

NO. 38953-3II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Matter of

Erin Hamrick, fka Erin Collier

Appellant,

vs.

Benjamin James Collier

Respondent.

BRIEF OF APPELLANT

Kurt A. Anagnostou
Attorney for Appellant

Daggy and Anagnostou, P.S.
WSBA #17035
1801 First Avenue, Suite 4-A,
P.O. Box 1793
Longview, WA 98632
(360) 425-6500

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Letter from Attorney Noelle McLean to Appellant dated May 15, 2008 . A

I. INTRODUCTION

Petitioner/Appellant, Erin Hamrick, fka Erin Collier (hereinafter Appellant) asks this court to reverse the trial court's order of default taken August 22, 2008, and the subsequent final orders that were entered by default on September 19, 2008. Said default was based on allegations of discovery violations. Despite the fact that the Appellant was pro se at the time, and appeared and attempted to comply with discovery requests and there is no record of what the discovery violations were, and that CR 26(i) was not complied with, nor were lesser remedies explored under CR 37 (b), the trial court nonetheless granted the default and entered final orders. The trial court's ruling is erroneous and should be reversed.

The trial court's denial of attorneys fees should also be reversed. In addition, attorneys fees for this appeal should be awarded to the Appellant.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred by granting the motion for default based on alleged discovery violations without first requiring compliance with CR 26(i). (CP67)

2. The court erred by granting the motion for default without first considering other alternatives as required in CR 37(b). (CP 67)

3. The court erred in granting the motion for default against a pro se litigant, who appeared and attempted to answer interrogatories without first setting forth the specifics as to the discovery violations. (CP 67)

4. The court erred in denying the Appellant's motion to set aside the default dated January 10, 2009. (CP 141)

5. The court erred in denying the Appellant's request for attorneys fees on her motion to set aside default. (CP 141)

B. Issues Related to Assignment of Error.

1. Is compliance with CR 26(i) required?

(a) Is it an reversible error by the trial court to grant a motion for default without first requiring compliance with CR 26(i)?

2. Is compliance with CR 37 required?

(a) Is it an abuse of discretion for a court to not utilize less restrictive sanctions regarding alleged discovery violations, especially when dealing with a pro se litigant?

3. Is the court required to set forth the questions asked and the answers given on the record prior to ruling that the answers are, “insufficient”?
 - (a) Is it an abuse of discretion for the trial court not to set forth on the record the questions asked and the answers given to a pro se litigant who has appeared and attempted to answer discovery and is unsure of what is needed?
4. Was it error for the court to deny the Appellant’s motion to set aside the default?
 - (a) Is it an reversible error for the court to find that a letter sent to the pro se litigant which does not request a discovery conference complies with CR 26(i)?
5. Should attorneys fees be awarded to the Appellant?

III. STATEMENT OF THE CASE

A. **Introduction.**

This is an appeal from an order of default and judgment taken August 22, 2008, (CP 67) and the subsequent final orders that were

entered by default on September 19, 2008. (CP 73, 74, 75, 76, 77) The Appellant seeks reversal of the trial court's order granting said default and default judgment and the trial court's denial of her motion to set aside dated January 9, 2009. (CP 119, 120) Said default motion was granted without first complying with CR 26(i) and the court did not use less restrictive alternatives as set forth in CR 37, and therefore should be reversed.

B. Facts.

On July 2, 2008, the respondent Benjamin James Collier (hereinafter Respondent) filed a motion to compel. (CP46) That motion indicated interrogatories had been served on the Appellant's former counsel, on April 1, 2008. (CP 46) The Appellant's counsel had subsequently withdrawn. (CP 141) The declaration of Respondent's counsel claimed, "the conference requirements of Civil Rule 26(i) were completed when I sent my letter to the pro se party." (CP 46, pg. 311, 11-12) Counsel's letter to the Appellant, attached thereto as Appendix A, was dated May 15, 2008, and did not refer to CR 26(i).

The Appellant had complied with providing documentation to the Respondent's attorney by July 9, 2008. (RP pg. 18 lines 23-24). It was

determined that the discovery answers were sufficient. (RP pg. 19 lines 1-3)

Nonetheless, the court entered an order of default on August 22, 2008. (CP 67) That order recited that the Appellant had produced discovery answers to the Respondent's attorney on or about July 11, 2008. (CP 67) Without any record as to the questions asked or the answers provided, the order stated the answers were "insufficient." (CP67)

Thereafter, on September 29, 2008, the court entered findings of fact and a final decree of dissolution and entered a final parenting plan. (CP 73, 74, 75) The parenting plan required supervised residential time and referenced an attached supervision contract, but no such contract was attached. Thereafter, family court closed their investigation without completing a recommendation. (RP pg. 8, lines 12-15 CP 120, pg. 2, lines 20-26)

The Appellant retained counsel and a motion to set aside the default was brought on December 9, 2008. (CP119, 120) A hearing was held on January 16, 2009. Therein, the court ruled that the letter was sufficient to comply with CR 26(i). (RP p. 24, lines 4 - 18) The court

further summarily dismissed alternatives under CR 37(a). (RP p. 25, lines 1-3)

Furthermore, the court denied the Appellant's request for attorney fees. (RP p. 24, lines 19-20) An order was entered denying the motion to set aside on January 23, 2009. (CP 141)

IV. ARGUMENT

A. Standard of Review.

In *Case v. Dundom*, 115 Wn. App. 199 58 P.3d 919 (2002), the Court ruled as follows:

“We interpret court rules by reference to rules of statutory construction. *State v. Greenwood*, 120 Wn. 2d 585, 592, 845 P.2d 971 (1993). In drafting CR 26(i), our Supreme Court selected the words “will not” and “shall.” These words are mandatory, as opposed to “may,” which is permissive. *Scannell v. City of Seattle*, 97 Wn.2d 701, 648 P.2d 435, 656 P.2d 1083 (1982). Because the language of CR 26(i) is mandatory, not permissive, the trial court's decision to hear a CR 37 motion to compel is a question of law that we review de novo. *Rudolph v. Empirical Research Systems, Inc.*, 107 Wn. 861 866, 28 P.3d 813 (2001).

B. Argument Regarding CR 26(i).

Court Rule 26(i) provides as follows:

“The court will not entertain any motion or objection with respect to Rules 26 through 37 unless counsel have

conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respects to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under Rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsel certification that the conference requirements of this rule have been met.” (Emphasis added)

In *Clarke v. Office of Attorney General*, 133 Wn. App. 767, 138 P.2d 144 (2006), the Washington Court of Appeals Division II found at page 780 as follows:

In *Dundom*, we ruled that CR 26(i) requires literal compliance and that the **trial court lacks the authority to hear a motion to compel** when the parties do not certify that they have complied with the conference requirements. 115 Wn. App. at 203. We did not specify what "certification" required, but we stated that a conference had to be a **contemporaneous two-way communication**. *Dundom*, 115 Wn. App. at 203-04. Emphasis added.

Although discussions and correspondence had occurred between counsel, the court went on to find that *Clarke*, without a further CR 26(i) conference to discuss any remaining discovery issues, filed the motion to compel. Thereafter, at page 781, the court ruled as follows:

Under these circumstances, we cannot construe the March 31 telephone discussion between the attorneys relating to the State's interrogatory answers as a conference satisfying

CR 26(i) for either issue. Thus, the **trial court did not have authority to hear Clarke's motions to compel.** Emphasis added.

In *Rudolph v. Empirical Research Sys., Inc.*, 107 Wn. App. 861, 866, 28 P.3d 813 (2001), the court was faced with very similar facts as those herein. Following a claimed discovery violation and motion to compel, the trial court dismissed Rudolph's complaint with prejudice.

Division II ruled at page 867 as follows:

Contrary to the mandates of CR 26(i), the parties in this case did not confer in person or by telephone to discuss the motion to compel. Although Rudolph's counsel mentioned the conference requirement in his May 25, 2000 letter, **it does not appear from the record that either party attempted to arrange for such a conference.** (footnotes omitted) Moreover, ERSI's counsel did not provide certification that the conference requirements of CR 26(i) were met. Emphasis added.

On appeal, ERSI argues that "a written request for compliance pursuant to Rule CR 26 is better and more effective than an oral telephone call." Br. of Resp't at 10. **This argument is meritless** as it is contrary to the plain language of the rule requiring a conference in person or by telephone. **The trial court lacked authority to entertain a motion to compel** that did not contain a certification that the parties had complied with the conference requirements of CR 26(i). (fn4 omitted) Emphasis added.

Here, the same is true. The Respondent's attorney's letter is a one-way communication not in compliance with CR 26(i). Furthermore, it

does not ask or invite the Appellant to participate in a CR 26(i) conference. It impermissibly sets a new deadline. As such, the court lacked authority on the motion to compel. Therefore, the order of default must be reversed.

B. Argument Regarding CR 37(b)(2).

Pursuant to CR 37(b)(2) the court, as a discovery violation sanction, may make the following orders:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination;

(E) Where a party has failed to comply with an order under rule 35(a) requiring him to produce another for examination such orders as are listed in sections (A), (B), and (C) of this subsection, unless the party failing to comply shows that he is unable to produce such person for examination.

Due process considerations require that, before a court dismisses an action or counterclaim or renders judgment by default, there must be evidence that there was a willful or deliberate refusal to obey a discovery order and that the refusal substantially prejudiced the opponent's ability to prepare for trial. *Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990). See also, *In re Estate of Foster*, 55 Wn. App 545, 779 P.2d 272 (1989), review denied 114 Wn.2d 1004, 788 P.2d 1079 (1990) (will violation alone is not enough; prejudice to the party seeking the sanction must also be demonstrated). The sanction of default or dismissal is considered a harsh remedy which should only be granted when there has been a deliberate failure to make discovery, e.g. *Kagele v. Frederick*, 43 Wn.2d 410, 261 P.2d 699 (1953).

If there are numerous issues in a case, and discovery is sought as to some of the issues, the striking of the answer and the entering of a default judgment on all issues for failure to make discovery as to some would be a violation of due process. The striking of an answer and the entering of a default judgment cannot be justified where there is no showing of the materiality of the facts of which discovery was sought. *Mitchell v.*

Watson, 58 Wn. 2d 206, 361 P.2d 744 (1961); *Lawson v. Black Diamond Coal Mining Co.*, 44 Wash. 26, 86 P. 1120 (1906).

The severity of the sanction may have constitutional implications. The United States Supreme Court in a case in which there was good faith, but fruitless, effort to comply with discovery demands, has said "... there are constitutional limitations upon the power of courts, even in aid of their own valid process, to dismiss an action without affording a party the opportunity for a hearing on the merits of the cause." *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958).

In *Snedigar v. Hodderson*, 114. Wn.2d 153, 786 P.2d 781 (1990), the Washington State Supreme Court stated at page 170:

"...we are unable to find that either willfulness or prejudice is present in this case at this time. We thus reverse the current order of default. If, after undertaking the analysis we outlined in connection with Issue One herein, the trial court enforces the discovery order and the Party again refuses to comply, the trial court should make clear on the record whether the factors of willfulness and prejudice are present before considering entry of a default order. The trial court also should state whether lesser sanctions would be effective and why it is imposing an order of default. As the Court of Appeals observed, these steps are routinely followed by the federal courts and should be employed by Washington courts when dismissal is imposed as a sanction for violating a discovery order in a First Amendment case."

Citing *In Re Macmeekin*, 722 F.2d 32, 35-36 (3d Cir. 1983). Emphasis added.

Here, this is no showing as to a willful violation by the Appellant. In fact, just the opposite is true. The Appellant sought the advice of two attorneys and attempted to answer the interrogatories herself. (CP 120, pg 22, lines 1-9) She purportedly submitted answers on or about July 9, or July 11, 2008. (RP 18, lines 24-25; CP 67, pg. 2, lines 13-14) There is no showing in the record of the questions, nor the answers, nor how her answers are inadequate, other than "[Appellant] produced insufficient discovery answers" (CP67, pg. 2, line 13). There is no showing that those questions were relevant as to particular issues and whether it was more appropriate to strike certain parts of her claims as opposed to her entire action. Furthermore, there is no showing whatsoever of how her failure to answer prejudices the Respondent. Without a record established as to what the questions were nor the inadequacies of her answers, the prejudice to the Respondent, if any, is indeterminable. Furthermore, there is no record showing that the court considered any of the lesser sanctions prior to imposing default.

The requirements under CR 37(b)(2) were cited and followed in *Delany v. Canning*, 84 Wn. App. 498, 929 P.2d 475 (1997). There, after

hearings the court found that the managing partner in a real estate investment partnership willfully and deliberately refused to comply with court orders compelling discovery and that withheld information was intrinsically bound up with the merits of the intervener's claims. The court of appeals specifically found that the trial court's findings on which the default judgment was based were supported by record of separate hearing and that the trial court had carefully explored alternatives before entering a default. No such hearing was conducted here and the court made no such findings of willfulness by the Appellant nor prejudice to the Respondent. Furthermore, no alternatives were considered.

C. Attorney Fees Should Be Awarded to the Appellant.

Attorney fees in this matter should be granted to the Appellant, based on violations of CR26(i), and based upon need and ability to pay, pursuant to RCW 26.09.140. Here, Respondent brought a motion without complying with the CR26(i) conference provision. Attorneys fees are allowed under CR 26 and CR 37. Appellant had to retain counsel and expend attorney fees in attempting to set aside the improperly obtained default and default judgments.

In the alternative, Appellant seeks attorneys fees pursuant to RCW 26.09.140. The Respondent was employed, whereas, the Appellant has been unemployed and unable to afford attorneys fees. (RP pg. 13, lines 1-7) Attorneys fees are requested for having to bring the motion to set aside before the trial court as well as attorneys fees for having to bring this appeal.

V. CONCLUSION

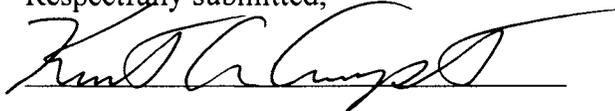
For the foregoing legal reasons, the order of default re: motion to compel dated August 22, 2008, (CP67) must be vacated. In addition, the final orders which include findings of fact, decree of dissolution, final order parenting plan, child support worksheets and final order of child support all entered September 19, 2008, (CP73, 74, 75, 76, 77) based on said order of default must be set aside. The effect of said set aside will allow the dissolution to proceed. It will also reestablish the order referring the matter to Family Court, not requiring a new fee and allowing Family Court to complete its investigation. The temporary order of child support, setting support at \$25.00 per month would be automatically reinstated, reducing the back support created by the default order of support. (CP 77) Most

importantly, the court could revisit the parenting plan, which on default provided for only supervised residential time. (CP75)

Finally, the court should award attorneys fees to The Appellant.

Dated this 26 day of June, 2009.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kurt A. Anagnostou", written over a horizontal line.

KURT A. ANAGNOSTOU, WSB#17035
Of Attorneys for Appellant

CERTIFICATE OF MAILING

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 26 day of June, 2009, I caused to be served upon counsel listed below, in the manner indicated therein, a true and correct copy of the Brief of Appellant.

Addressed to:

Washington State Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

NOELLE McLEAN
P.O. Box 757
Kelso, WA 98632

Delivered via:

USPS First Class Mail

USPS First Class Mail

Dated this 26 day of June, 2009.



Rebecca Flock

STATE OF WASHINGTON
BY  DEPUTY
17 JUN 2009 10:44 AM
TACOMA, WA 98402
COURT OF APPEALS
DIVISION II

Noelle McLean PS

Attorney at Law

206 West Main Street

P. O. Box 757

Kelso, Washington 98626

(360) 425 - 0111

(360) 425 - 2232 fax

email nmclean@cport.com

May 15, 2008

MS ERIN COLLIER
31932 DEL CIELO ESTATE #4
BONSALL CA 92003

Re: Collier Dissolution

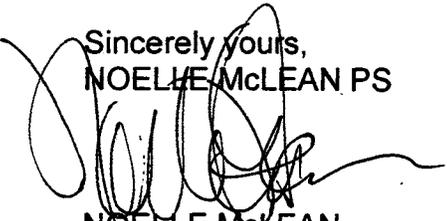
Dear Erin:

Please be advised that the discovery request that was mailed to you on 4/01/08 was due on 5/12/08. As of this writing, we have not received your answers to that request or the requested documentation. I will extend the deadline for an additional 20 days (**6/04/08**) to allow you to provide any and all requested information and documentation. If I do not receive the requested documentation, I will be filing a Motion to Compel with reference to this matter.

Thank you for your prompt attention to this matter. If you have any questions regarding this correspondence, please contact my office at 360-425-0111.

Thank you for your prompt attention to this request.

Sincerely yours,
NOELLE McLEAN PS


NOELLE McLEAN
Attorney at Law

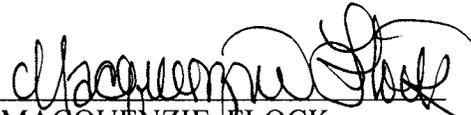
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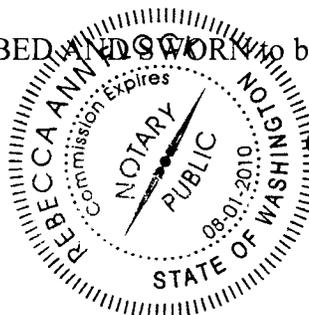
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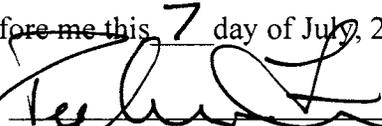


Respectfully submitted this 7 day of July, 2009.

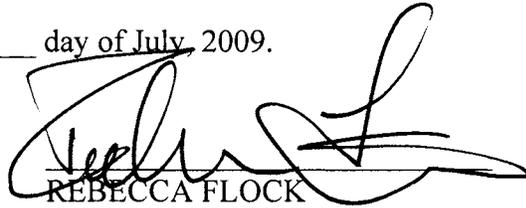

MACQUENZIE FLOCK

SUBSCRIBED AND SWORN to before me this 7 day of July, 2009.

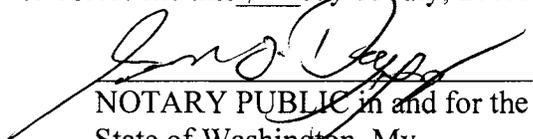



NOTARY PUBLIC in and for the
State of Washington. My
commission expires: _____

Respectfully submitted this 7 day of July, 2009.


REBECCA FLOCK

SUBSCRIBED AND SWORN to before me this 7th day of July, 2009.


NOTARY PUBLIC in and for the
State of Washington. My
commission expires: 2-12-2010

