

NO. 29205-3-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION NO. III

RAYMOND DUSHEY and JEANNINE DUSHEY,

Appellants,
v.

TRANSNATION TITLE INSURANCE,
a Washington corporation,

Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR SPOKANE COUNTY

BRIEF OF RESPONDENT TRANSNATION TITLE INSURANCE

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I. ISSUES PRESENTED FOR REVIEW

- A. Whether the Superior Court properly excluded witnesses disclosed for the first time six months after the deadline imposed by the Case Scheduling Order, almost a year after discovery had been served, a month after the discovery cutoff date, after the motion for summary judgment had been filed and less than a month before trial.
- B. Whether the Superior Court properly granted Defendant's motion to strike Plaintiff's memorandum in opposition to the exclusion of expert witnesses.
- C. Whether the Superior Court properly granted Defendant's Motion for Summary Judgment.
- D. Whether the Superior Court properly denied Plaintiff's Motion for Reconsideration.

II. STATEMENT OF THE CASE

A. THE TRANSACTION

The Respondent, Transnation Title Insurance ("Transnation"), was the closing agent for a loan on real property owned by the Appellants Raymond Dushey and Jeannine Dushey. (CP 55). The transaction was closed on October 25, 2006 by Marie York, an Escrow Officer for Transnation. (CP 55). Ms. York has been a closing officer since 2003. (CP 54).

When Ms. York conducted a closing, she would obtain the driver's licenses of the parties, copy those licenses, and place them in the closing file. (CP 55). In this case, the closing file contains a copy of the driver's licenses from both Raymond Dushey and Jeannine Dushey. (CP 55, 58-59). When Ms. York closed a transaction, she would require both parties to sign all necessary documents in her presence before they were notarized. (CP 55-56). Ms. York would not allow any party at a closing to take the documents out of the office and return them later to be notarized. (CP 55-56). There is no dispute that the closing file contains all of the required documents. Ms. York maintains that she did not allow any party to take the closing documents from the office and have them signed and returned later to complete the closing. (CP 55). There is no dispute that all of the closing documents bear the signatures of "Raymond Dushey" and "Jeannine Dushey". (CP 60-154). As a result of the refinance, the Dusheys received \$47,321.13. (CP 60).

Over a year after the transaction closed and the Dusheys had spent the money, Raymond Dushey claimed that he did not attend the closing and alleged that all of the closing documents were forged. (CP 4-5). Jeannine Dushey has provided conflicting accounts of what she contends occurred at the closing. In her affidavit opposing Transnation's summary judgment motion, Jeannine Dushey claimed that Ms. York allowed her to

take the closing documents out of the office, have them signed, and return them to the closing officer. (CP 274). She also claimed that she forged Raymond Dushey's name to all of the closing documents in her car. (CP 274). In her deposition, Jeannine Dushey contradicted these facts.

Jeannine Dushey testified that she and her husband were looking into a refinance of the home. (CP 162). She testified that she did not recall whether she asked the closing officer if she could take the closing documents from the title office to her husband to sign. (CP 166). Ms. Dushey testified that she "believes" that she signed the documents at the closing office, then took them to the parking lot to sign. (CP 67, Dep. of Jeannine Dushey). Jeannine Dushey further testified that she does not recall if the closing agent notarized all of the documents before or after she returned from the parking lot. (CP 167). Ms. Dushey further testified that she did not recall signing the closing documents in the parking lot or taking them to another location to get them signed. (CP 168). At her deposition, Ms. Dushey was not even sure whether she actually signed Raymond Dushey's name. She testified that she "assumes" that both signatures on the closing documents were hers. (CP 170). Jeannine Dushey testified that she does not recall giving the closing officer a copy of her driver's license or her husband's license. (CP 167) but could not

explain how her driver's license or Raymond Dushey's driver's license ended up in the closing file. (CP 175).

B. THE FUNDS FROM THE LOAN WERE USED FOR COMMUNITY PURPOSES

There is no dispute that the Dusheys received \$47,321.13 from the refinance of community property. (CP 60). Contrary to the Dusheys' contention, the marital community did benefit from this transaction. The funds obtained from the refinance were deposited into Raymond Dushey's personal account at Washington Trust Bank. (CP 170). Jeannine Dushey testified at her deposition that the money was used to pay community bills. (CP 170). Jeannine Dushey admitted the money was used to construct a "mother-in-law" quarters on the home owned by the Dusheys. (CP 172). Jeannine Dushey testified that she would write the checks to the contractors and Mr. Dushey would sign them. (CP 172). As such, the Dusheys' contention that there was no evidence of any benefit to the marital community is simply incorrect.

C. THE LAWSUIT

Raymond Dushey filed suit on December 23, 2008 on behalf of Raymond Dushey and the marital community comprised of Raymond Dushey and Jeannine Dushey one year after he allegedly discovered the transaction and over two years after the transaction closed. (CP 3-6,

CP 68). The Dusheys alleged that Ms. York was negligent in closing the transaction without his presence. (CP 3-4). The complaint further alleged that Raymond Dushey's signature was "false and forged". (CP 5). The Dusheys acknowledged that they had the burden to demonstrate through expert testimony that the documents were "false and forged" through handwriting analysis and that Transnation was negligent in closing the transaction. (CP 296).

The Dusheys Complaint requested damages for the marital community including unspecified general damages, damage to their credit rating and the costs of the increased interest rate for the loan. (CP 6, 22, App. Brief, pg. 5). The Dusheys now apparently claim damages against Transnation for "Ms. Dushey's misuse and misappropriation of funds" but provide absolutely no authority as to how Transnation is responsible for any wrongdoing on the part of Mrs. Dushey. (App. Brief, pg. 5).

D. THE DUSHEYS DID NOT MEET THE DEADLINES IMPOSED BY THE CASE SCHEDULING ORDER AND DID NOT COMPLY WITH THE RULES OF DISCOVERY

1. The Dusheys did not comply with the Case Scheduling Order.

The Case Scheduling Order was issued on April 10, 2009, four months after the lawsuit was filed. (CP 9). The Case Scheduling Order was never amended. The discovery cutoff was January 4, 2010 and trial

was set for March 8, 2010. (CP 9). The cutoff date to request a continuance of the trial date was December 14, 2009. (CP 9). The Dusheys never filed a motion to continue the trial prior to the cutoff date. In fact, as discussed more fully below, the Dusheys did not seek to continue the trial date at any time until an oral motion on February 23rd (the day of the summary judgment hearing), over two months after the cutoff date, and thirteen days before trial. (CP 914).

The Dusheys' lay and expert witness disclosure was due on August 10, 2009. (CP 9). No disclosure was filed. Transnation's witness disclosure, due on October 19, 2009, was timely filed and served on the Dushey's attorney. (CP 9, CP 26-27). Transnation's witness disclosure identified witnesses, including an expert witness, and contained the following objection:

Defendant objects to any witnesses identified by Plaintiff as a witness disclosure has not been filed. (CP 26-27).

Despite the deadline clearly stated in the Case Scheduling Order and additional notice contained in Transnation's disclosure that the Dusheys had never filed a witness list, the Dusheys still failed to file a witness list.

2. The Dusheys did not comply with the rules of Discovery.

Transnation's first set of Interrogatories and Requests for Production of Documents were served on January 30, 2009. (CP 11). On

June 8, 2009, Transnation filed a motion to compel. (CP 10). The motion was only filed after counsel sent a letter to the Dusheys' attorney on May 19, 2009 asking for the responses, set a discovery conference for June 1, 2009, obtained an agreement from counsel that the responses would be provided by June 2, 2009 and, having received no response as of June 8, 2009, filed the motion. (CP 10-11). The hearing was stricken after the Dusheys finally provided responses on June 23, 2009, three weeks after the Dusheys' attorney agreed to provide them. (CP 155).

Interrogatory No. 8 requested the Dusheys to identify any experts and the opinions of those experts. (CP 230). The Dusheys responded as follows:

Retained experts objection. This is beyond the scope of discovery rules. It has not been determined if plaintiff will call an expert. (CP 230).

Interrogatory No. 10 asked the Dusheys to identify persons with knowledge about the facts alleged in the lawsuit. (CP 321). The Dusheys responded as follows:

The closing agent-defendants employee/ Mrs. Dushey.
(CP 231).

The Dusheys' responses to Interrogatory No. 8 and Interrogatory No. 10 were never supplemented at any time before the discovery cutoff

date. In fact, the Dusheys identified no other witnesses and provided no supplementary responses until February, 2010, just before trial.

Transnation's second set of Interrogatories and Requests for Production of Documents were sent to the Dusheys on September 10, 2009. (CP 28-29, 31). On October 15, 2009, Transnation sent a letter to the Dusheys' attorney asking for responses. (CP 29, CP 32). No responses were provided. On November 2, 2009, Transnation sent a letter setting a discovery conference on November 9, 2009. (CP 29, 33). The Dusheys' attorney asked to re-set the conference for November 13, 2009 as he was out of town on November 9. (CP 29, 34). On November 13, 2009 during the discovery conference, the Dusheys' attorney indicated that the responses would be provided by November 23, 2009. (CP 29, 35). No responses were received and Transnation was forced to file a second motion to compel. (CP 29). The hearing was set for December 11, 2009. (CP 36) The hearing was continued to December 18, 2009 to yet again accommodate the schedule of the Dusheys' attorney. (CP 36) Eventually, a stipulated order was entered granting Transnation's motion to compel discovery which required the Dusheys to provide responses by December 21, 2009 and sanctions totaling \$200.00. (CP 253). While responses were eventually provided, these sanctions were never paid. (CP 253).

The Dusheys' responses to Interrogatory No. 8 and No. 10 are the limit of the disclosures regarding expert witnesses and witnesses that would be called at trial. Despite having the burden of proof that to demonstrate that the documents were "false and forged" (and acknowledging that such proof was necessary) through expert testimony, the Dusheys identified no witnesses to meet this burden within the time limits imposed by the Case Scheduling Order. The Dusheys identified no expert witnesses in answers to Interrogatories. In fact, as discussed below, the Dusheys did not disclose any expert witnesses until February, 2010, after Summary Judgment had been filed, after the due date for their response to the Summary Judgment motion had passed, six months after the disclosures were due, over a year after pre-trial discovery had been served, a month after the discovery cutoff, and the month before trial. (CP 265, CP 276).

E. THE DUSHEYS FAILED TO TIMELY RESPOND TO THE SUMMARY JUDGMENT MOTION WHICH RESULTED IN FURTHER DELAY.

On January 14, 2010, Transnation filed a motion for summary judgment setting the hearing for February 12, 2010. (CP 253). Pursuant to Spokane County Local Rule 56, the Dusheys' response was due Monday, February 1, 2010. (CP 253-254). No response was filed. The Dusheys' attorney never contacted counsel for Transnation about the

motion, the hearing date or the response prior to February 1, 2010. (CP 254). The Dusheys' attorney contacted Transnation's counsel for the first time on February 2, 2010, the day **after** the response was due and indicated that a response had not been prepared. (CP 254). The Dusheys' attorney asked for additional time to respond because he had to file pleadings in a matter before the 9th Circuit. (CP 254). Counsel further claimed that he had retained experts to respond to the summary judgment motion. (CP 254). These experts were not identified nor were any documents produced in response to Interrogatories that had been served over a year earlier. (CP 254).

Counsel for Transnation contacted the Dusheys' attorney on February 3, 2010 and was advised by the Dusheys' attorney that he wanted until February 12, 2010 to file his response to the summary judgment motion (the date set for hearing). (CP 254). The Dusheys' attorney also advised that he wanted to continue the trial date from March 8, 2010 for a few weeks and that he had retained two experts to respond to the summary judgment motion. (CP 254). Again, the Dusheys did not disclose who these witnesses were, had not filed a witness list, and had not provided any responses to discovery regarding the experts. (CP 254). Counsel for Transnation objected to any

continuance of the trial date and the summary judgment hearing.

(CP 254).

On February 4, 2010, the Dusheys' attorney requested an emergency hearing for a continuance of the summary judgment motion. (CP 910). At this hearing, the Dusheys' attorney represented to the Court that he believed that Plaintiff's witness list had, in fact, been filed which was simply not the case. (Rep. of Proceedings, pg. 12, ln. 9). The Dusheys' then attorney admitted that he had retained one expert but was still looking for a second expert. (Rep. of Proceedings, pg. 6, ln. 1-13). Counsel asked to "move things back a month or two" in order to find a second expert. (Rep. of Proceedings, pg. 6, ln. 8-13). At this same hearing the Dusheys requested, and received, a continuance of the summary judgment motion until February 23, 2010 in order to file a response. No formal motion for a continuance of the trial date was ever filed. The Court ordered the Dusheys to file a response to the summary judgment motion by February 15, 2010. (CP 264) (Rep. of Proceedings, pg. 13, ln. 16-25). Transnation's reply was due on February 22, 2010 with the hearing on February 23, 2010. (CP 264), (Rep. of Proceedings, pg. 13, ln. 16-25).

The same day of the emergency hearing, six months after the disclosure was due, one month after the discovery cutoff, over a year

after pre-trial discovery had been served, a month away from trial, and after summary judgment had been filed, the Dusheys finally filed a witness list identifying John Montgomery as an expert concerning the duty of care for notaries. (CP 265-266). The Dusheys finally provided a report dated December 21, 2009 from Mr. Montgomery in response to discovery. (CP 895). Despite the fact Mr. Montgomery was retained before the discovery cutoff, the Dusheys did not disclose him as an expert or supplement their responses to Interrogatories.¹

The Dusheys filed an amended witness list over a week later on February 12, 2010 identifying, for the first time, Robert Floberg as an expert in handwriting analysis. (CP 276). The Dusheys also disclosed (for the first time) Marty Dushey as a lay witness. (CP 276). Mr. Floberg was not hired as an expert until February 11, 2010. (CP 304, CP 886).

The Dusheys filed a response to the summary judgment motion which included the declarations of Mr. Floberg and Mr. Montgomery on February 15, 2010. (CP 270-272, 277-283, 288-293). Despite the

¹ Counsel represented to the Court that he received Mr. Montgomery's report after his clients had provided responses to the first set of Interrogatories and that he would supplement these responses once he received it. (Rep. of Proceedings, pg. 6, ln. 1-7). The report is dated December 21, 2009 and was not provided to Transnation until February 5, 2010, well after the discovery cutoff. (CP 885).

Court's briefing schedule, the Dusheys also unilaterally filed a separate "Motion and Memorandum Re: Exclusion of Expert Witnesses or Their Declarations" on February 19, 2010 in anticipation of Transnation's objection to these witnesses. (CP 295-307, 911, Rep. of Proceedings, pg. 25, ln. 3-8).² Transnation timely filed its reply on summary judgment including a motion to strike the declarations of Mr. Floberg and Mr. Montgomery. (CP 831-833, 834-843, 844-846). Transnation requested the Court to deny any attempt to continue the trial date and rule on the summary judgment motion.

At the summary judgment hearing on February 23, 2010, the Dusheys' attorney then changed his explanation as to why a witness list had not been filed. The new explanation was that disclosure of experts on February 4 and February 12 had not been made earlier because of counsel's subjective belief the case would settle and not proceed to trial. (Rep. of Proceedings, pg. 29, ln. 22-25). When questioned why a witness list was not filed after Transnation filed its witness list in October, 2009, and alerted the Dusheys that they had not filed one, counsel stated that he

² Contrary to Plaintiff's brief, this memorandum was not filed in response to summary judgment, but filed only in anticipation of a motion to strike by the Defendant. Since the Court ordered a set briefing schedule at the hearing on February 4, 2010, which was clearly violated by Plaintiffs, there was no error in striking this pleading. Regardless of whether this pleading was stricken, the same arguments were presented at the hearing on Summary Judgment and in Plaintiff's Motion and Memorandum on Reconsideration as clearly outlined in the Court's memorandum opinions related to each motion. As such, any error striking this brief was harmless.

was dealing with other cases. (Rep. of Proceedings, pg. 29, ln. 9-17).

Counsel further stated “So I have no other excuse other than to explain to you that I missed that and to beg the Court’s indulgence here.” (Rep. of Proceedings, pg. 30, ln. 9-10.)

The Dusheys then offered a third reason to justify non-compliance in their motion for reconsideration. The Dusheys claim that experts were not disclosed because the parties were negotiating and that these negotiations suddenly broke down well after the cutoff dates.

(CP 296-297). The Dusheys’ attorney claimed that it was only then that he realized the case would proceed to trial which would, in turn, require an expert witness on handwriting analysis and the standard of care for notaries. (CP 296-297). The Dusheys’ attorney maintains that since the disclosure date and discovery cutoff date had already passed, it was essentially impossible to comply with the Case Scheduling Order or discovery. (CP 296-297).

The explanations are not reasonable. First, it is undisputed that, despite the Dusheys’ representation, a witness list was not filed. Second, the subjective belief of an attorney that the case would settle prior to trial does not excuse compliance with a Case Scheduling Order or the discovery rules. Third, there were no on-going settlement negotiations. The Dusheys represented to this Court at Summary Judgment that they

filed the **Complaint** because settlement negotiations broke down in December, 2008, not because the parties were negotiating and all of a sudden realized trial was less than a month away. (CP 269, App. Brief, pg. 6). Second, even if there were any settlement negotiations, this does not justify non-compliance with the Case Scheduling Order or the discovery rules. The parties did not agree to waive or amend any of the dates in the Case Scheduling Order or waive the rules of discovery. The Dusheys knew that they needed an expert to show that the documents were false and forged. (CP 296, CP 861). The Dusheys knew that they needed an expert to prove their claim that Transnation was negligent in closing this transaction. (CP 296). As the Superior Court correctly pointed out, there has been no explanation why the witness list was never filed regarding **any** of the witnesses the Dusheys intended to call at trial until 24 days after Summary Judgment was filed. (CP 861). In addition, the explanations offered by the Dusheys ignore the record which clearly shows Transnation was pushing this matter to trial as follows:

Transnation timely filed its witness list (CP 26), Transnation's witness disclosure noted that the Dusheys had not filed a witness list (and an objection was lodged to any witness that may be identified) (CP 27), and Transnation filed motion after motion to make the Dusheys provide full and complete responses to discovery. (CP 10-16, CP 28-37). The record

clearly reflects what happened in this case: the Dusheys did not file a witness list, indicated that they had no plans to hire an expert, did not timely file a response to the summary judgment motion and sought to remedy the problem by continuing the summary judgment motion and retain expert witnesses.

The Superior Court correctly found that the Dusheys did not follow the requirements of the Case Scheduling Order and rules governing discovery. The Superior Court also correctly found that the Dusheys' subjective belief or their attorney's subjective belief that the case would settle prior to trial was not a reasonable excuse and the violations were willful. (CP 862, 913-915). The Superior Court correctly considered on the record whether a lesser sanction was appropriate. (CP 862). In light of the time before trial, the continued violations of the discovery rules, violation of the Case Scheduling Order and the extreme prejudice to Transnation to prepare for trial in two weeks, a lesser sanction was not appropriate. (CP 862, CP 933-934).

The Superior Court also correctly ruled that even if the declarations had been admitted, the Dusheys did not have sufficient proof to rebut the motion for summary judgment or to prove their case that the documents were forged by Jeannine Dushey and that Transnation was negligent. (CP 863-865). The Superior Court also correctly ruled that

the Dusheys were not entitled to damages pursuant to the doctrines of estoppel, waiver and benefit to the marital community. (CP 863-864).

III. SUMMARY

The closing file contains all of the appropriate closing documents, the drivers' licenses and the signatures of both Raymond Dushey and Jeannine Dushey. The Dusheys initiated this lawsuit two years after the transaction closed, alleged that the signature of Raymond Dushey was "false or forged", and that Transnation was negligent in closing the transaction. The Dusheys sought damages despite having received \$47,321.13, depositing these funds in a community account and spending these funds to pay community bills and improve community property. As such, the community benefitted from this transaction and cannot seek additional damages.

The Dusheys acknowledge that they had the burden of proof through expert testimony demonstrate that the signature of Raymond was "false or forged" and that Transnation was negligent in closing the transaction as alleged in the Complaint. The Dusheys did not file a witness list as required by the Case Scheduling Order and stated in interrogatory responses that no decision had been made concerning experts to support their burden of proof. The Dusheys did not retain experts to meet their burden of proof until February, 2010. The first time any expert witnesses

were disclosed was after Transnation moved for summary judgment: six months after the disclosure date required by the Case Scheduling Order, over a year after pre-trial discovery had been served and less than a month away from trial. Clearly, there was a violation of the Case Scheduling Order and discovery rules.

The Dusheys explanations were not reasonable and therefore the violations were willful. Due to all of the delays created by the Dusheys, the summary judgment hearing did not take place until two weeks before trial. Since the Dusheys violated the Case Scheduling Order, Transnation was not required to show prejudice. Even so, the Superior Court correctly found that Transnation would be extremely prejudiced in preparing for trial. By the time the summary judgment motion was heard because of actions of the Dusheys, only 13 days remained prior to trial. Transnation was extremely prejudiced as it would have to not only depose the two experts retained in February but get its own expert up to speed on the case. The Superior Court properly considered, on the record, whether lesser sanctions would be appropriate. The Superior Court correctly considered the time left before trial, the continued violations of the discovery rules and Case Scheduling Order and the extreme prejudice to Transnation in having prepare for a trial in less than two weeks. The Court correctly ruled that a lesser sanction was not sufficient under the circumstances and

properly excluded the declarations of Mr. Montgomery and Mr. Floberg offered in response to Summary Judgment. Since the Dusheys did not meet their burden to show that the documents were forged by Jeannine Dushey or that Transnation was negligent in closing the transaction, the Superior Court correctly granted summary judgment.

Even if the declarations of Mr. Floberg and Mr. Montgomery had been admitted, they were based on pure speculation and conjecture and did not provide sufficient factual basis or other information to create a genuine issue of material fact. Furthermore, the evidence presented by Jeannine Dushey in opposition to summary judgment contradicted her deposition testimony and cannot be used to create a genuine issue of material fact.

The Dusheys had the obligation to prove their case and comply with the rules of litigation. That obligation required them to meet deadlines imposed by the Case Scheduling Order, fully respond to discovery and timely respond to motions. The Dusheys failed to meet any of these obligations. It was only after all deadlines had passed and after their summary judgment response was overdue that the Dusheys finally retained an expert witness, disclosed witnesses and attempted to comply with the rules of discovery. By that time, trial was less than two weeks away. All of these issues were created solely by the Dusheys. The Superior Court acted properly and its Orders should be affirmed.

IV. ARGUMENT

A. STANDARD OF REVIEW

When reviewing an order for summary judgment, the Court engages in the same inquiry as the trial court. *Wilson Court Ltd. Partnership v. Tony Maroni's Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998). An order on summary judgment will be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 698. Civil Rule 56(e) requires the non-moving party to come forward with specific evidence showing that there is a genuine issue of fact. *Charbonneau v. Wilbur Ellis Co.*, 9 Wn. App. 474, 477, 512 P.2d 1126 (1973). In resisting a motion for summary judgment, the non-moving party cannot rely on mere denials, argumentative assertions, or conclusory statements. Instead, the non-moving party must submit sufficient affidavits setting forth specific facts which have the effect of disputing the facts of the moving party. Such disputing facts must rise to the level of creating a genuine issue of material fact, i.e., one upon which the outcome of the litigation (or litigation of specific issues) depends. *Island Air, Inc. v. Labar*, 18Wn.App. 129, 136, 566 P.2d 972 (1977). The non-moving party, however, is not compelled to meet every speculation, conjecture, or possibility by alleging facts to the contrary. *Bates v. Grace United Methodist Church*, 12 Wn. App. 111, 115, 529 P.2d 466 (1974).

Motions for reconsideration are within the sound discretion of the trial court and a reviewing court will not reverse that decision absent a showing of a manifest abuse of discretion. *Wagner Development, Inc. v. Fidelity Bond and Deposit Co. of Maryland*, 95 Wn.App. 896, 906, 977 P.2d 639 (1999), *review denied* 139 Wn.2d 1005, 989 P.2d 1139 (1999).

B. THE DUSHEYS HAD THE BURDEN OF PROOF

In order to prevail in a claim for negligence, the Dusheys had the burden to prove (1) the existence of a legal duty, (2) breach of that duty, (3) injury resulting from the breach and (4) proximate cause. *Little v. Countrywood Homes, Inc.*, 132 Wn.App. 777, 779, 133 P.3d 944 (2006). *Bakay v. Yarnes*, 431 F.Supp.2d 1103, 1110 (W.D. Wash. 2006). The party bearing the burden of proof to establish negligence must supply substantial evidence. *Johnson v. Aluminum Precision Products, Inc.*, 135 Wn.App. 204, 208-209, 143 P.3d 876 (2006). Expert testimony is required when a specific fact in question is beyond the understanding of ordinary laymen and is essential to an element of the case. *Cole v. McGhie*, 59 Wn.2d 436, 442, 361 P.2d 938 (1961) and *Seybold v. Neu*, 105 Wn.App. 666, 676, 19 P.3d 1068 (2001). In this case, the Dusheys acknowledge that they had the burden of proof to show that Ms. York breached the ordinary care of a closing agent in completing this transaction. *Denaxas v. Sandstone Court of Bellevue, LLC*, 148 Wn.2d

654, 663 (63 P.3d 125 (2003), (CP 296). The Dusheys also agree that they had the burden to prove that the documents were “false and forged” through the testimony of a handwriting expert. (CP 296). The evidence clearly demonstrates that the Dusheys did not meet their burden and summary judgment was properly granted because (1) the expert witnesses were properly excluded at summary judgment and (2) even if the declarations had been admitted, the Dusheys did not meet their burden of proof to preclude summary judgment.

C. EXCLUSION OF THE EXPERT WITNESSES WAS PROPER

The Superior Court properly excluded the expert witnesses as the Dusheys violated the Case Scheduling Order and failed to fully and adequately answer or supplement discovery under Civil Rule 26. Since there was no reasonable excuse offered by the Dusheys, the violations were willful. As a result of the violations, Transnation was prejudiced as it had approximately two weeks to prepare for trial including deposing the Dusheys’ experts and getting its own expert up to speed on the case. The prejudice was created exclusively by the Dusheys’ failure to disclose witnesses, failure to respond to discovery and failure to timely file a response to the motion for summary judgment. The Superior Court

properly found, on the record, that a lesser sanction was not appropriate given the prejudice to Transnation and the time remaining before trial.

1. **Violation of the Case Scheduling Order.**

There is no dispute that the Case Scheduling Order required the Dusheys to disclose all witnesses by August 10, 2009. Despite representations that a witness list had been filed, there is no dispute that a witness list was not filed. There is no dispute that these disclosures were not made until February 4, 2010 and February 12, 2010, six months after they were due, one month after the discovery cutoff and less than a month away from trial. It is also undisputed that Transnation timely filed its witness disclosure in October, 2009 and provided *additional* notice to the Dusheys that they had not filed a witness list.

A trial court has broad discretion in deciding whether to sanction a party for violation of a Court order. *Blair v. TA-Seattle East #??176*, 150 Wn.App. 904, 908-909, 210 P.3d 326 (2009). The broad discretion of the Superior Court will not be disturbed on appeal absent a clear abuse of discretion. *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial court only abuses its discretion only when its decision is unreasonable or based on untenable grounds or if no reasonable person would take the position adopted by the trial court. *Mayer v. City of Seattle*, 102 Wn.App. 66, 79, 10 P.3d 408 (2000). Deference should be

given to the trial court for its decision to impose sanctions since it is in the best position to make this decision. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 582, 220 P.2d 191 (2009). An appellate court can disturb sanctions imposed by the trial court only if it is clearly unsupported by the record. *Id.* at 582.

A Court may exclude witnesses or testimony as a sanction where there is a showing of intentional or tactical nondisclosure, willful violation of a Court order, or other unconscionable conduct. *Blair v. TA Seattle East* at 908-909. A violation of a Court order without a reasonable excuse will be deemed willful. *Id.* Even an inadvertent error in failing to disclose an expert may be deemed willful, justifying exclusion of testimony. *In re Estate of Foster*, 55 Wn.App. 545, 548, 779 P.2d 272 (1989). If non-disclosure is in violation of a Court order, no showing of prejudice is required. *Falk v. Keene Corp.*, 53 Wn.App. 238, 250-251, 767 P.2d 576 (1989).

In *Blair v. TA Seattle East* (supra), the Plaintiff failed to disclose witnesses over one week after the deadline imposed by the case scheduling order. The trial court granted a motion to strike the witnesses as the Plaintiff provided no reasonable excuse for the failure to timely disclose. The Court of Appeals held that there was no abuse of discretion in striking the witnesses. *Blair v. TA-Seattle East* at 909. See also *Allied*

Financial Services, Inc. v. Mangum, 72 Wn.App. 164, 169, 864 P.2d 1 (1993) (opinion amended 871 P.2d 1075 (1994) (Holding that it is not an abuse of discretion to exclude witnesses where a party willfully violates the Case Scheduling Order by failing to supply any valid reason for non-compliance.)

The local rules of the Spokane County Superior Court also justify sanctions. The rules provide that failure to comply with the Civil Case Scheduling Order may be grounds for the imposition of sanctions including dismissal or terms. LAR 0.4.1(g)(1). The rules further provide that if the Court finds that an attorney has failed to comply with the Case Scheduling Order without reasonable excuse, the Court may impose monetary sanctions or sanctions as justice requires. LAR 0.4.1(g)(3). “Other sanctions” include, but are not limited to the exclusion of evidence. LAR 0.4.1(g)(4). The rule does not require a showing of “prejudice” as a prerequisite to the Court’s exclusion of witnesses as a sanction for failure to submit a witness list.

2. Violation of Discovery Rules.

Discovery sanctions may be imposed pursuant to Civil Rule 26 or Civil Rule 37. There is no dispute that Transnation’s interrogatories and requests for production of documents were served January 30, 2009, a full year prior to the discovery cutoff. Once the Dusheys finally provided

responses, they indicated that no decision was made as to whether an expert witness would even be called. The only lay witnesses disclosed were Jeannine Dushey and the closing officer. There is no dispute that the Dusheys did not disclose Mr. Montgomery as an expert witness until February 4, 2010 even though he had been retained sometime prior to December 21, 2009. There is no dispute that Mr. Floberg, the handwriting expert, was not retained or disclosed until February 12, 2010.

A party must answer or object to interrogatories and cannot ignore or fail to respond to a request. *Magana v. Hyundai Motor America*, 167 Wn.2d at 585. A party must provide information concerning an expert witness that will be called at trial if requested in interrogatories. CR 26(b)(5)(A)(i). The civil rules allow a party to inquire about the subject matter on which the expert is to testify, the substance of facts and opinions to which the expert is expected to testify and a summary of grounds for each opinion. CR 26(b)(5)(A)(i). A party that responds to interrogatories is required to supplement each interrogatory regarding an expert that will be called at trial. CR 26(e)(1). The rule places a duty on the party to seasonably supplement responses regarding each person expected to be called as an expert witness. *Rupert v. Gunter*, 31 Wn.App. 27, 32, 640 P.2d 36 (1982) and *Detwiler v. Gall, Landau & Young Const.*

Co., 42 Wn.App. 567, 572, 712 P.2d 316 (1986). Failure to abide by the discovery rules will result in mandatory sanctions. *Carlson v. Lake Chelan Community Hospital* 116 Wn.App. 718, 737, 75 P.3d 533 (2003) and Civil Rule 26(g). Failure to supplement responses will result in “terms and conditions that the trial court may deem appropriate.” Terms and conditions are based on the broad discretion of the trial Court. CR 26(e)(4), CR 37 and *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). Exclusion of an expert’s testimony is an appropriate sanction for failure to provide prompt responses or to timely provide supplementary responses. *Detwiler v. Gall*, 42 Wn.App. 567 at 572-573, *Rupert v. Gunter*, 31 Wn.App. 27, 32, 640 P.2d (1982) and *Lampard v. Roth*, 38 Wn.App. 198, 201-202, 684 P.2d 1353 (1984). The Court may exclude witnesses for failing to respond to discovery if the violation was willful and prejudices a party’s ability to prepare for trial. Where a willful noncompliance with discovery substantially prejudices the opponent’s ability to prepare for trial, the exclusion of evidence is not an abuse of discretion. *Hampson v. Ramer*, 47 Wn.App. 806, 812, 737 P.2d 298 (1987).

3. *The Superior Court Properly Excluded the Expert Witnesses for Violation of the Case Scheduling Order and Violation of Discovery Rules*

Washington law is clear that exclusion of witnesses is an appropriate sanction for failure to timely supplement responses and disclose expert witnesses that will be called at trial. *Scott v. Grader*, 105 Wn.App. 136, 140-141, 18 P.3d 1150 (2001), (expert witness designated at the last minute without reasonable excuse is untimely and justifies exclusion); *Allied Financial Services v. Mangum*, 72 Wash.App. 164, 168-69, 864 P.2d 1 (1993) (witnesses excluded due to party's failure to submit a witness list as required by pretrial order), and *Barci v. Intalco Aluminum Corp.*, 11 Wn.App. 342, 349-50, 522 P.2d 1159 (1974). In determining whether a witness will be excluded, the Court must consider, on the record, lesser sanctions. *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn.App. 65, 69, 155 P.3d 978 (2007).

The Dusheys knew that expert testimony was required to prove their case. They did not file a witness list and did not provide any notice regarding expert witnesses until February 4, 2010 and February 12, 2010, six months after the disclosure after Transnation moved for summary judgment and after their response to summary judgment was overdue. The Dusheys' did not disclose any expert witnesses in answers to Interrogatories and did not timely supplement their responses. A

supplemental response was not provided until February, 2010, over a year after discovery had been served and a month after the discovery cutoff. Furthermore, at least one of the experts (Mr. Montgomery) had been retained in December, 2009, yet never disclosed in a witness list or in answers to discovery. Mr. Floberg was not retained as an expert until February 11, 2010. (CP, 304, CP 886).

The Dusheys have not provided a reasonable excuse for non-compliance and, as such, the violations were willful. There is absolutely no authority that the subjective belief by a party or their attorney that the case may settle is a reasonable excuse for failing to follow the Case Scheduling Order or answer discovery. There is no authority that the sudden realization of a party less than a month away from trial that expert testimony will actually be necessary when that has been apparent since the inception of the case is a reasonable excuse. There is no authority that the existence of settlement negotiations is a reasonable excuse for non-compliance. There is no authority which allows non-compliance with the discovery rules or the Case Scheduling Order even if settlement negotiations are taking place. Furthermore, the Dusheys' representations that there were continuing settlement negotiations are simply inaccurate. There were no "continuing negotiations" in this case. Furthermore, even if settlement negotiations were taking place, there was no stipulation to

waive or amend the Case Scheduling Order even if these negotiations were taking place. There is nothing in the record showing any valid or reasonable excuse for non-compliance except the Dusheys subjective belief and subjective desire to settle this case. The record clearly reflects that Transnation was pushing this matter to trial by disclosing witnesses, retaining an expert, notifying the Dusheys that they had not filed a witness list, serving discovery, filing motions to compel to obtain discovery when the Dusheys failed to respond and conducting the deposition of Ms. Dushey. The Dusheys' attorney claims that a heavy workload prevented a timely response to the summary judgment motion. (Rep. of Proceedings, pg. 4, ln. 1 - pg. 5, ln.9). In general, a heavy workload is not a reasonable excuse. See e.g. *Matter of Loomos*, 90 Wn.2d 98, 103, 579 P.2d 350 (1978). All of the delays and non-compliance, created solely by the Dusheys, resulted in a hearing on February 23, 2010, thirteen days from trial.

Generally, prejudice is not a pre-requisite to the Court's exclusion of witnesses as a sanction for a party's failure to abide by a court order, especially considering the time remaining before trial. *Allied Financial Services Inc.*, 72 Wn.App. at 169 and *Burnet v. Spokane Ambulance*, 131 Wn.2d484, 496-497, 933 P.2d 1036 (1997).

Even if a showing of prejudice was required, Transnation was certainly prejudiced as it would have to depose both of the Dusheys' experts and get its own expert up to speed to prepare for trial in less than two weeks because of the Dusheys' delays and non-compliance.

The Dusheys argue that since they offered to have Mr. Montgomery and Mr. Floberg deposed and offered to pay for any expense related to those depositions, the order striking their declarations was improper. Counsel for the Dusheys made an "offer" of an eight day window to depose two experts and get this matter ready for trial. The Dusheys filed this matter in December, 2008 yet waited six months after the disclosure date and over a year after discovery to disclose witnesses. Counsel for the Dushey sought to excuse non-compliance with court rules in providing expert witnesses and providing a response to a summary judgment motion because of other cases that took up his time. Counsel for Transnation also has other cases and was working on those cases during this eight day window to depose these experts. (Rep. of Proceedings, pg. 41, ln. 2-19). To claim that there is no prejudice and to claim that Transnation refused to mitigate the problem is disingenuous. Given the continued delays and non-compliance by the Dusheys, by the time the Dusheys actually attempted to meet their obligations, trial was less than two weeks away. The Superior Court correctly found that no

other appropriate sanction was available due to the time left before trial, the continued violations of the discovery rules and Case Scheduling Order and extreme prejudice to Transnation other than exclusion of witnesses. (CP 862). The trial court did not abuse its discretion in striking the expert witnesses and this decision should be upheld on appeal.

D. THE DUSHEYS DID NOT MEET THEIR BURDEN OF PROOF

As the Dusheys had no expert testimony to establish that the closing documents were “false and forged” and that Transnation was negligent in closing this transaction, summary judgment was properly granted. Even if the expert declarations of Mr. Montgomery and Mr. Floberg had been allowed at summary judgment, the Dusheys did not meet their burden of proof and summary judgment was properly granted.

The Dusheys claimed that the closing documents were removed from the closing by Jeannine Dushey, taken to the parking lot and the signature of Raymond Dushey was repeatedly forged by Jeannine Dushey. It is undisputed that the Dusheys had to provide substantial evidence and through expert testimony to prove the forgery and negligence on the part of Transnation. In the context of summary judgment, an expert must support his opinion with specific facts. *Digital Control, Inc. v.*

McLaughlin Mfg. Co., Inc., 242 F. Supp.2d 1000, 1007 (W.D. WA 2002). Evidence that is based upon speculation or conjecture is not admissible. *Id.* at 1007. (“Conclusory expert declaration devoid of facts upon which the conclusions were reached does not raise a genuine issue of material fact.”) See also *Ruff v. County of King*, 125 Wn.2d 697, 707, 887 P.2d 886 (1995) and *Hash by Hash v. Children’s Orthopedic Hosp.*, 49 Wn.App. 130, 133, 741 P.2d 584 (1987) (“Unsupported conclusional statements alone are insufficient to prove the existence or nonexistence of issues of fact.”).

In this case, the Dusheys offered the testimony of attorney John Montgomery to provide an opinion about the duty of a notary in Washington State. Mr. Montgomery did not address whether the signatures on the closing documents were valid and did not address the presence of Raymond Dushey and Jeannine Dushey’s driver’s licenses in the closing file. Mr. Montgomery’s opinion is based on pure assumption that the documents were not signed by both parties in the presence of a notary. This opinion is based on pure speculation and conjecture and, therefore was not admissible and cannot create a genuine issue of material fact. Mr. Montgomery’s opinion ignores Jeannine Dushey’s deposition testimony where she was not sure if she actually signed her husband’s name and Ms. York’s testimony that she would not notarize documents

without the presence of the parties and did not do so in this case. The Dusheys expert opinion presupposes that the documents were forged and is based on pure speculation and conjecture.

The Dusheys also offered the declaration of Robert Floberg to support their claim that the closing documents were forged. Mr. Floberg provides no supporting facts or opinions that the Dusheys claims are accurate: that Jeannine Dushey removed the documents from the closing and signed these documents. Instead, Mr. Floberg provided a generalized statement without any basis on evidence or scientific testing that the closing documents were forged. Again, affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment. *Digital Control Inc.* at 1007, *Davies v. Holy Family Hosp.*, 144 Wn.App. 483, 493, 183 P.3d 283 (2008) and *Griswold v. Kilpatrick*, 107 Wn.App. 757, 761, 27 P.3d 246 (2001) (“Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.”) (citations omitted). The Dusheys offered no evidence that Jeannine Dushey in fact signed these documents. The Dusheys offered no evidence other than a generalized opinion that they were “forged”. As such, the affidavit of Mr. Floberg was not sufficient to demonstrate a material fact and summary judgment was properly granted.

The Dusheys also argue that Jeannine Dushey's affidavit created a genuine issue of material fact. In responding to summary judgment, one cannot rely on mere denials, argumentative assertions or conclusory statements. *Island Air, Inc. v. LaBar*, 18 Wn. App. At 136. Self-serving affidavits which contradict deposition testimony cannot be used to create a genuine issue of material fact. *McCormick v. Lake Washington School Dist.* 99 Wn.App. 107, 111, 992 P.2d 511 (1999) and *Selvig v. Caryl*, 97 Wn.App. 220, 225, 983 P.2d 1141 (1999). In this case, Jeannine Dushey's affidavit in response to summary judgment claims that Ms. York allowed her to take the closing documents to her car, that she forged Raymond Dushey's name them, and returned them to the closing officer. This is contradicted by her deposition testimony wherein she testified that was not sure whether she even signed the closing documents in the parking lot and returned them later. Furthermore, Jeannine Dushey was not even sure that she signed Raymond's Dushey's name, instead testifying that this was only based on an "assumption" that she did so. As such, her declaration in response to summary judgment is in conflict with her deposition testimony and simply a blanket assertion to try and create a genuine issue of material fact.

The Dusheys claim that expert witnesses were not necessary since a "per se" violation was established pursuant to RCW 64.08.050. RCW 64.08.050 requires that the notary establish that the person signing the

documents is “known to them” as determined by satisfactory evidence. RCW 64.08.050. A notary has a positive duty to exercise reasonable care to ascertain the identity of persons executing documents. *Meyers v. Meyers*, 81 Wn.2d 533, 536, 503 P.2d 59 (1972). A notary is not liable for making an acknowledgement for an imposter in absence of a failure to exercise care. *Lee James, Inc. v. Carr*, 170 Wash. 29, 32-33, 14 P.2d 1113 (1932). The statutorily presumption which attaches to a document properly notarized may only be overcome by clear and convincing evidence. *Whalen v. Lanier*, 29 Wn.2d 299, 308, 186 P.2d 919 (1947). There is no “per-se” violation under the relevant statute or *Meyers* case cited by the Dusheys. Instead, the Dusheys had to prove that the notary failed to establish identification and the falsity of the notary certificate by clear and convincing evidence. *Meyers v. Meyers*, 81 Wn.App. 533 at 536 and *Whalen v. Lanier*, 29 Wn.2d at 308. Again, the Dusheys failed to show by clear and convincing evidence through lay or expert testimony that there has been a violation of the statute.

E. THE DUSHEYS ARE BARRED FROM ANY RECOVERY

Even if the declarations of Mr. Floberg and Mr. Montgomery had been admitted, the Dusheys would still not be entitled to any recovery for the claims they have asserted. It is undisputed that the marital community

obtained \$47,321.13 from this loan in October, 2006. It is also undisputed that the Dusheys used these funds for community purposes and obtained a community benefit. The Dusheys paid community bills using these funds. The Dusheys built living quarters on their property with these funds. Mr. Dushey took no action to void the transaction and waited over two years to file this lawsuit. As the closing took place over four years ago, the marital community obtained a benefit from the loan, and Mr. Dushey has waived any claim to void the transaction, summary judgment was properly granted.

Washington law provides “either spouse . . . acting alone, may manage and control community property.” RCW 26.16.030. Thus, absent a showing of bad faith, “a debt incurred by either spouse during marriage is presumed to be a community debt.” *Oil Heating Co. of Port Angeles, Inc. v. D.D. Sweeney*, 26 Wn.App. 351, 353, 613 P.2d 169 (1980) (citing e.g. *Fies v. Storey*, 37 Wn.2d 105, 221 P.2d 1031 (1950)). This presumption may be overcome by clear and convincing evidence. *Oil Heating Co. of Port Angeles, Inc.*, 26 Wn.App. at 353 (citing *Beyers v. Moore*, 45 Wn.2d 68, 272 P.2d 626 (1954)). “[It] may be rebutted by a showing that the spouse incurring the debt or obligation did so without ‘the intention or expectation, at the inception of the transaction, . . . that a material economic benefit would accrue to the community.’” *Bank of*

Washington v. Hilltop Shakemill, Inc., 26 Wn. App. 943, 946, 614 P.2d 1319 (1980) (quoting *Warren v. Washington Trust Bank*, 19 Wn.App. 348, 360, 575 P.2d 1077 (1978)). Courts have held that whether or not the benefit to the community is actually received is irrelevant, “since the presumption of community liability will not be refuted if there is any expectation of community benefit from the transaction for which the debt was contracted.” *Oil Heating Co. of Port Angeles, Inc.*, 26 Wn. App. at 355 (holding that even though the community received no benefit from the debt incurred by the husband alone, due to the fact that when the debt was incurred by him there was the potential of some future financial benefit to the community, such debt was deemed community debt). Furthermore in *In re Marriage of Schweitzer*, the court noted that the community debt presumption is overcome if borrowed funds were devoted, without the other spouse’s knowledge to a purpose that did not benefit the community. *Schweitzer v. Schweitzer*, 81 Wn. App. 589, 597, 915 P.2d 575 (1996) (noting that the test is the benefit to the community, not lack of knowledge by the other spouse). In *Oil Heating Co. Port of Angeles, Inc.*, the court held that even though the husband, acting alone, purchased fuel on credit and owed the plaintiff over \$1,600, such was deemed to be a community debt because there was the “potential that it . . . could have some future financial benefit to the community.” *Id.* at 355.

In this case, there is no dispute that the marital community benefitted from this transaction. The Dusheys obtained over \$47,000 from the refinance. The funds were deposited into a community account and used to pay bills and improve the real property owned by the community.

F. PLAINTIFF IS BARRED FROM RECOVERY PURSUANT TO THE DOCTRINES OF ESTOPPEL AND WAIVER

Washington law requires the signature of both spouses for transactions that encumber community real property. RCW 26.16.030(3). The Courts have held that when one spouse engages in such a transaction alone, it is voidable, meaning that the spouse who engaged in the transaction is separately liable, but the community is not. *Sanders v. Wells*, 71 Wn.2d 25, 28, 426 P.2d 481 (1967). In this case, if Jeannine Dushey signed the documents without Raymond Dushey's knowledge, it would be the separate obligation of Jeannine Dushey if he had promptly voided the transaction. Once the non-signing spouse has enough information to be reasonably informed of the transaction, that spouse has a duty to elect or repudiate the transaction. *In re Horse Heaven Irr. Dist.*, 19 Wn.2d 89, 94, 141 P.2d 400 (1943) and *Sanders v. Wells*, 71 Wn.2d at 29. However, the transaction may not be avoided by the non-signing spouse if he sanctioned the transaction, is estopped from repudiating the transaction, or ratified the transaction. *See Washington State Bank v.*

Dickson, 35 Wash. 641, 647, 77 P. 1067 (1904). The policy is that a spouse who did not execute the document should not be allowed to knowingly accept the benefits of it, and then attempt to renounce it at a later time. *Id.* See also *Dizard & Getty v. Damson*, 63 Wash. 2d 526, 530, 387 P.2d 964 (1964). The non-signing spouse must disaffirm the transaction within a reasonable time or may be bound. *Stabbert v. Atlas Imperial Diesel Engine Co.*, 39 Wn.2d 789, 793, 238 P.2d 1212 (1951) (“It does not follow that a wife may, tortoise-like, claim the protection of the statute and, under no circumstances, be bound by such a defective document.”). Non-action by the spouse will result in that individual being estopped from avoiding or denying the liability of the obligation. *Sanders v. Wells* 71 Wn.2d 25 at 29. (“Unless rescinded otherwise avoided, a voidable contract imposes upon the parties the same obligations as if it were not voidable.”).

Waiver or ratification occurs when the non-participating spouse learns of the transaction after it occurs, but does not take prompt action to avoid it. *Smith v. Dalton*, 58 Wn.App. 876, 881, 795 P.2d 706 (1990) (“Ratification in community property law rests on principles of agency. Ratification is the affirmance by a person ‘of a prior act which did not bind him but which was done or professedly done on his account.’”). Waiver or ratification occurs by retention of the benefits of the transaction,

with *knowledge* of the details of it to trigger the need to avoid the transaction if such is the choice of the non-signing spouse. *See In re Horse Heaven Dist*, 19 Wn.2d 89, 95, 141 P.2d 400 (1943).

We have adopted the rule that, if a husband enters into a contract to sell or lease community real estate without joining his wife therein, and she either consents thereto or subsequently sanctions or ratifies his act, neither she nor the community may thereafter disaffirm it.

Raymond Dushey accepted the benefits of this transaction by using the money obtained by the loan to finance construction of “mother in law” quarters on community property and pay community bills. Furthermore, Raymond Dushey took no action to void and has now waived any attempt to avoid the transaction. The action he did take was to file a lawsuit on behalf of the marital community seeking damages for money they received and spent. The transaction cannot be voided and is now an obligation of the marital community.

G. THE DUSHEYS DO NOT COME BEFORE THE COURT WITH CLEAN HANDS

The Dusheys come before this Court requesting damages including, but not limited to damage to their credit rating, the costs of the increased interest rate for the loan and unspecified general damages. (App. Brief, pg. 5). The Dusheys also claim damages against Transnation for “Ms. Dushey’s misuse and misappropriation of funds.” (App. Brief,

pg. 5). There is no explanation or authority provided as to how Transnation is liable for an allegation that Ms. Dushey misappropriated funds thereby damaging the marital community. The undisputed facts are that the marital community received funds and used those funds for community purposes. The Dusheys now ask for additional damages despite the fact that they received these funds and used these funds.

Plaintiffs seeking equity must come into Court with clean hands. *Buchanan v. Buchanan*, 150 Wn.App. 730, 737, 207 P.3d 478 (2009). The “clean hands” principle does not repel the wrongdoer from Courts of equity or disqualify the wrongdoer from relief who has not dealt unjustly in the very transaction which he complains. *McKelvie v. Hackney*, 58 Wn.2d 23, 31, 360 P.2d 746 (1961). However, the opposite must also be true that the doctrine will deny relief to a wrongdoer that has dealt unjustly in the transaction at issue. In this case, there is no dispute that the Dusheys received over \$47,000.00 as a result of this loan. There is no dispute that the Dusheys deposited this money into a community account. There is no dispute that the Dusheys spent this money to pay community bills and used the money to improve community property. The Dusheys maintain that Jeannine Dushey perpetrated a fraud, misused the funds and misappropriated the funds. Raymond Dushey and Jeannine Dushey are now asking this Court to allow this case to proceed to trial in order to

obtain damages in addition to the benefits they received from the loan and despite the fact that they claim Jeannine Dushey perpetrated a fraud. The marital community should not be rewarded for its claim that one member of that community perpetrated a fraud and spent the money for community purposes that was obtained from that fraud.

V. CONCLUSION

The closing took place on October 25, 2006. The closing file contains the proper documents all executed and containing signatures of Raymond Dushey and Jeannine Dushey and notarized by the closing agent. The Dusheys received \$47,321.13. The funds were deposited in a community bank account. The Dusheys used this money to pay community bills and to improve community property. The Dusheys took no action to dispute this transaction despite receiving these benefits for over two years. They now seek damages in addition to the money they already received and spent, including damages from funds “misappropriated” by Jeannine Dushey. The Dusheys are not entitled to relief as they retained these benefits, the community received a benefit and they are estopped from obtaining damages. The Dusheys are also not entitled to damages for the fraud they claim Jeannine Dushey perpetrated to obtain these funds.

The Dusheys had the burden of proof to provide substantial evidence to support their claim that (1) Jeannine Dushey removed the documents from the closing (2) Jeannine Dushey forged them in the parking lot and (3) Transnation was negligent in closing this transaction. The Dusheys had the burden to provide substantial evidence through expert testimony to prove their case. The Dusheys did not file a witness list. The Dusheys did not provide the names and opinions of experts in answers to interrogatories. The record clearly shows that the Dusheys took no action to do anything until the month before trial and six months after the disclosure deadline, a year after discovery had been served and after summary judgment had been filed and the deadline for their response had passed. While the first expert had been retained in December, 2009 (and never disclosed), the Dusheys did not attempt to find and disclose the second expert until February 12, 2010, less than a month from trial.

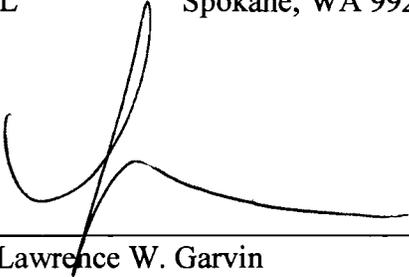
The Dusheys have not offered any reasonable excuse for the delay and, therefore, non-compliance with the Case Scheduling Order and rules of discovery was willful. The Dusheys failed to respond to the summary judgment motion requiring yet more delay. All of the issues were created solely by the Dusheys resulting in extreme prejudice to Transnation. By the time the Dusheys finally attempted to comply with the Case Scheduling Order, the rules of discovery and supplied a response to the

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by the method indicated below to the following this 27th day of January, 2011.

- U.S. MAIL
- HAND DELIVERED
- OVERNIGHT MAIL
- TELECOPY (FAX)

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