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ARGUMENT

A. The Applicable Standard of Review Is De Novo

Appellate review of an order of dismissal is de novo, and the appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.* 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

B. Dismissal Under CR 37 Not Warranted

A court should issue sanctions appropriate to advancing the purposes of discovery. *Burnet v. Spokane Ambulance* 131 Wn.2d 484, 497, 933 P.2d 1036(1997). The discovery sanctions should be proportional to the discovery violation and the circumstances of the case. *Id.* At 496-97 933 P.2d 1036, [T]he least severe sanction that will be adequate to serve the purpose should be imposed. *Magana v. Hyundai Motor Am.* 167 Wn.2d 570 590, 220 P.3d 191, 201 (2009)

When a trial court imposes dismissal or default in a proceeding as a sanction for violation of a discovery order, it must be apparent from the record that, (1) the party's refusal to obey the discovery order was willful or deliberate;(2) the party's actions substantially prejudiced the opponent's ability to prepare for trial; and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed. *Rivers v. Washington State Conference of Mason Contractors* (2002) 145 Wash.2d 674, 4 P.3d 1175.

- 1) Cuzdey's failure to produce documents not willful.

Respondent, Druzianich's position is that when they ask for a document in discovery it must exist and then jump to the conclusion if not produced, it was a willful act of Cuzdey behalf. The facts under a de novo review by this panel does not support such a finding. Bruce Clark as counsel for Plaintiff Cuzdey withdrew on October 4, 2017. Jack Hanneman then appeared for Mr. Cuzdey. Between Mr. Sanders and Mr. Hanneman there was a negotiated agreement and stipulated dismissal of all plaintiffs except Jacob Cuzdey. This left many of the propounded discovery requests not relevant for any defense at trial.

Mr. Cuzdey then willingly submitted to his deposition in February 2018. Discovery was supplemented as noted in motion to dismiss. (CP 306-314). Jack Hanneman then sought out and located Cuzdey's previous accountant, Kyle Scott. In the response brief against dismissal, Jack Hanneman agreed that certain objections lodged by Bruce Clark were improper and asked for an additional 30 days to complete the response or accept dismissal. (CP 542-552). See declaration Bradley Drury. (CP 548- 549). Mr. Scott was tasked by Jack Hanneman to try and locate the records requested. (CP 548-549). Remember, these records in some cases were over eight years old. The court rejected this request.

Most telling as to the position of Druzianich is when Mr. Sanders in his brief for dismissal states "... it is now clear that Mr. Cuzdey either cannot or will not comply". (emphasis added) (CP 311 line 18). It is Mr. Cuzdey's position that he cannot provide certain information. Druzianich contends Cuzdey will not comply. On a de novo review the evidence does not suggest that Cuzdey refused to comply, but rather he simply could not comply. A lesser sanction or a limiting instruction to be given at trial if documents

were not produced in a timely manner if discovered should have been the decision of the trial court.

2) The court did not explicitly consider other sanctions

A major issue is that the major theory of the Plaintiff's case is for an expert opinion on future economic loss. The expert testimony was being developed by Plaintiff's as revealed in Mr. Hanemann's responsive brief to the motion to dismiss. None of the discovery requests in the motion to compel as the basis of the Motion to Dismiss relate to this claim of Loss of Business Opportunity. The trial court by dismissing the matter denied Cuzdey to right to prosecute his claim for Loss of Business Opportunity.

The court should have allowed the accountant Kyle Scott to review his files to see if he had any of the documents. If he found no documents than the answer would be no further documents and the case would have moved forward to trial. The defendants could have moved for summary judgment based on the documents provided.

The underlying theme of the defendant's motion to compel and dismissal is that the documents they seek do exist and Cuzdey refuses to produce them. A reading of the record as a whole does not bear that assumption out. Cuzdey's actions were not willful and with new counsel and the accountant the documents could be determined to exist or not and the matter proceed. One must remember this is a small business and the records sought are eight years old.

C. Attorney Fees and Costs

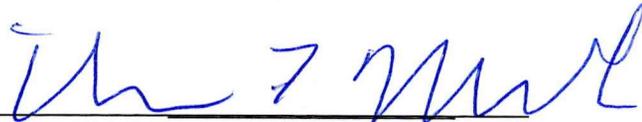
C. Attorney Fees and Costs

Jacob Cuzdey seeks attorney fees and cost pursuant to the written contract at paragraph 25 page 5 and executed on December 23, 2011 by Jacob Cuzdey and Daryl Druzianich. (CP 60-66)

D. CONCLUSION

Appellant asks that the court reverse the decision of the trial court and remand the matter for further proceedings.

RESPECTFULLY Submitted this 25 day of March, 2019



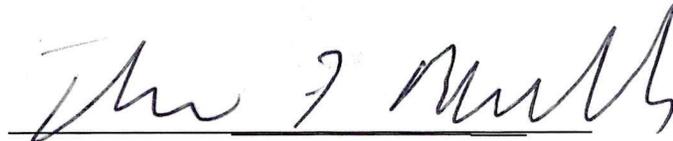
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Attorney for Jacob Cuzdey

CERTIFICATE OF MAILING

I certify that on the 25th day of March, 2019, I placed in the mails of the United States a duly addressed, stamped envelope containing a copy of the Appellant's Brief to the Court of Appeals Division Two and electronic service to Michael G Sanders counsel for respondent.

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