

Appellants,

v.

CLARENCE G. MUNCE,

UNPUBLISHED OPINION

Respondent.

HUNT, J. — Kristy L. Rickey and Kelly R. Cavar, co-executrixes of their father Gerald Munce’s estate (Gerald’s estate), appeal a superior court’s reinstatement of Clarence Munce’s (Munce) answer and his contributory negligence affirmative defense,¹ previously stricken by a different superior court as a discovery violation sanction. Gerald’s estate argues that the reinstating superior court (1) lacked authority to revise the discovery sanction order entered by the original court; (2) even if the second superior court judge had such authority, it abused its discretion because the previous order was neither internally inconsistent nor in need of revision; and (3) alternatively, the second superior court should have resolved any inconsistency by relying on the original court’s written order. We hold that although the second superior court

¹ Munce’s original affirmative defenses included (1) contributory negligence, (2) self-defense, (3) assumption of risk, (4) apportionment, and (5) comparative fault. Only the contributory negligence defense is at issue in this appeal.

No. 42245-0-II

had authority to revise the original court's order, it abused its discretion by vacating the order sua sponte without justifiable reason. Accordingly, we reverse the second superior court's revision of the original court's discovery sanction order, and we remand for trial, at which Munce will be precluded from presenting his previously stricken answer and contributory negligence affirmative defense.

FACTS

In June 2008, Clarence Munce shot his son, Gerald², in the back, killing him. Munce told police that he had intended merely to scare Gerald. There were no other witnesses. The State charged Munce with first degree murder.

During the course of the criminal proceedings, Gerald's daughters, Kristy L. Rickey and Kelley R. Cavar, both individually and as co-executrixes of Gerald's estate, filed claims against Munce in superior court under Washington's wrongful death and survival statutes. In his answer to Gerald's estate's wrongful death complaint, Munce asserted several affirmative defenses—including self-defense, assumption of risk, apportionment, and comparative fault. He also asserted counterclaims for assault and battery.

I. STRIKING ANSWER AS DISCOVERY SANCTION BY ORIGINAL COURT

Pending a competency determination for Munce, the original superior court in the wrongful death action entered an order precluding Gerald's estate from requesting discovery from Munce for 120 days. When Munce was found incompetent to stand trial in the criminal case, the original court lifted the discovery stay in Gerald's estate's civil action against him and appointed Michael Smith to act as Munce's guardian ad litem.

² We refer to Gerald by his first name for clarity; we intend no disrespect.

No. 42245-0-II

Munce timely responded to Gerald's estate's pending discovery requests, but he provided little or no substantive information. Instead, he objected to most of the requests for admission and provided equivocal admissions and denials for the interrogatories based on his assertion of the Fifth Amendment³ privilege against self-incrimination and his alleged mental incompetency.

The original court ordered Munce to present himself for deposition; it also allowed Munce's criminal defense attorney, Erik Bauer, to attend the deposition with Munce to "instruct and assert privileges." Clerk's Papers (CP) at 46 (emphasis omitted). During Munce's deposition, Bauer instructed him to refuse to take the oath and, except for one question, not to answer any questions, based on the Fifth Amendment privilege against self-incrimination.

Gerald's estate moved for sanctions against Munce based on his inadequate responses to discovery requests and his abuse of the Fifth Amendment privilege during his deposition: Gerald's estate asked the original court to strike Munce's affirmative defenses and answer, to dismiss his counterclaims, and to deem him in default based on his failure to provide any meaningful substantive answer or response to discovery requests.

The original superior court ruled that Munce's blanket assertion of the Fifth Amendment privilege during his deposition was inappropriate and improper. Because Munce had failed to allow Gerald's estate to depose him in any meaningful way, Gerald's estate was unable to learn what relevant and admissible evidence his deposition could have provided had he answered the questions. The original court also ruled: "I am going to impose some sanctions. I am going to strike the counterclaims and the affirmative defenses. [But] I'm not going to grant your request

³ U.S. CONST. amend. V.

No. 42245-0-II

for some kind of a directed verdict in the case." CP at 39. The original court's written findings stated,

[T]he Court will impose sanctions as follows: (1) Defendant's Affirmative Defenses and Answers shall be stricken; (2) Defendant's Counter-claim[s] shall be stricken and shall forthwith be dismissed.

CP at 50 (Finding of Fact (FF) 19). And it reiterated, "[T]he Court shall not enter an Order of Default, which would be tantamount to a directed verdict on the issue of liability in this matter." CP at 50 (FF 19).

Munce moved for reconsideration of the sanction order, highlighting, "While this [c]ourt stated in its oral ruling that it was not imposing the most severe sanction of a directed verdict, the court has for all practical purposes, granted a directed verdict for the plaintiffs by dismissing the defendant's affirmative defenses and counterclaims." CP at 2241. The original court acknowledged Munce's argument but signed Gerald's estate's proposed order striking Munce's answer, including his affirmative defenses and counterclaims.

II. REINSTATEMENT OF STRUCK ANSWER BY SECOND COURT

The wrongful death case against Munce was then transferred to a different superior court judge. Gerald's estate moved for (1) partial summary judgment on its negligence and proximate cause claims, and (2) an order of default. Gerald's estate argued that, because the original court had struck Munce's answer and affirmative defenses, Munce had "failed to plead, or otherwise defend" against Gerald's estate's claims. CP at 640.

The second superior court denied Gerald's estate's motion for an order of default but granted the motion for partial summary judgment on the liability component of the estate's claims. Denying summary judgment on the proximate cause component of Gerald's estate's

No. 42245-0-II

claims, the second court instead (1) concluded that the original court's written findings of fact and conclusions of law were internally inconsistent and conflicted with its oral ruling⁴; and (2) based on these perceived inconsistencies, the second court sua sponte reinstated Munce's answer and contributory negligence affirmative defense.⁵ Gerald's estate appeals.

ANALYSIS

Gerald's estate argues that the second court abused its discretion in revising the original court's discovery sanction order because (1) it is "generally inappropriate for one trial court to revisit or revise an order from another trial court judge which has been entered unconditionally"; (2) there was no inconsistency between the original court's oral ruling and its written order; and (3) alternatively, the second court inappropriately revised the original court's order because the earlier written order should have controlled. Br. of Appellant at 29. We agree with Gerald's estate's second argument.

⁴ More specifically, the second court noted:

Now, looking at the findings of facts and conclusions of law that were entered by [the original court] . . . , it says here ["The Court, in the exercise of its discretion, shall not award the following sanctions requested by [Plaintiffs] in this matter: The Court shall not enter an order of default which would be tantamount to a directed verdict on the issue of liability.["] And when he gets to the conclusions of law, he is striking the affirmative defenses. He has not stricken the Answer, no matter how inconsistent this might seem to [me]. Nonetheless, that's what he did . . . He struck the counter claim and affirmative defenses. He didn't strike the Answer; so at this point, we still have an Answer, such as it is.

Verbatim Report of Proceedings (May 20, 2011) at 17.

⁵ The second court provided no reason for reinstating Munce's contributory negligence defense. But the court did share its vision for trial on the issue of fault as follows:

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

CP at 1076.

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I. AUTHORITY TO REVISE ORIGINAL SANCTION ORDER

A trial court is generally entitled to reexamine an issue and to reconsider a ruling unless it was a final decision. *Cent. Reg'l Transit Auth. v. Heirs & Devisees of Eastey*, 135 Wn. App. 446, 464-65, 144 P.3d 322 (2006) (Cox, J., concurring); *accord MGIC Fin. Corp. v. H.A. Briggs Co.*, 24 Wn. App. 1, 8, 600 P.2d 573, *review denied*, 92 Wn.2d 1038 (1979). Under CR 54(b), a decision that adjudicates fewer than all of the claims in an action is not final unless the trial court makes a written finding that there is no just reason for delay of the entry of judgment. In the absence of such a finding, a ruling resolving fewer than all claims "is subject to revision at any time."⁶ Moreover, the trial court has authority to modify sua sponte its initial judgment;⁷ and, where a case is transferred to a new judge at the same court, the transferee judge is not foreclosed from revisiting a ruling the previous judge made. *In re Estate of Jones*, 170 Wn. App. 594, 604-05, 287 P.3d 610 (2012).

Here, the original court's sanctions order did not resolve all of the claims against all of the parties; nor do the parties assert that the original court certified the finality of its discovery sanction order dismissing Munce's answer. Therefore, the second court had authority under CR 54(b) to modify the original court's sanction order. The next question we address, then, is whether the second court abused that authority in revising the original court's sanction order.

⁶ CR 54(b). See also *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 300, 840 P.2d 860 (1992) (citing *Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 504, 798 P.2d 808 (1990)).

⁷ *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 14 n.32, 206 P.3d 1255, *review denied*, 167 Wn.2d 1007 (2009).

No. 42245-0-II

II. ABUSE OF DISCRETION

Gerald's estate argues, "[I]t is simply beyond question that [the second court] abused [its] discretion" and acted arbitrarily and capriciously in revising [the first court's] sanction order because (1) there was no motion before the court to do anything to the sanction order; (2) there was no inconsistency between its oral ruling and his written sanction order; and (3) even if there was an inconsistency, the written order controlled. Reply Br. of Appellant at 16. We agree.

We leave reconsideration of any issue to the sound discretion of the superior court and will not reverse absent a clear manifest abuse of discretion. *Holaday v. Merceri*, 49 Wn. App. 321, 324, 742 P.2d 127, review denied, 108 Wn.2d 1035 (1987). A superior court abuses its discretion when it acts in a manner that is manifestly unreasonable or if its ruling is based on untenable grounds or reasons. *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). Such is the case here.

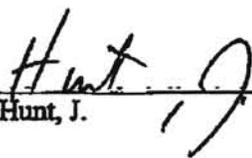
The second court's order granting partial summary judgment to Gerald's estate on the issue of liability also reinstated Munce's answer and contributory negligence affirmative defense, which the original court had stricken as a discovery violation sanction. Contrary to the second court's conclusion, however, there was no internal inconsistency in the original court's order dismissing Munce's answer while simultaneously denying Gerald's estate's motion for entry of a default judgment. Even though the ruling deprived Munce of his affirmative defenses, there remained for trial at that point the issues of liability and damages. And even if entry of a default judgment might arguably have been an option when the second judge later granted Gerald's estate's motion for summary judgment on the issue of Munce's liability, the issue of damages, at least, still remained for trial.

No. 42245-0-II

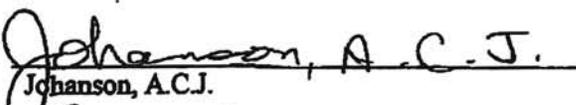
Moreover, Munce did not ask the second superior court to reinstate his affirmative defense of contributory negligence; nor did the parties or the second court discuss this issue at any hearing. Furthermore, in reinstating this affirmative defense sua sponte, the second court articulated no reason or any tenable ground. In short, because there was no internal inconsistency justifying the second court's sua sponte vacating portions of the original court's sanction order and reinstating Munce's answer and no explanation for reinstating his contributory negligence affirmative defense, we hold that the second court abused its discretion.⁸

We reverse the second superior court's revision of the original court's discovery sanction order, and we remand for trial, at which Munce will be precluded from presenting his previously stricken answer and contributory negligence affirmative defense.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Hunt, J.

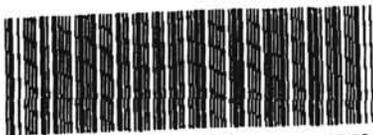
We concur:


Johanson, A.C.J.


Bridgewater, J.P.T.

⁸ Accordingly, we do not address Gerald's estate's third argument for abuse of discretion and reversal, namely that the superior court violated the well-settled legal principle that, when a superior court's oral decision conflicts with its written decision, the written decision controls. See *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963).

APPENDIX 5



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/Defender WSBA# 11176

[Signature] Attorney for Defendant/Respondent WSBA# 16809

APPENDIX 6



08-2-10227-6 33330828 CROF 12-09-09

6134 12/9/2009 08231

FILED
IN COUNTY CLERK'S OFFICE
A.M. DEC - 8 2009 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

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

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

v.

CLARENCE G. MUNCE,,
Defendant,

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

No. 39531-2-II

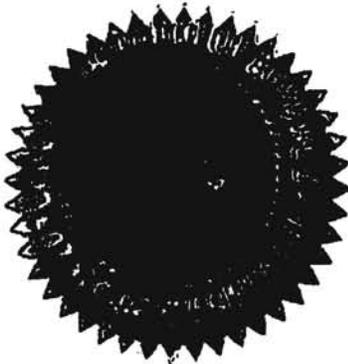
CERTIFICATE OF FINALITY

Pierce County

Superior Court No. 08-2-10227-6

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and
for Pierce County.

This is to certify that the decision of the Court of Appeals of the State of Washington,
Division II, filed on October 13, 2009, became final on November 13, 2009.



IN TESTIMONY WHEREOF, I have hereunto set my
hand and affixed the seal of said Court at Tacoma, this
SM day of December, 2009.


David C. Ponzoha
Clerk of the Court of Appeals,
State of Washington, Division II

CASE #: 39531-2-II, Mandate Pg 2
Kristy L. Rickey et al, Respondents v Michael B. Smith, Petitioner

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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

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FILED
COURT OF APPEALS

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 7



08-2-10227-6 35070451 CROF 09-23-10

FILED
IN COUNTY CLERK'S OFFICE

A.M. SEP 22 2010 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KRISTY L. RICKEY and KELLY R.
CAVAR, individually and as co-executrices
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

CERTIFICATE OF FINALITY

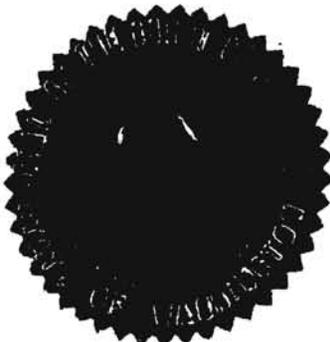
Pierce County

Superior Court No. 08-2-10227-6

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and
for Pierce County.

This is to certify that the decision of the Court of Appeals of the State of Washington,
Division II, filed on May 19, 2010, became final on September 9, 2010.

IN TESTIMONY WHEREOF, I have hereunto set my
hand and affixed the seal of said Court at Tacoma, this
16th day of September, 2010.



David C. Ponzoha
Clerk of the Court of Appeals,
State of Washington, Division II

CERTIFICATE OF FINALITY

40377-3-II

Page Two

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**Dan'L Wayne Bridges
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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40377-3-II
Page Two

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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,

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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
10/11/18 PM 1:57
BY: [Signature]

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.

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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