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NO. 51081-2-II

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

TRAVIS LEE PADGETT,

Appellant/Cross-Respondent,

v.

DEPARTMENT OF CORRECTIONS,
a Subdivision of the State of Washington,

Respondent/Cross-Appellant.

THE DEPARTMENT OF CORRECTIONS' REPLY BRIEF ON CROSS-APPEAL

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I. INTRODUCTION

Throughout this litigation Padgett maintained that he had a particular need for the records he requested. But when the Department sought evidence to refute this claim and shed light on his true motivation to request such records, Padgett provided inaccurate and uncertified discovery responses. These discovery violations were uncovered after the hearing on the merits and therefore interfered with the Department's ability to defend against Padgett's claims. Instead of promptly rectifying these discovery issues when they were brought to his attention, Padgett refused to fix the inaccurate and uncertified responses for over a month and did so only after Padgett had filed a notice of appeal. The Department then worked to supplement the record with these corrected responses to include them in the record on appeal. Padgett repeatedly opposed the Department's attempts to correct and supplement the record, undermining this Court's ability to adjudicate this matter fairly. This Court should send a strong message that such gamesmanship in discovery is inappropriate and violates Civil Rule 26(g). Because the trial court abused its discretion in failing to impose sanctions for Padgett's Civil Rule 26(g) violations, this Court should

reverse that portion of the trial court's decision and remand for the trial court to exercise its discretion in setting an appropriate sanction.[1]

II. ARGUMENT

A. Padgett's Various Explanations for his Inaccurate and Incomplete Interrogatory and Request for Production Responses do not Show that his Conduct was Objectively Reasonable or Otherwise Complied with Civil Rule 26(g)

The question of whether an attorney made a reasonable inquiry into a discovery response is an objective inquiry. *Wash. State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 343, 858 P.2d 1054 (1993). Subjective or good faith on the part of an attorney by itself does not shield an attorney from sanctions under CR 26(g). *Id.* When a party violates CR 26(g), a sanction is mandatory. *Wash. Motorsports Ltd. Partnership v. Spokane Raceway Park, Inc.*, 168 Wn. App. 710, 715, 282 P.3d 1107 (2012). Although the nature of the sanction is discretionary, there is no discretion to decline to award a sanction at all. *Id.*; *see Rojas v. Town of Cicero, Ill.*, 775 F.3d 906, 909 (7th Cir. 2015).[2]

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[1] As discussed in the Department's Opening Brief, this Court should affirm all other aspects of the trial court's decision.

[2] Because Civil Rule 26(g) is essentially identical to Federal Rule of Civil Procedure 26(g), state courts have looked to the federal decisions interpreting the federal rule for guidance. *Fisons*, 122 Wn.2d at 341.

Padgett's failure to provide accurate discovery responses was not objectively reasonable. Padgett does not contest that his discovery responses were inaccurate. Indeed, this is plain when comparing the original response and the supplemental responses that were provided after the notice of appeal was filed in this case. *See* CP 429-434, 869-874. In response to an interrogatory requesting identification of communications between Padgett or his attorney and Jeffrey McKee, Padgett responded "none exist." CP 429-434. Later, after the hearing on the merits where Padgett strenuously denied any allegation of collusion with McKee, CP 472-73, Padgett provided an attorney billing statement that showed there had in fact been communication between him and McKee. CP 687. Of particular note, Padgett's counsel had access to information through his own records that, if examined prior to providing the inaccurate discovery response, could have shown that such a response was inaccurate.[3] As such, Padgett provided an inaccurate discovery answer to the Department and such conduct under the circumstances violated CR 26(g).

In light of these circumstances, the trial court abused its discretion in failing to impose a sanction. The trial court's ruling did not address

[3] In all likelihood, Padgett's attorney had personal knowledge that strongly suggested that the response that was being provided was inaccurate as Padgett's attorney personally participated in conversations that were identified in the supplemental interrogatory response.

whether or not Padgett had violated CR 26(g) by providing inaccurate and uncertified discovery responses. *See* CP 554-558. Nor did the trial court provide any legal or factual basis for declining to award a sanction under CR 26(g). *Id*. Instead, the trial court simply indicated that it was troubled by what happened and that it suspected there was a lot more to the story than the trial court knew. *Id*. However, CR 26(g) is a provision that requires some kind of sanction if violated. To the extent that the trial court declined to address whether CR 26(g) was violated, particularly when it found Padgett's discovery conduct "troubling," that decision was an abuse of discretion. Furthermore, to the extent that the trial court determined no sanction is appropriate when a party provides an inaccurate discovery response without reasonable explanation or excuse, that decision was an abuse of discretion. Therefore, this Court must reverse and remand for the trial court to appropriately consider whether CR 26(g) was violated and what sanction is appropriate in light of this violation.

In response to the Department's cross-appeal, Padgett makes three unpersuasive arguments about why his conduct was reasonable. He argues: (1) the failure to disclose the information that was eventually revealed in the attorney invoice was obviously not intentional because if it were intentional, Padgett simply would have never revealed the information or intentionally deleted the information prior to him subsequently providing it

to the Department; (2) his conduct was reasonable because it would have been strategically disadvantageous to provide the information prior to the entry of a judgment; and (3) Padgett was excused from providing a certification under CR 26(g) with his responses because the Department did not include a blank copy of this certification in the discovery requests. The Court should reject all three of these arguments and conclude that none provide a basis to conclude that Padgett's or his attorney's conduct was objectively reasonable.

Padgett's claim that his conduct must have been inadvertent because if it were intentional he would have deceptively doctored his billing statement is not persuasive. First, this misapprehends the legal standard. Again, subjective or good faith on the part of the attorney by itself does not shield an attorney from sanctions under CR 26(g). *Fisons*, 122 Wn.2d at 343. Second, the fact that a person could have gone to greater lengths to cover up that person's misconduct does not mean that the original conduct was innocent. Such an argument defies logic and experience. People often make statements or engage in conduct against their own interests or that inadvertently reveals misconduct. *Cf.* ER 804(b)(3) (establishing a hearsay exception for statements made by people against their own interest).

Padgett's remaining two arguments do not provide an excuse and actually suggest that his failure to provide accurate discovery answers was

*un*reasonable. First, Padgett argues that his failure to brief fees (and presumably to provide the invoice that demonstrated the inaccuracy of the discovery responses in question) was to prevent the Department from gaining a strategic advantage. However, this argument suggests that the decision to withhold the information contained on the billing invoice was actually intentional. Regardless, his decision to decline to address the fees issue or provide the billing invoice was objectively unreasonable. The trial court's scheduling order explicitly required him to address the issue of attorney's fees at the May 26, 2017 hearing and this was made abundantly clear at the April 14, 2017 hearing. CP 677-78, CP 561-563 ("the issue of penalties, attorney's fees, and costs are to be addressed at the hearing on May 26, 2017"). A party's decision to ignore a court's scheduling order is not objectively reasonable conduct.

For similar reasons, Padgett's reliance on *Branscum v. San Ramon Police Dep't*, 283 F.R.D. 530, 531 (N.D. Cal. 2012) and Civil Rule 54(d)(1) is not helpful. Although Padgett is correct that these authorities discuss requests for costs and discovery related to costs and fees, neither dealt with the flouting of a court order requiring that the parties brief the fees issue on a particular date. In this way, Padgett's argument actually supports the imposition of sanctions. A party's decision to conceal evidence requested in discovery to gain a strategic advantage violates CR 26(g).

Finally, Padgett's argument that he failed to properly certify his responses under CR 26(g) because the Department failed to provide him a verification page in the discovery requests is based on a misunderstanding of the obligations on a party responding to discovery. Civil Rule 26(g) requires an attorney to certify discovery responses; the rule makes no mention of a requirement that the propounding party draft such a certification for the responding party. Instead, the rule requires that "[e]very request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated." Civil Rule 26(g). Padgett has failed to provide any authority that a propounding party's failure to provide a Civil Rule 26(g) verification page excuses the responding party's failure to comply with the rule. Padgett does not appear to dispute that he initially failed to comply with this rule. And although the Department brought this issue to Padgett's attention, Padgett failed to remedy this issue for over a month and did so only after filing a notice of appeal. Decl. of Counsel filed October 18. 2017. Such conduct is not objectively reasonable.

In light of Padgett's objectively unreasonable conduct and the inaccurate discovery response that Padgett provided, the trial court abused its discretion in declining to impose or explicitly address the requested

sanctions. Although the court noted that it was "troubled by what happened," it did not make any conclusion about CR 26(g) and failed to explain any reasoning for declining to impose sanctions. This Court should reverse for the trial court to address this issue.

B. The Court Should Reject Padgett's Argument that the Department Was Not Prejudiced Because the Department had an Opportunity to Depose Padgett and this Evidence is Merely a "Distraction"

The purposes of punishing discovery misconduct are to deter, to punish, to compensate, and to educate. *Fisons Corp.*, 122 Wn.2d at 354. As such, the fact that a party's discovery misconduct did not prejudice the opposing party does not provide a basis for declining to impose a sanction. *R.F.M.A.S., Inc. v. So*, 217 F.R.D. 13, 24-25 (S.D.N.Y. 2010); *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 108 (2d Cir. 2002); *see also Driggs v. Howlett*, No. 32855-4-III, 2016 WL 901075 (Wash. Ct. App. March 8, 2016) (unpublished) ("But no Washington court has held that a condition precedent to pecuniary sanctions is prejudice.").[4] As such, Padgett's arguments about prejudice are misplaced.

[4] Consistent with GR 14.1, the Department recognizes that this case is unpublished, that the opinion is not binding on any court, that the opinion has no precedential value, and that it is cited only for such persuasive value as the court deems appropriate. *See* General Rule 14.1(a) (allowing citation to unpublished opinions); *see also Crosswhite v. Wash. State Dept. of Social & Health Services*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017).

Even if an absence of prejudice could justify the failure to impose a sanction under CR 26(g), Padgett's claim that his conduct did not prejudice the Department should be rejected. First, to the extent that Padgett suggests that the Department bears the burden of showing prejudice, the Court should reject this argument. The party who failed to comply with its discovery obligation should bear the burden of showing a lack of prejudice. Civil Rule 26(g) requires that the responding party ensure that the discovery responses are accurate. The responding party should bear the burden of showing compliance and the burden of showing a lack of prejudice.

Moreover, Padgett's arguments do not support a conclusion that the Department was not prejudiced. Padgett argues that the Department was not prejudiced because it had the opportunity to depose McKee and Padgett. However, this ignores the sequence of events. The Department propounded the written discovery prior to the deposition of McKee. *See* CP 68, 393, 426. In other words, if an accurate discovery response had been provided by Padgett, the Department could have asked McKee questions about the information in the discovery response. Padgett's inaccurate response deprived the Department of that opportunity. Additionally, neither Padgett nor McKee provided the detailed information that was subsequently disclosed in the discovery responses. In fact, they largely denied any connection to each other related to this issue. CP 348-351, 399. Perhaps,

this testimony would have been different had McKee been presented with accurate discovery responses from Padgett detailing the communications between McKee and Padgett or his attorney. Furthermore, had the Department received accurate answers, it is possible that the Department would have decided that the written discovery was sufficient and there was no need for a deposition. Because Padgett provided inaccurate information, the Department did not even have the option of making such an informed choice. As such, it is difficult to see how the depositions prevented any prejudice to the Department.

Finally, Padgett's claim that the Department is attempting to distract from the issues of this case and the implication that these discovery issues are not related to the issues in the case is incorrect. As an initial point, it is unclear what relation this argument bears to the issues in his brief. Regardless, the Court rejected this argument in allowing the Department to supplement the record. And it did so for a good reason. Despite Padgett's argument that the motivation behind his request is not relevant to any issue, Padgett's own opening briefing—indeed the very first sentence—starts with a discussion of why Padgett purportedly submitted his public records request. Padgett's Opening Brief, at 1 ("Travis Padgett had questions about how his phone account was being handled by the Department of Corrections ('Department'). The Department's evidence and argument about the real

reason that Padgett submitted his request is certainly relevant—at a minimum—to rebut Padgett's version of the facts.

Indeed, during the motion practice related to the Department's motion to supplement, the Department repeatedly pointed out that Padgett was putting his own motive at issue in saying that he had made the request for a specific reason, i.e. because he was concerned about his phone charges. Nonetheless, Padgett repeatedly opposed supplementing the record and argued that such evidence of Padgett's motivation behind his request was not relevant. However, when Padgett filed his opening brief, he began with the story of the purported motivation behind his request. The Department is entitled to present a different theory about why Padgett made his request. Therefore, this Court should reject Padgett's claim and recognize that the motive behind Padgett's request is relevant and that his discovery violations are important and should be sanctioned.

III. CONCLUSION

The Department respectfully requests that the Court reverse the trial court's decision to decline to award sanctions for Padgett's violations of Civil Rule 26(g) and remand for determination of an appropriate sanction

under CR 26(g). As discussed in the Department's Opening Brief, the Court should affirm the trial court's decision in all other respects.

RESPECTFULLY SUBMITTED this 20th day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the date below, I caused to be electronically filed the DEPARTMENT OF CORRECTIONS' REPLY BRIEF ON CROSS-APPEAL with the Clerk of the Court using the eFiling Portal system which will send notification of such filing to the following eFiling Portal participant:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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