

FILED
Court of Appeals
Division III
State of Washington
5/22/2019 4:34 PM

No. 359204
No. 362272 Consolidated

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

SARA RHODES, an individual

Appellant,

v.

BARNETT & ASSOCIATES, INC., a Washington corporation, and
RYAN BARNETT AKA RYAN MOSSBRUGGER, a married
individual,

Respondent.

APPEALED FROM SPOKANE COUNTY SUPERIOR COURT
CAUSE NO. 14-2-04684-1

SARA RHODES' REPLY BRIEF

KEVIN W. ROBERTS
WSBA #29473
ROBERTS | FREEBOURN, PLLC
1325 W. 1st Ave., Suite 303
Spokane, Washington 99201
(509) 381-5262
Attorney for Sara Rhodes

TABLE OF CONTENTS

	<u>Page</u>
I. <u>INTRODUCTION</u>	1
II. <u>RE-STATEMENT OF CASE</u>	3
A. Ms. Rhodes Was Sexually Harassed and Assaulted	3
B. Defendants Unnecessarily Delayed the Case from February 2015 – September 2017	4
C. Discovery	3
III. <u>ARGUMENT</u>	7
A. Defendants’ Stilted Arguments To Try To Avoid Review of Their Demeaning Discovery And Litigation Tactics Are Not Supported by Law Or Fact	7
1. There Was No Evidence Ms. Rhodes “Abandoned” Her Case	7
2. Ms. Rhodes Properly Objected To The Discovery And Sought a Protective Order	8
3. Defendants Fail to Identify How The Discovery Was Likely To Lead To Discoverable Evidence	8
4. Defendants Failed To Confer Under LR 37(a)	11
B. Defendants Have Failed To Establish Dismissal	12
1. The Trial Court Did Not Enter Findings On	

2.	The Discovery Violation Was Not Willful Or Deliberate	12
3.	Defendants' Were Not Substantially Prejudiced In Their Ability To Prepare For Trial	13
4.	Lesser Sanctions Were Not Considered	13
5.	There Is No Evidence Supporting Defendants Claim The Action Was Without Ms. Rhodes' Consent.	13
C.	The Sanctions of Paying the Discovery Master Fees And Defendant Fees Were Improper	14
IV.	<u>RESPONSE TO COUNTER APPEAL</u>	14
V.	<u>ATTORNEY FEES</u>	15
A.	Ms. Rhodes Should Receive RAP 18.1 Attorney Fees for Responding To The Frivolous Counter Appeal	15
VI.	<u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Rudolph v. Empirical Research Sys., Inc.</u> , 107 Wn. App. 861, 867 (2001)	12
<u>Teter v. Deck</u> , 174 Wn.2d 207, 216, 218, 2019 (2012).....	12, 13
 <i>Other Authorities</i>	
CR 11.....	15, 16
CR 26.....	9
ER 404.....	9
ER 412.....	2, 9, 10
LR 37(a)	11
RCW 4.84.185.....	16
U. Chi. Legal F. 519, 523-524 (1999.).....	9
57 Hastings L.J. 991 (2006).....	10
70 Ohio St. L.J. 661 (2009).	11

I. INTRODUCTION

Defendants' Response Brief illustrates the problem in this case and why the Trial Court's decision should be reversed to prevent a manifest injustice and abuse of the legal process. Defendants Response fails to provide any substantive argument, through either the underlying facts or law, which addresses the actual issues to be reviewed: 1) in a sexual harassment case, is a plaintiff entitled to be protected from discovery which serves no purpose other than to harass, embarrass and annoy; 2) was it an improper sanction to dismiss Ms. Rhodes's case where there was no evidence or finding of prejudice which would have prevented a lesser sanction. Instead of addressing these issues, Defendants response consists of nothing more than conclusory claims, inaccurate hyperbole, personal attacks and assertions which are not supported by the actual record. Defendants attempt to put up a smoke screen to mislead this Court from the actual issues. However, Defendants' Counsel casting of unsupported pronouncements, does not make them true.

Defendants have not explained how asking a single mother who was subjected to sexual harassment and assault to provide personal details of her sexual history, prior personal relationships and whether she has ever received "*state or federal aid*" would lead to the discovery of admissible evidence in this sexual harassment case. Nor did they explain

how they were prejudiced in a way that would prevent trial preparation for a case that was not set for Trial for another 11 months. A trial date that was delayed to accommodate Defendants' own lawyer's schedule. At the time of dismissal, trial was not scheduled until November 5, 2018.

This Court is asked to establish clear precedence that when it comes to sexual harassment cases in Washington, Defendants will not be able to defend the case by using the discovery process to bully and intimidate Plaintiffs. Instead, Plaintiffs like Ms. Rhodes should be provided the protections that are intended by ER 412.

In addition, our legal system is not about the lawyers. Instead, it is about justice and fairness for the parties involved. Ms. Rhode's case was delayed for years by Defendants improper removal, and the trial and hearings throughout the case were delayed weeks and months to accommodate the schedule of Defendants Counsel. Yet, when Ms. Rhodes suffered a devastating life crisis, despite there being 11 months until trial, the Discovery Master and the Trial Court refused to extend her the same considerations Defendants lawyer was given. The idea that our judicial system would continually accommodate the calendars of lawyers but becomes inflexible for a single mother suffering from domestic abuse is appalling. There would have been no prejudice to Defendants' in allowing Ms. Rhodes additional time. Even if the discovery were proper,

in order to address the delay, the Court could have issued lesser sanctions than dismissal.

The refusal to provide a protective order for Ms. Rhodes with regard to the harassing discovery and the dismissal of Ms. Rhodes action should be reversed and the matter remanded to provide Ms. Rhodes with her day in Court.

II. RE-STATEMENT OF THE CASE

A. Ms. Rhodes Was Sexually Harassed And Assaulted.

In 2014, Ms. Rhodes, a single mother who was dependent on her job to support her child, was subjected to severe sexual harassment and assault by Ryan Barnett who had purchased the business she worked for and immediately used his position of power to engage in quid pro quo harassment and assault. CP 28-44. As with most lawsuits, Ms. Rhodes attempted to resolve the case prior to filing a lawsuit. CP 191-197. Defendant Barnett's lawyer at the time engaged in settlement discussions and it appeared the matter would be resolved. That changed when Ms. Schultz, who had represented Ms. Rhodes mother in her divorce when Ms. Rhodes was a minor, appeared. From that point forward the defense tactic shifted into a posture of delay and then personal attacks on Ms. Rhodes and her Counsel.

On December 2, 2014, Ms. Rhodes filed a verified complaint swearing under oath her allegations were true. CP 44. In contrast, no

such sworn testimony exists from the Defendants. Instead, their lawyer has invented a narrative to try to justify her attack on Ms. Rhodes. A review of the verified complaint shows that Ms. Rhodes recitation of what she was subjected to is not “*histrionics*”. Defendants glib suggestion is consistent with how this matter has been defended - insulting and demeaning.

B. Defendants Unnecessarily Delayed The Case From February 2015 – September 2017.

Remarkably, Defendants attempt to characterize and blame their own delay on Ms. Rhodes. Defendants are not being candid with the Court when they suggest no action was being taken during that time. Ms. Rhodes was forced during this time to deal with the improper and baseless procedural maneuverings by Defendants.

On December 24, 2014, Defendants filed a baseless Notice of Removal. CP 51. Plaintiff filed a Motion to Remand which was granted and filed on February 13, 2015. CP 53. The Federal Court found Defendants lacked a reasonable basis for seeking removal and awarded Ms. Rhodes attorney fees and costs, which remain unpaid. CP 54-55. Notably, the Court noted Ms. Schultz’s unwillingness to pick up the phone to resolve issues. CP 55.

Instead of allowing the case to proceed on remand, on February 25, 2015, Defendants filed a Motion for Reconsideration in

Federal Court. CP 453. On August 5, 2016, the case was assigned to Judge Clarke. After this assignment, an affidavit of prejudice was filed. See 10/18/2017 ROP, p. 2. During this time Defendants also appealed the decision to the 9th Circuit. The 9th Circuit's Appellate Decision was not filed until June 26, 2017. As explained by Judge Triplet,

“but this case went to federal court, and actually was kind of lost for about – well, a year that it was in federal court, and then when it came back from federal court, there was an affidavit filed on Judge Harold Clarke, and then the case got reassigned to me with an indication for counsel to get ahold of my court. And somehow we dropped the ball by not forcing a status conference to be set for a while.” Id.

The delays were procedural and administrative, not a delay caused by Ms. Rhodes. Defendants requested the trial as set be continued because Ms. Schultz could not “*accommodate*” completing discovery. Id. As requested by Defendants, the Trial was set for November 5, 2018.

C. Discovery

While the Federal appeal was pending, on October 6, 2015, Defendants served discovery on Dunn, Black & Roberts. Unfortunately for Ms. Rhodes, Counsel for Plaintiff had left the firm that same week. This created a time period where Ms. Rhodes had to decide what lawyer would continue representation. Once the procedural delays and appeal

were completed, when Ms. Rhodes provided answers to the discovery, she properly objected to the harassing and improper discovery. Following those objections, Defendants did not confer. There was nothing “*usual*” about the types of discovery requests Defendants propounded. A review confirms they had one purpose, to harass and embarrass Ms. Rhodes in the hopes of making litigation so invasive and difficult for her she would capitulate.

On Monday December 18, 2017 the Court adopted the Discovery Master’s recommendations which ordered “*Despite Plaintiff’s compelling arguments, ...Plaintiff provide complete and full responses to Defendant’s First Set of Interrogatories and Requests for Production, and execute a medical release form by December 21, 2017.*” CP 816-817. Ms. Rhodes was required to comply with the order by that Thursday, 3 days later.

On December 20, 2017, Plaintiff’s Counsel filed a motion requesting an extension of time to provide the discovery responses based on the fact Ms. Rhodes had been subjected to domestic violence and was seeking shelter outside the residence of her abuser and was unavailable to her Counsel. Ms. Rhodes was the victim of domestic abuse by him and was in the process of recovering from it, trying to find a home for her children, and working through the issues associated with the crisis. CP 1254.

The discovery Master ignored Ms. Rhode's plight by buying into Defendants claim that somehow Ms. Rhodes could not be represented through Counsel to protect her interests. Instead, she suggested Ms. Rhodes needed to "*testify*" or that Ms. Rhode's counsel should disclose attorney client counsel communications. This began the fiction Ms. Schultz invented of claiming Ms. Rhodes had "*abandoned*" her case. Ms. Rhodes provided a sworn affidavit to the Court making it clear that with her knowledge her Counsel was representing her interests and pursuing the case as she intended. CP 1253-1255.

III. ARGUMENT

A. **Defendants' Stilted Arguments To Try To Avoid Review Of Their Demeaning Discovery And Litigation Tactics Are Not Supported By Law Or Fact.**

1. **There Was No Evidence Ms. Rhodes "Abandoned" Her Case.**

In an attempt to avoid review of a decision which was made with no basis and contrary to the facts presented to the Court, Defendants claim there was a finding of "*abandonment*." However, this argument fails based on Defendant's own citation. There were no "*Findings of Fact*" or "*Conclusions of Law*" entered. See CP 1013 – 1014, "*ORDER*". As such, there was no "*finding of fact*" to be assigned error.

Furthermore, Defendants fail to provide any legal authority or applicable legal standard required with regard to "*abandonment*". If there

is such a doctrine, it would constitute a legal conclusion based on facts, not a finding of fact.

Finally, the entire speculative argument lacks any logic. Like Defendants, Ms. Rhodes was represented by Counsel. Under Defendants theory, every party in a case would “*abandon*” the case by acting through Counsel. Apparently, Defendants believe that every party must disclose attorney client privileged communications and at each Court appearance provide testimony as to the direction they have provided Counsel. It’s a ludicrous and frivolous argument.

2. Ms. Rhodes Properly Objected To The Discovery And Sought A Protective Order.

Defendants claim Ms. Rhodes did not provide responses is inaccurate. The procedural delays aside, September, 2017, Ms. Rhodes provided signed responses and objections to the discovery. See CP 706 - 719. Those objections and the decision compelling Ms. Rhodes to answer the improper discovery have been properly appealed. Ms. Rhodes also properly sought a protective order which was denied and is being appealed. There is no legal authority to support Defendants claim the Trial Court’s decisions cannot be reviewed.

3. Defendants Fail To Identify How The Discovery Was Likely To Lead To Discoverable Evidence.

It is telling Defendants could not articulate what admissible evidence would be discovered by asking the names of the fathers Ms.

Rhodes children, any prior sexual relationships, whether Ms. Rhodes had been on public assistance, whether Ms. Rhodes had ever received unemployment, whether Ms. Rhodes had been contacted by investigators “related to alleged sexual trafficking” or by identifying all lawyers “you have used for any purpose”. That is because under ER 412, ER 404 and CR 26, the discovery had no purpose beyond harassing Ms. Rhodes.

Ms. Schultz did not invent this strategy of using this type of intrusive and humiliating discovery to subject a Plaintiff in a sexual harassment and assault case to further pain and humiliation in an attempt to force them to capitulate.

Shortly before the 1994 amendments to FRE 412 took effect, the Wall Street Journal reported that sexual harassment defendants frequently pursued a “nut or slut” strategy that portrayed plaintiffs either as hypersensitive and overimaginative, or as promiscuous and welcoming of the advances.²⁵ With the plaintiff captive on the witness stand, defense attorneys “increasingly resort(ed) to harsh tactics, asking about sex lives, childhood molestation, abortions and venereal disease.”²⁶ Their hope, according to plaintiffs’ attorneys, was to coerce the plaintiff to drop her suit or to settle for an unfairly low amount.²⁷ These inquiries threatened not only to intimidate the plaintiff but also to diminish her character in the eyes of the jury. Of course, courts could exclude such evidence as irrelevant or prejudicial under Federal Rules of Evidence 403 and 404,²⁸ but evidently such tactics succeeded often enough to motivate Congress to create a sexual harassment shield.

THE CONFLICTING MANDATES OF FRE 412 AND FRCP 26: SHOULD COURTS ALLOW DISCOVERY OF A SEXUAL HARASSMENT PLAINTIFF’S SEXUAL HISTORY?, U. Chi. Legal F. 519, 523-524 (1999.) (Emphasis added).

This was the very reason ER 412 was amended to include civil sexual abuse and harassment cases. See *UNFOLDING DISCOVERY ISSUES THAT PLAGUE SEXUAL HARRASSMENT SUITS*, 57 Hastings L.J. 991 (2006). Defendants argument claiming discovery is different than admissibility has been rejected. As has been pointed out by many courts and scholars, to allow this approach would make the directives of ER 412 meaningless.

Defendants in sexual harassment suits undoubtedly can argue that evidence of a plaintiff's prior sexual history is relevant. However, with the admission of information regarding the victim's past sexual history comes the potential misuse of that information by the jury.¹⁷ Presumably, the jury can become tainted after hearing about a sexual harassment victim's past sexual experience, and based on that information, assume that the victim somehow "asked for" or "welcomed" the harasser's advances.¹⁸ Like a rape victim, a sexual harassment victim should not have her reputation attacked in the courtroom, and consequently have to risk losing credibility with regards to her harassment claim merely because she has a sexual history. For purposes of the sexual harassment suit, the victim's past sexual history, with anyone other than the defendant, should be irrelevant.¹⁹

One objective behind amending Rule 412 was to protect against cultural stereotypes and sexual myths.²⁰ However, because Rule 412 requires the judge to subjectively balance the probative value of the evidence against the danger of harm to any victim and unfair prejudice to any party, the judge's assessment inevitably includes his value judgments along with any stereotypes he or she might hold about the given situation.²¹ In order for Rule 412 to work, "judges must be willing and able to stand back from their own beliefs to determine if they are engaging in these stereotypical ideas in assigning the evidence probative value and in assessing prejudice and harm."²² This "stand-back" approach judges must undertake when analyzing Rule 412 admissibility should also be done when setting the scope of discovery under Rule 26.

The policy behind Rule 26 is to allow parties to engage in a broad scope of discovery in order to accumulate evidence in support or defense

*of their cases.*²³ *The advisory note to Rule 412 is meant to temper Rule 26's broad discovery range by instructing judges to limit the scope of discovery on a plaintiff's sexual history.*²⁴ *The Advisory Committee suggests judges even go one step further by presumptively granting protective orders to plaintiffs who seek them in order to protect them from the defense delving into their sexual histories.*²⁵

Id. (emphasis added). See also BUT SHE SPOKE IN AN UN-LADYLIKE FASHION: PARSING THROUGH THE STANDARDS OF EVIDENTIARY ADMISSIBILITY IN CIVIL SUITS AFTER THE 1994 AMENDMENTS TO THE RAPE SHIELD LAW, 70 Ohio St. L.J. 661 (2009).

In this case, the attitude of the Discovery Master, comparing this case to a “*car wreck case*” and Defendants Counsel underscores the need for ER 412 to be balanced with CR 26 in order to prevent discovery abuse, stereotyping and unfair prejudice. Defendants Counsel had the audacity to claim it would be “*malpractice*” if, despite ER 412, she did not ask “*How many individuals have you been involved with?*” CP 1100. Defendants have not and cannot identify any legitimate purpose for the discovery at issue. It is nothing more than an attempt at character assassination and would not lead to any admissible evidence and certainly no evidence where the probative value out weighed the potential prejudice. Accordingly, the Trial Court’s rulings should be overturned.

4. Defendants Failed To Confer Under LR 37(a).

It’s undisputed that after receiving the objections, Defendants did not meet and confer. They did not meet the obligations of LR 37(a). Therefore, the trial court lacked authority to never consider the motion to

compel. Rudolph v. Empirical Research Sys., Inc., 107 Wn. App. 861, 867 (2001).

B. Defendants Have Failed To Establish Dismissal Was Justified Based On The Required *Burnet* Factors.

Defendants offered no argument or evidence addressing the failure for the Court to comply with legal standard necessary to impose the ultimate sanction, dismissal of the case. “*A trial court may impose the most severe discovery sanctions upon a showing that (1) the discovery violation was wilfull or deliberate, (2) the violation substantially prejudiced the opponent’s ability to prepare for trial, and (3) the court explicitly considered less severe sanctions.*” Teter v. Deck, 174 Wn.2d 207, 216 (2012).

1. The Trial Court Did Not enter Findings on the Burnet Factors.

Under Washington law, the Trial Court was required to make specific Findings with regard to the Burnet factors. Id. Here it did not do so and a review of the actual facts confirms the Burnet factors have not been met.

2. The Discovery Violation Was Not Willful Or Deliberate.

The issue of willfulness and lesser sanction findings are not to be based on the record as a whole. Teter, 174 Wn.2d at 218. Instead, the Trial court should have focused on the request for an extension of time to comply at issue. A violation is only considered willful if it is without

“reasonable excuse or justification”. Id. Here, any violation resulted from Ms. Rhodes being subjected to severe domestic abuse and working through a family crisis. CP 1254. Her inaction was not willful or without justification.

3. Defendants Were Not Substantially Prejudiced In Their Ability To Prepare For Trial.

Defendants have not identified or described any way in which allowing Ms. Rhodes additional time to respond would have prejudiced their ability to prepare for trial in any way. The case was dismissed as a sanction on February 9, 2018. This despite the fact the discovery cut-off was not until August 31, 2018 and Trial was not until November 5, 2018. No prejudice has ever been articulated by anyone. Given what Ms. Rhodes was going through, even an additional 60-90 days would not have impacted the ability to complete discovery, depositions and pretrial motions.

4. Lesser Sanctions Were Not Considered.

The Teter Court explained that considering prior orders cannot substitute for consideration of lesser sanctions of the issue being decided. Teter, 174 Wn.2d at 219. Despite the complete lack of prejudice, no lesser sanctions were considered in this case.

5. There Is No Evidence Supporting Defendants Claim The Action Was Without Ms. Rhodes Consent.

Instead of addressing the Burnet requirements, Defendants claim the case was not pursued with Ms. Rhode's consent. This fiction was one invented by Ms. Schultz to avoid addressing the actual legal standard for dismissal. There is absolutely zero evidence in the record to support this derogatory and false assertion. Ms. Rhodes made this clear to the Court. CP 1254. This argument is frivolous and without merit.

Based on the above failure to meet the Burnet factors, the dismissal should be reversed.

C. The Sanctions Of Paying The Discovery Master Fees And Defendants Fees Were Improper.

The Discovery Master and Courts decisions were in error. As a result, the decisions awarding the payment of Discovery Master fees and Defendants attorney fees should be reversed. There was no abandonment and the Motion to Extend was valid and proper.

IV. RESPONSE TO COUNTER APPEAL

It is unclear exactly what Defendants are counter-appealing. It is assumed it is the Trial Courts granting of the Motion to Amend the Judgment and Order. A review of the pleadings considered by the Court on this issue confirms the Court properly exercised its Judgment in granting the motion to amend. See CP 1142-1156; and CP 1244 – 1251. The reason the motion was granted was due to an irregularity in obtaining the Judgment. Ms. Shultz made the decision to intentionally submit a

Judgment that did not match the Order of the Court and refused to act with candor toward opposing counsel and the Court. The Court's Order corrected the Judgment to match the Order of the Court. See CP 1245-1246 which confirms the undisputed fact the Judgment did not match the orders resulting in an irregularity.

As explained in the Trial court briefing, there was and is no conflict in asking the Court to amend the Judgment to match the actual ruling. CP 1248.

The Counter Appeal by Defendants is frivolous. A review of the record confirms that there have never been any findings of fact or conclusions of law supporting CR 11 sanctions, that the purported CR 11 sanctions were granted merely because Counsel was protecting the interest of his client as directed. If these sanctions were upheld, it would have a chilling effect on every lawyer's ability to protect their clients. A review of Ms. Schultz's personal attacks and willingness to create fictional claims establishes that there is no basis for the sanctions. CP 1253-1255. This is especially true given the fact that the Trial Court's decisions were in error.

V. ATTORNEY FEES

A. Ms. Rhodes Should Receive RAP 18.1 Attorney Fees For Responding To The Frivolous Counter Appeal.

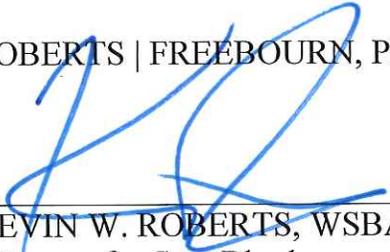
Ms. Schultz committed a fraud on the Court and Counsel by submitting an Judgment which she knew did not match the Court's Order. In response to the Motion to Amend, Ms. Schultz never disputed and could not dispute that fact. There is no legitimate factual or legal basis for the appeal of that decision. Pursuant to RCW 4.84.185 and CR 11, Ms. Rhodes should be awarded attorney fees against Ms. Schultz and the Defendants.

VI. CONCLUSION

Ms. Rhodes respectfully requests the Court reverse the Trial Court's rulings, enter a protective order, vacate the Judgments entered, award Ms. Rhodes attorney fees and costs on appeal and remand this matter to be decided on the merits.

DATED this 22 day of May, 2019.

ROBERTS | FREEBOURN, PLLC



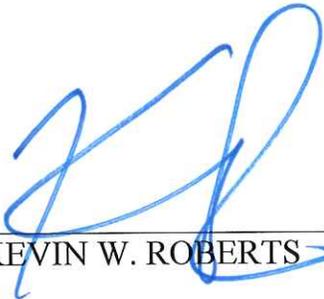
KEVIN W. ROBERTS, WSBA #29473
Attorney for Sara Rhodes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of May, 2019, I caused to be served a true and correct copy of the foregoing document to the following:

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- EMAIL

Mary Schultz
Mary Schultz & Associates
211 E. Red Barn Lane
Spangle, WA 99031



KEVIN W. ROBERTS

ROBERTS FREEBOURN

May 22, 2019 - 4:34 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36227-2
Appellate Court Case Title: Sara Rhodes v. Stadtmueller & Associates, et al
Superior Court Case Number: 14-2-04684-1

The following documents have been uploaded:

- 362272_Briefs_20190522163100D3959940_7874.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was AppellantReply.pdf

A copy of the uploaded files will be sent to:

- Mary@mschultz.com
- shae@robertsfreebourn.com

Comments:

Sender Name: Lauren Sterrett - Email: lauren@robertsfreebourn.com

Filing on Behalf of: Kevin W Roberts - Email: kevin@robertsfreebourn.com (Alternate Email: lauren@robertsfreebourn.com)

Address:
1325 W. 1st Ave.
Ste. 303
Spokane, WA, 99201
Phone: (509) 381-5262

Note: The Filing Id is 20190522163100D3959940