NO. 326551-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

MARISA WUNDERLICH and JOSEPH WONDERLICH,
a married couple

Respondents

v.

JOHN P. ROUSE and KARMA ROUSE, a married couple,
and THORPE-ABBOTT PROPERTIES LLC,

Appellants

REPLY BRIEF OF APPELLANTS

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A. REPLY TO "INTRODUCTION" OF RESPONDENTS, MARISA WUNDERLICH AND JOSEPH WUNDERLICH

In reply to the "Introduction" of Respondents, Marisa Wunderlich and Joseph Wunderlich (hereinafter sometimes "the Wunderlichs")[See, "Respondents's Brief," pp. 3-5], Appellants, John P. Rouse, Karma Rouse, Thorpe-Abbott Properties, LLC, and their undersigned counsel, first submit that said "Introduction" is not "a concise introduction" as required by RAP 10.3(a)(3). Second, Appellants wish to point out to this Court that most of the factual statements contained in the "Introduction" are absolutely and totally irrelevant to any of the issues raised by Appellants in this appeal, as well as being misleading or inaccurate. Finally, Appellants desire to point out that none of the factual statements contained in the "Introduction" are supported by any citation whatsoever to the record. Appellants recognize that RAP 10.3(a)(3) does not require such a citation in a proper "Introduction." However, Appellants believe the following observation contained in the Washington Appellate Practice Deskbook (Wash. State Bar

Assoc. §19.7(8)(2005 and Rev. 2011),is apropos in this instance:

> The rule [10.3(a)(3)] states that the introduction need not contain citations to the record or authority, but this is not a license to lard the introduction with facts that are outside the record. Every fact recited in the introduction should be supported later in the brief by a citation to the record.

The Court should note Respondents, the Wunderlichs, never supported most of the purported facts contained in their "Introduction" by proper citations to the record anywhere in their "Respondent's Brief." Unless said facts are supported by proper citations to the record, under RAP 10.3(a)(5), the facts stated by Respondents, the Wunderlichs, should not be considered on this appeal. See also, Murphy v. Lint, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998).

B. REPLY TO ATTEMPTED REVISION OF AN ISSUE BY RESPONDENTS, THE WUNDERLICHS

Respondents, the Wunderlichs, in "Respondents' Brief," at pages 5 through 6, are attempting, without license, to reframe an issue of Appellants, John P. Rouse, Karma Rouse, Thorpe-Abbott Properties, LLC, and their undersigned

counsel, by claiming an assignment of error of Appellants is incorrect. Suffice it to say, Respondents, the Wunderlichs, have no right or prerogative whatsoever to manipulate and pollute the assignments of error and issues framed by Appellants so as to evade, circumvent, or dilute the issues as presented for consideration by this Court. See generally, RAP 5.2(f), RAP 10.1(f) and RAP 10.3(b).

C. REPLY TO ATTEMPTED RESTATEMENT OF CASE BY RESPONDENTS, THE WUNDERLICHS

Appellants, John P. Rouse, Karma Rouse, Thorpe-Abbott Properties, LLC, and their undersigned counsel, stand by their rendition of the "Statement of the Case" in their "Brief of Appellants," at pages 10 through 18, and resent any implication of Respondents, the Wunderlichs [See, "Respondents' Brief," pp. 6-16], that the facts and citations to the record set forth therein were somehow incomplete. Appellants' "Statement of the Case" sets forth all facts necessary to a review and determination of the issues raised by Appellants on this appeal. Any additional purported facts or conclusory

statements asserted by Respondents, the Wunderlichs, to the extent, if at all, they are not an embellishment and are actually borne out by a proper citation to the record in this case, are misleading, inaccurate, or totally irrelevant and have absolutely no bearing whatsoever on those precise assignments of error and issues raised by Appellants on this appeal. [See, "Brief of Appellants," pp. 1-10].

Further, and again, the Court should note Respondents, the Wunderlichs, in their "Statement of Case" [See, "Respondents' Brief," pp. 6-16] never supported most of the purported facts contained therein by proper citations to the record as required by RAP 10.3(a)(5). As always, unless said purported facts are supported by proper citations to the record, said facts stated by Respondents, the Wunderlichs, should not be considered on this appeal. See also, Murphy v. Lint, supra, at 531-32.

D. REPLY TO ARGUMENT OF RESPONDENTS, THE WUNDERLICHS

1. Issue No. 1 and Issue No. 2 Pertaining to Deposition of John Rouse Revisited

Respondents, the Wunderlichs, do attempt to respond to Issue No. 1 and Issue No. 2 of Appellants, John P. Rouse, Karma Rouse, Thorpe-Abbott Properties, LLC, and their undersigned counsel, which issues pertain to a deposition of Appellant, John Rouse. [See, "Respondents' Brief," pp. 16-29, 31-32]. However, a simple review of the arguments of Respondents, the Wunderlichs, clearly indicate that they are (a) ignoring the actual decisions of the Superior Court that are the subject of this appeal [CP 126-130], and (b) laboring under a false assumption that there are no requirements, limitations, or restrictions whatsoever applicable to Respondents and their discovery under the applicable provisions of the Superior Court Civil Rules, Section 5. Depositions and Discovery [CR 26-37]. As previously stated, Respondents have taken the unwavering position that John P. Rouse, a lay deponent, was obligated to answer any and all questions asked by counsel for Respondents, regardless of their relevancy, or even though the questions were strictly argumentative and

hypothetical in nature. [See, "Brief of Appellants," pp. 19-23].

Contrary to Respondents' misguided belief, CR 26(b)(1), without question, limits the scope of discovery and the type of questions which may be propounded to a deponent. Specifically, CR 26(b)(1) provides:

> **(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In General. Parties may obtain discovery regarding any matter, not privileged, **which is relevant to the subject matter involved in the pending action**, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

[Emphasis added].

Further, CR 30(h)(1) states:

> **(h) Conduct of Depositions.** The following shall govern deposition practice:
>
> (1) **Conduct of Examining Counsel. Examining counsel** will refrain from

> asking questions he or she **knows to be beyond the legitimate scope of discovery**
> . . . .

[Emphasis added].

Suffice it to say, the governing case law and treatises pertaining to Issue No. 1 and Issue No. 2, as previously set forth in the "Brief of Appellant," at pages 21 through 23, also dictate that said questions posed by Respondents' counsel were not a legitimate subject of discovery under CR 26(b)(1), should have been known by Respondents' counsel to be beyond the legitimate scope of discovery under CR 30(h)(1), and, thus, simply did not need to be answered by the Appellant and lay deponent, John P. Rouse.

Hence, counsel for a deponent should not be subject to the imposition of monetary sanctions by a Superior Court in the sum of $275.00 under CR 37 for instructing a lay deponent not to answer questions by an examining counsel that are clearly improper under CR 26(b)(1) and CR 30(h)(1).

2. Revisiting Issue No. 3 and Issue No. 4 Pertaining to Objections to Plaintiffs' (Respondents') Interrogatories and Requests for Production Propounded to Defendants (Appellants)

Respondents, the Wunderlichs, again attempt to respond to Issue No. 3 and Issue No. 4 of Appellants, John P. Rouse, Karma Rouse, Thorpe-Abbott Properties, LLC, and their undersigned counsel, which issues pertain to the objections of defendants' (Appellants') to a document entitled "Plaintiffs' First Set of Interrogatories and Requests for Production Propounded to Defendant John Rouse, Karma Rouse and Thorpe-Abbott Properties, LLC.," dated February 21, 2014 [CP 141-158].

Again, a elementary perusal of the arguments of Respondents, the Wunderlichs [See, Respondents' Brief," pp. 29-32], show that Respondents are again laboring under a false assumption that there are no requirements, limitations, or restrictions whatsoever applicable to Respondents or their attempts at discovery. Clearly, a simple review of the provisions CR 33 and CR 34 dictate that there are restrictions governing the purported discovery undertaken by respondents. Further, a simple review of the document entitled "Plaintiffs' First Set of Requests for Production

Propounded to Defendants" [CP 141-158] clearly show that said document violated numerous provisions of CR 33 and CR 34, together with case law and other authorities governing said document.

Finally, Respondents, the Wunderlichs, ignore the plain and clear wording of CR 26(g). That rule provides as follows:

> (g) **Signing of Discovery Requests, Responses, and Objections.** Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a **certification that the attorney** or party **has read the request, response, or objection, and that to the best of their knowledge, information, and belief formed after a reasonable inquiry it is:** (1) **consistent with these rules and warranted by existing law** or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; **and** (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

[Emphasis added].

As can be seen from CR 26(g), three elements need to be present before a violation of said rule can occur. The first element is that the objections and responses of Appellants would have had to be inconsistent the civil rules and not warranted by existing law. However, in this case, the objections and responses of Appellants [CP 160-167; CP 169-180] to the purported interrogatories and requests for production of Respondents, the Wunderlichs, were totally and absolutely "consistent with these rules and warranted by existing law." [CR 26(g)(1)]. Hence, the objections and responses of Appellants and their undersigned attorney to the purported interrogatories and requests for production of Respondents, without qualification or exception, did not violate CR 26(g)(1).

Accordingly, Appellants and their undersigned counsel should not be subject to the imposition of monetary sanctions by a Superior Court in the sum of $1,012.50 under CR 26(g) for objections and responses to purported interrogatories or requests

for production that are clearly consistent with the discovery rules and warranted by existing law, and therefore, cannot violate CR 26(g).

3. Revisiting Issue No. 5 Pertaining to Reporting and Recording of a CR 26(i) Conference

Interspersed through pages 29 through 32 of "Respondent's Brief," the Wunderlichs attempt to respond to Issues No. 5 of Appellants, John P. Rouse, Karma Rouse, Thorpe-Abbott Properties, LLC, and their undersigned counsel, which issue pertains to the reporting and recording of a CR 26(i) conference at the sole cost of Appellants and the request by the undersigned counsel for Appellants. Contrary to the Respondents' ill-conceived response to this issue, the position maintained by Appellants on this issues is clearly well taken under the applicable provisions of the discovery rules as previously spelled out in the "Brief of Appellant" on pages 35 through 36.

As before, Appellants are unaware of any authority prohibiting them, or their undersigned counsel, from having a CR 26(i) conference reported or recorded solely at their own expense.

Nor, have Respondents, the Wunderlichs, identified any such authority whatsoever in the "Brief of Respondents." Thus, reporting and recording a CR 26(i) conference is not inconsistent with the civil rules nor in violation of existing law. And consequently, reporting and recording a CR 26(i) conference cannot be a violation of CR 26(g).

Accordingly, Appellants and their undersigned counsel should not be subject to the imposition of monetary sanctions by a Superior Court in the sum of $388.80 under CR 26(g) for reporting and recording a CR 26(i) conference

4. Revisiting Issue No. 6 Pertaining to Denial of Defendants' (Appellants') Motion for Reconsideration by the Superior Court

Curiously enough, Respondents, the Wunderlichs, did not address Issue No. 6 of Appellants, John P. Rouse, Karma Rouse, Thorpe-Abbott Properties, LLC, and their undersigned counsel, pertaining the issue of the denial of their motion for reconsideration before the Superior Court. Under accepted practice, such failure or neglect of Respondents should now be taken as a concession by them as to the merits of

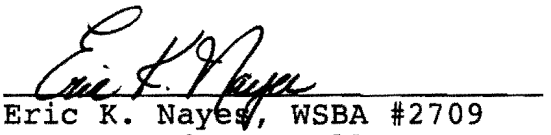
Issue No. 6 of Appellants. See, State v. Ward, 125 Wn.App. 138, 143-44, 104 P.3d 61 (2005). This is particularly true since such concession is entirely consistent with the governing law as set forth in the "Brief of Appellants" at pages 36 through 37 concerning that issue. See generally, State v. Steen, 164 Wn.App. 789, 804 n.10, 265 P.3d 901 (2011).

E. CONCLUSION

Based upon the foregoing, Appellants, John P. Rouse, Karma Rouse, Thorpe-Abbott Properties, LLC, and their undersigned counsel, once more maintain that this Court should reverse the challenged decisions of the superior court and remand this matter for a determination of the amount of reasonable attorney fees which Appellants should be awarded under the provisions of CR 26(g) and CR 37(a)(4) in so far as the motion of the plaintiffs and Respondents, the Wunderlichs, and their attorney's conduct, before the Superior Court violated the civil rules set forth above.

Respectfully submitted this 13th day of May 2015.

The Nayes Law Firm, P.S.

By: 

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