No. 326551-III

(Spokane County Superior Court No. 11-2-02470-3)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

MARISA WUNDERLICH and JOSEPH WUNDERLICH, a married couple

Respondents,

vs.

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

Appellants

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

Table of Cases

Statutes, Administrative Rules and Constitution

I. Introduction

The court issued sanctions against Mr. Nayes for discovery abuses on two separate occasions. The first was during a deposition where Mr. Nayes advised his client not to answer questions, and interrupted the questioning with long, argumentative objections, including what the court found to be at times testifying for his client. The court ordered a motion to

compel answers to the questions, but reserved the issue of sanctions until later.

Shortly thereafter the Respondent served requests for production and interrogatories that the Appellants objected to and provided no answers. In response to the Respondents' request for a CR 26(i) Mr. Nayes required a significant amount of time and a court reporter before he would engage in the CR 26(i). The Respondents stated that if those were the requirements for Mr. Nayes to follow the rule then the CR 26(i) needed to get done.

At the CR 26(i) the Appellants agreed to give some discovery, but it was not going to be produced until just shy of the discovery cutoff date so the Respondents asked for a continuance of the trial to make up for the delays. The Appellants objected to the continuance blaming the discovery delays upon the Respondents.

During this time the Respondents brought a summary judgment to strike improper pleading of CR 11 in the answer, and the Appellants responded at that time by raising a separate summary judgment motion in their response. At that time the Respondents brought a motion for CR 11, CR 26(g) and CR 37 sanctions so the case could be tried on the merits and not procedural games.

The court agreed to revisit the CR 37 sanctions due to the

violations of CR 30(h) in the deposition, and awarded $225 for one hour in bringing the motion to compel, and $50 for the new appearance fee at the next deposition. The court also agreed that refusing to provide any discovery answers and putting unusual requirements on the CR 26(i) had unreasonably increased the costs and delays of discovery and awarded CR 26(g) sanctions of $1,012.50 plus the cost of the transcript from the CR 26(i) of $388.80. The Appellants brought this appeal as a matter of right under *Diaz v. Migrant Council*, 165 Wn. App. 59 (2011), a case that appealed a contempt ruling as a matter of right, and the discovery sanctions under discretion review. *Id.* at 71.

The court's ruling on the CR 37 sanctions were based upon law with the case of *Johnson v. Mermis*, 91 Wn. App. 127 and CR 30(h). They are well grounded in fact by the transcript that was before the court.

The court's ruling on CR 26(g) were based upon law under *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299 and CR 26(g). The of delay and increased costs caused by discovery abuse was well founded in the delayed court date, the increased costs of discovery impediments raised. All these decisions were based upon facts in the record and well established law.

II. Statement of Issues

Appellants' assignment of error No. 1. is incorrect: The Appellant solely

appealed the sanctions order and the motion for its reconsideration, and not the order to compel which was issued in February of 2014, rather than May 30, 2014 and July 15, 2014. (Any motion to compel would not be subject to appeal in this matter as this appeal is late under RAP 5.2.) The actual issue is whether or not sanctions were appropriate under CR 37 for violations of CR 30(h) as the trial court found appropriate. CP 277-276. Other assignment of errors are disagreed with here, but will be addressed as laid out by the Appellants.

III. Statement of Case

This issue was filed on September 13, 2013 in Spokane Superior Court. The claim was one of adverse possession where Marisa Wunderlich claimed that either outright or with her predecessor in interest she had farmed and adversely possessed 10 acres on the West Plains of Spokane. CP 288-293. Mrs. Wunderlich's claimed possessor in interest was Mrs. Ellen Heinemann, the aunt of Mr. Rouse. *Id.* On November 27, 2013 the Defendant, Mr. Rouse moved to have Mrs. Heinemann declared incapacitated under RCW 11.88.030 and a guardian appointed for her. CP 29-34. Shortly thereafter Mr. Rouse put in a declaration to Superior Court that he gave Mrs. Heinemann permission to use the 10 acres to encroach upon for farming. (*Declaration of John P Rouse filed December 27,*

2013)[1]

Mr. Rouse's deposition was set for January 3, 2013. CP 14. In the deposition Mr. Rouse was asked about the claims he put in the petition for guardianship of Mrs. Heinemann. CP 15-17. Mr. Rouse's counsel, Mr. Nayes, objected and instructed Mr. Rouse not to answer the questions. *Id.*

As the deposition proceeded it became clear that Mr. Rouse agreed that cattle and hay had both been on the property in question. Despite this the answer filed jointly by the Defendants (Mr. Rouse, Mrs. Karma Rouse, and their solely owned entity Thorpe-Abbott Properties, LLC) had denied that crops had been raised upon land and cattle grazed upon the land. Mr. Rouse was questioned on these responses in the answer. (*Defendants Answer November 23, 2013*)

Appellant has quoted only part of this transaction, but the full transaction is as follows:

Q. If the Complaint had said they put cattle on the property versus grazed--

A. When you say they, specifically who do you mean?

Q. The plaintiffs or their predecessors.

Mr. Nayes: There's no foundation for this line of questions, Mr. Casey. I mean, you're asking purely hypotheticals that

[1] Since these papers have been designated, but not assigned a court paper number they will be referred to by title and date.

haven't happened at all.

The other thing is that I draft this Answer based upon facts that you won't have anything to do with. Number one is your client doesn't own any real property.

And so when I drafted it, I drafted it based upon actual facts, not supposed facts.

Now if you want to ask him if he thinks his attorney tells the truth or doesn't tell the truth, go ahead.

He did not draft this Answer. I drafted this Answer. And I drafted it based on actual facts, not supposed facts.

And I based it on the actual fact that your client does not own any property. So that, therefore, your client has no predecessor. So that, therefore neither your client nor any predecessor can claim they raised any property on this – any crops on any property owned by Thorpe-Abbott. They own no property.

Mr. Casey: Are you going to instruct him not to answer?

Mr. Nayes: Yes.

Just don't answer any more of these hypothetical questions.

Mr. Casey: Lets mark the record there.

Q. (By Mr. Casey) I'm trying to find out what you're denying. Are you denying then that they grazed their cattle?

Mr. Nayes: I wrote this Answer. He did not write this Answer. Okay?

I am denying. He is not denying. For crying out loud.

Mr. Casey: And I understand that. You're acting on his behalf.

I'm trying to explore the contentions that have been made here.

Mr. Nayes: And I told you what the contentions are.

Mr. Casey: I hear your contentions. I'm trying to explore the factual contentions in these, which is --

The Witness: You haven't explored any facts in this case today.

Mr. Casey: Well, I'm sorry you feel that way. I'm not going to turn this into an argument.

Mr. Nayes: It's not an argument.

Mr. Casey: I have a right to ask questions.

Mr. Nayes: I know you have a right to ask questions.

Mr. Casey: I expect them to be answered unless there's some kind of privilege.

Mr. Nayes: You know, I've been around the practice of law for 40 years.

I'll tell you why: Attorneys draft Answers. Clients don't draft Answers.

Now, if I take your deposition based upon your Complaint, which

contains not one fact in the world--

I mean, it is ridiculous.

Now, what do you want to know? Do you want to know what he thinks or do you want to know what are facts? And so far it's: What do you think? What do you think?

Mr. Casey: I want to know what his testimony is going to be. I have asked him a lot of facts. We've talked about that.

But that's fine. You can deal with that in front of the Court. I'm asking here --

Mr. Nayes: No. I get tired of wasting time, Mr. Casey.

Mr. Casey: Okay

Mr. Nayes: That's what I get tiredest about, you know.

Ask him your question.

Mr. Casey: Okay. And my question is going to be--

Mr. Nayes: Do you think your attorney lied when he said--

Mr. Casey: No. That's not my question at all.

Q. (By Mr. Casey) I'm trying to figure out some of the facts here. And I' trying to figure out if I changed the words, if you would have answered in -- if you would agree with them.

And so I think right now we've established that crops—the problem you have with crops is not that there wasn't hay on the land.

A. I've already--

Q. It's that you don't want to call them crops; correct?

A. I've already answered that there were some hay bales on the land when we got ready to build. Okay?

If you call 10 or 15 hay bales a crop, that's not a crop. CP 18-22.

Later in the deposition Mr. Nayes again took significant issue with another question:

Q. And underneath your definition of possession, does that include raising hay?

Mr. Nayes: Again, there's no foundation.

You have already established that it was leased land. The hay was raised. They didn't raise any hay. A trespasser farmer raised some hay. And that's what the facts show. It's constant.

Mr. Casey: Eric, I understand that's your argument.

Mr. Nayes: No. It's not an argument. It's facts.

Mr. Casey: Well, I have Declarations to the opposite that I have put in front of this Court.

Mr. Nayes: I know you did. And I pointed out to you that you better check on them before--

Mr. Casey: Its testimony of people who have been willing to declare that under the penalty of perjury. That's sufficient evidence.

Okay?

The Witness: Wrong

Mr. Casey: That being said, I do not have to justify my case to you. Okay?

I'm asking you if --

The Witness: You have to justify --

Mr. Casey: I'm asking a question.

The Witness: You have to justify it to me.

Mr. Casey: You know what? We're not here arguing about this.

Are you going to answer my question or not?

The Witness: Ask one.

Mr. Nayes: What is the question? You say did the plaintiffs. Did he see Marisa out there farming?

Mr. Casey: No

Mr. Nayes: Did he see her baling hay?

Mr. Casey: You know what? We have crossed the boundaries now of you advising your client, and you are now speaking for your client.

Mr. Nayes: I am not.

Mr. Casey: I'm going to ask you to limit yourself to the civil rules.

The Witness: Let him ask his questions, Eric. Just let him ask them, because he's got to get a question out.

Mr. Casey: Would you mind reading the last question I did there. CP 24-26.

It was based upon this transcript that the Plaintiffs moved for a new deposition and sanctions. CP 9. The court ruled that a new deposition was proper, but withheld the ruling on sanctions to see how the parties continued to act. CP 46.

On February 21, 2014 the Respondents served interrogatories and requests for production upon the Appellants, to which the Appellants responded with only objections on March 24, 2014. (*Declaration of Counsel in Support of Motion to Move Trial Date, April 4, 2014*). The Defendants jointly responded 30 days later with no answers and pure objections. *Id.* Plaintiffs requested a CR 26(i) to discuss this lack of response. *Id.* Mr. Nayes responded with a lengthy letter doubting the "good faith" request of the CR 26(i) and pointing out that the "talk" requested did not fit the rule. *Id.* The letter requested an in person conference with a court reporter and considerable time be devoted to the CR 26(i) due to the "number of interrogatories and requests for production" done by the Plaintiffs. *Id.* Plaintiffs responded by telling Mr. Nayes that if such were his requirements to fulfill his duty under the rules then they would do whatever it took to get the meeting done. *Id.*

At the meeting Mr. Nayes brought forward no case law to support

his positions or objections. CP 60, CP 66. Mr. Nayes had previously brought this same objection before an administrative law judge and lost. CP 60. Mr. Nayes also disagreed that he had an affirmative duty to follow the spirit of the rules. CP 63 In particular Mr. Nayes complained at one point:

Mr. Nayes: "I've never run up against an attorney like you in 40 years of practice. I haven't. And I just --

I mean, you expect us to read; you expect us to interpret. You expect us to make sure that you have every bit of information we have about our case you know.

Mr. Casey: And you think that's improper?

Mr. Nayes: Yes

Mr. Casey: So I just want to get this right.

You don't think you should do a full investigation so you disclose all material facts to me, so I know what you know about the case?

Mr. Nayes: That's right. I don't think you have--

We don't have to put together your whole case for you, for crying out loud.

Mr. Casey: I don't expect you to. I expect you to do a full investigation.

Mr. Nayes: And inform you of all the material facts. That's what

you just said.

Mr. Casey: I do expect fair disclosure. CP 75

The discovery cut off was set for April 28, 2014. (*Order Setting Case Schedule, December 13, 2013*). Because of the discovery delays due to no responses on interrogatories the Respondent moved to a changing of the trial date. (Plaintiff's Motion to Move Trial Date, April 4, 2014; Declaration of Counsel Supporting Trial Date Motion, April 4, 2014). Appellants opposed the move of the trial date blaming the delays upon the Respondents. (Defendants Memorandum, April 11, 2014). The court moved the trial date out along with the discovery date.

On April 9, 2014 the Plaintiffs filed a motion to strike the CR 11 pleadings from the answer. (Plaintiffs Summary Judgment Motion, April 9, 2014). In Response the Appellants filed a response asking for the court to issue a summary judgment to them on a separate issue of zoning not allowing agricultural use of the land, thus defeating adverse possession. (Defendants Response in Opposition, April 25, 2014). This response ignored CR 56's requirement of 28 days of service, and played with the burden evidentiary requirement that facts be taken in the best light of the non-moving party. In response the Respondents filed a motion with the court sanctions with the court on May 2, 2014. CP 91-103. During the hearing the court asked Mr. Nayes if simply providing objections without

providing any answers was proper. CP 265. The court issued sanctions to stop the discovery behavior and to encourage the case to move forward on the issues. CP 269-273.

During the motion for reconsideration the court found a complete lack of cooperation; finding that the objections were interposed improperly and created unnecessary delay as well as increased litigation costs. (Order On reconsideration, July 15, 2014).

IV. Argument

This is an appeal of two sanctions, one under CR 37, and the other under CR 26(g). Appellant has reargued the entire proceedings as if they have done a protective order, or a response to a motion to compel. That is not the issue here since the Appellants never did a motion for a protective order, and the court's order to compel the answers to questions in the deposition was not appealed. As shown by both the order that is appealed, and the motion for reconsideration, the sole issues are (B)[2] the CR 37 sanctions for how Mr. Nayes behaved in the deposition of the Defendant Mr. Rouse, and (C) CR 26(g) sanctions for Mr. Nayes failure to conduct discovery under that rule, and (D) whether the amount of sanctions was appropriate. This brief will address solely those issues, since they were the only items ruled upon by the court.

[2] A is the standard of review so that is left out.

A. Standard of Review

Abuse of discretion is the standard of review when reviewing an order for sanctions. *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 338 (1993). Appellants have represented to this court that the standard of care is de novo for legal issues and abuse of discretion for factual issues. That is incorrect; the *Fisons* court specifically rejected the request to review sanctions de novo. *Id.* The abuse of discretion standard recognizes that deference is owed to the judicial actor who is better positioned than another to decide the issue in question. *Id.* at 39. *Fisons* analyzed both decisions under CR 26(g) and CR 37, noting that they were under the abuse of discretion standard and that was the proper standard for all discovery sanctions. *Id.*

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *Id.* A trial court would abuse its discretion if it based its ruling on an erroneous view of the law, or if it is based upon insufficient evidence. *Id.*

B. CR 37 sanctions are appropriate- Issues 1 and 2

A spirit of cooperation and forthrightness during the discovery process is mandatory for our trial process. *Fisons*, 91 122 Wn.2d at 342. CR 37 is the enforcement section for the discovery process and authorizes sanctions for failure to comply with a discovery order or failure to respond

to a discovery request or to appear at a deposition. *Johnson v. Mermis*, 91 Wn. App. 127, 132-133 (1998). Sanctions are permitted for unjustified or unexplained resistance to discovery and serve the purposes of deterring, punishing, compensating and educating a party or its attorney engaging in the discovery abuses. *Id.* at 133. Mr. Nayes violated two portions of the civil rules in the deposition, (1) he improperly instructed the witness not to answer, and (2) he argued, coached, and testified for the witness.

1. Mr. Nayes improperly instructed his client not answer questions

A party is not allowed to unilaterally set the limits of discovery nor can they unilaterally limit the scope of the deposition. *Id.* at 134. Rather a party should seek court intervention if they wish to limit discovery. *Id.*, CR 26(c), CR 30(d). CR 30(h)(4) requires counsel to instruct a witness to answer all questions without evasion to the extent of their testimonial knowledge, unless properly instructed not to do so. *Id.* The only proper instructions not to answer are either based upon privilege or pursuant to a CR 30(d) motion to terminate or limit the examination. CR 30(h)(3). *Id.*

In this matter, much like in *Johnson*, Mr. Nayes unilaterally decided the relevancy of the question on Mrs. Heinemanns ability to care for herself. While Mr. Nayes now argues that there was no proffer of proof on its relevancy under CR 26(b)(1), that is not the standard of our

discovery rules. The burden is upon the party resisting the discovery to bring a protective order, and in particular the rules in a deposition require either a privilege, which was not shown here, or the bringing of a protective order under CR 30(d). The party seeking discovery has no duty to provide its strategy or basis, but rather the duty is upon the party opposing discovery.

Discovery in Washington is a constitutional right that springs from the access to our courts. *Putman v. Wenatchee Med. Ctr.*, 166 Wn.2d 974, 979 (2009). "It is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense." *Id.* quoting *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 782 (1991).

Despite these principals the Appellants quote *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 394 (1999) for the statement that the court "will not condone, and will not suffer, what amounts to a fishing expedition." Appellant brief p. 22. However, what the Appellants do not tell this court is that the *Gentry* court was looking at a post-conviction discovery request under a personal restraint petition. *Gentry*, 137 Wn.2d at 390-394. In particular the *Gentry* court noted that "prisoners seeking post-conviction [sic] relief are not entitled to discovery as a matter of ordinary course, but are limited to discovery only to the extent the prisoner

can show good cause to believe the discovery would prove entitlement to relief." *Id.* at 390-391. It was within that context that the *Gentry* court stated they would not grant a "fishing expedition." *Id.* at 394. In direct contrast *Putman*, and CR 26(b)(1) allow broad discovery in civil matters as a constitutional right. The Respondents believe their questions were well within the scope of CR 26(b)(1) relevancy, and to compare them to the standard of *Gentry* is misleading.

a. Questions on Mrs. Heinemann's capacity were allowed

Assuming though that the Appellant is correct that there must be some showing of relevance based solely upon his unilateral demand during a deposition, the information sought was clearly relevant and within the scope of CR 26(b)(1) as likely to lead to relevant evidence. Broad discovery is permitted under CR 26. *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 584 (2009). CR 26(b)(1) allows for questions around information sought that appears reasonably calculated to lead to the discovery of admissible evidence. *Id.* Here the information sought in regards to the incapacity of Mrs. Heinemann went directly to whether or not Mr. Nayes's client had information or testimony to impeach her memory.

The credibility of a witness is very relevant to the trial of facts and issues. ER 607- 613 all speak to impeachment of a witness. Along with

those rules Washington's pattern jury instructions tell the fact finder that they are the sole judge of a witness's testimony, and that they should consider among other things, "the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; and the manner of the witness while testifying...." 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.02 (6th ed.).

In considering the likelihood of the question to lead to reasonable evidence it bears reflecting that Mr. Rouse, the deponent, had (1) put in front of the court a declaration stating he gave Mrs. Heinemann permission to use the land, and (2) that he had started a collateral action to have Mrs. Heinemann declared incapacitated and a guardian appointed. Mr. Rouse's allegations of incapacity and any basis he had for those allegations go directly to the credibility of Mrs. Heinemann, and the impeachability of any testimony Mrs. Heinemann could give to counter Mr. Rouse's declaration. Add to that the facts that Mr. Rouse claimed in the incapacity proceedings that the Plaintiff, Marisa Wunderlich, was abusing Mrs. Heinemann; the timing of the filing being after this suit started; and the claims of the transfer of land from Mrs. Heinemann to Mrs. Wunderlich as invalid and it now moves from likely to lead to relevant evidence, to evidence directly relevant to the claims to the claims

of a predecessor in interest, as alleged in the Respondent's complaint.

These facts, along with the lack of a motion for a protective order, support the findings of the trial court that Mr. Nayes violated CR 30(h) in his instructions not to answer.

b. Questions on the Appellant's answer were allowed

CR 8(b) lays out that in an answer a party may deny all or portions of the complaint. CR 11(a)(4) states that by signing the denial a party must confirm that "the denials of factual contentions are warranted on the evidence..." CR 26(b)(1) allows discovery questions that are broad in scope to get to any discoverable evidence.

To support their objection the Appellant uses *Glazier v. Adams*, 64 Wn.2d 144 (1964). In *Adams*, the trial court limited the cross examination of a witness in front of a jury based upon counsel "attempting to degrade, humiliate or disgrace the witness in order to discredit him and to create prejudice against him in the eyes of the jury." *Id.* at 149. First it bears mention that discovery questions are different than trial because of the difference between ER 402 relevancy versus the broad discovery allowed in CR 26(b)(1). Plus there is the question of protecting the jury from undue or substantial prejudice in trial under ER 403, which does not arise in a deposition. Probably more compelling though is CR 11(a)(4)'s requirement of factual support for a denial that makes asking the

defendant about the answer critical during discovery.

In this matter the deponent initially denied that crops had been raised on the land or cattle grazed on the land. During the deposition it was clear that the deponent had seen hay on the land and cattle on the land. The reasons for the denial appeared to be verbiage of the use of the word "crops" and "grazed." The questions are clear that Respondent's counsel was exploring these differences between testimony and pleadings, which is perfectly proper in discovery and likely in trial as well. Mr. Nayes was not allowed to make himself the sole judge of the propriety of the questions, but rather had a duty under CR 30(h) to either tell his client to answer the question, assert a privilege, or move the court to limit the deposition. *Johnson*, 91 Wn. App. at 127. This supports the courts finding of an improper statement to the deponent not to respond.

2. The court's finding of CR 30(h) violations is also supported

CR 30(h)(2) states "[a]ll objections shall be concise and must not suggest or coach answers from the deponent. Argumentative interruptions by counsel shall not be permitted." The court found a violation of this rule based upon the transcript of the deposition in front of them. Consider the following as the evidence upon which the violation was found:

Q. If the Complaint had said they put cattle on the property versus

grazed--

A. When you say they, specifically who do you mean?

Q. The plaintiffs or their predecessors.

Mr. Nayes: There's no foundation for this line of questions, Mr. Casey. I mean, you're asking purely hypotheticals that haven't happened at all.

The other thing is that I draft this Answer based upon facts that you won't have anything to do with. Number one is your client doesn't own any real property.

And so when I drafted it, I drafted it based upon actual facts, not supposed facts.

Now if you want to ask him if he thinks his attorney tells the truth or doesn't tell the truth, go ahead.

He did not draft this Answer. I drafted this Answer. And I drafted it based on actual facts, not supposed facts.

And I based it on the actual fact that your client does not own any property. So that, therefore, your client has no predecessor. So that, therefore neither your client nor any predecessor can claim they raised any property on this – any crops on any property owned by Thorpe-Abbott. They own no property.

Mr. Casey: Are you going to instruct him not to answer?

Mr. Nayes: Yes.

Just don't answer any more of these hypothetical questions.

Mr. Casey: Lets mark the record there.

Q. (By Mr. Casey) I'm trying to find out what you're denying. Are you denying then that they grazed their cattle?

Mr. Nayes: I wrote this Answer. He did not write this Answer. Okay?

I am denying. He is not denying. For crying out loud.

Mr. Casey: And I understand that. You're acting on his behalf.

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The Witness: You haven't explored any facts in this case today.

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But that's fine. You can deal with that in front of the Court. I'm asking here --

Mr. Nayes: No. I get tired of wasting time, Mr. Casey.

Mr. Casey: Okay

Mr. Nayes: That's what I get tiredest about, you know.

Ask him your question.

Mr. Casey: Okay. And my question is going to be--

Mr. Nayes: Do you think your attorney lied when he said--

Mr. Casey: No. That's not my question at all.

Q. (By Mr. Casey) I'm trying to figure out some of the facts here. And I'm trying to figure out if I changed the words, if you would have answered in -- if you would agree with them.

And so I think right now we've established that crops—the problem you have with crops is not that there wasn't hay on the land.

A. I've already--

Q. It's that you don't want to call them crops; correct?

A. I've already answered that there were some hay bales on the land when we got ready to build. Okay?

If you call 10 or 15 hay bales a crop, that's not a crop.

Later in the deposition Mr. Nayes again took significant issue with another question:

Q. And underneath your definition of possession, does that include raising hay?

Mr. Nayes: Again, there's no foundation.

You have already established that it was leased land. The hay was raised. They didn't raise any hay. A trespasser farmer raised some hay. And that's what the facts show. It's constant.

Mr. Casey: Eric, I understand that's your argument.

Mr. Nayes: No. It's not an argument. It's facts.

Mr. Casey: Well, I have Declarations to the opposite that I have

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Mr. Nayes: I know you did. And I pointed out to you that you better check on them before--

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The Witness: Wrong

Mr. Casey: That being said, I do not have to justify my case to you. Okay?

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Mr. Casey: I'm asking a question.

The Witness: You have to justify it to me.

Mr. Casey: You know what? We're not here arguing about this.

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The Witness: Ask one.

Mr. Nayes: What is the question? You say did the plaintiffs. Did he see Marisa out there farming?

Mr. Casey: No

Mr. Nayes: Did he see her baling hay?

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now of you advising your client, and you are now speaking for your client.

Mr. Nayes: I am not.

Mr. Casey: I'm going to ask you to limit yourself to the civil rules.

The Witness: Let him ask his questions, Eric. Just let him ask them, because he's got to get a question out.

Mr. Casey: Would you mind reading the last question I did there. CP 24-26

This is sufficient evidence to find a violation of CR 30(h) and to award sanctions under CR 37.

C. CR 26(g) sanctions were appropriate

It has been the rule in Washington since 1993 that discovery "responses must be consistent with the letter, spirit, and purpose of the discovery rules." *Fisons Corp.*, 122 Wn.2d at 344. In determining whether or not an attorney has complied with the discovery rule the court should consider all the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response to comply with the request. *Id.* at 343.

The court issued sanctions here based upon two items, first, that it is a violation to only object to the responses without cooperation or other answer; that in solely objecting to the responses, without even attempting to cooperate or answer it was a violation. The second item was Mr. Nayes

imposing conditions of an extensive time and a court reporter before he agreed to cooperate in a CR 26(i) conference.

The Appellants brief tries to raise issues of defect in the original requests, in particular the fact that they were served in one document upon all of Mr. Nayes's joint clients. To support that, the Appellants argue that CR 33 and CR 34 use the term "party", meaning they can be only served upon one party. This argument furthers the finding of the underlying court of a violation of the spirit of the rules, and no good faith basis for only serving objections. Consider another rule that says "party" such as CR 8(b) which says "[a] party shall state in short and plain terms his defenses." Despite the use of "a party" in that rule the Appellants served a joint answer to cover all of them and not individual answers, which their interpretation of "party" would require. Mr. Nayes acknowledged that he had tried this argument before and lost it in front of an administrative law judge, and that he had no case law to support this argument and the pure objection. This is a clear showing of a violation of the spirit of the rule, and CR 26(g) as the court in its discretion found.

Other facts support the court's findings of a violation here. Consider the surrounding circumstances in which this motion was made:

a. Due to the objections and delay, Respondents had been forced to request a movement of the trial date. The Appellants objected to the

movement despite giving no response but objections on the discovery responses, as well as forcing two depositions and a motion to compel on their client. This evidence supports the court's finding of undue delays.

b. Increased costs of litigation are also supported by the Appellants, requiring a lengthy CR 26(i) with a court reporter before the Appellants agreed to a CR 26(i). While there is no specific rule stating a CR 26(i) cannot be done in front of a court reporter, the requirement that it be done that way before a party decides to join it supports a finding of a discovery violation under CR 26(g).

The sanctions under CR 26(g) were well founded.

D. The sanctions here were appropriate

The appropriate sanction is the least severe sanction that will be adequate to serve the purpose of the particular sanction imposed. *Fisons Corp.*, 122 Wn.2d at 355. The sanction should not be so minimal, however, that it undermines the purpose of discovery, but should ensure that the wrongdoer does not profit from the wrong. *Id.* at 356.

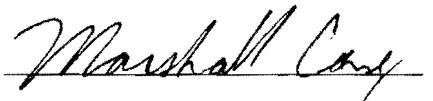
Here the CR 37 sanction was for one hour of the Respondents time at $225.00 per hour based on the time required to bring a motion to compel in addition to the appearance cost of the second deposition ~~of~~ at $50.00. The CR 26(g) sanctions amount was for two hours of the

Respondents research into the Appellants objections, and two and a half hours of a CR 26(i) meeting, along with the cost of the transcript. These sanctions were not excessive and were limited to the cost the violations imposed. These are well within reason.

V. Conclusion

The court's sanctions were well within the discretion of the court, were not an error of law, and were supported by the evidence in front of the court. The sanctions were the least severe to accomplish their goal. Because of this the Respondents request this court to affirm the ruling for sanctions of the trial court in this matter.

RESPECTFULLY SUBMITTED THIS 12th day of March 2015.



Marshall Casey, WSBA #42552

Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury, that on the 12th of March, 2015, I caused to be served a true and correct copy of the foregoing document on the following:

___✓___ HAND DELIVERY
_____ US MAIL
_____ OVERNIGHT MAIL
_____ FACSIMILE
_____ E-MAIL/ELECTRONIC DELIVERY

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