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Court of Appeals
Division I
State of Washington

74048-2

No. 74048-2-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

SUSAN CAMICIA,

Respondent,

v.

HOWARD S. WRIGHT CONSTRUCTION COMPANY,
a Washington corporation; and CITY OF MERCER ISLAND,

Defendants,

and

ANDREW G. COOLEY and KEATING,
BUCKLIN & MCCORMACK, INC., P.S.,

Appellants.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Federal Cases

Statutes

Rules and Regulations

Other Authorities

A. INTRODUCTION

The brief of respondent Susan Camicia is remarkable for its distortion of the facts below, its attempt to surface a tardy constitutional dimension on discovery, and its failure to even attempt to come to grips with the legal issues raised in the opening brief of Andrew G. Cooley and his firm, Keating Bucklin & McCormack, Inc. P.S. ("Cooley"). Instead, it makes an entirely unjustified assertion that the present appeal is frivolous and engages in what can only be described as character assassination of a well-respected lawyer and his equally well-regarded firm by baiting this Court into filing a Bar grievance against Cooley. This Court should plainly reject such unacceptable conduct from counsel, who should know better.

Camicia's counsel issued broad and vague discovery requests in October 2007 that Cooley and the City of Mercer Island ("City") endeavored to answer within 30 days of their receipt on October 31, 2007. Thereafter, Camicia's counsel did *nothing* about those responses until the trial court dismissed Camicia's complaint in July 2009, nearly two years later. The appellate process intruded until March 2014, but again, inexplicably, Camicia's counsel waited until nearly *a year* later, on the eve of trial, to move to compel discovery. Notwithstanding Camicia's delay, the trial court issued a May 6, 2015 order (with trial set for May 11), giving the City a mere 48 hours to produce all bicycle incident records, including

health care records from the fire department for treating persons with bicycle-related injuries, over an 18-year period. Despite the nearly impossible time frame for compliance, the City met the trial court's order. Nevertheless, that Court sanctioned Cooley and the City. That sanctions ruling should not stand.

B. STATEMENT OF THE CASE

Camicia largely does not dispute the factual recitation in Cooley's opening brief. Appellants br. at 3-13.

Camicia was a Mercer Island resident who "knew the area well." CP 10. Around 1984, engineers from the Washington State Department of Transportation ("WSDOT") installed the bollards on the park path as part of the re-construction of the I-90 floating bridge. CP 129. The bollard that Camicia ran into was designed and installed by WSDOT. *Id*. Over the years, there were many other projects in the area. Not one engineer ever said to the City that the bollards are dangerous or should be removed. *Id*. If there were complaints, they would be registered with the City Clerk, the City Attorney, the parks department or the City transportation planner. *Id*. There were no complaints. *Id*.

In 2007, the City responded to Camicia's discovery. CP 281-92. In 2009, City employees were deposed. CP 128, 131. Camicia claims that the testimony was "false" when it came to the history of the so-called Plein

accident.[1] Resp't br. at 12 n.2. The City witnesses only said they did not remember any other accidents. CP 132 (Mayer said he did not remember anyone complaining about the bollard); CP 129 (Yamishita said he did not know of any other accidents "at this location" except Camicia's). There is no evidence these memories were "false." There is no evidence that Cooley knew the witnesses were lying and needed to correct the record, as implied by Camicia. Resp't br. at 12 n.2, 26.[2]

In 2008, over a year after she propounded discovery to the City, Camicia's lawyer reviewed a HIPAA and UHCIA compliance release for the fire department medical records regarding Camicia's treatment. CP 234-36. Thereafter, the only time Camicia would permit opposing parties to review her confidential medical records if the City complied with the UHCIA. CP 242. There is no evidence that Cooley saw Camicia or any

[1] In 2005, Plein hit a bollard. CP 1034. Paramedics responded and gave him medical treatment. CP 1028. Plein testified that he was dehydrated and "felt a bit off." CP 1034. He never communicated with anyone at the City that the bollard was dangerous. CP 1035. He thought he hit the bollard due to his fatigue. CP 1035. Camicia suggests that the City's failure to reveal the Plein accident is an example of willful refusal to provide discovery. Resp't br. at 8-9. This is untrue. Given the precise question Camicia asked of the City, Plein's accident did not qualify. CP ___ (City's Resp. to Plaintiff's Offer of Proof at 5-7). (This is the subject of a supplemental designation.).

[2] Criminal law prevents a prosecutor "from knowingly presenting false evidence, including false testimony, to the jury." *United States v. Vega*, 813 F.3d 386, 391 (1st Cir. 2016). This includes failure to *correct* knowing false testimony. But for a duty to arise, there has to be proof the prosecutor knew a witness was lying.

other patient's health care records in possession of the City fire department. CP 218.[3]

In 2015, the trial court ordered the City to produce tort claims in possession of the City Clerk. CP 1348. The Clerk had followed the State's document destruction policies and had destroyed tort claims prior to 2006. CP 829. Camicia concedes that there is no evidence that Cooley ever reviewed the tort claim files, or had any hand in their destruction. Resp't br. at 18. Camicia otherwise fails to explain why the trial court sanctioned Cooley for an act in which he had absolutely no role.

Camicia also does not contest or address the trial court's finding that delay in producing the Parr police photos was not in the City's interest and that it caused no prejudice to Camicia. CP 1346.

C. ARGUMENT

Camicia's brief fails to even attempt to address any of the legal issues articulated in the opening Cooley brief of appellants. The issues Camicia does raise are unsupported. Each will be addressed in turn.

(1) Cooley Is an Aggrieved Party under RAP 3.1

[3] Despite this record, Camicia continues to insist that the fire department does not possess medical records and any such claim is "false." Resp't br. at 25. Yet nowhere in her 37-page brief does she address the undisputed record from the paramedics at Mercer Island (CP 205, 790-811, 1350), and she never even acknowledges or addresses RCW 70.03, the key statute in this case. Resp't br. at v (Table of Authorities).

Camicia advances what can only be described as a borderline frivolous argument that Cooley is not an aggrieved party under RAP 3.1. Resp't br. at 2, 29.[4] Camicia asserts that Cooley is not an aggrieved party "except as to the fine." *Id.* at 2. This argument, candidly, makes no sense, conceding, as it does, that Cooley is, in fact, aggrieved within the meaning of RAP 3.1.

An attorney subject to a sanction order is an aggrieved party under RAP 3.1, as Washington courts have *repeatedly* held. *E.g.*, *In re Guardianship of Lasky*, 54 Wn. App. 841, 848, 776 P.2d 695 (1989); *Breda v. B.P.O. Elks Lake City 1800 SO-620*, 120 Wn. App. 351, 90 P.3d 1079 (2004).[5] *Breda* makes clear that where a person's proprietary pecuniary, or personal rights are affected, they are "aggrieved" under RAP 3.1;

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[4] There is a certain irony in the fact that Camicia makes this frivolous argument in the context of her baseless contention that Cooley's appeal is frivolous.

[5] Camicia cites *Johnson v. Jones*, 91 Wn. App. 127, 855 P.2d 826 (1988) in this context, resp't br. at 2, 30, but does not explain its significance. As it related to standing, Jones involved an attorney appeal, which the Court of Appeals decided, proving that an attorney is "aggrieved" under RAP 3.1 as to a sanctions order. Beyond that, the case bears no resemblance to this one. As noted in Cooley's opening brief at 18, that case involved the imposition of sanctions against a client and counsel where both participated actively in the sanctionable behavior. Indeed, in that replevin case, the trial court granted Johnson's motion to compel a deposition relating to an expensive car, ordering Mermis to make himself available for deposition, produce certain documents, and disclose the car's location, make it available for inspection, and not move it. Mermis's counsel, Jones, filed a third party action against Johnson's attorney, his wife, and his law firm. At the deposition, Mermis failed to produce the documents and refused to answer question on his counsel's direction. A further motion to compel was granted and further discovery abuses were enumerated. With regard to answers to interrogatories and requests for production, Mermis's counsel made overly broad objections and, unlike this case, produced no responsive documents at all. *Id.* at 134. Plainly, the level of sanctionable behavior in *Johnson* was extraordinary.

specifically, an attorney subject to sanctions is an aggrieved party. *Id.* at 353. Federal authorities are in agreement. *Keach v. Cty. of Schenectady*, 593 F.3d 218, 223 (2d Cir. 2010) (summarizing case law and noting that 8 circuits agree an attorney is an aggrieved party as to sanctions; many hold an attorney is aggrieved party to sanctions order even where no monetary penalty is awarded).

Camicia seemingly argues that Cooley is not aggrieved as to any of the trial court's discovery and evidentiary decisions. Resp't br. at 30. Cooley is not appealing those decisions per se, but he is appealing the imposition of sanctions where those discovery and evidentiary orders are wrong. This Court cannot understand why the trial court's sanctions order against Cooley was an abuse of discretion without assessing why that court's underlying rulings upon which sanctions were predicated were themselves fundamentally flawed. *See* RAP 2.4(b) (review of a decision brings up with it the underlying orders necessary to appropriate review of the order at issue). Cooley is an aggrieved party with regard to sanctions and he is entitled to document precisely why the trial court abused its discretion in ordering sanctions.

(2) Camicia Misstates the Applicable Standard of Review

Camicia asserts that the standard of review with regard to discovery violations is an abuse of discretion. Resp't br. at 19. On that point, Cooley

generally agrees. Appellants br. at 14 n.12. However, Camicia neglects to address the fact that a trial court abuses its discretion when it exercises its discretion based on an incorrect legal standard or makes an error of law. *Kreidler v. Cascade Nat'l Ins. Co.*, 179 Wn. App. 851, 866, 321 P.3d 281 (2014). An "erroneous legal interpretation" is abuse of discretion and reversible. *Nw. Wholesale, Inc. v. PAC Organic Fruit, LLC*, 183 Wn. App. 459, 481, 334 P.3d 63, 75 (2014), *review granted sub nom, Nw. Wholesale, Inc. v. Ostenson,* 182 Wn.2d 1009 (2015), and *aff'd*, 184 Wn.2d 176, 357 P.3d 650 (2015), *cert. denied sub nom*. *Ostenson v. Holzman*, 136 S. Ct. 1453 (2016). Moreover, construction of a statute like the UHCIA is reviewed de novo under the error of law standard. *Waste Mgmt. of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 627, 869 P.2d 1034, 1038 (1994). Of course, that is precisely what occurred here. The trial court improperly held that the UHCIA and HIPAA statutes did not apply to the fire department's medical records and this was error.

Camicia then launches into a discussion of a bar disciplinary case, *In re Disciplinary Proceedings Against McGrath*, 174 Wn.2d 813, 280 P.3d 1091 (2012), resp't br. at 19-21, apparently citing that case in connection with the standard of review for findings of fact, although that is not exactly

clear from Camicia's discussion.[6] Camicia is obviously oblivious to the fact that a bar disciplinary matter is quasi-criminal in nature, *In re Kindschi*, 52 Wn.2d 8, 10, 319 P.2d 824 (1958), and the bar must prove any facts against an attorney in a disciplinary case by a higher standard than mere preponderance — a clear preponderance — a standard just short of beyond a reasonable doubt. *In re Disciplinary Proceedings Against Marshall*, 160 Wn.2d 317, 330, 157 P.3d 859 (2007). Whatever findings the trial court made here did not meet this standard.

(3) Camicia Raises a Constitutional Argument for the First Time on Appeal

In the brief of appellants at 15, Cooley noted the constitutional dimension to discovery in Washington. Now, Camicia asserts a constitutional right to discover "essential evidence." Resp't br. at 21-23. But Camicia neither explains her tardy assertion of this claim of a constitutional right, nor does she explain what this claim actually means in this litigation. Camicia does not get to raise such an issue belatedly. RAP 2.5(a)(3). A party may raise a *manifest error* affecting a constitutional right for the first time on appeal, but that does not mean that a party in a civil case is entitled to make such a belated constitutional claim. In *State v. WWJ*

[6] A far more likely reason for Camicia's citation of *McGrath* is her apparent hope that by repeatedly citing the case this Court will agree with her contention that this Court should equate a discovery sanctions case with a disciplinary case, suggesting Cooley's actions here were on a par with such a case.

Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999), our Supreme Court noted that this exception to the general rule that issues could not be raised for the first time on appeal was a narrow one. The error must both be manifest and truly of a constitutional magnitude. Here, Camicia is not even claiming trial court error at all. She is simply raising an additional argument she failed to sufficiently argue below. She cannot demonstrate the necessary "concrete detriment" to her constitutional rights to justify her belated presentation of her newly found argument. *State v. Koss*, 181 Wn.2d 493, 503 n.6, 334 P.3d 1042 (2014). In any event, Camicia's ill-formed argument here does not merit this Court's attention and it should be disregarded.

(4) Camicia Has No Answer to Cooley's Contention that the Trial Court Erred by Imposing Sanctions for Records that Could Not Be Produced or Were Unavailable by Law in Washington

Cooley carefully articulated in the opening brief at 20-29 how state and federal medical records privacy laws barred the imposition of sanctions because the records were not subject to discovery. Specifically, Cooley argued that fire department EMTs were health care providers.

Camicia's only response to such authorities is to assert that Cooley's claim is somehow "false," repeating the trial court's erroneous conclusion that fire department EMT information is not subject to HIPAA or the

UHCIA. That is not a legally sufficient responsive argument. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193, 195 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none."). Far from "false," as documented in Cooley's opening brief, paramedics and EMTs are health care providers under HIPAA and UHCIA, and their records are health care records subject to privacy protection. *Camicia herself* acknowledged this by requiring the City to secure a HIPAA waiver to obtain her records from the fire department. CP 234-36.

Camicia cites *one case* in response to Cooley's argument, *State v. Vietz*, 94 Wn. App. 870, 973 P.2d 501 (1999).[7] That case does not help Camicia as it addresses neither HIPAA nor the UHCIA. Rather, Division II there held that an LPN does not fall under the specific language of the statutory privilege afforded nurses by RCW 5.62.020.[8] It has nothing to do with HIPAA or the UHCIA. Camicia seemingly has no real answer to

[7] Camicia claims that Division II held that "Fire Department paramedic records are not privileged medical records." Resp't br. at 25. But the case does not say this. Indeed, the case does not deal with a fire department, a paramedic, or even records.

[8] In passing, in a footnote, *id*. at 872 n.2, the *Vietz* court referenced *State v. Ross*, 89 Wn. App. 302, 307, 947 P.2d 1290 (1997), *review denied*, 135 Wn.2d 1011 (1998) wherein the court held a paramedic was not covered by the specific language of the physician-patient privilege. Both HIPAA and the UHCIA broadly define health care records, encompassing fire department EMT-generated records here.

Cooley's argument that the language of HIPAA and the UHCIA precludes disclosure of EMT-generated health care records. And she has no defense to the claim that the trial court simply erred in declaring that the fire department does not possess medical records. This error goes to the heart of the trial court's sanctions order and demonstrates why it should be reversed.[9]

Similarly, Cooley noted in the opening brief at 29-32 that because of Camicia's inordinate delay in moving to compel,[10] many of the tort

[9] Washington courts have not adopted a blanket rule that anytime a discovery request is overly broad and may invade privilege, a mandatory duty to file a motion for protective order is triggered. *Gillett v. Conner,* 132 Wn. App. 818, 825, 133 P.3d 960 (2006) (Court can modify discovery request under CR 34, even in absence of protective order motion). The sole exception is hospitals in possession of quality improvement files. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 790, 280 P.3d 1078, 1089 (2012); *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 695, 295 P.3d 239, 244 (2013) (dicta). The rule from *Lowy* makes sense, in that the hospital is both the holder of the records and the holder of the quality improvement process privilege. These cases do not purport to overrule CR 26(b)(1) which prohibits discovery of privileged matters.

[10] As noted in Cooley's opening brief at 32-33, Camicia's own delay in seeking discovery and moving to compel literally on the eve of trial foreclosed her ability to seek sanctions against Cooley. Camicia does not dispute the legal authorities cited by Cooley in the opening brief, and instead makes a general denial that she could not have acted that is not anchored in the time line of this case.

The record here is clear — Camicia propounded discovery in October 2007 and received the City's answers later that same month. CP 281-92, 841. She took *no action* on those answers between October 2007 and June 2, 2009 when the trial court dismissed her complaint on the basis of the recreational immunity statute. CP 24-30. The appellate process concluded in early March, 2014 with the issuance of the mandate. CP 64-65. Nevertheless, Camicia waited until late April 2015, literally on the eve of trial, to file her expansive motion to compel. CP 186-201.

Camicia had *years* to act on discovery, despite the appellate process in this case. She failed to timely pursue her discovery-related issues and the trial should not have sanctioned the City or Cooley.

claims filed with the City that the trial court ordered to be produced had been destroyed in accordance with State policy. Camicia does not even address the spoliation issue in her brief, presumably meaning she does not, or cannot, deny the arguments Cooley offered. "A trial court necessarily abuses its discretion if it applies the incorrect legal standard." *Gillett*, 132 Wn. App. at 822. The correct legal standard is that there is no general duty to preserve evidence. Appellants br. at 29-32. Once again, Camicia seemingly has no real answer for Cooley's arguments.

In sum, with respect to the central grounds for the trial court's imposition of discovery sanctions against the City and Cooley – the failure to produce fire department health care records that were exempt from disclosure under HIPAA or the UHCIA and spoliation as to tort claims – Camicia has *no answer* to the fact that the trial court's belief that documents should have been provided was legally erroneous. The trial court's sanction order against Cooley cannot stand.[11]

(5) Cooley's Appeal Is Not Frivolous

Camicia contends that Cooley's appeal is frivolous, resp't br. at 29-34, citing Philip Talmadge, *et al., When Counsel Screws Up: The*

[11] Camicia also has no answer to the argument in Cooley's opening brief at 18-20 that the trial court failed to differentiate between the City and Cooley in the imposition of discovery-related sanctions.

Imposition and Calculation of Attorney Fees as Sanctions, 33 Seattle U. L. Rev. 437 (2010). Camicia neglects to *completely* apprise this Court of the contents of that authority. As noted there, the routine assertion that any appeal with which a party disagrees is frivolous has been rejected by this Court in its seminal frivolous appeal decision, *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980). *Streater* articulated a standard that set a high bar for a frivolous appeal. *Id.* at 434. An appeal is not frivolous unless it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. A party has a right to appeal; all doubts are resolved in the appellant's favor; the record must be viewed as a whole; affirmance does not equate with frivolousness. *Id.*

Further, Camicia's citation of *Johnson* does not help her. As noted *supra*, attorney Jones persisted in that case in appealing sanctions that were predicated upon multiple discovery abuses *and* the disobedience to two court orders. There was no reasonable basis to argue the trial court abused its discretion. By contrast, in this case, the trial court's discovery decision is suspect given HIPAA, UHCIA, and Washington law on spoliation, legal questions for which Camicia seemingly has no response. Moreover, Cooley did not disobey a trial court order here.

This appeal is not frivolous within the meaning of RAP 18.9(a), as interpreted in *Streater*, in any sense.

(6) Camicia's Effort to Have This Court File a Bar Grievance Against Cooley Is a Vicious Attempt at Character Assassination and Should Be Rejected

Not content with her aggressive assertion that Cooley's appeal is frivolous, Camicia piles on by arguing that this Court should file a bar grievance against Cooley. Resp't br. at 34. Camicia apparently fails to heed the statement of our Supreme Court in *Washington Physician Insurance Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993) that discovery sanctions cases should not become satellite litigation or a cottage industry for lawyers. But Camicia wants to go even farther, making every dispute between parties over discovery a very personal grudge match in which this Court should be enlisted to make the dispute a bar disciplinary matter; this Court should find this invitation to become embroiled in lawyer mud wrestling as distasteful as it obviously is.[12]

Camicia's citation of *McGrath* does not help her. As noted *supra*, the burden of proof for lawyer discipline is greater than the burden in sanctions matters, evidencing the fact that McGrath's conduct that subjected

[12] The oath of attorney in Washington, of which Camicia's counsel must be aware, is that counsel should refrain from "offensive personalities." APR 5(d). This is a mandate to appropriate professional civility. In his zeal to go after Cooley, Camicia's counsel has perhaps lost sight of this obligation.

him to discipline was demonstrably willful and deliberate. There, the attorney deliberately obstructed the case by failing to respond to discovery requests, despite court orders, lied about having made a reasonable inquiry of the client when he didn't, and sent ex parte communications to the judge considering discovery sanctions disparaging the opposing party for being Canadian. The Supreme Court noted that McGrath's misconduct far exceeded a routine discovery sanctions case. *Id*. at 823-84.

Simply put, not every discovery dispute constitutes a bar disciplinary matter. Camicia did not invite the trial court to file a bar grievance, something the *McGrath* court recognized as appropriate. *Id*. at 824. Instead, she waited until review by this Court to do so. Because the trial court erred in imposing sanctions for the reasons Cooley has enumerated, this Court should decline Camicia's extraordinary, and baseless, effort to have the Court join in the character assassination of a well-respected lawyer or his firm.

D. CONCLUSION

Nothing presented in Camicia's abrasive brief should dissuade this Court from concluding that the trial court abused its discretion in asserting that Cooley engaged in willful discovery violations, deliberately withholding documents from opposing counsel and then imposing onerous sanctions for such alleged violations, particularly where state and federal

health care privacy requirements applied, as Camicia seemingly concedes, and state law permitted the destruction of the tort claim forms at issue, as Camicia again seemingly concedes. Discovery sanctions were also inappropriate where Camicia literally waited nearly eight years, on the eve of trial, to raise any concerns about the adequacy of the responses to discovery.

This Court should reverse the trial court's May 6 and September 14, 2015 orders to the extent they apply to Cooley and the firm. Costs on appeal should be awarded to Cooley and the firm.

DATED this 30th day of June, 2016.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the Reply Brief of Appellants in Court of Appeals Cause No. 74048-2-I to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 20, 2016, at Seattle, Washington.

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