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Court of Appeals
Division II
State of Washington
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No. 52080-0-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

JACOB CUZDEY,

Appellant,

v.

DARRYL DRUZIANICH,

Respondent.

BRIEF OF RESPONDENT DRUZIANICH

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I. INTRODUCTION

Respondents raise no assignments of error in the instant appeal. The question before the Court is straightforward: “Is it ever within the discretion of a trial court to dismiss a lawsuit solely on the basis of a plaintiff’s refusal to engage in discovery?” If the answer to this question is “yes,” this Court should affirm the Honorable Grant Blinn’s June 8, 2018 Order on Defendants’ Motion for Imposition of Sanctions and Dismissal. CP 627-628. The facts and procedural history leading to the dismissal of this action could not more clearly provide a justification for the relief ultimately granted.

Mr. Cuzdey and his related business entities were afforded every opportunity to come into compliance and provide information requested in discovery over the period of nearly 15 months. He was repeatedly called before the trial court for his failures to comply, and lesser sanctions were imposed. As the case carried on, Appellants were compelled to expend time and resources in opposition to what was felt from the beginning to be a lawsuit of dubious merit. Appellants could not or would not respond to basic discovery that was directly relevant to the issues they had put before the trial court in their Complaint, and then thwarted or ignored all attempts at investigating further.

II. COUNTER-STATEMENT OF CASE

a. Facts of the Underlying Case are Irrelevant

The underlying facts of this case are not at issue. Appellants have provided a brief factual narrative from his perspective, absent citation to authority. Appellants essentially filed a Complaint, attached improper self-serving declarations to it along with photographs and other inadmissible materials, and then refused to be governed by the Court Rules thereafter. The allegations in the Complaint have nothing to do with the reasons for dismissal of this action, and the submissions by Appellant in purported support of his Complaint should be disregarded.

Again, because the factual allegations have no bearing on the reasons for dismissal of this lawsuit, Respondents will refrain from further addressing the dubious merits of Appellants' Complaint.

Aside from being irrelevant to the Assignment of Error, this Court also should not afford any weight to Appellants' description of the underlying facts for the reason that Appellants refused to allow investigation thereof through the discovery process. To do otherwise would confer a benefit on Appellants that was only obtainable through willful and ongoing violation of the Court Rules and the orders of the trial court.

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b. Procedural History

The procedural history set forth in “Defendants’ Motion to Dismiss or, in the Alternative, Defendants’ Third Motion to Compel,” filed April 3, 2018 (CP 306-314) provides a comprehensive statement of the relevant events leading to the trial court’s dismissal. It is substantially reproduced here:

On March 22, 2017, just over two months after Appellants’ filed their Complaint, Defendants Druzianich propounded written interrogatories and requests for production on Appellants. CP 307, 315, 319-340. Over two months later, on May 4, 2017, Appellants submitted an unsigned, undated document purporting to be “Defendants’ First Interrogatories and Requests for Production of Documents to Plaintiffs’; Responses Thereto.” CP 342-364. Far from being responsive to the March 22, 2017 discovery requests, the document provided by Appellants contained numerous absurd objections and otherwise reflected a lack of effort to engage in discovery as contemplated by the applicable Court Rules. Id. This included blanket objections to all requests for production of documents that would substantiate Mr. Cuzdey’s claim that he lost millions of dollars as a result of the conduct of Respondents. Id. For illustrative purposes, one example of Mr. Cuzdey’s May 4, 2017 so-called responses is provided here:

REQUEST FOR PRODUCTION NO. 3: Produce, for the period of July 1, 2011 through the present, all documents that you have filed with, or otherwise provided to, the Washington Department of Revenue, Department of Labor & Industries, and Employment Security Department relating to:

- (a) Jacob Cuzdey,
- (b) Cuzdey Manufacturing Technologies, LLC, and
- (c) Cuzdey Enterprises, Inc.

RESPONSE: Objection. Information regarding tax returns, including income tax returns, W-2 and/or 1099 forms, is privileged under federal and state law.

As indicated, Appellants responded substantially the same way to all such requests by Defendants for records and information pertaining to Appellants' business activities and income during the time period referenced in Appellants' Complaint. Id.

On July 19, 2017, Respondents' counsel sent a detailed letter to Appellants' counsel, identifying with particularity the issues with Appellants' responses to written discovery. After setting forth the deficiencies in Appellants' responses, attorney Jason Whalen issued a plea to Appellants' counsel: "For the two of us to make any meaningful sense of this case, we really need to hone the claims down by the facts at hand. I appreciate your assistance in this regard." CP 366-369. In the letter, Respondents' counsel further indicated a desire to obtain the materials before August 10, 2017, and to take the deposition of Appellant Jacob Cuzdey on August 22, 2017. Id. The letter enclosed a deposition notice to Mr. Cuzdey for that date, and closed with the following: "If this date is not

workable for your schedule, please let me know and we can adjust accordingly.” Id.

As of September 6, 2017, Appellants had failed to take any meaningful action to provide useful discovery responses. CP 377-378. Respondents’ counsel wrote a letter to Appellants’ counsel on that date, noting the lack of a response. Id. Also in the letter, Respondents’ counsel offered to give Appellants an additional three weeks to respond. Id. Following Appellants’ continued failure to respond, Respondents filed their first motion to compel on September 28, 2017. CP 80-85. As noted therein, Respondents’ counsel had conferred on at least three separate occasions with Appellants’ counsel regarding the overdue discovery, in accordance with CR 37 and CR 26(i). Id.

The hearing on Respondents’ first motion to compel was scheduled to occur on October 6, 2017. However, on October 4, 2017, Appellants’ attorney filed a notice of intent to withdraw. CP 611. Consequently, the motion was set over to November 3, 2017 by an amended note filed on October 4, 2017. Thereafter, on November 1, 2017, Appellants’ new counsel made an arrangement whereby Appellants would issue payment of \$1,000.00 in terms in exchange for cancellation of the hearing on Respondents’ motion to compel. CP 380-381.

Appellants' new counsel submitted a supplemental offering of discovery responses on January 16, 2018. CP 377-508. In it, they withdrew their objection to providing Appellants' current addresses, offering in its place a business address for Cuzdey Manufacturing Technologies, LLC, and Mr. Cuzdey's attorney's address. Id. Additionally, Appellants supplemented their responses to Requests for Production 1 and 2 which had requested any and all documentation pertaining to the formation of Cuzdey Manufacturing Technologies, LLC and Cuzdey Enterprises, Inc. Id. Appellants also responded to a request for all facts leading Appellants to believe that Defendants had sold Appellants' machinery and tools by providing a series of photographs of tools and equipment in a shop setting. Id. Appellants then provided a list of potential fact witnesses, and copies of cancelled rent checks that had been requested. Id.

In response to Request for Production No. 7, wherein Appellants were requested to produce "true and correct copies of all agreements, contracts, invoices, work orders, change orders, and receipts for any and all repairs and improvements to 4751 State Route 12, Elma, Washington," Appellants provided 73 pages of receipts, the bulk of which were non-responsive to the request. Id. These included receipts for food items, disposable dishes, miscellaneous office equipment and work materials. Id. Also included were substantial invoices from a company called Tristar for

repairs to Mr. Cuzdey's own CNC Mill Machine. Id. Mr. Cuzdey essentially admitted that these materials had nothing to do with the request in his deposition, taken February 28, 2018:

Q. Okay. You included invoices of theirs in your response to Request for Production Number 7. So my question to you is: How is an invoice for work that was done on your CNC mill machine responsive to a request for agreements, contracts, invoices, work orders, change orders and receipts for any and all repairs and improvements to 4751 State Route 12, Elma, Washington?

A. It's possible that's an oversight of mine. Going through dozens of receipts and paperwork middle of the night.

Q. And many of those other receipts also include food items, temporary items, coffee filters, things of that nature. Do you believe that those are also responsive to a request that asks you for proof of repairs and improvements to the address?

A. No.

CP 518-519.

Finally, Appellants provided what appear to be three IRS Forms 1040 purporting to reflect Mr. Cuzdey's personal earnings from 2013-2015. CP 526-531. The 2015 form was unsigned, but Mr. Cuzdey attested in his deposition that to the best of his knowledge all three had been filed on or around the same date in March of 2016. CP 515. No other financial records of any kind have been provided by Appellants, and no financial records of any kind have been provided concerning any business entity Mr. Cuzdey claims affiliation with. This action alleged only economic loss, and

Appellants' only response to multiple requests for evidence pertaining to the core issue of this case—aside from three dubious 1040 forms—has been an objection on the basis that financial information is privileged.

At his deposition, Mr. Cuzdey testified that he had at least some portion of these records available to him, but offered no substantive explanation as to why he had made no effort to disclose them. CP 517-523. On the record at that deposition, Mr. Cuzdey and his counsel were requested to immediately comply with their obligation to respond to the March 22, 2017 discovery. Id.

Following the deposition, Mr. Cuzdey's attorney supplied a document intended to support his claim of having served in the U.S. military as an enclosure to a March 1, 2018 letter. CP 533. The undersigned responded to this letter on the same date with yet another demand to provide complete discovery responses. CP 535-536. This time, the undersigned offered Appellants until March 22, 2018 to comply. Id. Appellants provided nothing. CP 317. On March 23, 2018, Respondents conducted their fourth CR 26(i) conference with Appellants' counsel, and provided a summary of the conversation immediately after. CP 538. As indicated both in the March 1 and March 24 correspondence to Appellants' counsel, Respondents stated that if discovery could not be provided after over a year of requesting it, they would seek dismissal with prejudice as sanction for Appellants' failure

to adhere to their discovery obligations and/or to make any effort to share information. Id.

Appellants' refusal to participate in discovery concerning the central matters pertaining to their claims was unreasonable. After over a year of effort and expense incurred by Respondents in seeking to compel Mr. Cuzdey to provide meaningful evidence for his otherwise highly dubious claims, it became evident that Mr. Cuzdey either could not or would not comply. Respondents believed then and believe now that the sanction of dismissal of this lawsuit with prejudice was the only reasonable option left to the trial court.

At hearing on April 27, 2018, the trial court declined Respondents' first request for dismissal, noting its reluctance to levy so harsh a sanction even in the face of Respondents' misconduct. RP (April 27, 2018), p. 10, ln. 15- p. 13, ln. 2. Subsequently, on June 8, 2018, the trial court requested a recitation of factors supporting dismissal. RP (June 8, 2018), p. 4, ln. 18-22. Respondents' counsel provided it. Id. at p. 4, ln. 23- p. 7, ln. 22. The trial court then articulated its findings as to why lesser sanctions than dismissal would not foreseeably remedy Appellants' intransigence before dismissing the case. Id. at p. 8, ln. 7- p. 9, ln. 8.

Lastly, there is no dispute that the financial sanctions imposed against Appellants, and reduced to judgment, have not been satisfied. No supersedeas bond has been posted.

III. ARGUMENT

1. Standard of Review

Appellants misstate the standard of review to be applied by this Court. In arguing for de novo review, they cite to *Jones v. Allstate Insurance Company* (146 Wn.2d 291, 45 P.3d 1068 (2002)), which involved an appeal of a trial court's order on motion for summary judgment. 146 Wn.2d at 299-300.

In the present instance, Appellants seek review of an order dismissing the underlying lawsuit as a sanction for flouting the Court Rules and the trial court's orders compelling them to comply. This Court's inquiry is therefore not de novo, as Appellant argues, but is instead confined to whether the trial court abused its discretion in dismissing the matter. See, e.g., *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

2. Appellants' Intransigence Necessitated Dismissal After all Reasonable Lesser Sanctions Were Implemented to no Avail.

As demonstrated above, Appellants displayed a consistent unwillingness to engage in discovery in good faith throughout the life of this matter. Despite leveling a series of allegations against Respondents and

forcing them to consume valuable resources and time, Appellants made not a single genuine effort to allow their claims to be examined. Understanding that the sanction of dismissal is the most severe, the trial court again and again imposed lesser sanctions in order to allow Appellants every reasonable opportunity to comply. Despite the monetary sanctions imposed, Appellants have evidenced no intent to pay them and have resisted collection efforts thus far. Consequently, Respondents have no real expectation that their fees and expenses (much less their time and energy) will ever be substantially reimbursed. Were the Court to endorse this abuse of process, the message to any civil defendant would be clear: “If you cannot have the case dismissed as a matter of law, you run the risk of financial ruin for no other reason than the whimsy of a bad faith plaintiff with a specious claim.”

Appellants’ conduct in this case was well beyond the pale. To allow the suit to continue would have been tantamount to a violation of Respondents’ fundamental right to due process. “The right to discovery is an integral part of the right to access the courts embedded in our constitution.” *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 695, 295 P.3d 239 (2013). This has resulted in actual prejudice, and considerable expense to Respondents in their attempts to understand and prepare a meaningful response to Appellants’ allegations.

CR 37 warrants penalties if a party fails to comply with the rules of discovery. CR 37(a) provides that “a party, upon reasonable notice to other parties and all persons affected thereby, and upon a showing of compliance with rule 26(i) may apply to the court in the county... where the action is pending, for an order compelling discovery.” See *CR 37(a)*. Even an inadvertent failure to disclose requested or required discovery information is enough to impose sanctions if there is a violation of the rule without a reasonable excuse. See *Carlson v. Lake Chelan Community Hospital*, 116 Wn. App. 718, 737, 66 P.3d 1080 (Div. 1, 2003). A trial court has broad discretion in imposing discovery sanctions under CR 37(b) and, as previously indicated, its determination should not be disturbed absent a clear abuse of discretion. See *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). An abuse of discretion occurs when a decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.*

For CR 37(b) sanctions in the form of dismissal to be imposed, it must be “apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed, and whether it found that the disobedient party’s refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial.” *Burnet*, 131 Wn.2d at 494. As documented above and in

the materials submitted in support of Respondents' brief, Appellants have willfully violated the discovery rules and have failed to provide a reasonable justification for doing so.

Despite considerable expense and effort by Respondents, they have been thwarted in their endeavor to engage in discovery and assess the merits of Appellants' allegations. "Discovery abuse is by definition prejudicial and can, in extreme cases, make litigation prohibitively expensive." *Mayer*, 156 Wn.2d at 690. There is no justification for Appellants' behavior, and it is clearly indicative of a lack of good faith in maintaining this action. Appellants have amply demonstrated no interest in prosecuting this action in good faith, as they unreasonably and continuously refused to engage in discovery concerning the central element of their claim while this was an active case. Dismissal on June 8, 2018 was therefore appropriate and the decision should be affirmed.

IV. CONCLUSION

Dismissal of this action by the trial court was the appropriate remedy in view of the facts and argument set forth above. Respondents respectfully request this Court affirm the decision.

RESPECTFULLY SUBMITTED this 22nd day of February, 2019.

MIX SANDERS THOMPSON, PLLC

s/ Michael G. Sanders

Michael G. Sanders, WSBA #33881

Attorney for Respondents

DECLARATION OF SERVICE

I, Ashton Acker, hereby declare under the penalty of perjury under the laws of the State of Washington that on February 22, 2019, I caused the foregoing Brief of Respondent to be filed with the Court of Appeals, Division II via the Court's e-filing portal, and a true and correct copy of the same to be sent to the following in the manner indicated below:

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