

ORIGINAL

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

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VELEMA WALKER, et al.,

Respondents,

vs.

HUNTER DONALDSON, LLC, et al.,

Appellants.

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BRIEF OF RESPONDENTS

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## I. INTRODUCTION

This appeal involves the efforts of Appellants Ralph Wadsworth and Rebecca Rohlke (“Appellants”) to evade Respondents Velma Walker, et al.’s (“Respondents”) discovery requests for *over a year and half*, in violation of the civil rules and multiple court orders. Two members of the Pierce County judiciary, Judge Serko and Judge Costello, separately reviewed the record; ruled that Appellants had committed these violations; found that these violations were evasive and willful; and entered a series of orders compelling Appellants’ discovery productions, imposing *per diem* monetary sanctions designed to coerce those productions, and thrice reducing accrued sanctions to judgments against Appellants until they finally came into full compliance. Appellants now invite this Court to condone or excuse their unrepentant flouting of the trial court’s authority on appeal. This Court should flatly reject that invitation.

Appellants first contend that reversal of the trial court’s May 23 order granting Respondents’ second motion to compel and imposing the *per diem* sanctions and vacation of all subsequent orders is required because Respondents failed to satisfy CR 26(i) ’s “meet and confer” requirement before bringing the motion. But the record demonstrates that Respondents did meet this requirement. Regardless, as the trial court observed, this requirement was rendered moot by the trial court’ previous entry of an order compelling discovery, Appellants’ failure to respond to an attempt to resolve the discovery issues short of another motion, and a record otherwise demonstrating that any further discovery conference with

Appellants would have been futile. Moreover, even had a conference been required and Respondents failed to strictly comply, this Court should reject previous panel decisions holding that CR 26(i) strips a trial court of authority to hear a discovery motion unless the rule's requirements are met and instead adopt an interpretation—the rules of statutory interpretation, the intent of CR 26(i)'s drafters, and Washington precedent establishing trial courts' broad authority over and discretion in managing discovery—allowing trial courts discretion to enforce or waive CR 26(i)'s requirements.

Appellants further argue that the trial court abused its discretion in entering the May 23 order and subsequent orders reducing accrued *per diem* sanctions to judgment because an alleged lack of clarity and consistency in the trial court's oral rulings and written orders that left them confused regarding what they were being ordered to produce and when and with a "good faith belief" that they were compliant. However, the trial court's first March 28 order compelling discovery productions presented Appellants with two remarkably clear alternatives: either "fully answer" Respondents' requests for production, including producing responsive documents, or lodge legally-justified objections. Appellants, however, opted for a third approach: continuing to withhold documents under boilerplate objections they had been notified were legally insufficient. Moreover, the trial court removed any further theoretical doubt regarding Appellants' discovery obligations by entering its May 23 order which expressly required production of "all responsive documents."

Incredibly, Appellants persisted in withholding the documents based on objections already rejected by the trial court and by pleading ignorance of their crystal-clear obligations, despite never moving for a protective order or moving for clarification. Under those facts, the trial court properly exercised its discretion both in imposing sanctions and continuing to reduce them to judgments against Appellants until they came into full compliance with the trial court's orders.

Appellants additionally contend that the trial court abused its discretion in entering its orders imposing sanctions and reducing them to judgments in part based on their failure to produce certain documents—including work emails, work calendars, and cellular phone bills—possessed by Hunter Donaldson, a bankrupt corporate defendant in this case, but also controlled by Appellant. But the record amply demonstrates that both Wadsworth—Hunter Donaldson's sole owner, President, and Chief Executive Officer—and Rohlke—Wadsworth's daughter and a Hunter Donaldson corporate executive—had access and the practical ability to produce those documents, including work emails, work calendars, and cellular phone bills, and, thus, “control” as the term is legally defined. Indeed, Appellants both admitted these facts during their depositions. Thus, the trial court properly exercised its discretion in ordering Appellants to produce these documents and sanctioning them for their continuing failure to do so.

Simply put, Appellants present no legally and, certainly, no factually compelling grounds for condoning or forgiving their willful,

intransigent violation of the civil rules and multiple court orders. Accordingly, this court should affirm the trial courts' orders in their entirety.

## II. RESTATEMENT OF ISSUES

1. Did the trial court appropriately consider Respondents' second motion to compel and impose running monetary sanctions where Respondents properly complied with CR 26(i) by holding a telephonic discussion of the discovery issues prior to entry of a May 23 order compelling discovery and certified the rule's requirements had been met?
2. In the alternative, should this Court reject previous panels' decisions and hold that CR 26(i)'s requirements are only directory and permissive and, thus, trial courts have discretion to hear a discovery motion in the absence of compliance with those requirements?
3. Did the trial court properly exercise its discretion to hear Respondents' second motion to compel even if Appellants did not strictly comply with CR 26(i)'s requirements?
4. Did the trial court properly exercise its discretion in entering multiple orders imposing *per diem* monetary sanctions and reducing those sanctions to judgments against Appellants where the trial court concluded that Appellants were violating multiple, clear court orders by continually failing to produce all documents responsive to Respondents' requests for production, including documents within Appellants' control?
5. Did the trial court properly exercise its discretion in entering orders imposing running non-compensatory monetary sanctions and reducing those sanctions to judgment against Appellants without first applying the *Burnet* factors where our Supreme Court has clearly stated those factors apply only to sanctions that directly affect a party's ability to present their case, such as striking witness or claims or entering a default judgment?

6. Should this Court award Respondents their fees and costs on appeal?

### III. COUNTER-STATEMENT OF THE CASE

#### A. The Underlying Lawsuit

This underlying substance of this case centered on chapter 60.44 RCW, Washington's medical lien statutes. The statutory scheme allows certain enumerated medical services providers to create and assert a lien against a patient's recovery from or claims against third-party tortfeasors responsible for the patient's injuries, on the condition that the provider complies with RCW 60.44.020's<sup>1</sup> numerous requirements.<sup>2</sup> Most pertinent to this appeal, those requirements include recordation with the county auditor of a lien claim "subscribed by the claimant" and "verified

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<sup>1</sup> RCW 60.44.020 provides:

No person shall be entitled to the lien given by RCW 60.44.010 unless such person shall, within twenty days after the date of such injury or receipt of transportation or care, or, if settlement has not been accomplished and payment made to such injured person, then at any time before such settlement and payment, file for record with the county auditor of the county in which said service was performed, a notice of claim stating the name and address of the person claiming the lien and whether such person claims as a practitioner, physician, nurse, ambulance service, or hospital, the name and address of the patient and place of domicile or residence, the time when and place where the alleged fault or negligence of the tort-feasor occurred, and the nature of the injury if any, the name and address of the tort-feasor, if same or any thereof are known, which claim shall be subscribed by the claimant and verified before a person authorized to administer oaths.

<sup>2</sup> Appellants state in their opening brief that "[t]he statute automatically creates a lien in favor of the provider" that is merely perfected by recordation. Br. of Appellants at 3. However, Appellants fail to inform the Court that the legal issue of when medical services liens are created—either automatically or when a lien is recorded—was hotly contested by the parties below in litigating the larger issue of a patient's standing to challenge the validity of a medical services lien. The "moment of creation" issue was not resolved by the trial court. Given the issue's lack of relevancy to this appeal, Respondents cannot conceive of Appellants' reason for mischaracterizing a disputed legal the Court should exercise caution in characterizing the statutory scheme, lest it inadvertently tread into legal waters uncharted by the trial court.

by a person authorized to administer oaths”—that is, notarized by a validly licensed notary public. RCW 60.44.020.

Defendants MultiCare Health System (“MultiCare”) and Mt. Rainier Emergency Physicians (“MREP”) contracted with Hunter Donaldson, LLC, a California corporation, to file and collect on their medical services liens.<sup>3</sup> Respondent Wadsworth was Hunter Donaldson’s President, Chief Executive Officer, and sole owner.<sup>4</sup> Respondent Rohlke, at all material times, was part of Hunter Donaldson’s corporate management—specifically, the “Chief Integrity Officer”—and Wadsworth’s daughter.<sup>5</sup>

After traumatic accidents involving third-party tortfeasors, all five Respondents received emergency medical care from MultiCare, MREP, or both.<sup>6</sup> Hunter Donaldson, on behalf of MultiCare and MREP, filed medical services liens against Respondents and demanded payment from them.<sup>7</sup> After receiving monetary settlements from the respective tortfeasors responsible for their injuries, four of the Appellants either paid thousands of dollars to Hunter Donaldson or had a portion of their funds held in trust to satisfy the liens.<sup>8</sup> Each lien bore a materially-identical notarization by Rohlke, purportedly acting as a Washington State notary

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<sup>3</sup> Clerk’s Papers (“CP”) at 246.

<sup>4</sup> CP at 248, 319.

<sup>5</sup> CP at 249, 319.

<sup>6</sup> CP at 8-15.

<sup>7</sup> *Id.*; CP at 48-64.

<sup>8</sup> CP at 8-15.

public.<sup>9</sup> Rohlke's notary jurat also certified that she had notarized the liens in Pierce County; Wadsworth had personally appeared before her for the notarizations; and Wadsworth had signed the liens in Pierce County.<sup>10</sup>

As subsequent investigation and litigation revealed, however, all of these statements were false.<sup>11</sup> Rohlke had always lived and worked in California; she never performed a notarial act in Washington State; and Wadsworth never appeared before her to sign the liens, instead utilizing an electronic signature.<sup>12</sup> Compounding the falsehoods, Rohlke provided a Gig Harbor home address of Jason Adams—MultiCare's Vice President of Revenue Cycle at the time—as her own address on her Washington State notary public application.<sup>13</sup> Adams—who provided a statutorily-required endorsement of Rohlke on her notary application—in turn provided a private mail box address as his own, presumably to obfuscate the deception.<sup>14</sup> After a Washington Department of Licensing investigation, Rohlke entered into an agreed order in which she admitted she had never resided in Washington and had falsely represented she performed notarial acts here; agreed that she had violated multiple RCWs through her misconduct; and accepted being barred from serving or applying to serve

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<sup>9</sup> CP at 48-64.

<sup>10</sup> *Id.*

<sup>11</sup> CP at 657, 659.

<sup>12</sup> CP at 659, 726, 729, 749, 770, 772.

<sup>13</sup> CP at 34-35. Rohlke's fraudulent assertion of her Washington residency was essential for her application for a Washington notary public license, as Washington law requires individuals to be a resident of Washington, Oregon, or Idaho to receive such a license. RCW 42.44.020.

<sup>14</sup> CP at 34-35.

as a notary public in any jurisdiction in the United States, as well as a \$7,500 fine.<sup>15</sup>

On April 30, 2013, Appellants filed this proposed class action in the Pierce County Superior Court against Appellants, MultiCare, and MREP, the central claim of which was that Rohlke's fraudulently-obtained notary public license and any or all of the false statements contained within her notary jurat invalidated her notarizations and, thus, rendered all Rohlke-notarized liens invalid under RCW 60.44.020 for lack of a valid verification and unlawfully deprived Respondents of the use of their funds.<sup>16</sup> Respondents also alleged that Appellants filed and collected on these liens instead of submitting Respondents' bills to their private or government health insurance plans because Appellants could achieve higher, dollar-for-dollar recoveries from lien collections as opposed to lower, contractually-negotiated payments from insurance plans.<sup>17</sup> This entire universe of allegations formed the basis of Respondents' claims for fraud, conspiracy, negligence, violations of Washington's Consumer Protection Act, and other torts against 4,838 individuals.<sup>18</sup>

**B. Wadsworth's and Rohlke's Continual Evasion of Discovery for Over One and a Half Years**

1. Service of discovery requests and First Motion to Compel

On May 1, 2013 Respondents served Hunter Donaldson and

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<sup>15</sup> CP at 657-662.

<sup>16</sup> CP at 1-64.

<sup>17</sup> CP at 903.

<sup>18</sup> CP at 77-112, 1270, 1278.

Wadsworth with interrogatories and requests for production.<sup>19</sup> On May 30, Appellants removed the lawsuit to federal district court.<sup>20</sup> At the time, the Perkins Coie law firm represented Appellants.<sup>21</sup> On June 10, Appellants' counsel at the time sent a letter to Respondents regarding the outstanding discovery requests.<sup>22</sup> The letter cited, without any elaboration, a number of federal district court cases for the proposition that removal of a case to federal court invalidates pre-removal discovery requests.<sup>23</sup> In the alternative, the letter also requested without elaboration that Respondents consider it "as a denial of all requests for admission and objection to all interrogatories and requests for production."<sup>24</sup>

On September 12, 2013, Walker served Rohlke with interrogatories and requests for production.<sup>25</sup> On September 16, 2013, the federal district court ordered a remand of the case to the superior court.<sup>26</sup> On September 30, Appellants petitioned the United States Court of Appeals for the Ninth Circuit for review of the federal district court's remand order.<sup>27</sup> On January 17, 2014, with the understanding that it would expedite efforts to settle the case, Respondents agreed to a 30-day

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<sup>19</sup> CP at 121, 126, 129.

<sup>20</sup> CP at 657-662.

<sup>21</sup> CP at 190-191.

<sup>22</sup> CP at 244.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> CP at 354.

<sup>26</sup> CP at 197-203.

<sup>27</sup> CP at 204-205.

stay of the proceedings, including discovery.<sup>28</sup> On January 23, the superior court received the federal district court's order remanding this case after denial of review by the Ninth Circuit.<sup>29</sup> On February 17, the 30-day stay expired without the parties reaching a settlement.<sup>30</sup> On February 27, in order to address Appellants' alleged reluctance to provide discovery that might contain sensitive information, the parties entered a stipulated, 12-page protective order to protect proprietary, personal, and otherwise confidential or sensitive information that might be contained within the protected discovery.<sup>31</sup>

However, even after these efforts to cooperate with Appellants, they still refused to provide discovery. As a result, on March 6, 2014, Respondents' counsel and Appellants' counsel held a CR 26(i) conference regarding Appellants' failure to provide timely responses to Respondents' discovery requests.<sup>32</sup> Among other things, counsel discussed Appellants' position that their removal of the lawsuit invalidated Respondents' pre-removal discovery requests, requiring them to be served again.<sup>33</sup>

On March 13, 2014, Respondents moved to compel Hunter Donaldson's and Wadsworth's discovery responses.<sup>34</sup> Respondents' motion pointed out that, by that date, 317 actual days had elapsed—55

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<sup>28</sup> CP at 121.

<sup>29</sup> CP at 196.

<sup>30</sup> CP at 121.

<sup>31</sup> CP at 217-228.

<sup>32</sup> CP at 118, 232-233.

<sup>33</sup> CP at 232.

<sup>34</sup> CP at 113.

days of which were not enveloped by the case's removal to federal court or the 30-day stipulated stay—without *any* formal discovery responses by Appellants.<sup>35</sup> The motion also directly quoted well-established Washington precedent stating that a party must “*fully* answer *all* interrogatories and requests for production, unless a *specific* and *clear* objection is made.”<sup>36</sup>

In opposing the motion, Appellants (1) reasserted their string citation of federal district court case allegedly supporting the proposition that the case's removal to federal court “mooted” their discovery requests, requiring them to be served again after remand and (2) invoked their June 10, one-sentence, blanket letter objection to all discovery requests as excusing their failure to respond.<sup>37</sup> Appellants also touted the fact that, in a “nearly identical” action filed by Respondents’ counsel on behalf of an individual, Appellants had provided “substantive responses” to some discovery requests and stated they were “willing . . . to negotiate a timeline” for responding to the requests in this action.<sup>38</sup>

In reply, Respondents rebutted these arguments by pointing out that all the federal cases cited by Appellants stood only for the general proposition that when an action is removed to federal court, the federal rules apply to discovery, none of the cases involved a remand to state

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<sup>35</sup> CP at 116.

<sup>36</sup> CP at 116-17 (quoting *Johnson v. Mermis*, 91 Wn. App. 127, 132, 955 P.2d 826 (1998)).

<sup>37</sup> CP at 236-37.

<sup>38</sup> CP at 235, 237.

court, and none of the cases held that state discovery rules somehow no longer apply on remand to state court.<sup>39</sup> Respondents further rebutted Appellants' contention that they could rely on their one-sentence, blanket objection by citing well-established Washington precedent establishing that "blanket" or "boilerplate objections without specificity" violate the discovery rules, a party's failure to produce documents is not excusable based on grounds that the requested discovery is objectionable, and a party cannot withhold discovery unless it moves for a protective order.<sup>40</sup> Finally, Respondents asserted that Appellants' previous compliance with similar discovery requests in the individual action only underscored Appellants' lack of good cause for providing discovery in this case, as it demonstrated Appellants' familiarity with the universe of information Respondents sought and corresponding ability to easily ascertain and produce information and documents responsive to the requests in this case.<sup>41</sup>

It is in this specific factual and legal context that Judge Serko heard Respondents' first motion to compel. At the hearing, Appellants suggested for the first time that there might be issues with "simply turning . . . over" some of the requested discovery because it might contain "protected health information"<sup>42</sup> On this basis, Appellants requested

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<sup>39</sup> CP at 270-71.

<sup>40</sup> CP at 271-72.

<sup>41</sup> CP at 273.

<sup>42</sup> Verbatim Transcript of Proceedings March 28, 2014 (VTP (Mar. 28, 2014)) at 6.

additional time to comply with Respondents' discovery requests so that those issues could be "resolved and worked through."<sup>43</sup> Judge Serko acknowledged the theoretical potential for these issues, but also observed that there were also critical documents requested for production that did not involve protected information, such as "[e]-mails, policies, [and] internal things as between a health care provider and Hunter Donaldson."<sup>44</sup>

Ultimately, on March 28, 2014, Judge Serko entered an order ("March 28 Order") granting Respondents' motion to compel.<sup>45</sup> The March 28 Order expressly ordered, "All outstanding discovery responses *will be produced* by no later than close of business on April 25, 2014," 28 days later.<sup>46</sup> The March 28 Order further clarified, "The responses will include a good faith attempt to *fully answer* each interrogatory or request for production, or provide an objection *justified in law*."<sup>47</sup>

2. Second Motion to Compel and Imposition of *Per Diem* Sanctions

After entry of the March 28 Order, Hunter Donaldson's own in-house counsel, Stephen Perisho, and general counsel, Kevin Smith, substituted in as counsel for all three Appellants.<sup>48</sup> At an April 11 hearing in this case, the subject of outstanding discovery arose early and often. In

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<sup>43</sup> VTP (Mar. 28, 2014) at 6-7.

<sup>44</sup> VTP (Mar. 28, 2014) at 7-8.

<sup>45</sup> CP at 281-83.

<sup>46</sup> CP at 282 (emphasis added).

<sup>47</sup> *Id.* (emphasis added).

<sup>48</sup> CP at 1250-1255, 1264-1265.

general, Judge Serko expressed her desire, given her level of experience with the case's facts and issues, to progress as much as possible before the case was sent to another judge as part of regular calendar rotations.<sup>49</sup> Respondents' counsel agreed, but reminded Judge Serko of Appellants' failure to produce information and documents in discovery and the inability to progress in the case until Appellants produced "that kind of central information."<sup>50</sup> As a result, Judge Serko engaged in the following colloquy with Appellants' counsel:

THE COURT: . . . . And is there any reason to believe that Hunter Donaldson will not be *producing discovery* by April 25th when it is due, Mr. Perisho?

MR. PERISHO: No, it's our plan to *produce the discovery*, Your Honor.<sup>51</sup>

Emphasis added. Judge Serko added:

So if, I mean, addition issues are raised, I guess my goal is to hear a motion to certify the class ASAP so that, you know, we can move this case along

. . . .

Certainly with the education I'm receiving, because you know that I'm going to turn over this docket to a different judge so it would be helpful, I think, to have it as far along as possible by the time I leave.<sup>52</sup>

Thus, the overall context of the discovery colloquy during the April 11 hearing demonstrates not only that Judge Serko understood her March 28

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<sup>49</sup> VRP (April 11, 2014) at 27.

<sup>50</sup> *Id.* at 11, 23.

<sup>51</sup> *Id.* at 26-27.

<sup>52</sup> *Id.* at 27.

order as requiring discovery *productions*—such as substantive answers to interrogatories and document productions—but also that Appellants shared that understanding.

However, despite the March 28 Order and Appellants’ counsel’s subsequent assurances of producing discovery, Respondents did not receive Appellants’ discovery responses by the April 25 deadline.<sup>53</sup> On April 28, the following Monday, Respondents’ counsel inquired via email about the late discovery responses; Appellants replied that they had only put them in the mail on April 25, but provided electronic copies attached to an email.<sup>54</sup>

Even after Respondents finally received Appellants’ discovery responses, however, they contained a notable omission: a complete failure to produce any documents responsive to Respondents’ requests for production (“RFPs”).<sup>55</sup> For the vast majority of RFPs where Appellants did not deny that responsive documents existed, Appellants responded only with statements that they “[would]” produce responsive documents “identified as a result of a reasonable search” or with boilerplate objections.<sup>56</sup> The following tables illustrate these responses:

<b>Wadsworth’s Responses</b>
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<sup>53</sup> CP at 296, 304.

<sup>54</sup> CP at 306.

<sup>55</sup> CP at 296, 372.

<sup>56</sup> CP at 342-48; 363-67. Hunter Donaldson’s responses largely took the same approach. CP at 308, 313-315, 319-328.

RFP No.	Request	Responses
1	All documents identified in response to Interrogatory 8 (facts or documents supporting contention that liens recorded on MultiCare's behalf from 2010-present were legally, properly, or validly executed by Wadsworth)	"same objections to the preceding Interrogatory" <sup>57</sup> ("overly broad, unduly burdensome to respond to and not reasonably tailored to the discovery of admissible evidence related to Plaintiff's claims") <sup>58</sup>
4	All requests for reimbursement of business expenses of any kind submitted to Hunter Donaldson and receipts over the last five years	"overly broad, unduly burdensome to respond to and not reasonably tailored to the discovery of admissible evidence related to Plaintiff's claims"; "improperly seeks class discovery in an individual action" <sup>59</sup>
5	All documents sent to/from MultiCare re: Rohlke's application or licensure as a Washington	"will produce responsive documents . . . that are responsive to Ms. Miesmer identified as a result of a reasonable search" <sup>60</sup>

<sup>57</sup> CP at 342.

<sup>58</sup> CP at 341.

<sup>59</sup> CP at 344.

<sup>60</sup> CP at 344. Curiously, many of Wadsworth's discovery responses referred to an intention to produce documents responsive to "Ms. Miesmer," the plaintiff in the individual action, or "Plaintiff's," instead of any of the named, multiple plaintiffs in this action. See CP at 121, 344, 344-35, 347. Undermining Appellants' claims that these responses constituted a good faith attempt to fully answer the discovery requests is the appearance that they were nonchalantly copied and pasted from discovery responses made in the individual action.

	notary	
6	All communications sent to/from Jason Adams from 2009-present	“overly broad, unduly burdensome to respond to, and not reasonably tailored to lead to the discovery of admissible evidence because it seeks all documents involving Jason Adams over a seven year period without any limitation that the document relate to work Hunter Donaldson has done for or with MultiCare and/or relate to Ms. Miesmer” <sup>61</sup>
7	All reports, correspondence, emails or documents sent to/from MultiCare re: execution of liens on MultiCare’s behalf from 2009-present	“vague, ambiguous, and inaccurate”; “overly broad, unduly burdensome, and not reasonably tailored to lead to the discovery of admissible evidence because it seeks all documents involving MultiCare over a five year period without any limitation that the document relate to work Mr. Wadsworth has done for or with MultiCare on behalf of Ms. Miesmer” “seeks class discovery in an individual action . . . Plaintiff’s allegations relate to individual notices of claims of lien specific to her”; “will produced responsive documents . . . that are specific to Ms. Miesmer identified as a result of a reasonable search” <sup>62</sup>
8	All reports, correspondence, remittances, checks, emails or documents sent to MultiCare re: collection of monies related to medical liens you executed on behalf of MultiCare from 2009-present	“vague, ambiguous, calling for legal conclusions, and inaccurate”; “duplicative of Requests for Production Nos. 5 and 7” <sup>63</sup>
10	Any work schedules or calendars from	“overly broad, unduly burdensome to respond to, and not reasonably tailored to lead to the discovery of admissible evidence because it

<sup>61</sup> CP at 345.

<sup>62</sup> *Id.*

<sup>63</sup> CP at 346.

	2010-present	requests information unrelated to Plaintiff's claims" <sup>64</sup>
11	All state and federal tax returns for 2009-2012	"overly broad, unduly burdensome to respond to, and not reasonably tailored to lead to the discovery of admissible evidence because it requests information unrelated to Plaintiff's claims" <sup>65</sup>
12	Any bills for cellular phones used by you for January-April 2013	"overly broad and not reasonably tailored to lead to the discovery of admissible evidence because it requests information wholly unrelated to Plaintiff's claims" <sup>66</sup>

<b>Rohlke's Responses</b>		
<b>RFP No.</b>	<b>Request</b>	<b>Responses</b>
1	All notary public applications made in any state for the last 10 years	"overly broad and not reasonably tailored to the discovery of admissible evidence relevant to Plaintiffs' claims"; "will produce responsive documents relating to her Washington notary application identified as a result of a reasonable search" <sup>67</sup>
2	All applications for a notary bond in any state for the past 10 years	"See Response to Request No. 1" <sup>68</sup>
3	All notary bonds received in the past 10 years	"See Response to Request No. 1" <sup>69</sup>
4	All notary licenses obtained in any state in the last 10 years	"overly broad and not reasonably tailored to the discovery of admissible evidence relevant to Plaintiffs' claims"; "will produce a copy of the notary license she obtained in Washington in 2010" <sup>70</sup>

<sup>64</sup> CP at 347.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> CP at 363.

<sup>68</sup> CP at 364.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* Rohlke stated in an interrogatory response that she had previously held a

5	Any marriage applications submitted or marriage licenses received in the last 10 years	“overly broad and not reasonably tailored to the discovery of admissible information because it seeks information unrelated to Plaintiffs’ claims” <sup>71</sup>
6	All state income tax returns for the previous seven years	“overly broad, unduly burdensome to respond to, and not reasonably tailored to lead to the discovery of admissible evidence because it requests information unrelated to Plaintiffs’ claims” <sup>72</sup>
7	All correspondence, emails, or other documents sent to/from MultiCare re: applying for or obtaining a Washington notary license over the previous five years	“overly broad and not reasonably tailored to lead to the discovery of admissible information”; “will produce responsive documents identified as a result of a reasonable search” <sup>73</sup>
8	All correspondence, emails, or other documents sent to/from Jason Adams over the last five years	“overly broad, unduly burdensome to respond to, and not reasonably tailored to the discovery of admissible evidence relevant to Plaintiffs’ claims” <sup>74</sup>
9	All correspondence, emails, or other	“Rohlke agrees to conduct a reasonable search . . . and to produce any documents located as a result of such search” <sup>75</sup>

California notary license; due to her recent marriage, she needed to renew her California notary license to update her legal name; and the reason she applied for a Washington notary license was her belief that “the administrative process to obtain a Washington notary license was faster and easier than the process to update her name on her California license.” CP at 359. Curiously, however, Rohlke refused to produce any documents that would verify this story on grounds that they were irrelevant.

<sup>71</sup> *Id.*

<sup>72</sup> CP at 365.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> CP at 366.

	communications sent to/from the Washington State Department of Licensing re: your Washington notary license	
10	Any work schedules and/or calendars from 2010-present	“overly broad, unduly burdensome to respond to, and not reasonably tailored to lead to the discovery of admissible evidence because it requests information unrelated to Plaintiffs’ claims” <sup>76</sup>
13	Any bills for cellular phones sued by you for January-April 2013	“overly broad, unduly burdensome to respond to, and not reasonably tailored to lead to the discovery of admissible evidence because it requests information unrelated to Plaintiffs’ claims” <sup>77</sup>

On May 2, attempting to resolve Appellants’ failure to produce any documents, Respondents’ counsel engaged in a telephonic conference with Appellants.<sup>78</sup> During the conference, Appellants’ counsel assured Respondents’ counsel that the requested documents would be produced that same day.<sup>79</sup>

Later that day, Appellants “informally” produced a single spreadsheet of medical services lien data without specifying to which discovery requests the spreadsheet was responsive, clarifying whether the spreadsheet constituted a partial or full response to any discovery requests, and including a signature under penalty of perjury by Appellants or CR 26(g) certification by Appellants’ counsel.<sup>80</sup> Appellants also admitted that

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> CP at 296, 381.

<sup>79</sup> CP at 296.

<sup>80</sup> CP at 381, 394; *see also* CP at 349 (signature and certification required for discovery responses).

they had previously produced this spreadsheet to both MultiCare and Plaintiffs.<sup>81</sup>

On May 6, Appellants made an identical, non-specific, unsigned and uncertified “informal” production of 40 pages of emails “relating to the issue of Hunter Donaldson not pursuing liens against patients with commercial insurance and not pursuing more than 25 percent of patients’ settlements.”<sup>82</sup> However, large amounts of that production were partially or fully redacted, despite Appellants’ failure to produce a privilege log or provide any basis for the redactions.<sup>83</sup> On May 13, Respondents’ counsel emailed Appellants’ counsel, stating that he would “love to hear from [them] that [the remaining discovery] is coming today or tomorrow” in order to avoid further motions practice.<sup>84</sup> However, Appellants failed to respond.<sup>85</sup>

Accordingly, on May 15, Respondents filed a second motion to compel Appellants’ and Hunter Donaldson’s discovery responses and productions and for imposition of sanctions.<sup>86</sup> Respondents again pointed out that, under well-settled Washington authority, Appellants’ boilerplate and baseless objections were insufficient under the discovery rules and, regardless, Appellants had not moved for a protective order excusing them

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<sup>81</sup> CP at 387.

<sup>82</sup> CP at 381, 394.

<sup>83</sup> CP at 394.

<sup>84</sup> CP at 372.

<sup>85</sup> CP at 394.

<sup>86</sup> CP at 287.

from producing the documents.<sup>87</sup> Respondents further argued that, in light of Appellants' violation of the March 28 Order, further coercion was needed to comply with the discovery rules and trial court's authority was needed.<sup>88</sup> To that end, Respondents asked Judge Serko to enter an order compelling immediate production of all outstanding documents, awarding Respondents their fees and costs for bringing the motion, and imposing *per diem* sanctions of \$1000 until Appellants produced all remaining documents.<sup>89</sup>

This time, Appellants' untimely filed<sup>90</sup> opposition to the motion consisted of (1) referring again to their belief that the removal to federal court invalidated Respondents' discovery requests and their June 10, 2013 letter containing a blanket objection to all discovery requests; (2) claiming their counsel had been unable to "confer" under CR 26(i) with Respondents' counsel since May 2; (3) asserting without explanation or elaboration that Respondents' document requests were "burdensome," (4) claiming that Appellants were "willing to make productions," but required "input and clarification" from Respondents' counsel before doing so; and (5) stating without explanation that "Hunter Donaldson keeps very few paper files."<sup>91</sup>

In their reply brief, Respondents observed that (1) Judge Serko had

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<sup>87</sup> CP at 291.

<sup>88</sup> *Id.*

<sup>89</sup> CP at 288.

<sup>90</sup> VTP (May 23, 2013) at 3-4.

<sup>91</sup> CP at 374, 376, 381.

already rejected the removal argument and blanket objection; (2) the one-word “burdensome” objection was insufficient under Washington law; (3) Respondents requests for production had informed Appellants precisely of the documents they sought; and (4) Appellants’ lack of paper files “should have speeded, not hindered, production as [Appellants] maintain[ed] their files in a more easily indexed, searchable, and reproducible electronic file format.”<sup>92</sup>

Late in the afternoon of May 22—after Respondents had already filed their reply brief and too late for them to file any further response before the next day’s motion hearing—Appellants served Respondents with supplemental responses to Respondents’ RFPs.<sup>93</sup> Specifically, Wadsworth supplemented his responses to RFPs 4, 5, 7, and 8 with the exact same response: “after conducting a reasonable search, there are no responsive documents within his possession or control . . . any documents responsive to this request would be in the possession or control of Hunter Donaldson, LLC.”<sup>94</sup> However, Wadsworth provided no supplemental responses to RFPs 1, 6, 10, 11, and 12.<sup>95</sup> Wadsworth also failed to produce any additional documents.<sup>96</sup>

Likewise, other than producing a single document—her Washington State notary license—Rohlke supplemented her responses to

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<sup>92</sup> CP at 388-89.

<sup>93</sup> CP at 455, 458, 463, 467; VTP (May 23, 2014) at 6.

<sup>94</sup> CP at 455-458.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

RFPs 1, 2, 3, 7, 8, 9, and 10 with the same representation that she had none of the requested documents within her “possession or control” and any responsive documents would be in Hunter Donaldson’s possession or control.<sup>97</sup> However, Rohlke provided no such supplemental responses to RFPs 4, 5, 6, or 13.<sup>98</sup> Notably, Hunter Donaldson did not serve any supplemental responses or produce any additional documents.<sup>99</sup>

On May 23, Judge Serko heard Respondents’ second motion to compel and to impose sanctions. Appellants again asserted that the motion should be denied due to an alleged lack of a CR 26(i) conference.<sup>100</sup> Judge Serko rejected the argument, reasoning,

Isn’t the CR 26(i) reference [sic] now moot *because the Court entered an order* on March 28<sup>th</sup> that required there be full compliance?

....

So the requirement of CR 26(i) is over, that would have come in March.<sup>101</sup>

Appellants also raised the fact of their eleventh-hour supplemental responses to some of the RFPs that only Hunter Donaldson, not Appellants, had possession, custody, or control of the documents.<sup>102</sup> Contrary to Appellants’ misrepresentations, Judge Serko addressed these contentions in the following extended colloquy with Respondents’

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<sup>97</sup> CP at 463-467; VTP (May 23, 2014) at 6.

<sup>98</sup> CP at 463-467.

<sup>99</sup> CP at 423.

<sup>100</sup> VTP (May 23, 2014) at 5.

<sup>101</sup> VTP (May 23, 2014) at 5 (emphasis added).

<sup>102</sup> *Id.* at 5.

counsel:

THE COURT: My question for you, Mr. Gallagher, is you said you did receive response from Rohlke and Wadsworth yesterday that they do not have any documents in their possession; why would you then get a joint and several liability order against them for sanctions?

MR. GALLAGHER: Your Honor, it's not just that, it's the interrogatory objections as well. *And they only responded to some of the request for production*, I didn't have a chance to really outline which ones those were. They only responded to several of them.

THE COURT: And I haven't looked at them in detail too. *I mean, I'm now looking through it just to see what the objections are*

....

MR. GALLAGHER: *Right. And they only responded to, just like I say, just a handful of requests for production.*

THE COURT: Okay.

MR. GALLAGHER: And, once again, and the responses were hiding behind the company where they work where *Ralph Wadsworth is the President and CEO, where Ms. Rohlke - -*

THE COURT: And remains the President and CEO?

MR. GALLAGHER: I believe so, Your Honor. That's my understanding.

THE COURT: All right. *And what about Rohlke?*

MR. GALLAGHER: *She still works there. That's her father, her father's company.* Her husband works there. Her mother works there.

THE COURT: Thank you.<sup>103</sup>

When pressed by Judge Serko for a response, Appellants offered no rebuttal to these factual representations, instead shifting to an argument that the March 28 order “was not regarding the content of any discovery, it was regarding when it had to be answered”; that Hunter Donaldson and Appellants had answered the discovery requests; and they had not violated the Order.<sup>104</sup>

Finally, Respondents’ counsel pointed out the boilerplate nature of Hunter Donaldson’s and Appellants’ objections in their initial responses to the discovery requests; detailed the relevance of the discovery to Respondents’ claims; and identified the lesser sanction of coercive *per diem* monetary sanctions as having the necessary “teeth” to compel Hunter Donaldson’s and Appellants’ compliance, as opposed to the “more draconian” sanctions of striking pleadings or entering default judgments.<sup>105</sup>

Ultimately, Judge Serko made the following oral rulings:

THE COURT: Thank you. This will be my ruling. I am going to impose a daily sanction between now and May 30<sup>th</sup> for \$100.00 per day, between now and May 30<sup>th</sup>, until ***proper answers are produced, documents are produced***, and the appropriate signatures are on all the documents. So that’s in essence giving Hunter Donaldson, Rohlke and Wadsworth an additional week -- which I think is pretty generous, frankly, but I will impose that \$100.00 per day between now and May 30<sup>th</sup>. After May 30<sup>th</sup>, I’m imposing

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<sup>103</sup> *Id.* at 9-10 (emphases added).

<sup>104</sup> *Id.* at 10-11.

<sup>105</sup> *Id.* at 7-8.

\$1,000.00 per day. *I think my order was quite clear in March, and I also think -- I agree with Mr. Gallagher that the interrogatories and request for production are tailored to the issues in this case, are not overbroad or vague, and should be completely answered.* I'm also imposing \$2,500.00 in attorney's fees for Mr. Gallagher's presence.<sup>106</sup>

Judge Serko requested that Respondents' counsel prepare the written order and call Appellants' counsel and read it "so he's satisfied that it conforms to my ruling."<sup>107</sup>

That same day, the trial court entered the written order ("May 23 Order"). The May 23 Order expressly provided:

Defendant Hunter Donaldson, Wadsworth [sic] and Rohlke are hereby Ordered to produce full and complete responses to Plaintiff's first Interrogatories and Requests for Production of Documents, *specifically including all responsive documents* and sign the same.<sup>108</sup>

The May 23 Order further provided that

Defendant Hunter Donaldson, Wadsworth and Rohlke are *jointly* ordered to pay \$2500.00 in attorney's fees, and pay sanctions until they comply with this order, as follows:

Wadsworth, Rohlke and Hunter Donaldson shall jointly pay \$100.00 per day through May 30, 2014, and \$1000.00 per day for each day after May 30, 2014, for each day that Hunter Donaldson, Rohlke, and Wadsworth have not fully answered Plaintiffs' Interrogatories, *produced full and complete responses to Plaintiffs' Requests for Production*, signed the discovery requests, and delivered the same to Plaintiffs' counsel.<sup>109</sup>

Finally, next to the signature line for Appellants' counsel, the May

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<sup>106</sup> *Id.* at 11-12 (emphasis added).

<sup>107</sup> *Id.* at 12.

<sup>108</sup> CP at 430 (emphasis added).

<sup>109</sup> CP at 430 (emphases added).

23 Order expressly stated: “Terms of the order were read to Mr. Perisho via phone. No objection.”<sup>110</sup>

3. Appellants’ continued attempts to evade court-ordered discovery via Hunter Donaldson’s bankruptcy and Respondents’ First Motion for Entry of Judgment

On May 29—at the brink of a ten-fold increase in the *per diem* sanctions—Appellants served their Second Supplemental Responses to Respondents’ Interrogatories and Requests for Production.<sup>111</sup> Specifically, Wadsworth supplemented his responses to RFPs 1, 6, 10, and 12 to assert for the first time that any responsive documents were in the possession, custody, or control of Hunter Donaldson, not his own.<sup>112</sup> In response to RFP 11, requesting tax returns for previous years, Wadsworth also objected for the first time on the basis that “this request calls for the production of private and privileged information.”<sup>113</sup> Wadsworth did not elaborate on this objection or produce a privilege log. And, again, Wadsworth failed to produce any additional documents in responses to any of Walker’s RFPs.<sup>114</sup>

Similarly, Rohlke’s supplemented her response to RFP 13 to assert for the first time that all responsive documents were in Hunter Donaldson’s possession, custody, or control.<sup>115</sup> Rohlke also supplemented

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<sup>110</sup> CP at 431.

<sup>111</sup> CP at 423.

<sup>112</sup> CP at 437-440.

<sup>113</sup> CP at 439.

<sup>114</sup> CP at 423; 496.

<sup>115</sup> CP at 450.

her response to RFP 6, requesting her previous tax returns, to object for the first time that it “calls for the production of private and privileged information.”<sup>116</sup> Additionally, Rohlke supplemented her response to RFP 5 to state that she would “produce documents as a result of a reasonable search.”<sup>117</sup> The same day, she produced via email five additional pages of documents: (1) her “Declaration of Applicant” for her Washington State notary application; (2) her Notary Public Bond for California; (3) her California notary public commission; and (4) her California marriage license.<sup>118</sup> The email stated that the production “constitute[ed] all identified responsive documents in Ms. Rohlke’s possession, custody, or control,” although it again failed to identify the RFPs to which the documents were responsive.<sup>119</sup>

Finally, and yet again, Hunter Donaldson produced no documents or attempted to supplement its discovery responses. On June 9, Respondents’ counsel wrote to Appellants’ counsel about Hunter Donaldson’s total lack of production, as well as the continuing “little or no production” from Appellants.<sup>120</sup> Respondents’ counsel reminded Appellants’ counsel of “the sanctions continuing to mount against [them]” and stated he wanted to “make sure I am not missing anything due to a

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<sup>116</sup> CP at 449.

<sup>117</sup> CP at 449.

<sup>118</sup> CP at 538, 540-44.

<sup>119</sup> CP at 538.

<sup>120</sup> CP at 478.

transmission error or a misunderstanding.”<sup>121</sup> Respondents’ counsel also invited Appellants’ counsel to talk in order “to understand better what is happening on your end.”<sup>122</sup>

Appellants or their counsel made no attempt to respond. Instead, on June 17, Hunter Donaldson filed a petition for Chapter 11 bankruptcy.<sup>123</sup> Hunter Donaldson’s petition came less than a week before Respondents were scheduled to depose Wadsworth, Rohlke, Hunter Donaldson’s CR 30(b)(6) representative, and other Hunter Donaldson employees.<sup>124</sup> Respondents were forced to cancel the depositions—wherein their counsel planned to question Wadsworth and Rohlke under oath regarding whether any of the unproduced documents were within their possession, custody, or control—due to Appellants’ representations that the petition prohibited their depositions from going forward.<sup>125</sup>

On July 17, without any indication that Appellants intended to complete their compliance with the trial court’s orders, Respondents moved to reduce the sanctions accumulated to that date—\$51,300—to judgment against Wadsworth and Rohlke.<sup>126</sup> Specifically, Respondents asserted that Wadsworth—by withholding documents responsive to RFPs

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> CP at 589.

<sup>125</sup> See CP at 614 (Appellants’ attempts to use bankruptcy proceedings to prohibit their depositions renoted for August 2014); CP at 952-955 (October 28, 2014 deposition wherein Wadsworth testifies regarding his possession, custody, and control over requested discovery); CP at 957-961 (October 29, 2014 deposition wherein Rohlke testifies regarding the same).

<sup>126</sup> CP at 409-411.

1, 6, 10, and 12—and Rohlke—by withholding documents responsive to RFP 13—continued to violate the May 23 Order.<sup>127</sup> Respondents refuted Appellants’ new contention that those documents were within the possession, custody, or control of Hunter Donaldson—not their own—by reminding the trial court that Wadsworth was the corporation’s owner; Rohlke was Wadsworth’s daughter and a corporate officer; and, by virtue of their positions, both undoubtedly had the ability to procure those documents from the business they owned, operated, or worked for each day.<sup>128</sup>

Respondents also asserted that Appellants continued to violate the May 23 Order by withholding their tax returns under a newly-asserted “private and privileged” boilerplate objection.<sup>129</sup> Respondents argued that the time for objections had passed after the May 23 Order expressly required the production of “all responsive documents” without exception.<sup>130</sup> Finally, Respondents once again directed Appellants to Washington precedent stating that boilerplate, conclusory objections are an insufficient basis for withholding discovery.<sup>131</sup>

On July 29—12 days after Respondents filed their motion and three days before the motion hearing—Hunter Donaldson filed an

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<sup>127</sup> CP at 412-413.

<sup>128</sup> CP at 415-416.

<sup>129</sup> CP at 412-413; 416.

<sup>130</sup> CP at 416.

<sup>131</sup> *Id.*

emergency motion for preliminary injunction in bankruptcy court.<sup>132</sup> Hunter Donaldson referred to Respondents' pending motion for entry of judgment and asked the bankruptcy court to "issue a preliminary injunction staying any and all actions" against Wadsworth or Rohlke "in the Washington State Litigation."<sup>133</sup> Hunter Donaldson represented that Rohlke "[was] an integral part of Hunter Donaldson's day-to-day operations"; "work[ed] . . . to ensure Hunter Donaldson's data systems are connected to [its client] hospitals"; "post[ed] all payments made to Hunter Donaldson"; and "regularly audit[ed] patient accounts."<sup>134</sup>

Likewise, Hunter Donaldson represented that Wadsworth "[was] also intimately involved in running the company" and "remain[ed] an equal part of every business decision"; "all issues [were] brought to him" on a day-to-day basis and at weekly meetings; he "ma[de] all necessary decisions"; and he "[was] also an integral part of every decision affecting the growth, direction, and long-term strategy of the company."<sup>135</sup>

On July 30, Appellants filed their opposition to Respondents' motion for entry of judgment.<sup>136</sup> As with the bankruptcy court, Appellants represented to the trial court that they were "essential to the day-to-day operations of the company."<sup>137</sup> Appellants relied on (1) their conclusory

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<sup>132</sup> CP at 614.

<sup>133</sup> CP at 616.

<sup>134</sup> CP at 511-512. The motion makes further representations regarding Rohlke's role and authority within Hunter Donaldson. *Id.*

<sup>135</sup> CP at 512.

<sup>136</sup> CP at 479.

<sup>137</sup> CP at 484, 496.

assertions that certain documents were not within their possession, custody, or control; (2) their representations that their original, boilerplate overbreadth and burdensome objections or newly-asserted, boilerplate “private and privileged” objections to the requests for Appellants’ tax returns had never been addressed in a CR 26(i) conference, in briefing, in oral argument before the trial court, or in the trial court orders<sup>138</sup>; and (3) their argument that entry of a judgment jointly payable by Hunter Donaldson and Appellants would violate the automatic bankruptcy stay of proceedings against Hunter Donaldson.<sup>139</sup>

On July 31, the bankruptcy court denied Hunter Donaldson’s motion for a preliminary injunction.<sup>140</sup> That same day, Respondents filed their reply brief, asserting that (1) based on Appellants’ representations to various courts regarding their roles and authority within Hunter Donaldson, it was inconceivable that they lacked control over the requested emails, work schedules and calendars, and cellular telephone bills; (2) Appellants’ boilerplate objections to the requests for their tax returns were untimely after two orders compelling production and insufficient to withhold production under Washington law; (3) the parties

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<sup>138</sup> These representations were patently false. As discussed above, Walker addressed the insufficiency of boilerplate objections in *every single motion previously filed*. Moreover, after engaging in a colloquy with Walker’s counsel, Judge Serko also expressly rejected Appellants’ overbreadth, burdensome, and not reasonably tailored objections at the May 23 hearing. VTP (May 23, 2014) at 11-12. Finally, counsel had engaged in a telephonic CR 26(i) conference regarding Appellants’ production of objections rather than document before Walker filed her second motion to compel. CP at 296, 381.

<sup>139</sup> CP at 485-489.

<sup>140</sup> CP at 557; 636-637.

were likewise well beyond the point of CR 26(i) conferences after two court orders compelling production of all responsive documents; and (4) entry of a judgment payable only by Appellants was appropriate, given their ongoing violation of court orders and the bankruptcy court's rejection of their last-minute attempt to use Hunter Donaldson's bankruptcy as a shield from the consequences of their own misconduct.<sup>141</sup>

On August 1, Judge Serko heard the motion for entry of judgment.<sup>142</sup> Respondents' counsel began by addressing the possession, custody, or control of some of the requested documents, such as their work emails, calendars, and cellular phone bills, reminding Judge Serko of Appellants' own representations of their roles and authority within Hunter Donaldson and arguing:

And they're coming to court telling you that they can't sit down at their desk and either hit "print" on their computer, or they can't put a CD in and burn the documents onto the CD. That's their excuse that the documents are in the possession of Hunter Donaldson, and that is not a valid objection.<sup>143</sup>

Judge Serko then inquired about the effect of the bankruptcy proceedings.<sup>144</sup> Appellants' counsel stated that no judgment could be entered against Hunter Donaldson, but agreed with Judge Serko that

[i]f you segregate out Hunter Donaldson and choose to address the issue of what Ralph Wadsworth and Rebecca Rohlke did with respect to their documents, you can

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<sup>141</sup> CP at 548-552.

<sup>142</sup> VTP (Aug. 1, 2014) at 3, 5.

<sup>143</sup> *Id.* at 7.

<sup>144</sup> *Id.* at 9.

probably do that.<sup>145</sup>

Judge Serko then rejected Appellants' counsel's argument that Walker wanted Appellants "to have control of documents they don't have" and that there was no manner of distinguishing between Appellants and Hunter Donaldson in terms of ability to produce the documents, stating:

That's not a problem. I'm going to make that distinction.

....

What I'm going to order is that they have failed to produce what's in their possession. And I can't believe that they don't have written electronic communications between Wadsworth and Adams, work schedules or calendars, cell phone bills. I mean, that seems to be pretty straightforward.<sup>146</sup>

Judge Serko then addressed Appellants' newly-asserted "private and privileged" objection and complaint that it had not been addressed, stating, "We're beyond that. The order that was entered in May, that was the point at which you talk about 26(i), not now . . . I entered an order compelling and entering sanctions; so that issue is moot."<sup>147</sup>

Afterward, Appellants' counsel again protested regarding the emails, work calendars, and cellular phone bills, arguing that, because they were "owned" and possessed by Hunter Donaldson, "nothing [could] be done to force that those documents be turned over."<sup>148</sup> And Respondents' counsel once again countered that the salient point was not Hunter

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<sup>145</sup> *Id.* at 10.

<sup>146</sup> *Id.* at 13-14.

<sup>147</sup> *Id.* at 14-15.

<sup>148</sup> *Id.* at 15.

Donaldson's possession, custody, or control over those documents, but Appellants' access to and control over the documents through their positions within Hunter Donaldson.<sup>149</sup> Respondents' counsel argued, "They have access to those piece [sic] of information and they're using [Hunter Donaldson] as a shield to avoid discovery and that should not be condoned."<sup>150</sup>

Immediately afterward, Judge Serko agreed, ruling: "***It's not being condoned . . . [t]he relief requested today is to . . . enter judgment, and I'm going to do that . . . [s]o whatever it is through today, I'm prepared to enter an order against [Appellants] only.***"<sup>151</sup> For a third time, Appellants' counsel interjected, attempting to goad Judge Serko into including language in the order emphasizing that the documents belonged to Hunter Donaldson.<sup>152</sup> However, Judge Serko saw through the ruse and flatly refused:

I'm not putting that in the order. I appreciate exactly what you're trying to have me do, which is to suggest that I am ordering the company to produce those; I am not. I'm ordering -- ***I already ordered Wadsworth and Rohlke to produce those records and they've failed to do it.***

. . . .

I mean, as you can tell, I'm not very happy about what's happened in this case. ***I think Rohlke and Wadsworth and frankly Hunter Donaldson have been evading the Court's orders.*** So I'm prepared to enter that judgment and I'm not

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<sup>149</sup>

<sup>150</sup> *Id.* at 16.

<sup>151</sup> *Id.* at 16-17 (emphasis added).

<sup>152</sup> *Id.* at 16-17.

going to argue about it anymore.<sup>153</sup>

Judge Serko entered an order (“August 1 Order”) “[f]inding that [Appellants] remain in violation of the Court’s May 23 order compelling discovery responses—including all responsive documents—” and directing entry of judgment against Appellants for \$51,300, as well as entering the judgment itself.<sup>154</sup>

#### 4. Respondents’ Second Motion for Entry of Judgment

After entry of the August 1 Order, when Respondents merely attempted to record and serve the judgments on Appellants, Appellants—by then represented by their current counsel—countered with a cease and desist letter contending that the judgments were not final and threatening to move for sanctions against Respondents.<sup>155</sup> However, despite devoting the time and expense to retaining new attorneys and threatening Respondents with sanctions, Appellants could spare none toward producing any of the outstanding discovery.<sup>156</sup> Accordingly, on September 17, 2014, Respondents filed a second motion for entry of judgment against Appellants for the sanctions incurred between July 18 and that date—\$70,000—as well as a finding that they were in contempt of court.<sup>157</sup> Two days later, on September 19, Appellants produced the tax

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<sup>153</sup> *Id.* at 17 (emphases added). Incredibly, for a fourth time, Appellants’ counsel then tried to bait Judge Serko into stating that a portion of the judgment would include an amount for Hunter Donaldson’s failure to produce documents, despite Judge Serko’s repeated statements that she was segregating out Hunter Donaldson and its misconduct as a basis for the judgment and was entering a judgment based solely on Appellants’ failure to produce accessible documents. *Id.* at 18.

<sup>154</sup> CP at 566-574.

<sup>155</sup> CP at 657.

<sup>156</sup> CP at 589-590.

<sup>157</sup> CP at 576-577; VRP (Sept. 26, 2014) at 4.

returns requested by Respondents in discovery, but continued to withhold production of the remaining outstanding discovery.<sup>158</sup> Specifically, Wadsworth continued to claim he did not have possession, custody, or control over any electronic communications between him and Jason Adams, documentation relating to liens filed by Hunter Donaldson, his work schedules or calendars, or his cellular phone bills.<sup>159</sup> Rohlke claimed only that she did not have possession, custody, or control over her cellular phone bills.<sup>160</sup>

At the September 26 hearing before Judge Costello on the motion, Appellants' counsel stated, "Judge Serko was clear . . . with respect to the tax returns, we've dealt with that."<sup>161</sup> Appellants' counsel, however, still maintained that Judge Serko had not ordered Appellants to produce documents within Hunter Donaldson's possession.<sup>162</sup> Judge Costello stated that he was not concerned with whether the documents were "property of the company," remarking that Judge Serko had concluded Appellants could access the documents and again posed the access question to Appellants' counsel.<sup>163</sup> After an extended colloquy, Judge Costello ruled:

I am not satisfied from the defense here that – that Wadsworth and Rohlke are unable to access this data that is

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<sup>158</sup> CP at 865, 870.

<sup>159</sup> CP at 865.

<sup>160</sup> CP at 870.

<sup>161</sup> CP at

<sup>162</sup> VRP (Sept. 26, 2014) at 22.

<sup>163</sup> *Id.* at 24.

-- that is sought. I have to conclude from what I've seen in this record, and heard, that it is -- this data is within their possession and control. And I'm not talking about the LLC's -well, I agree with Mr. Gallagher's assertions here that this is an effort to obtain discovery to prosecute claims against defendants other than the LLC for whose benefit a stay has been -- has been entered.

So I will sign an order that they produce this material, or an order consistent with what Judge Serko had signed before. You know, willfulness under the law is -- can be found, and is found, when a party has the ability to comply, and there's no good excuse. I don't think there's a good excuse. So within the meaning of Civil Rule 37, I'm willing to sign an order that -- that finds these individuals in contempt of previous court orders. That's how I see it. I agree with Judge Serko's views that these individuals are indeed evading court orders.<sup>164</sup>

When asked for clarification, Judge Costello reiterated:

I believe that the -- even though Judge Serko didn't -- wasn't asked to and doesn't formally find that it was contemptuous, I believe that it is.

Mr. Cramer, you've respectfully and appropriately argued, you know, the positions here, but I think these individuals are -- are indeed trying to hide behind the form of an LLC and they don't want to comply. That's the conclusion that I draw from what the evidence is. And the sanctions should continue, and will continue.<sup>165</sup>

Accordingly, Judge Costello entered a written order finding Appellants in contempt of the May 23 Order under CR 37(b)(2)(D) and directing entry of a second judgment of \$70,000 against them.<sup>166</sup>

5. Respondents' Third Motion for Entry of Judgment

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<sup>164</sup> *Id.* at 28-29.

<sup>165</sup> *Id.* at 30.

<sup>166</sup> CP at 910-913, 928-930.

Despite two monetary judgments entered against them and continuing *per diem* monetary sanctions, Appellants made no further document productions until October 15, 2014.<sup>167</sup> The production consisted of almost 45,000 pages of documents, including many thousands of pages of emails between Appellants and Adams and work calendar entries that had first been requested from Appellants in *May 2013*.<sup>168</sup>

On October 28 and 29, 2015, Respondents deposed Appellants.<sup>169</sup> Appellants both admitted that, even up to the date before their depositions, they had unfettered access to their emails and work calendars, confirming Judge Serko's and Judge Costello's earlier rejections based on additional evidence that these documents were outside Appellants' possession, custody, or control.<sup>170</sup>

Subsequently, on December 4, 2014, Respondents filed a successful motion for entry of a third judgment against Appellants for the sanctions accumulated to that date, \$18,000.<sup>171</sup> This appeal followed.

#### IV. ARGUMENT AND AUTHORITY

##### A. Standard of Review

Previous panels of this Court have held that this Court reviews a trial court's authority to hear a motion to compel *de novo*. *Clarke v. Office of Att'y General*, 133 Wn. App. 767, 779-80, 138 P.3d 144 (2006);

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<sup>167</sup> CP at 950.

<sup>168</sup> *Id.*

<sup>169</sup> CP at 952, 957.

<sup>170</sup> CP at 953-955; 958-961.

<sup>171</sup> CP at 939, 1140-1142, 1151-1153.

*Case v. Dundom*, 115 Wn. App. 199, 201, 58 P.3d 919 (2002) (stating the same); *Rudolph v. Empirical Research Sys., Inc.*, 107 Wn. App. 861, 866, 28 P.3d 813 (2001) (stating the same); *but see Amy v. Kmart of Wash., LLC*, 153 Wn. App. 846, 855-858, 223 P.3d 1247 (2009) (applying an abuse of discretion standard and rejecting a de novo standard in light of existing Washington Supreme Court precedent, federal precedent, and harmonization of Washington's civil rules).

In contrast, Washington trial courts have “broad discretion as to the choice of sanctions for violation of a discovery order,” and, accordingly, all Washington appellate courts review a trial court's order of sanctions for noncompliance with discovery orders for abuse of discretion. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002). Abuse of discretion occurs when the trial court's decision rests on untenable grounds or when no reasonable judge would have reached the same conclusion. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006); *Byerly v. Madsen*, 41 Wn. App. 495, 499, 704 P.2d 1236, *review denied*, 104 Wn.2d 1021 (1985).

**B. The Trial Court Had Authority to Consider Respondents' Second Motion to Compel**

1. Respondents fully complied with this Division's precedent regarding CR 26(i)'s conference requirement before filing their second motion to compel

Appellants argue that Respondents failed to comply with CR 26(i)'s conference requirement before filing their second motion to compel, thus depriving the trial court of authority to hear that motion and

requiring vacation of the May 23 Order and all other subsequent, resulting orders.<sup>172</sup> However, Appellants' argument fails because the record demonstrates that Respondents fully complied with any and all of CR 26(i)'s requirements before filing the motion.

CR 26(i) provides:

The court *will not* entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. ***If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b).*** Any motion seeking an order to compel discovery or obtain protection *shall* include counsels' certification that the conference requirements of this rule have been met.

Emphases added. The drafters' comment to the rule provides that its purpose is "twofold: to encourage professional courtesy between attorneys, and to reduce the number of discovery controversies before the courts." 3A WASHINGTON PRACTICE: RULES PRACTICE CR 26 (6th Ed. 2015). Previous panels of this court, relying on the phrases "will not" and "shall," have ruled that the telephonic conference and certification requirements are mandatory and, in their absence, a trial court has no authority to hear a discovery motion. *Clarke*, 133 Wn. App. at 780; *Case*, 115 Wn. App. at 203; *Rudolph*, 107 Wn. App. at 866-867. As stated by those previous panels, the rule requires "literal compliance." *Case*, 115

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<sup>172</sup> Brief of Appellants at 17-26.

Wn. App. at 203. Although this Court has not specified what “certification” requires, this Court has concluded that the “conference” requirement requires “a contemporaneous two-way communication.” *Clarke*, 133 Wn. App. at 780.

This Court may affirm on any grounds supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). Here, the record demonstrates that both the letter and the purpose of CR 26(i) were satisfied. By Appellants’ own representations to the trial court, a telephonic discussion occurred on May 2, 2014 before Respondents filed their second motion to compel on May 15.<sup>173</sup> The record demonstrates that the discussion concerned Appellants’ failure to produce any documents responsive to Respondents’ discovery requests in the wake of the trial court’s rejection of Appellants’ contention that the temporary removal to federal court obviated Respondents’ discovery requests and the trial court’s March 28 Order imposing the April 25 deadline for Hunter Donaldson and Wadsworth responding to those requests.<sup>174</sup> Appellants then produced a handful of the responsive documents on May 2 and May 6, but not the vast majority. Moreover, two days before Respondents filed their second motion to compel, Respondents’ counsel once again reached out to Appellants’ counsel as a courtesy via email requesting confirmation that the remaining documents would be produced in order to avoid filing the motion. Accordingly, the record demonstrates both that a telephonic

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<sup>173</sup> CP at 296, 381.

<sup>174</sup> *Id.*

discovery conference on these issues occurred and that Respondents' second motion to compel certified that CR 26(i)'s requirement had been met.<sup>175</sup> Thus, the trial court did not err in hearing Respondents' second motion to compel, and the May 23 Order or any subsequent orders stemming from that order should not be vacated.

Moreover, even if this Court concludes that CR 26(i)'s conference requirement was not strictly met, the record demonstrates that the trial court appropriately heard the second motion to compel under the rule's "failed to confer in good faith" provision. As discussed above, on May 2, counsel for the parties telephonically conferred regarding document production, and Respondents' counsel specified some productions to prioritize. However, the record is devoid of any release of Appellants' obligations under the May 23 Order or court rules to produce all the requested documents. When Appellants failed to produce the remaining requested documents by May 13, Respondents requested confirmation

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<sup>175</sup> Respondents anticipate that Appellants will argue that the certification was insufficient because it stated that the parties had concurred via email, rather than by telephone. But CR 26(i)'s plain language requires only that the certification state that "the conference requirements of this rule have been met," without further specification. Likewise, Washington precedent has not specified what the "certification" requires. *Clarke*, 133 Wn. App. at 780. Here, Respondents' certification met the only criteria provided by CR 26(i)'s language: it certified that the rule's conference requirement had been met. Thus, the certification was sufficient.

However, even if the certification was insufficient, any error in hearing Respondents' second motion to compel despite the insufficient certification was harmless. Under CR 26(i)'s plain language, the only procedural prerequisite for a hearing on a discovery motion is that a telephonic or in-person conference actually took place: "The court *will not* entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred." Here, even if the certification that the parties conferred via email was insufficient, Appellants represented to the trial court that a telephonic discussion regarding the requested document productions occurred before Respondents filed their second motion to compel. Accordingly, any insufficiency in the certification was harmless.

from Appellants that the remaining documents would be produced in order to avoid filing the second motion to compel, but received no response from Appellants.<sup>176</sup> Thus, Appellants' total lack of response demonstrates that, if any subsequent conference was necessary, Appellants failed to confer in good faith or any attempt to confer would have been futile.

2. Respondents telephonically conferred with Rohlke's counsel before filing their second motion to compel

Appellants also contend that the trial court erred in hearing Respondents' second motion to compel with respect to Rohlke because Respondents failed to confer with her or her counsel before filing the motion.<sup>177</sup> But the record belies this contention. At the time Respondents filed the motion, both Hunter Donaldson and Appellants were represented by Stephen Perisho. As discussed above, Mr. Perisho admitted that he and Respondents' counsel held a telephonic discovery discussion on May 2, and the record demonstrates that the discussion total lack of document production by Appellants (which necessarily included Rohlke). Thus, Appellants' argument fails.

3. Even if Respondents did not fully and literally comply with CR 26(i)'s requirements before filing their second motion to compel, this Court should reject previous panel decisions requiring literal compliance, and the trial court appropriately exercised its discretion in hearing the motion

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<sup>176</sup> Respondents anticipate that Appellants will argue that they represented to the trial court that they attempted to contact Respondents regarding further productions, but received no response. However, this Court defers to the trial court for purposes of resolving conflicting testimony and making credibility determinations. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). Here, to any extent that Respondents' assertions were relevant, the trial court necessarily rejected them

<sup>177</sup> Br. of Respondents at 24-26.

- a) *This Division's previous opinions holding that failure to strictly comply with CR 26(i)'s deprives a trial court of discretion to hear a discovery motion are inconsistent with Washington law*

Even if Respondents did not literally comply with CR 26(i)'s requirements before filing their second motion to compel, this Court can and should reject the previous panel decisions in *Rudolph, Case*, and *Clarke* construing CR 26(i)'s prerequisites as "mandatory" and limiting a trial court's discretion to hear a discovery motion.<sup>178</sup> With all respect to the previous panels, such an interpretation of the rule is contrary to ordinary principles of statutory construction, the intent of CR 26(i)'s drafters, and Washington precedent regarding a trial court's broad discretion in managing discovery.

First, Washington courts interpret court rules in the same manner as statutes. *Jafar v. Webb*, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013). If a statute's meaning is plain on its face, then this Court gives effect to that plain meaning as an expression of legislative intent. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). In determining the plain language of a statute, this Court considers "the ordinary meaning of words, basic rules of grammar, and the statutory context." *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 838, 215 P.3d 166 (2009). However, this Court also "gives effect to

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<sup>178</sup> This Court is not bound by previous panels' opinions. *Compare State v. McCormick*, 152 Wn. App. 536, 539-540, 216 P.3d 475 (2009), with *State v. Cross*, 156 Wn. App. 568, 577-578, 234 P.3d 288 (2010) (two different panels of this court taking diametrically opposite positions on whether a criminal defendant could challenge a vehicle search for the first time on appeal based on *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)).

all statutory language, considering statutory provisions in relation to each other and harmonizing them to ensure proper construction.” *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 560, 14 P.3d 133 (2000). “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010) (internal quotation marks omitted) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003))). This Court also avoids readings that produce absurd results because “it will not be presumed that the [drafters] intended absurd results.” *Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020, 1026 (2007).

The previous panel decisions construing CR 26(i) as stripping a trial court of its authority to hear a discovery motion unless the moving party strictly and literally complies with its prerequisites relied on the general principle of statutory interpretation that the terms “will not” and “shall” “are mandatory,” not permissive. *Case*, 115 Wn. App. at 202; *Rudolph*, 107 Wn. App. at 866. However, imperative terms such as shall are only *presumptively* mandatory and, thus, do not necessarily end the Court’s inquiry. *State v. Rice*, 174 Wn.2d 884, 896, 279 P.3d 849 (2012). As our Supreme Court has held regarding terms like “shall,” their meaning “is not gleaned from [use of] that word alone because our purpose is to ascertain legislative intent of the statute [or rule] as a whole.” *Rice*, 174 Wn.2d at 896 (first alteration in original) (quoting *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994)). Indeed, our Supreme Court has,

“[o]n numerous occasions,” interpreted statutes to be “directory or simply permissive,” notwithstanding the use of presumptively mandatory terms, when otherwise consistent with the drafters’ underlying intent. *Rice*, 174 Wn.2d at 899-900 (citing numerous cases). For example, where statutes or rules containing presumptively mandatory terms are intended to guide orderly procedure, not limit power, they should be construed as directory and permissive, not mandatory and imperative. *Niichel v. Lancaster*, 97 Wn.2d 620, 624, 647 P.2d 1021 (1982). Likewise, where the time or manner of exercising a body’s authority is not essential to a statute’s or rule’s purpose, provisions regarding the time or manner should be interpreted as merely directory. *Niichel*, 97 Wn.2d at 624.

Here, CR 26(i)’s prerequisites are intended to guide the procedure for hearing discovery motions: the moving party should first attempt to confer with the non-moving party regarding the discovery issues before filing the motion. As aptly observed by one member of this Court, the rule’s

primary purpose is to minimize the use of judicial resources during discovery, or, in the more formal words of the rule’s drafters, ‘to reduce the number of discovery controversies brought before the courts for adjudication.’ It is not designed to trap the court or the party seeking discovery, or to be a sword in the hands of the party who has not provided discovery.

*Case*, 115 Wn. App. at 205 (quoting 4 WASHINGTON PRACTICE: RULES PRACTICE, Civil Rule 26, § 22, at 13 (6th Ed. Supp. 2001)) (Morgan, J., dissenting); *accord Amy*, 153 Wn. App. at 857-858. “The

rule's purpose is to *assist* the court in policing discovery, not to *impede* the court in *policing* discovery." *Case*, 115 Wn. App. at 206 (Morgan, J., dissenting) (emphases in original). Given this purpose, "the rule should be a shield that protects the court from becoming involved in half-baked discovery disputes, not a sword for the discovery violator to wield against the court." *Id.* at 205.

Accordingly, the rule's underlying purpose requires a directory, permissive interpretation allowing the trial court to exercise discretion in enforcing or waiving CR 26(i)'s requirements. *Amy*, 153 Wn. App. at 857-858; *Case*, 115 Wn. App. at 205-206 (Morgan, J., dissenting). Such an interpretation would give effect to the rule's requirements by giving "notice to the parties that the court has discretion not to consider a motion to compel in the absence of a conference and certification," but would not "eliminate the court's discretion to manage discovery proceedings in a fair and expeditious way." *Case*, 115 Wn. App. at 206 (Morgan, J., dissenting). Such an interpretation would also avoid the absurd result anticipated by Judge Morgan in a hypothetical and presented by this appeal: a nonmoving party being able to vacate discovery orders entered against it solely on some technical deficiency with the conference and certification requirement, despite a record demonstrating that the nonmoving party had violated the discovery rules and a conference would not have served any purpose. *Case*, 115 Wn. App. at 206 (Morgan, J., dissenting). Such a result absurdly and impermissibly elevates form over substance and must be avoided through a directory, permissive

interpretation of CR 26(i).

Moreover, a directory, permissive interpretation of CR 26(i) is necessary under principles of statutory interpretation to give effect to CR 26(i)'s "failed to confer in good faith" provision. If the nonmoving party willfully refuses to confer or fails to confer in good faith, no discovery conference occurs and the moving party cannot truthfully certify that the conference requirement was met. However, under this division's current, literal reading of the rule, a trial court has *absolutely no* authority to hear a discovery motion absent those conditions. Thus, this literal reading of the rule renders the "failure to confer" provision a nullity; the provision would never apply because trial courts could only hear discovery motions where a conference actually occurred and certification is possible, thus leaving moving parties without a mechanism for seeking relief despite a nonmoving party's evasion of conferencing. In contrast, a directory, permissive interpretation would allow the trial court discretion to hear the motion and enter an order compelling discovery or sanctions against an evasive, nonmoving party despite a lack of literal compliance with the rule.

Second, a directory, permissive interpretation allowing the trial court discretion to enforce or waive CR 26(i)'s requirements is consistent with other provisions of the civil rules. As Division One observed in *Amy*, CR 1 requires that the civil rules must be "construed and administered to secure the just, speedy, and inexpensive determination of every action." 153 Wn. App. at 855 (quoting CR 1). Thus, giving CR 26(i) a directory,

permissive interpretation would harmonize that rule with CR 1's requirements by giving trial courts the discretion to waive CR 26(i)'s requirements when doing would present the most fair and expeditious option.

Third and finally, giving CR 26(i) a directory, permissive interpretation is consistent with Washington precedent regarding a trial court's role and authority in managing discovery. Trial courts have broad discretion in managing the discovery process, including determining under what circumstances entry of discovery sanctions is appropriate. *O'Connor v. Washington Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 905, 25 P.3d 426 (2001). This is so because our Supreme Court has recognized that trial courts are in a better position to assess discovery issues before them "given the history, contested facts, and context of the discovery issues." *In re Disciplinary Proceeding Against McGrath*, 174 Wn.2d 813, 824, 280 P.3d 1091 (2012). Relying on this well-established precedent, Division One reasoned that, in the CR 26(i) context,

We see no persuasive distinction between the rationale for permitting the trial court to exercise its discretion to decide a discovery motion and permitting the trial court to also exercise its discretion whether to hear a discovery motion. In both cases it is the judicial actor who is "better positioned than another to decide the issue in question."

*Amy*, 153 Wn. App. at 855-856 (quoting *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993)). Accordingly, Division One adopted an abuse of discretion standard for reviewing a trial court's decision to hear a discovery motion

even in the absence of strict compliance with CR 26(i). *Amy*, 153 Wn. App. at 856. Given this well-established precedent and well-founded opinion, this Court should reject the previous panel decisions and adopt an abuse of discretion standard of review.

b) *The trial court did not abuse its discretion in deciding to hear Respondents' second motion to compel in the absence of strict compliance with CR 26(i)*

When reviewed under a more appropriate standard, even if Respondents did not strictly comply with CR 26(i)'s requirements before filing their second motion to compel, the trial court did not abuse its discretion in deciding to hear the motion. In *Amy*, the nonmoving party argued that the trial court should not have heard a motion to compel because the moving party's certification failed to state that the parties had conferred in person or telephonically and a motion for sanctions because it entirely lacked a certification. 153 Wn. App. at 860, 862. Division One rejected these arguments, reasoning that the trial court properly heard the motion to compel despite a lack of strict compliance with CR 26(i) because postponing the motion "would have unnecessarily delayed resolution of [an] important issue, increased the expenses to the parties, and wasted court time." *Id.* at 861. Additionally, Division One reasoned that the nonmoving party could not demonstrate any prejudice from the trial court hearing the motion. *Id.* Finally, regarding the motion for sanctions, Division One concluded that even the *complete lack* of a certification of compliance, standing alone, did not preclude the trial court from hearing the motion. *Id.* at 863-864.

As in *Amy*, in this case postponing the motion would have further and unnecessarily delayed the important issue of class certification, an issue Judge Serko specifically warned Appellants at the April 11 hearing that she wanted to resolve before the case rotated to another judge. Likewise, postponing the motion would have unnecessarily increased the expenses to the parties and wasted the trial court's time, particularly where Appellants represented to the trial court that a telephonic discussion regarding the discovery had taken place, Respondents had tried to resolve the issues via email before filing the motion, and the motion included a certification. And, finally, Appellants cannot demonstrate any prejudice resulting from the trial court's decision to hear the motion; for example, Appellants continued to refuse to produce documents *for months* after the hearing based on objections previously and repeatedly rejected by the trial court. Accordingly, the trial court did not abuse its discretion in deciding to hear the motion.

4. Even if Respondents failed to comply with CR26(i)'s requirements, no conference was required as to Wadsworth

Finally, even if Respondents failed to comply with CR 26(i)'s requirements and this Court decides such a failure deprives a trial court of authority to hear a discovery motion, no such conference was required regarding Wadsworth because he was already subject to the March 28 Order compelling discovery responses. Although no on-point Washington precedent exists, numerous federal courts have ruled that "the prior issuance of a court order obviates the need to meet and confer" under

FRCP 37(a)<sup>179</sup> or similar meet-and-confer requirements under federal court local rules before filing a motion for sanctions. *Royal Maccabees Life Ins. Co. v. Malachinski*, No. 96-C-6135, 2001 WL 290308, at \*9 (N.D. Ill. Mar. 20, 2001); *see also Amatangelo v. Nat'l Grid USA Serv. Co.*, No. 04-CV-246S(F), 2007 WL 4560666, at \*6 (W.D.N.Y. Dec. 18, 2007); *Sheehy v. Wehlage*, Civ. No. 02-CV-592, 2007 WL 836816 (W.D.N.Y.2007); *Get-A-Grip, II, Inc. v. Hornell Brewing Co.*, 2000 WL 1201385, at \*2 n. 5 (E.D.Pa. Aug. 8, 2000); *Freiria Trading Co. v. Maizoro S.A. de C.V.*, 187 F.R.D. 47, 49 (D.P.R. 1999); *Reidy v. Runyon*, 169 F.R.D. 486, 491 (E.D.N.Y. 1997). As one federal district court aptly reasoned, it is likely that such a conference would be futile in the face of a party's disregard of a court order. *Freiria*, 187 F.R.D. at 49. As another reasoned, such a conference would have been futile both in the face of the nonmoving party's violation of an order compelling discovery responses and the nonmoving party's admission that it would have simply taken the position that it had already complied with its discovery obligations. *Reidy*, 169 F.R.D. at 491.

As in *Freiria* and *Reidy*, here Wadsworth was in violation of the March 28 Order compelling discovery at the time the trial court entered

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<sup>179</sup> FRCP 37(a) provides:

On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

the May 23 Order imposing sanctions. And, similar to *Reidy*, Appellants—including Wadsworth—repeatedly asserted that they had complied with all their discovery obligations during the May 23 hearing and at each subsequent hearing. Accordingly, the record demonstrates that any conference regarding Wadsworth’s failure to comply with the March 28 Order would have been futile. Thus, even if Respondents failed to meet CR 26(i)’s requirements, at the very least, the trial court did not err in hearing Respondents’ second motion to compel and impose sanctions with respect to Wadsworth.

**C. The Trial Court Properly Exercised Its Discretion in Sanctioning Appellants for Refusing to Produce Documents for Months in Violation of Multiple Court Orders**

1. Washington standards for discovery

Washington law imposes multiple requirements on parties seeking to resist discovery. Both Washington’s civil rules and Washington precedent “are clear that a party must fully answer all interrogatories and all requests for production, *unless a specific and clear objection is made.*” *Johnson v. Mermis*, 91 Wn. App. 127, 132, 955 P.2d 826 (1998) (emphasis added) (quoting *Fisons*, 122 Wn.2d at 353-54). “Blanket” or “boilerplate objections without specificity” violate the discovery rules. *Johnson*, 91 Wn. App. at 133-34. “A party’s failure to comply with deposition or document production rules may not be excused on grounds that the discovery sought is objectionable.” *Id.* “If a party disagrees with the scope of production, or wishes not to respond, it must move for a protective order and cannot withhold discoverable materials.” *Id.* at 133

(citing *Fisons*, 122 Wn.2d at 354); see also *Fellows v. Moynihan*, 175 Wn.2d 641, 649, 285 P.3d 864 (2012) (“The burden of establishing entitlement to nondisclosure rests with the party resisting discovery.”); *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 38, 111 P.3d 1192 (2005) (party seeking to resist discovery must move for a protective order and establish grounds for nondisclosure).

Moreover, as discussed above, Washington law grants trial courts broad discretion in imposing and fashioning sanctions for violations of the discovery rules. *Mayer*, 156 Wn.2d at 684. “The purposes of sanctions orders are to deter, to punish, to compensate and to educate.” *Fisons*, 122 Wn.2d at 356. A party’s disregard of a court order without reasonable excuse or justification is willful. *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 584, 220 P.3d 191 (2009).

2. The trial court properly exercised its discretion in sanctioning Appellants based on entirely clear and consistent court orders

Appellants contend that the trial court abused its discretion in entering its May 23 Order imposing *per diem* sanctions and subsequent orders reducing those sanctions to judgments because the trial court’s oral rulings and written orders were unclear and inconsistent.<sup>180</sup> As an initial matter, both Judge Serko and Judge Costello rejected these arguments as lacking credibility, instead finding that the orders were clear and that Appellants were willfully evading the orders. Accordingly, because

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<sup>180</sup> Br. of Appellants at 25-35.

Appellants' arguments depend on credibility determinations, the trial court's rulings may not be disturbed on appeal. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002).

Even if trial courts' rulings may be disturbed on appeal, Appellants' arguments are meritless. First, Appellants claim that the trial court abused its discretion in entering its May 23 Order imposing *per diem* sanctions for failure to produce documents because its March 28 Order did not clearly require any productions.<sup>181</sup> However, this claim completely ignores the March 28 Order's plain language and context. In their first motion to compel, Respondents made clear that they were seeking discovery *productions*, not mere responses, and directed Appellants to Washington precedent holding that boilerplate objections are an insufficient basis to refuse to produce requested discovery. At the March 28 hearing, Appellants claimed hesitance to simply turn over all the requested documents because some might contain "protected health information" and requested more time to resolve those issues.<sup>182</sup> Judge Serko acknowledged these concerns, but observed that many of the critical requested documents, such as emails, would not involve such protected health information.<sup>183</sup> Thus, in this context, Judge Serko entered the March 28 Order granting Hunter Donaldson and Wadsworth an extension of time to April 25, but also expressly requiring that "[a]ll outstanding

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<sup>181</sup> Br. of Appellants at 26-29.

<sup>182</sup> VTP (Mar. 28, 2014)) at 6-7.

<sup>183</sup> *Id.* at 7-8.

discovery responses [would be] *produced*.”<sup>184</sup> The March 28 Order also expressly required that Appellants had to “*fully answer each* interrogatory or request for production, or provide an objection *justified in law*.”<sup>185</sup> Furthermore, in response to Judge Serko’s concern during the April 11 hearing about resolving as much of the case as possible before its transfer to another judge and her question regarding whether Appellants would be “producing discovery” by April 25, Mr. Perisho affirmatively stated: “[O]ur plan is to *produce* the discovery.”<sup>186</sup> Therefore, the record demonstrates that both the trial court and Appellants fully understood that the March 28 Order presented two clear alternatives: either fully answer each of Respondents’ requests for production—which would necessarily require production of the requested documents—or provide a legally-sufficient objection.

Despite this understanding, however, Appellants<sup>187</sup> failed to

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<sup>184</sup> CP at 282 (emphasis added).

<sup>185</sup> *Id.* (emphases added).

<sup>186</sup> VRP (April 11, 2014) at 11, 23, 26-27.

<sup>187</sup> With respect to Rohlke, Appellants argue on appeal only that the trial court lacked authority to hear the second motion to compel with respect to her due to an alleged lack of a CR 26(i) conference and that, in general, the March 28 Order did not require production of any documents. Critically, Appellants do not argue that the trial court abused its discretion in imposing *per diem* sanctions against Rohlke because the March 28 Order did not apply to her. Appellants may not raise such an argument for the first time in their reply brief. *Cowiche*, 118 Wn.2d at 809.

Even were this Court to consider such an argument, however, it may affirm on any ground supported by the record. *LaMon*, 112 Wn.2d at 200-01. Here, Rohlke was served with Respondents’ discovery requests on September 12, 2013, this case was remanded back to state court on January 23, and a stipulated stay among the parties expired on February 17. Thus, at the very latest, Rohlke’s 30-day or 40-day period under CR 34(b)(3)(A) to respond to Respondents’ discovery requests began running on February 17. 95 days elapsed between February 17 and entry of the May 23 Order. Thus, by any measure, Rohlke’s document productions were severely untimely by May 23, and therefore waived. Moreover, Rohlke’s refusal to produce documents was based on the same legally-insufficient boilerplate objections. Accordingly, the trial court had

produce any documents in response to most of Respondents' requests. Instead, they asserted vague, boilerplate objections despite knowing such objections were not justified in law; that they could not refuse to produce documents based on their naked belief that the discovery was objectionable; and that they were required to move for a protective order if they wished to withhold the documents. Accordingly, the trial court did not abuse its discretion in entering the May 23 Order.

Second, Appellants argue that the trial court abused its discretion in entering the August 1 and September 26 Orders reducing accrued sanctions to judgment against them because the trial court did not clearly state the basis for doing so.<sup>188</sup> Specifically, they contend that the trial court was contradictory and unclear regarding whether it was entering judgment based on Appellants' failure to produce documents within their possession or documents within their control, and, thus, they had a good faith belief that they had complied with the trial courts' orders by representing that they had no further responsive documents in their personal possession.<sup>189</sup>

But this argument is meritless. The record shows that, at the May 23 hearing, the trial court addressed Appellants "lack of possession, custody, or control" arguments, Respondents' counsel asserted that Appellants could produce the documents due to their positions of authority

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reasonable grounds to impose sanctions on Rohlke under CR 37(d)(3).

<sup>188</sup> Br. of Appellant at 29-34.

<sup>189</sup> Br. of Appellants at 31-34.

within Hunter Donaldson, Appellants failed to rebut these facts, and the trial court entered the May 23 Order expressly requiring Appellants to produce “all responsive documents.”<sup>190</sup> In other words, by the time the trial court entered its August 1 and September 26 Orders, even if some lack of clarity existed regarding whether the trial court based on Appellants’ possession, their custody, or their control over the documents, there was nothing unclear about what the trial court *required* of Appellants: they were to produce “all responsive documents.” In the face of Appellants’ continued failure to do so, the trial court was reasonable in entering orders reducing the accrued sanctions to judgment. Accordingly, the trial court did not abuse its discretion in entering the August 1 and September 26 Orders.<sup>191</sup>

3. Appellants waived their “lack of possession, custody, or control” objections or, at the very least, those objections are moot with respect to all sanctions accrued to September 19

Appellants next argue that the trial court abused its discretion in reducing the accrued discovery sanctions to judgments against Appellants because Respondents failed to establish their “control” over the requested

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<sup>190</sup> CP at 430.

<sup>191</sup> However, even if this Court considered Appellants’ “clarity” arguments, any alleged lack of clarity is belied by the record. Appellants focus on a single usage of the word “possession” by the trial court during the August 1 hearing.<sup>191</sup> But Respondents’ motion for entry of judgment, Appellants’ opposition to the motion, and the parties’ arguments at the hearing all focused on Appellants’ *control* over the documents defined in terms of access to them. Simply put, despite any singular misstatement by the trial court, Appellants’ control over the documents constituted the entire context surrounding the August 1’s Order finding that Appellants remained in violation of the May 23 Order requiring production of all responsive documents, without exception. Thus, any “confusion” amongst Appellants regarding the trial court’s basis for ordering them to produce the documents is self-serving and lacks credibility.

work emails, work calendars, and cellular phone records.<sup>192</sup> However, these objections were untimely under the civil rules and, therefore, waived. And, even if the objections were timely, they are moot with respect to all sanctions accrued up to September 19, as Appellants continued to violate the May 23 Order by refusing to produce their requested tax returns until that date.

First, CR 34(b)(3)(A) governs the timing for responses and objections to requests for production and provides,

The responding party shall serve a written response within 30 days after the service of the request, except that the defendant may serve a response within 40 days after service of the summons and complaint upon that defendant.

Here, Respondents served Wadsworth with the summons, complaint, and their discovery requests on May 1, 2013, and 29 days elapsed before Appellants removed the lawsuit to federal court. Respondents served Rohlke with the same documents on September 12, while the case was still in federal court. The case returned to state court on January 23, 2014, and a 30-day stay of the proceedings expired on February 17. Thus, as of February 17, Wadsworth had 11 days and Rohlke had 40 days, respectively, to lodge their objections. However, Appellants failed to make their “lack of possession, custody, or control” objections to Wadsworth RFPs 4, 5, 7, and 8 and Rohlke RFPs 1, 2, 3, 7, 8, 9, and 10—including the requests for emails to and from Adams and Rohlke’s work calendar—until May 22—*94 days later*. Furthermore, Appellants failed to

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<sup>192</sup> Br. of Appellants at 35-42.

lodge their “lack of possession, custody, or control” objections to Wadsworth RFPs 1, 6, 10, and 12—including the requests for Adams emails, work calendars, and cellular phone records—and Rohlke RFP 13—including the request for Rohlke’s cellular phone records—until May 29, *101 days later* and after the trial court had entered its May 23 Order requiring production of “all responsive documents.” Accordingly, the record demonstrates that these objections were untimely both under CR 34(b)(3)(A) and the May 23 Order.

Second, Appellants’ “lack of possession, custody, or control” objections are moot regarding all sanctions accumulated until September 19, 2014, the date Appellants finally produced their previous years’ tax returns in response to Wadsworth RFP 11 and Rohlke RFP 6. Appellants allege that the trial court never addressed their boilerplate “private and privileged” objection to those requests, but do not assign error to the trial court requiring production of those documents or to the trial court’s alleged failure to address the objection.<sup>193</sup> Accordingly, any review of that issue is waived. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 846, 347 P.3d 487 (2015); RAP 10.3(a)(6). Thus, because it is uncontested that Appellants were required to produce their tax returns, but

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<sup>193</sup> And, even if this Court did review this issue, Appellants entirely misstate the record. Appellants only raised the “private and privileged” objection on May 29, *six days after* the trial court had already entered its May 23 Order requiring production of “all responsive documents.” Thus, Appellants’ objection was untimely and therefore waived. Indeed, contrary to Appellants’ misrepresentations, Judge Serko addressed this objection at the August 1 hearing and rejected it as untimely and moot, stating that the time for that objection would have been prior to the May 23 Order. VTP (Aug. 1, 2014) at 14-15. Finally, even had the objection been timely, it constituted the same cursory, boilerplate form of objection that Appellants had repeatedly been notified is insufficient under Washington law to resist discovery.

failed to do so until September 19, the record supports affirming the August 1 Order and judgment on these grounds, as well as the portion of the September 26 judgment representing sanctions accrued up to September 19.

4. The trial court properly exercised its discretion in reducing the discovery sanctions to judgments against Appellants where Appellants, as Hunter Donaldson officers and employees, had “control” over their work emails, work calendars, and cellular phone records

Finally, for any and all orders or judgments challenged on appeal, the trial court properly exercised its discretion in reducing the accumulated sanctions to judgments against Appellants based on its determination that they, as Hunter Donaldson corporate offices, had “control” over their own work emails, calendars, and cellular phone records. CR 34(a)(1) provides in pertinent part:

Any party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party, or the party's representative, to inspect, copy, test, photograph, record, measure, or sample the following items in the responding party's possession, custody, or control: any designated documents, electronically stored information, or things . . . .

“Control, apart from possession, is defined as ‘the legal right to obtain the documents requested upon demand.’” *Diaz v. Washington State Migrant Council*, 165 Wn. App. 59, 78, 265 P.3d 956 (2011) (quoting *Searock v. Stripling*, 736 F.2d 650, 653 (11<sup>th</sup> Cir. 1984)). “Control may also be found where an entity has access to and the ability to obtain the

documents.” *Diaz*, 165 Wn. App. at 78 (citing *Bank of N.Y. v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 144 (S.D.N.Y. 1997); *Addamax Corp. v. Open Software Found, Inc.*, 148 F.R.D. 462, 467 (D.Mass. 1993)). “The burden of demonstrating that the party from whom discovery is sought has the *practical ability* to obtain the documents at issue lies with the party seeking discovery.” *Diaz*, 165 Wn. App. at 78 (citing *Golden Trade S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 525 n. 7 (S.D.N.Y. 1992)).

Here, as early as the May 23 hearing, the trial court addressed Appellants’ “lack of possession, custody, or control” objections. Respondents countered with the facts that Wadsworth was Hunter Donaldson’s President, Chief Executive Officer, and sole owner, while Rohlke was also a corporate officer and, given their role and authority within the company, both had access to their own work emails exchanged with Jason Adams, their own work calendars, and their cellular phone bills and the practical ability to produce those documents. Indeed, Appellants’ own representations to the bankruptcy court and trial court confirmed their “integral” roles of authority within Hunter Donaldson.

Tellingly, Appellants *never* disputed these facts and assertions by stating under oath that they neither had access to nor the practical ability to produce these documents, instead opting to repeat their vague “lack of possession, custody, or control” objections. Indeed, they could not truthfully make such specific statements under oath, as they both confirmed in their October 2014 depositions that, to that very date, they

still had access to and the practical ability to produce the requested documents. Accordingly, the record completely supports the trial court's determination that Appellants had "control" over the documents under CR 34.

Appellants contend, however, that this Court should restrict the meaning of "control" merely to the legal right to obtain the documents on demand.<sup>194</sup> But Appellants never made this argument before the trial court, and may not do so for the first time on appeal. It is well settled that Washington appellate courts "will not review an issue, theory, argument, or claim of error not presented at the trial court level." *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001). An appellant must inform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct any error. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) . Failure to do so precludes raising the error on appeal. *Smith*, 100 Wn.2d at 37, 666 P.2d 351.

Here, Appellants never presented any alternative definition of "control" to the trial court, much less the one they urge this Court to adopt on appeal. Accordingly, this Court should decline to review the issue.

Even if this Court reviewed the issue, however, the record supports the trial court's determination of "control" urged by Appellants. For instance, in *Carrillo v. Schneider Logistics, Inc.*, No. CV 11-8557-CAS DTBX, 2012 WL 4791614, at \*10 (C.D. Cal. Oct. 5, 2012), the federal

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<sup>194</sup> Br. of Appellants at 36-38.

district court considered the defendant's refusal to make productions compelled by a court order on the basis that the defendant lacked possession, custody, or control over responsive information that was stored on servers possessed by Wal-Mart, a non-party. The *Carrillo* court applied the definition of "control" urged by Appellants but, nonetheless, concluded that the defendant had control over the information, reasoning:

Here, the fact that Schneider does not physically possess the server that stores the Wal-Mart emails is immaterial. The electronically stored information is within Schneider's control by virtue of the fact the Schneider employees use the Wal-Mart email accounts as their primary work email. As such, since Wal-Mart or Wal-Mart's vendor has granted access to Schneider to use its email system, it is inconceivable that Schneider lacks the ability to request and obtain such records from Wal-Mart or another third party that stores the relevant servers.

2012 WL 4791614, at \*11.

As in *Carrillo*, in this case Appellants had been granted access to the Hunter Donaldson computer systems containing their work emails, work calendars, and the phone plans to which their cellular phone usage was billed. Accordingly, it is inconceivable that Appellants lacked the ability to request and obtain those documents, especially given their positions as integral corporate officers within Hunter Donaldson. Thus, even under the definition urged by Appellants, the trial court reasonably determined that Appellants had "control" over the documents. Therefore, the trial court properly exercised its discretion in compelling Appellants to produce those documents and imposing sanctions and entering judgments against Appellants for their failure to do so.

**D. The Trial Court Properly Exercised Its Discretion in Imposing Sanctions Against Appellants Without First Analyzing the *Burnet* Factors**

1. Appellants failed to preserve any *Burnet* issue for review by failing to raise it below

As an initial matter, Appellants failed to raise any *Burnet* issue or argument before the trial court. RAP 2.5(a)(3) generally precludes parties from raising issues for the first time on appeal unless they constitute manifest constitutional error. Appellants do not address RAP 2.5(a)(3) in their opening brief, and they may not argue that they meet its requirements for the first time in their reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (appellate court does not consider arguments made for the first time in reply briefs). Accordingly, Appellants failed to preserve any *Burnet* issue for appellate review.

2. Even if this Court reviewed the issue, *Burnet* is inapplicable to non-compensatory monetary sanctions

Second, even if this Court reviewed the issue, Appellants argue that the trial court should have analyzed the *Burnet* factors before imposing sanctions against them because the sanctions were not compensatory in nature.<sup>195</sup> However, a *Burnet* analysis is required only when the trial court imposes one of the “harsher remedies allowable under CR 37(b).” *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (quoting *Snedigar v. Hodderson*, 53 Wn. App. 476, 487, 768 P.2d 1 (1989)). Our Supreme Court has clarified that *Burnet*’s

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<sup>195</sup> Br. of Appellants at 42-45.

reference to “harsher remedies” “applies to remedies such as dismissal, default, and the exclusion of testimony—*sanctions that affect a party’s ability to present its case.*” *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 690, 132 P.3d 115 (2006) (emphasis added).

Here, the discovery sanctions imposed by the trial court did not purport to limit the claims, evidence, or witnesses Appellants could present at trial or otherwise restrict the factual or legal parameters of Appellants’ case. Rather, the trial court merely imposed *per diem* discovery sanctions seeking to coerce Appellants’ compliance with court-ordered discovery productions. Accordingly, under *Mayer*, the trial court properly exercised its discretion in imposing such sanctions without a *Burnet* analysis.

3. The trial court did not abuse its discretion in reducing a total of \$139,300 in coercive discovery sanctions to judgments against Appellants

Finally, Appellants contend that the trial court did not adequately adhere to guidelines for imposing discovery sanctions provided by our Supreme Court. Specifically, they refer to our Supreme Court’s statements in *Fisons*, 122 Wn.2d at 355-56, that

In determining what sanctions are appropriate, the trial court is given wide latitude. However certain principles guide the trial court’s consideration of sanctions. First, the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong. The wrongdoer’s lack of intent to violate the rules and the other party’s failure to mitigate may be considered by the

trial court in fashioning sanctions.

However, the record demonstrates that the trial court did make any necessary considerations and that its discovery sanctions adhered to these principles.

First, the trial court imposed the least severe sanction adequate to serve its purpose. CR 37(b) grants the trial court authority to impose sanctions such as a large, determinate monetary sanction; striking defenses; excluding witnesses; or entering a default judgment. However, the issue in the case was Appellants' failure to produce requested documents. The trial court therefore entered a carefully-tailored *per diem* monetary sanction designed to coerce Appellants' compliance with an order clearly requiring production of "all responsive documents" while leaving the amount of accrued sanctions ultimately within Appellants' control. Thus, the May 23 order served to sanction Appellants in an amount no more and no less than was necessary to compel their complete compliance; essentially, Appellants complied when they had "had enough." Accordingly, the *per diem* sanctions adhered to the *Fisons* court's guidelines that sanctions be the least severe to effectuate their purpose but not so minimal as to undermine discovery efforts.

Second, Appellants present a veritable grab bag of arguments or alleged facts that they feel the trial court did not adequately consider before reducing the sanctions to judgment against them: their alleged good faith belief that they were in compliance with the May 23 and August 1 Orders prior to September 26; the alleged lack of clarity in the trial court's

orders and oral rulings; the trial court's alleged failure prior to September 26 to find they had control over some of the requested documents; their "swift compliance" with providing the remaining discovery after September 26; and Respondents' alleged failure to mitigate any damages caused by Appellants' repeated and willful violation of the civil rules and court orders.<sup>196</sup>

But these arguments border on frivolity. Regarding the intent of the sanctioned party and mitigation efforts, the *Fisons* court only stated that trial courts may consider those factors, not that they *must*. Accordingly, the trial court could properly exercise its discretion to impose sanctions without considering them.

Regardless, as Respondents have repeatedly discussed above, Appellants' "good faith belief" that they were compliant with the discovery orders was based on their repeated objection that they lacked possession, custody, or control over some of the requested documents. The trial court addressed and rejected this objection at the May 23 hearing and directly addressed their control over the documents at the August 1 hearing. Likewise, the May 23 Order clearly directed Appellants to produce "all responsive documents," yet Appellants persisted in their "good faith belief" that they could continue to withhold some documents based on an already-rejected objection.

Moreover, far from "swift compliance" after the September 26

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<sup>196</sup> Br. of Appellants at 46-48.

hearing, Appellants still failed to produce the remaining documents until October 15—*19 days later*—despite having had nearly a year and a half to identify and organize these documents for potential production. Additionally, Appellants contend that Respondents failed to mitigate their damages from Appellants' discovery violations by failing to request documents from MultiCare or from Hunter Donaldson during its bankruptcy proceedings. However, Appellants fail to explain how MultiCare could produce documents withheld by Appellants that did not concern MultiCare, such as Appellants' tax returns, work calendars, cellular phone bills, and other documents untimely produced throughout the litigation. Likewise, Appellants fail to explain how Hunter Donaldson could have produced withheld documents personal to Appellants, such as their tax returns, during the bankruptcy proceedings or why Respondents were required to incur the additional time and expense of seeking civil discovery in a Tampa, Florida bankruptcy proceeding over seeking Appellants' compliance with already-entered discovery orders in a familiar, Washington State forum. More importantly, Appellants ignore the fact that Respondents had been requesting documents from Hunter Donaldson *for over a year* before the company elected to declare bankruptcy in lieu of producing documents or facing the consequences of accruing discovery sanctions. Simply put, Appellants' contention that Respondents' discovery efforts were somehow lacking is ludicrous in light of the record.

Finally, Appellants assert that Respondents were required to

demonstrate prejudice before the trial court could impose sanctions for their violation of the discovery orders. However, Appellants fail to support their alleged prejudice requirement with any citation to authority. This Court does not consider arguments unsupported by citation to authority. RAP 10.3(a)(6); *Cowiche*, 118 Wn.2d at 809. And Appellants may not cure this error through providing further citation to authority in their reply brief. *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629-30, 285 P.3d 187 (2012). Even if the Court considered this argument, however, the heart of Appellants' claims against *every* defendant in the case was the invalidity of the medical services liens due to Rohlke's use of a Washington notary license unlawfully obtained through the concerted actions of her, Wadsworth, and Adams, as well as her false statements in her notary certifications regarding where she performed the notarial acts and Wadsworth's personal appearance for signature. Documents withheld by Appellants until October 15, such as Appellants' emails with Adams, their work calendars, and their cellular phone bills, were necessary to discover when, with whom, and about what they were speaking, as well as where they were on certain days Rohlke notarized liens. Appellants also suggest that Respondents suffered no prejudice because they eventually settled their claims against MultiCare for \$7.5 million of the \$8 million dollars collected on MultiCare's behalf by Hunter Donaldson based on Rohlke-notarized liens. However, this demonstrates only that Respondents left half a million dollars on the table, an amount they possibly would have been better position to recover had Appellants timely

provided the requested discovery. And, more importantly, this amount did not represent a recovery of *any* of the amounts collected on behalf of MREP, the other medical services provider and lien holder left in the case. Appellants cannot seriously argue that withholding requested discovery for nearly a year and a half central to the claims against all defendants was not prejudicial. Accordingly, Appellants' arguments are meritless.

**E. Respondents are Entitled to Their Attorney Fees on Appeal**

Finally, Respondents request their costs and attorney fees incurred on appeal pursuant to RAP 14.2, RAP 18.1(a), CR 37(a)(4), and CR 37(b). RAP 14.2 provides that costs will be awarded to the prevailing party on appeal, and RAP 18.1 allows for the recovery of reasonable attorney fees if applicable law grants the right to such recovery. Here, CR 37(a)(4) requires an award of reasonable expenses, including attorney fees, to a party moving to compel discovery payable by the "party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them." Likewise, CR 37(b) requires a "party failing to obey [a discovery] order or the attorney advising him or both" to pay the reasonable expenses, including attorney fees, "caused by the failure."

Here, Appellants' failure to obey the March 28 Order necessitated Respondents' second motion to compel. Because the trial court properly granted the second motion to compel and entered the resulting May 23 Order, Respondents are entitled to their fees and costs on appeal, payable by Appellants; their attorneys advising such conduct at the time, Stephen Perisho and Kevin Smith; or both groups. *Accord Eugster v. City of*

*Spokane*, 121 Wn. App. 799, 817, 91 P.3d 117 (2004) (awarding fees and costs on appeal based on CR 37(a)(4).

Likewise, Appellants' failure to obey the March 28 and May 23 Orders caused Respondents' expenses in moving for entry of the May 23 Order and moving to reduce the resulting accrued sanctions to judgments in order to coerce Appellants' compliance with that Order. Likewise, Appellants' failure to obey those orders has caused Respondents' current expenses in defending those orders and judgments on appeal. Because the trial court properly entered those orders and judgments, Respondents are entitled to their fees and costs on appeal under CR 37(b), payable by Appellants; Mr. Perisho, Mr. Smith, or Appellants' current counsel, Patty Eakes and Shane Cramer, who all advised Appellants regarding their conduct before they stopped violating the Orders on October 15; or all these individuals.<sup>197</sup>

## V. CONCLUSION

For the foregoing reasons, Respondents respectfully ask this Court to affirm and award their attorney fees and costs for this appeal.

RESPECTFULLY SUBMITTED this 5th day of November, 2015.

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<sup>197</sup> Given Hunter Donaldson's decision to declare bankruptcy rather than face the prospect of paying discovery sanctions, it is not outside the realm of possibility that Appellants might follow suit. Accordingly, Respondents request that this Court make their fees and costs on appeal jointly payable by Appellants and their attorneys. At the very least, Respondents request that this Court maintain jurisdiction over the case so that, in the event that Appellants declare bankruptcy in order to evade fees and costs solely payable by them, this Court might amend the award to be made payable by some or all of the attorneys so that this Court's authority could not be flaunted easily.

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**CERTIFICATE OF SERVICE**

Laura Neal, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on November 5, 2015, I delivered via Email a true and correct copy of the above document, directed to:

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