NO. 74048-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

(King County Superior Court Cause No. 07-2-29545-3 SEA)

SUSAN CAMICIA

Respondent,

vs.

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

BRIEF OF RESPONDENT SUSAN CAMICIA

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I. INTRODUCTION

This is an appeal by the Keating Bucklin & McCormack, Inc. P.S. law firm ("KBM") and one of its attorneys Andrew G. Cooley from the King County Superior Court's (Judge Laura Inveen's) May 6, 2015 Order on Plaintiff's Second Motion to Compel Discovery of Defendant Mercer Island, CP420-422, and September 14, 2015 Order on Motion for Sanctions/Admitting Evidence of Other Accidents. CP1340-1356. Cooley's and KBM's client, defendant City of Mercer Island ("the "City"), is not a party to this appeal.

The May 6, 2015 discovery order required the City to produce documents responsive to plaintiff's discovery requests or alternatively required KBM or Cooley to file a CR 26(g) certification that they had made a reasonable inquiry for the documents. The City began producing thousands of pages of documents in daily installments beginning on Sunday, May 11, 2015, five days after the court ordered deadline of May 7, 2015.

In the September 14, 2015 sanctions order, Judge Inveen found that Cooley and KBM committed willful discovery abuse, evasions and misrepresentations and fined Cooley/KBM and Mercer Island $10,000 jointly and severally as a discovery sanction. CP 1352. Cooley and KBM have not

alleged or established that their "proprietary, pecuniary or personal rights are substantially affected by" the May 6, 2015 discovery order or by the September 14, 2015 sanctions order, other than the fine. *See Breda v. B.P.O. Elks Lake City 1800-SO-620,*120 Wn. App. 351, 352-53, 90 P.3d 1079 (2009) and *Johnson v. Mermis,* 91 Wn. App. 127, 955 P.2d 826 (1998).

Consequently, Cooley and KBM are not "aggrieved part[ies]" under the May 6 discovery order or the September 14 sanctions order, except as to the fine imposed by the latter. Under RAP 3.1, this appeal should be dismissed as frivolous and terms should be awarded to Camicia because Cooley and KBM are not "aggrieved parties" except as to the fine, and no reasonable person could conclude that Judge Inveen abused her discretion in finding the discovery violations described in the September 14, 2015 order or in imposing a $10,000 joint and several fine on Cooley, KBM and the City as a discovery sanction.

Camicia requests this Court: (1) to hold that Judge Inveen's Findings in the September 14, 2015 sanctions order regarding Cooley's and KBM's willful discovery abuses and misrepresentations are supported by substantial evidence; (2) to exercise its authority under *Gammon v. Clark Equip. Co.,* 38 Wn. App. 274, 279-80, 686 P.2d 1102 (1984) to find that the $10,000 joint

and several fine is inadequate to ensure that Cooley and KBM have not profited from their wrongs, and to educate, punish and deter them from committing the same or similar discovery abuses in the future; and (3) to dismiss this appeal as frivolous and award terms to Camicia for having to respond to this appeal which is frivolous because Cooley and KBM are not aggrieved parties except as to the fine, and no reasonable person could conclude that the trial court abused its discretion in finding that they provided false, evasive discovery responses and misrepresentations described in the September 14, 2015 sanctions order or in imposing the fine.

II. COUNTERSTATEMENT OF THE CASE

A. The Accident.

On the evening of June 19, 2006, Susan Camicia was riding her bicycle westbound on the I-90 Trail in the City of Mercer Island. The I-90 Trail on Mercer Island is a regional and local non-motorized public transportation route classified under the Manual on Uniform Traffic Control Devices ("MUTCD") as a shared-use bicycle-pedestrian path. *See Camicia v. Howard S. Wright Constr. Co.,* 179Wn.2d 684, 688-91, 317 P.3d 987 (2014). It provides the only means of non-motorized transportation across Lake Washington. *Id.* at 689. Camicia came upon a construction fence

footing that protruded into the trail, steered to the left to avoid it, and struck an unmarked, wood bollard post in the middle of the trail. She pitched over the bollard onto her bicycle helmet and sustained a spinal cord injury that left her quadriplegic. CP 56-63. *See Camicia,* 179Wn.2d at 689-91.

Mercer Island police officer Ryan Parr responded to the accident and photographed the accident scene conditions. CP 352 . Officer Parr's June 19, 2006 photos showed the bollard was not marked with contrast paint or reflectorized, it blended in with the gray asphalt surface of the trail under the overcast sky, and the I-90 Trail surface leading up to the bollard was not striped, signed or otherwise delineated to identify the bollard. CP 164-168. Officer Parr's scene photos also showed a large sign leaning against the construction fence that protruded into the I-90 Trail, further restricting Camicia's travel lane. CP 174.

The City owned and maintained the I-90 Trail and the bollard at the accident location. It issued a Right of Way Use Permit which directed HSW to install its perimeter construction fence "on the trail." CP*(Sub #20; Exhibit 5 - Right of Way Use Permit).

On June 20, 2006, the day after the accident, the Washington Cities Insurance Authority ("WCIA") retained KBM and Cooley to defend Mercer Island against Camicia's anticipated personal injury claims. CP 1486-1487.

In September 2007, Camicia sued Howard S. Wright and the City of Mercer Island for installing the construction fence on the I-90 Trail without conducting a traffic engineering study and for not complying with MUTCD, WSDOT and bicycle traffic engineering standards for marking trail surfaces and fence and bollard obstructions on shared use bicycle paths. CP 3-8, 56-63.

Cooley represented Mercer Island in this case from the day after the accident through the settlement and dismissal of Camicia's claims on January 25, 2016. CP 2183-2187. *See Budlong Declaration, Ex 1.*

B. Procedural History

In July 2009, Judge Inveen dismissed Camicia's claims against Mercer Island under the recreational use immunity statute, RCW 4.24.210. CP 24-30.

In April 2010, this Court reversed, ruling that disputed factual issues precluded summary judgment. *Camicia v. Howard S. Wright Constr. Co.,* 158 Wn. App. 1029, 2010 WL 4457351 (2010).

In January 2014, the Supreme Court affirmed this Court's decision. *Camicia v. Howard S. Wright Constr. Co.,* 179 Wn.2d 684, 689-91, 317 P.3d

1987 (2014). On March 7, 2014, the Supreme Court issued its Mandate and remanded this case to the trial court. CP 64-65.

C. Camicia's Discovery Requests and Cooley/KBM's Responses.

In October 2007, Camicia served the following discovery requests on Mercer Island, which Cooley/KBM answered on October 30, 2007:

> **Interrogatory 14**. Have you or your agents, investigators, lawyers or anyone else investigated any incidents involving danger, injury or death to bicyclists or pedestrians because of fences, bollards or other obstructions or defects in any sidewalk, path or public right-of-way in the City of Mercer Island, either before or after this incident? If so, please identify or describe all such investigations and accident locations, the name, address, telephone number and job title of each person who reported or investigated each accident; the date of each accident, the name and number of each incident report and investigation report, and the name, address, telephone number and job title of each person who has custody of the reports or investigation documents.
>
> **ANSWER:** Objection. Compound. Vague as to time. Overly broad as to location. If by "incidents" you mean accidents, there have never been any bicycle vs. bollard accidents to the City's institutional knowledge. Otherwise the question is vague as to time, the word "incident" and "danger." Certainly there have been pedestrian incidents in the City since its incorporation.
>
> **Interrogatory 15.** Are you aware of any notices, reports, complaints, claims or other communications from any source about safety concerns to pedestrians or bicyclists from fences, bollards or other obstructions or defects in any sidewalk, path or public right-of-way in the City of Mercer Island, either before or after this incident? If so, please identify or describe the dates and details of all such notices, reports or complaints, the names, addresses and telephone numbers of all persons who made and received them, all documents electronic

communications or tangible things concerning them, and all decisions or actions taken in response to such notices, reports or complaints.

ANSWER: Objection. Compound. Vague as to what is meant by "notice" or "other communications" and "other obstructions or defects." ... .

Request for Production 11. Please produce genuine, authentic originals or copies of the following documents and things:
All incident reports, investigative reports or other documents, drawings, computer data, photos, movies, videos or other depictions relating to other bicycling and pedestrian accidents and related safety concerns as referenced in Interrogatory Nos. 14 and 15.

RESPONSE: See documents previously attached.

CP 115-126.

The City produced a 2007 police report about a bicyclist who turned around and fell off his bicycle. The City, Cooley and KBM knew the Mercer Island "fire department has EMTs and paramedics who would respond to injury accidents and prepare reports", *Appellant's Brief, p. 6, fn. 4*, but they did not inquire about or search fire department records for information or documents responsive to plaintiff's discovery requests about other bicycle accidents. Instead, Cooley unilaterally determined, sight unseen, that Fire Department records were "medical records" rather than accident records:

> "The Fire Department does not maintain accident records, it maintains medical records." It is highly unlikely that there would be relevant and admissible records in the Fire Department's medical files. And since these files have

> confidential medical information in them, they... could never provide evidence of "notice" of a dangerous condition.
>
> I have been practicing in this field for 30 years and have never made a search for Fire Department records in any road design case. And I have handled several hundred of these cases."

CP 218.

In July 2008, and February 2009, Camicia deposed Mercer Island's principal officials responsible for its bicycle facilities–City Engineer Patrick Yamashita and Parks Director Peter Mayer–to determine if the City's discovery responses denying any "institutional knowledge" of other bicycle accidents or bicycle-bollard collisions were true or false. CP 128-132. Although Yamashita, Mayer and City Traffic Engineer Nancy Fairchild all knew of and had exchanged emails about Paul Pleine's bicycle-bollard collision in 2005, CP 134-135, Yamashita falsely testified there never had been any complaints about the bollards being hazardous or not visible:

> Q. To your knowledge, since 1984, have there ever been any accidents at this location?...
>
> A. At the bollards? The only one I'm aware is the Camicia accident.
>
> Q. And have there ever been any complaints to you about the bollards being a hazard or not visible?
>
> A. In those locations, not to my knowledge....
>
> Q. Have you had complaints about other bollards not at this location?

A. I think we may have received one sometime after this accident. ...

Q. Had the City of Mercer Island, to your knowledge, ever received any complaints about bollards before this accident?

A. Not to my knowledge, no.

Q. Where would the complaints go if they come in to the City? What department would likely get them?

A. It, in part, depends on the form of the complaint. If it was a complaint, but related to a claim for damages, it would go to our city clerk and then the city attorney's office. If it was more related to bicycle and pedestrian facilities, recreational trails, it could go either to the parks and recreation department or to the transportation planner, Nancy Fairchild.... Nancy Fairchild was within my work group. She reported directly to me.

CP 129.

Although Mayer was aware of and had e-mail correspondence with other city officials about the Pleine bike-bollard collision, he falsely denied that he had been notified:

Q. Has anyone ever notified you that there was some danger with regard to wooden bollards used in park bike path settings?

A. No.

CP 132.

D. <u>May 6, 2015 Discovery Order</u>

The portion of the May 6, 2015 discovery order that pertains to Cooley and KBM provides:

> "If defendant City of Mercer Island does not timely produce all of the documents in paragraphs 1 and 2 to Plaintiff, its counsel shall certify pursuant to CR 26(g) that he and the City have searched all of its files and records where the documents reasonably may be located, has asked all of the City's employees who may possess or control the documents, and has otherwise made reasonable inquiry to obtain the documents, and that the documents do not exist to the best of his knowledge and belief and to the best of the City's knowledge and belief."

CP 421.

Cooley's and KBM's CR 26(i) certification obligations under the May 6 discovery order were not triggered because the City produced the Court ordered documents.

Respondent moves *infra* to dismiss the appeal from the May 6, 2015 discovery order because Cooley and KBM are not aggrieved by it and lack standing to appeal from it.

E. <u>The September 14, 2015 Sanctions Order.</u>

The September 14, 2015 sanctions order contains the following Findings pertaining to Cooley and KBM:

> "5. Although the City [through its attorneys Cooley and KBM] noted broad objections, it went on to answer the [interrogatory] questions. The City's responses did not indicate that it was withholding any information or documents responsive to Plaintiff's discovery requests. A reader would reasonably infer the City had substantively answered the interrogatories in question.

6. The City [through its attorneys] did not seek a protective order to limit or eliminate its obligation to respond fully to Plaintiff's discovery requests.

7. City officials have known since before Plaintiff's accident that records of bicycle accidents, (including bike-bollard collisions) are kept by its Fire Department. [Citing footnote 2 - an April 2005 email from Police Department Commander Lacy to Parks Director Mayer] CP 138. Neither the City nor Mr. Cooley searched for records of other bicycle accidents responsive to Plaintiff's discovery requests in the City's Fire Department. Cooley strategically ignored looking at Fire Department records.[1] Nor was a complete review made of the Police Department, City Clerk's or City Attorney's files, or records where they knew or should have known that responsive information might be located.

8. After Plaintiff's first discovery requests were propounded, the City destroyed claims and complaints that were potentially responsive to Plaintiff's discovery requests, causing such records preceding Plaintiff's accident to be lost. During the course of litigating the discovery issues in May, 2015, it was disclosed that the City had not searched its "claims for damages" forms for records responsive to the discovery requests. When ordered to do so, it was revealed that all claims for damages forms and records relating to claims for damages generated before the Plaintiff's accident had been destroyed.

9. Prior to plaintiff's accident, on July 16, 2005, Paul Pleine was injured in a bicycle-bollard collision on a portion of the I-90 trail located on Washington Department of Transportation right of way within Mercer Island to which Mercer Island Fire responded and

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[1] Before making this finding, the trial court reviewed Cooley's April 29, 2015 Declaration that "I have been practicing in this field for 30 years and have never made a search for Fire Department records in any road design case. And I have handled several hundred of these cases." CP 218. The trial court also had observed Cooley's demeanor and attitude at the hearing on plaintiff's motions to compel discovery and for sanctions. 7-17-15 RP/40-55.

arranged for Pleine to be taken to Swedish Hospital. Fire Department personnel prepared a report of the Pleine incident.

10. On August 22, 2005, City Parks Director Peter Mayer reported a recent "cyclist-bollard post collision" in an email to City Engineer Patrick Yamashita, which was copied to City Traffic Engineer Nancy Fairchild and other City personnel. Since there has been no evidence produced of any other bicyclist-bollard collision in that time-frame, the only reasonable inference is that Mayer was referring to the Pleine incident. This email was not produced in initial responses to discovery.

15. The Defendant City and attorney Cooley did not disclose any information or records regarding other bicycle accidents or any safety related claims or complaints of injuries or safety concerns in its responses to plaintiff's first discovery requests.

16. After writing his August 22, 2005 email identifying a recent bike-bollard collision [the Pleine accident], City Parks Director Peter Mayer testified in his February 2009 deposition that no one "had ever notified him that there was some danger with regard to wooden bollards used in park bike path settings." CP 131-132.

17. After receiving Mayer's August 22, 2005 email identifying a recent bike-bollard collision [the Pleine accident], City Engineer Patrick Yamashita testified at his deposition in July 2008 that to his knowledge the City...had not received any complaints about bollards before plaintiff's accident. [CP 128-129[2].]

18. The photos the City produced in October 2007 did not include the photos Mercer Island Police Officer Ryan Parr took of the accident scene on June 19, 2006. Mr. Cooley did not produce Officer Parr's June 19, 2006 accident scene photos until May 6, 2009, which

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[2]Cooley defended the Yamashita and Mayer depositions without correcting their false testimony denying knowledge of the Pleine bike-bollard accident. CP 128-132.

was after he had taken two depositions of the plaintiff and had deposed all but one of her expert witnesses.

19. Officer Parr's photos were relevant because they showed the scene conditions soon after the accident, including lighting conditions and construction signs in the Plaintiff's lane of travel on the I-90 Trail. It deprived Plaintiff of the opportunity to refresh her recollection of existing conditions before her depositions and deprived her expert witnesses of that evidence before their depositions.

20. Mr. Cooley does not have an explanation why Officer Parr's accident scene photos were not produced to plaintiff for 18 months after he answered plaintiff's first discovery requests in October, 2007.

22. On June 28, 2014, the City was informed of Coryn Gjerdrum's bicycle pitch-over accident which occurred on that day on the same unmarked bollard that Susan Camicia hit.

23. On April 23, 2015, Mercer Island's defense counsel [Cooley and Rosenberg] represented to Plaintiff's counsel in writing "there are zero reports (of accidents) connected to plaintiff's accident site", despite the City's knowledge of Gjerdrum's June, 2014 collision, as documented in the Mercer Island Police Department incident report.

24. On May 6, 2015, as a result of concerns ...that the City had not been responsive to initial discovery requests, including the fact it had not searched Fire Department records, the Court entered a broad discovery order...

25. Between May 11 and May 14, 2015, the City produced hundreds of records of other bicycle accidents, claims, complaints and related safety concerns that were responsive to plaintiff's October 2007 discovery requests and the May 6, 2015 order, including records of 5 other bicycle bollard collision incidents–the Pleine, Gjerdrum, Petty, Elmer and Easton collisions.

26. The City's destruction of all pre-incident records of claims and complaints about bicycle accidents and injuries while plaintiff's discovery requests were pending resulted in spoliation of potentially relevant evidence, and may have prevented Plaintiff from proving whether Mercer Island had prior notice of bicyclists being injured on bollards or obstruction hazards, except for the Pleine bike-bollard collision. It is acknowledged that some, or all, of these incidents would have also been disclosed in the (late) disclosed Fire Department records, Police Department records, or lawsuits. We will never know...

27. Plaintiff did not discover records of the other bicycle accidents and other bike-bollard collisions until Defendant City produced them pursuant to the court's May 6, 2015 discovery order. Plaintiff was unable to provide evidence to her expert witnesses in time to determine the similarity and relevancy of other bicycle accidents and prepare their testimony for trial on May 11, 2015, requiring a trial continuance....

28. The City's failure to respond fully to discovery was willful, as it was without reasonable excuse or justification.

29. The City's and its defense counsel's responses to Plaintiff's first discovery requests were false, misleading and evasive.[3]

30. To date, defense counsel shows no indication of a plan to change his conduct in the future. Defense counsel is unapologetic, defensive and refuses to admit that he or the City violated discovery obligations.[4]

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[3]Cooley's 4/29/15 declaration admits he never searched the Mercer Island Fire Department records which documented the Pleine, Gjerdrum and other bike-bollard collisions. CP 218.

[4]Cooley says his discovery responses "were consistent with the Civil Rules as I understood them at the time [in 2007] and as I understand them now." CP 832.

KBM and Cooley have not argued that the foregoing Findings are unsupported by substantial evidence. Conclusion 5 of the September 14, 2015 sanctions order imposed $10,000 in discovery sanctions jointly and severally against Cooley/KBM and the City. CP 1352.

F. Cooley's/KBM's Discovery and Litigation Practices.

Mr. Cooley's Declarations describe his legal background, discovery practices, and the amount of legal work he and other KBM attorneys have performed on this case and other similar cases over the last 10 years:

> "3. I began practicing law in 1985 with the Washington attorney General's office. There, I worked in the Tort Claims Division and began handling bicycle cases involving claims of defective roadways. It is an area I have focused on for the last 30 years....
>
> 5. ...I have substantial and possibly unique qualifications for a bicycle accident case involving claims of facility design liability.
>
> 7. I have substantial background in road design liability cases. I have been an attorney of record in most of the important road design cases at the Washington Supreme Court. ...I have tried many bicycle accident cases in my career. The significant ones include:
>
> > *Moore v. City of Kent*....a 4-week jury trial [in which] plaintiff was riding his bicycle on a Kent sidewalk when he fell into the street and suffered massive head trauma. He was rendered quadriparetic. The plaintiff's lawyers asked for $7 million. There was a defense verdict.
> >
> > *Huckins v. City of Puyallup.* ...a 4-week trial [in which] plaintiff was riding his bicycle and was struck

> by a car. He suffered a massive closed head injury and needed lifetime care. The Plaintiff's attorney asked for $20 million. ... There was a defense verdict.
>
> *Hayworth v. City of Kent.* ... a 3-week trial [in which] plaintiff was riding his bicycle in a crosswalk when he was hit by a car. He had a closed head injury. Plaintiff's counsel asked the jury to award $3 million. There was a defense verdict.

8. Because of this type of background, the City of Mercer Island hired me the day after the Camicia accident... I have been substantially involved in the case since 2006. I have taken or defended almost all the liability depositions in this case. I argued all of the summary judgment motions. I argued the case in the Court of Appeals and the Supreme Court. I am currently planning on doing the City's jury selection, opening, cross of Plaintiff, and direct or cross of 20 more witnesses. I have prepared substantially for this case, likely logging in excess of 300 hours in the last 6 weeks."

CP 1985-1987.

Mr. Cooley's July 1, 2014 Declaration says:

"Since this case was filed, I have been one of the two primary attorneys defending Mercer Island. By way of (non-exhaustive) background, I have:

> A. Been working on this case since the day after the accident in 2006;
> B. Taken, defended and/or attended most of the depositions;
> C. Conducted witness interviews and site investigation;
> D. Worked with experts and consultants;
> E. Participated in discussion related to strategy, trial, and themes;

> F. I argued the summary judgment motion and all appellate arguments."

CP 1486.

Another KBM senior lawyer Adam Rosenberg also was extensively involved for many years in defending the Camicia lawsuit: "I've been handling this case with Mr. Cooley for many years now, and my institutional knowledge, relationships and working knowledge of the legal issues reflects that." CP 1971-1972.

Cooley and KBM knew the Mercer Island "fire department has EMTs and paramedics who would respond to injury accidents and prepare reports." *Appellants' Brief, p 6, fn. 4.* But they did not search the fire department files for records of other bicycle accidents. Instead, Cooley followed his usual practice of never looking in fire department files for "other accident" records:

> "I have been practicing in this field for 30 years and have never made a search for Fire Department records in any road design case. And I have handled several hundred of these cases."

CP 218.

Cooley falsely denied that the fire department maintained accident records, falsely declared that Fire Department accident records were not shared with other City departments, and determined, sight unseen and

without moving for a protective order, that the fire department's records of other bicycle accidents were irrelevant medical records that would be inadmissible at trial:

> "The Fire Department does not maintain accident records, it maintains medical records. It is highly unlikely that there would be relevant and admissible records in the Fire Department's medical files. And since these files have confidential medical information in them, they are not shared with the rest of the City... and therefore, could never provide evidence of "notice" of a dangerous condition."

CP 218.

Cooley and KBM also admit they did not search the tort claims filed with the Mercer Island City Clerk and City Attorney: "... there is no evidence that Cooley ever reviewed tort claim files, knew what evidence they did or did not disclose..." *Appellant's Brief, p.12, fn9.*

Cooley and KBM also misrepresented that the City did not know of the 2005 Pleine accident or of the 2014 Gjerdrum bicycle collision with the same bollard Camicia had collided with in 2006:

> "We've also confirmed, on more than one occasion now, that we have no records or institutional knowledge of the 2005 bollard accident [the Pleine accident] Pete Mayer referenced in his email." ...we've also confirmed that there are zero reports connected to plaintiff's accident site."

CP 225.

On November 11, 2015, Camicia settled her claims against the City with the WCIA for $6,950,000. *Ex. 1 to Budlong Dec.* The Stipulation and Order of Dismissal was entered on January 25, 2016. CP 2186-2187.

Cooley and KBM appealed from that order and the May 6 discovery order and September 14, 2015 sanctions order. CP 1464-1485, CP* (Sub #447 - Amended Notice of Appeal).

III. ARGUMENT.

A. The Standard of Review.

An abuse of discretion standard applies to review of challenged findings of fact that an attorney committed a discovery violation by providing discovery responses without conducting a reasonable inquiry into their truthfulness. *See Johnson v. Mermis,* 91 Wn. App. 127, 133, 855 P.2d 826 (1998), ("We apply an abuse of discretion test to review a trial court's decision to impose discovery sanctions.") *See also In re Disciplinary Proceedings against McGrath,* 174 Wn.2d 813, 818, 280 P.3d 1091 (2012):

> "We uphold challenged findings as long as they are supported by substantial evidence. *Id.* Substantial evidence exists if a rational, fair-minded person would be convinced by it. Even if there are several reasonable interpretations of the evidence, it is substantial if it reasonably supports the finding. And circumstantial evidence is as good as direct evidence." *Rogers*

> *Potato Serv., LLC v. Countrywide Potato,* LLC, 152 Wash.2d 387, 391, 97 P.3d 745 (2004) (citations omitted). We give great weight to the hearing officer's findings of fact, especially where the veracity of witnesses is concerned."

Conclusions of law imposing sanctions for discovery violations are reviewed de novo. *McGrath, supra.* at 815.

Cooley's and KBM's willful discovery violations are similar to those committed by attorney McGrath which resulted in McGrath's suspension from practicing law.

In *McGrath,* the trial court found that attorney McGrath and his client:

> "falsely certified responses to [plaintiff's] requests for production,... acted in bad faith as to their other responses to discovery; and McGrath's actions were willful and intentional and undertaken to mislead both [plaintiff] and the court..."

Id. at 822.

In addition, the trial court found McGrath and his client intentionally disregarded a court order to compel discovery. *Id.* at 823.

The trial judge filed a grievance against McGrath with the Washington State Bar Association whose hearing officer found:

> "McGrath had engaged in four separate instances of conduct in violation of the rules of professional conduct (RPC). The first two violations involved McGrath's significant failures to respond to discovery requests and falsely certifying compliance with discovery rules. ...

Id. at 817.

> The hearing officer found:
>
> "McGrath's certification of his discovery answers was "a false representation to the court and opposing counsel that he had made a reasonable inquiry to determine that the responses were complete and correct", in violation of RPC 8.4. ...

Id. at 826.

> "McGrath continues to contend that he made a reasonable inquiry and that his certifications of the responses to discovery were accurate and proper. Again, his contentions are based upon his failure to understand the duties of a lawyer. Although McGrath may not have had actual knowledge of what documents were missing, he had actual knowledge that he had not made a reasonable inquiry."

Id. at 827.

B. Camicia's Constitutional Right to Discover Essential Evidence.

Cooley's and KBM's discovery abuses undermined Camicia's constitutional right of access to the court and to discovery of evidence necessary to prove her injury claims.

In *Doe v. Puget Sound Blood Center,* 117 Wn.2d 772, 780 (1991) and *Putman v. Wenatchee Valley Med. Ctr.,* 166 Wn.2d 974 (2009), the Supreme Court recognized, as part of the right of access to the courts under Wa. Const. Art. 1, Sec. 10 and Civil Rule 26, a plaintiff's constitutional right to "extensive discovery" of evidence necessary to prove her claim:

> "The people have a right of access to courts; indeed, it is the bedrock foundation upon which rest all the people's rights and obligations. This right of access to courts includes the right of discovery authorized by the civil rules. As we have said before, "it is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense."

166 Wn.2d at 979.

Because of the constitutional right to extensive discovery in personal injury cases, a defendant may not "unduly burden the right of medical malpractice plaintiffs to conduct discovery and, therefore, violate their right to access courts", *Putman,* 166 Wn.2d at 985, because "our rules of discovery are grounded upon the constitutional guaranty that justice will be administered openly." *Lowy v. PeaceHealth,* 174 Wn.2d 769 (2012).

In *WSPIE v. Fisons Corp.,* 122 Wn.2d 299, 341 (1993), our Supreme Court adopted the rule of *Hickman v. Taylor,* 329 U.S. 495 [67 S.Ct. 385, 91 L.Ed. 451] (1947) that *equal access* to all relevant evidence in a defendant's possession is essential to proper litigation:

> "The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "Mutual knowledge of *all the relevant facts gathered by both parties* is essential to proper litigation." (Emphasis added).

Equal access to evidence is a practical aspect of the "constitutional cornerstone" of extensive discovery:

> "Besides its constitutional cornerstone, there are practical reasons for discovery. ...As modern day pretrial discovery has evolved, it has contributed enormously to "a more fair, just, and efficient process." *Effective pretrial disclosure, so that each side knows what the other side knows*, has narrowed and clarified the disputed issues and made early resolution possible."

Lowy, 174 Wn.2d at 777.

C. The Purposes of Discovery Sanctions.

In *Wash. Physicians Ins. Assoc. Exch. v. Fisons Corp.,* 122 Wn.2d 299, 356, 858 P.2d1054 (1993) the Supreme Court said:

> "The purposes of [discovery] sanctions are to deter, to punish, to compensate and to educate... The sanction should insure that the wrongdoer does not profit from the wrong."

KBM and Cooley wrongfully profited by prolonging this lawsuit with eight years of willful discovery evasion. Camicia's claims were worth nothing to Mercer Island and the WCIA and could not be settled during the 8 years between 2007 and 2015 when Cooley, KBM and the City were withholding evidence of other bicycle accidents and destroying evidence of other injury claims. Soon after that evidence was produced and the trial court indicated it would offer a spoliation of evidence jury instruction, this case settled for $6,995,000 in November 2015. During those 8 years, KBM had two senior attorneys–Cooley and Rosenberg–who worked primarily on this

case. Cooley billed more than 300 hours in just 6 weeks during that period. CP 1987. This suggests that KBM lawyers billed more than a thousand hours in legal fees and received hundreds of thousands or perhaps millions of dollars in legal fees that would not have been paid, if Cooley and KBM had looked for and produced the discovery in 2007 and the case had settled at that time.

Judge Inveen's findings, Cooley's declarations, and this appeal suggest Cooley and KBM have not been educated, punished adequately or deterred from strategic discovery abuse in future cases.

D. Cooley's and KBM's Discovery Abuses Are Inexcusable.

1. Camicia did not delay in moving to compel.

From 2007 until 2015, Camicia had no evidence that the City's discovery responses or Yamashita's and Mayer's testimony were untruthful. She would have risked CR 11 sanctions, if she had moved to compel information and documents whose existence the City's lawyers and responsible officials had denied under oath.

Camicia could not move to compel after this lawsuit was dismissed in July 2009 and was on appeal from then until the Supreme Court issued its Mandate and remanded on March 7, 2014. CP 64-64.

On appeal, Cooley and KBM continue to offer baseless excuses for their willful discovery evasion. Their argument that "Camicia's delay in seeking discovery negates the basis for sanctions" *Appellants' Brief, p.32* is unsupported by legal authority and factually groundless.

2. Cooley's false claim that Fire Department records are medical records.

Cooley's and KBM's belated excuse, not asserted until 2015, that health care privileges prevented them and the City from searching Mercer Island Fire Department records for evidence of other bicycle accidents, is groundless. First, as the trial court observed, Camicia did not seek medical records, only accident records. Moreover, in *State v. Vietz,* 94 Wn. App. 870, 874 , 973 P.2d 501 (1999) this Court held that "Fire Department paramedic records are not privileged medical records." Since paramedic records are not privileged it was inexcusable for Cooley and KBM strategically to ignore them. Their argument that the fire department accident records were privileged medical records is contradicted by *State v. Vietz.*

Cooley and KBM did not object until 2015 that fire department bicycle accident records are privileged medical records exempt from discovery under state and federal health care laws. Moreover, as Judge Inveen concluded this belated objection is legally baseless because health

care privileges do not apply to fire department paramedic or records. *See State v. Vietz,* 94 Wn. App. 870, 874 , 973). 2d 501 (1999) ("the physician-patient privilege statute...does not apply to information obtained by paramedics.") .

3. Cooley and KBM falsely denied other accidents.

Cooley and KBM falsely denied in the City's discovery responses that the City had no institutional knowledge of other bicycle accidents and related tort claims. In October 2007, after this lawsuit was filed, Cooley/KBM, without conducting any inquiry, misrepresented in the City's discovery responses that the City had no "institutional knowledge" of other potentially relevant bicycle accidents or related claims.

During oral argument on May 12, 2015 Cooley told the court there were no other accidents. 5-12-15 RP/11. After the May 6, 2015 discovery Court order to the City to produce documents, the City began to produce in daily installments, dozens of other bicycle accident reports occuring on the I-90 trail. Five of those accidents were bike-bollard collisions, one of which involved the same bollard as the Camicia accident.

4. Cooley defended Mercer Island employee depositions but did not correct their false testimony.

In their deposition testimony, Yamashita and Mayer confirmed Cooley and KBM's false, evasive discovery responses, which left no clue to Camicia that evidence of other bicycle accidents and tort claims was being withheld.

Instead of conducting a reasonable inquiry for the "other accident" and "other claims" evidence sought in plaintiff's discovery requests, disclosing the responsive documents in Mercer Island's possession, or moving for a protective order, Cooley and KBM used the same type of boilerplate objections rejected in *Johnson v. Mermis* to evade their duty to respond to Camicia's discovery: "vague as to time"... Compound, Vague as to what is meant by "notice" or "other communications" and "other obstructions or defects." CP 2282.

In *Johnson v. Mermis,* 91 Wn. App. 127, 133, 855 P.2d 826 (1998), this Court described similar objections like "overly broad, privileged, ambiguous and irrelevant" as "blanket", "boilerplate without specificity", *id.* at 133, n. 10. The court ruled they "did not satisfy the requirements of the discovery rules." *id.* at 133, or excuse a lawyer's failure to conduct a reasonable inquiry, disclose and fully produce responsive information and

documents, or move for a protective order if the lawyer did not wish to respond:

> "The trial court was correct to find that the interrogatories and requests for production were improperly answered and contained boilerplate objections without specificity. The rules are clear that a party must answer all interrogatories and all requests for production unless a specific and clear objection is made. If a party disagrees with the scope of production, or wishes not to respond, it must move for a protective order and cannot withhold discoverable materials."

After watching Cooley argue at hearings on the discovery and sanctions motions at issue on this appeal, Judge Inveen found Cooley to be unapologetic and that he would likely continue to engage in similar discovery evasion in future cases:

> "31. Throughout the course of discovery and litigation surrounding it in this proceeding, counsel has made comments that are misleading. ...
>
> 31. (b) ... In attempting to justify the failure to disclose the Plein accident, defense counsel rephrased the question [plaintiff's interrogatory] in his own pleadings to change the meaning of the question, by using the term "Mercer Island right-of-way." He then argued that since the Pleine accident occurred in WSDOT right-of -way, there was no need for the city to disclose the incident–regardless of the fact it occurred on right-of-way within the City of Mercer Island, the City's own Fire Department responded to the incident, and a city department head referenced the incident in an email one month after it happened. The Court's experience with defense counsel has indicated that he is extremely well spoken and

> talented with words. The court can only assume this re-phrase was intentional.
>
> 31. (c)... The fact of the matter is that Plaintiff never asked for medical records. In oral argument, Mr. Cooley acknowledged that he has never searched Fire Department records for responses to discovery in past cases, and suggests no intent to change that practice. Given the fact that defense counsel's law practice focuses primarily on municipalities, it is highly likely this issue will come up in the future. "

CP 1349-1350.

Instead of apologizing for and renouncing their discovery practices, Cooley and KBM have filed this frivolous appeal seeking to justify the strategy for future use.

E. Motion to Dismiss and for Terms for Filing a Frivolous Appeal.

Camicia moves to dismiss this appeal as frivolous because a) Cooley and KBM are not "aggrieved parties" under RAP. 3.1 which provides: "...only an aggrieved party may seek review by the appellate court"; and b) because no reasonable person could conclude that the trial court abused its discretion in finding that they committed discovery abuses and in imposing a $10,000 joint and several fine against them and the City.

In *Breda v. B.P.O. Elks Lake City 1800-SO-620,*120 Wn. App. 351, 352-53, 90 P.3d 1079 (2009), this Court ruled:

> "Only an aggrieved party may appeal to this court. An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected. A lawyer who is sanctioned by a court becomes a party to an action and thus may appeal as an aggrieved party. However, although an attorney may appeal sanctions in his own behalf, he may not appeal decisions that solely affect his clients because his rights are not affected by the rulings and he is not an aggrieved party under RAP 3.1.

Under *Breda* and *Johnson v. Mermis,* this appeal should be dismissed because Cooley and KBM are not aggrieved by the trial court's discovery, evidentiary and sanctions rulings in the May 6 and September 14, 2015 discovery and sanctions orders pertaining to the City of Mercer Island, and the trial court did not abuse its discretion in imposing a $10,000 joint and several fine against them and the City.

1. Award of Terms.

Respondent Camicia moves this Court under RAP 18.1 and 18.9(a) for an award of reasonable attorney fees and expenses incurred in responding to this frivolous appeal.[5]

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[5]RAP 18.1 provides: "**Generally**. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule... ".

RAP18.9(a) provides: "**Sanctions.** The appellate court on its own initiative or on motion....may order a party or counsel,... who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party

Under *Johnson v. Mermis,* 91 Wn. App. 127, 131, 137-38, 855 P.2d 826 (1998), an appeal is frivolous if :

> "...considering the entire record, it has so little merit that there is no reasonable possibility of reversal and reasonable minds could not differ about the issues raised. ...there was no reasonable basis to argue that the trial court abused its discretion".

The Court should dismiss this appeal under its decision in *Johnson* and award terms in favor of Camicia for having to respond to a frivolous appeal. In *Johnson,* defendant Mermis and his attorney Jones committed "multiple discovery abuses", including improperly answering interrogatories and requests for production, using "boilerplate objections" like "overly broad, privileged, ambiguous and irrelevant", unilaterally determining that certain records were not discoverable, violating deposition procedures, and refusing to answer deposition questions. *Id.* at 131. The trial court imposed joint and several monetary sanctions against Jones and Mermis. *Id.* at 132.

On appeal, Jones did not seek any affirmative relief as to any of the trial court's rulings other than the monetary sanctions. This Court affirmed the sanctions and dismissed the appeal as frivolous because Jones was not

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who has been harmed by the delay or the failure to comply... ".

aggrieved by any rulings other than the monetary sanctions, which were reasonably imposed:

> "Finally, we need not consider Jones's other assigned errors: (1) the court's denial of Mermis's motion to strike the trial date, (2) its dismissal of Mermis's third party claims, and (3) its exclusion of one of Mermis's witness's testimony as a discovery sanction. Only an aggrieved party may seek review by the appellate court. An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected. Because Jones was not a party in the action below and his rights were not affected by these rulings, he cannot seek review of these assigned errors."

Id. at 137.

In *Johnson, supra*, this Court upheld the trial court's imposition of a $2,000 joint and several fine against the defendant and his lawyer and dismissed a similar appeal as frivolous and awarded terms against the attorney for filing a frivolous appeal. *Id.* at 132.

This court dismissed attorney Jones's appeal as frivolous:

> "An appeal is frivolous if, considering the entire record, it has so little merit that there is no reasonable possibility of reversal and reasonable minds could not differ about the issues raised.
>
> Applying this standard, we hold that Jones's appeal is so devoid of merit that it is frivolous. Reasonable minds could not differ that sanctions were properly imposed. Jones engaged in multiple discovery abuses and violated the court's express order compelling discovery. Because there was no reasonable basis to argue that the trial court abused its

> discretion, we hold that the appeal is frivolous and impose sanctions in the amount of $500 payable to this court."

Id. at 137-38.

See also Talmadge, et. al, *When Counsel Screws Up: The Imposition and Calculation of Attorney Fees as Sanctions,* 33 Seattle U. L. Rev. 437, 452-53. (2010):

> "An appeal is frivolous if it is essentially factual rather than legal in nature, if it involves discretionary rulings and the trial court did not abuse its discretion, or if the appellant cannot cite any authority to support his or her position. A respondent may recover his or her fees on appeal from the party filing a frivolous appeal. RAP 18.9(a) and RAP 18.7 both govern the imposition of sanctions on appeal. ... RAP 18.7 specifically incorporates the provisions of CR 11, which suggests a single frivolous appellate issue may be sanctionable. *Bryant v. Joseph Tree,* 119 Wn.2d 210, 223, 819 P.2d 1099 (1991)."

In this case, Cooley and KBM, like attorney Jones in *Johnson v. Mermis,* committed multiple discovery abuses, and there is no reasonable basis to argue that the trial court abused its discretion in imposing a $10,000 joint and several fine against them and the City.

This appeal is frivolous because (1) the trial court had authority, inherently and under CR 26(g), to impose reasonable terms against Cooley and KBM for their willful discovery abuses; (2) There is "no reasonable basis to argue that the [trial] court abused its discretion" in imposing a $10,000

joint and several fine against them and the City; (3) Cooley and KBM are not aggrieved by Judge Inveen's other orders from which they have appealed; and (4) the $10,000 joint and several fine represents only a small fraction of the legal fees Cooley and KBM made by using discovery abuse to prolong this lawsuit for 9 years. The fine clearly is within Judge Inveen's authority to impose. *Compare Magana v. Hyundai Corp.*, 167 Wn.2d 570, 220 P.3d 191 (2009) (trial court did not abuse its discretion in imposing a $8,000,000 default judgment for defendant's multiple discovery abuses in withholding evidence of other similar incidents.)

F. This Court Should File a Bar Grievance against Cooley and KBM.

Camicia requests this Court to file a grievance against Cooley and KBM with the Washington State Bar Association, as encouraged by *In re Disciplinary Proceedings Against McGrath,* 174 Wn.2d 813, 818, 280 P.3d 1091 (2012), and to provide bar disciplinary authorities with a copy of the record on this appeal so they can determine if Cooley and KBM, like attorney McGrath, violated RPC 8.4(c) and (d) and if enhanced sanctions, such as suspending Cooley and KBM from practicing law, are warranted, as they were for similar willful discovery abuses in *McGrath*.

In *McGrath*, a WSBA hearing officer found that:

> "...[attorney] McGrath intentionally and repeatedly obstructed and delayed litigation by failing to respond to discovery requests and by falsely certifying that he had made a reasonable inquiry into the accuracy of the responses he eventually gave. ..."

Id. at 815.

The hearing officer also found:

> "[McGrath] violated RPC 8.4(d)2 in providing discovery responses to opposing counsel without conducting a reasonable inquiry into the truthfulness of the responses in circumstances where inquiry and investigation by respondent was clearly called for." CL 1 (count I)."

Id. at 818-19.

On review, the Supreme Court accepted the officer's findings of fact, conclusions of law, and recommendation that McGrath be suspended from practicing law for 18 months. *Id.* at 815.

In *McGrath,* the Supreme Court said:

> "Where the evidence establishes the lawyer has repeatedly failed to comply with discovery in one case or a series of cases, discipline sanctions are appropriate. Further, we encourage judges to file grievances if they feel their best efforts to achieve compliance with discovery orders are insufficient or if they believe a lawyer fails to understand discovery obligations. ...Bar disciplinary sanctions are entirely appropriate for his conduct."

Id. at 824.

The WSBA hearing officer in *McGrath* found McGrath's certification of his discovery answers was:

> "a false representation to the court and opposing counsel that he had made a reasonable inquiry to determine that the responses were complete and correct," in violation of RPC 8.4(c)4 and (d). ..."

Id. at 826-27.

The Supreme Court rejected McGrath's continuing contentions:

> "...[t]hat he made a reasonable inquiry and that his certifications of the responses to discovery were accurate and proper. Again, his contentions are based upon his failure to understand the duties of a lawyer. Although McGrath may not have had actual knowledge of what documents were missing, he had actual knowledge that he had not made a reasonable inquiry."

Id. at 827.

Judge Inveen made similar findings of fact and conclusions of law with regard to Cooley/KBM in this case.

VI. CONCLUSION

In personal injury lawsuits where the constitutional right to obtain essential discovery is at stake, sanctions for willful discovery abuse must be sufficient to ensure that governmental officials and lawyers fight fair as well as fight hard and to make sure that unrepentant, intransigeant discovery cheaters do not prosper.

Judge Inveen's findings in the sanctions order that Cooley is unapologetic and likely will continue to commit willful discovery abuses in future cases, *See* 9/14/15 Sanctions order, suggest that a joint and several monetary sanction of $10,000 is inadequate to educate, punish and deter Cooley and KBM from committing willful discovery abuses in other current or future cases.

To protect the constitutional rights of future plaintiffs to obtain essential discovery, this Court should file a bar grievance against Cooley and KBM so the WSBA disciplinary authorities can investigate and determine if enhanced sanctions are warranted as they were in *McGrath*.

Camicia does not know what amount of money, if any, Cooley and KBM have paid or will pay to satisfy the $10,000 joint and several fine in the sanctions order. If the City paid or pays the entire $10,000 fine, then Cooley and KBM will have escaped any sanctions.

RESPECTFULLY OFFERED this 19th day of May 2016.

THE BUDLONG LAW FIRM

By _____
JOHN BUDLONG, WSBA #12594
Attorneys for Respondent Susan Camicia

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date indicated below, a true and correct copy of the attached Brief of Respondent was filed with the court and delivered via e-mail to the following persons:

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DATED this 19th day of May, 2016.

Starla M. Hohbach

NO. 74048-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

(King County Superior Court Cause No. 07-2-29545-3 SEA)

SUSAN CAMICIA

Respondent,

vs.

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

Defendants,

and

ANDREW G. COOLEY, and KEATING BUCKLING & McCORMACK, INC., P.S.,

Appellants

DECLARATION OF JOHN BUDLONG

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Attorneys for Respondent Susan Camicia

I am one of the attorneys for Respondent Susan Camicia. This declaration is based upon my personal knowledge and review of the records and offered in support of Respondent's Brief.

The following are genuine copies of original documents which are relevant and admissible in evidence for purposes of this appeal:

Exhibit 1 January 19, 2016 Cooley Letter and copy of Settlement Check.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 19th day of May, 2016.

THE BUDLONG LAW FIRM

By _____

JOHN BUDLONG, WSBA #12594
TARA L. EUBANKS, WSBA #34008

Attorneys for Respondent Susan Camicia

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date indicated below, a true and correct copy of the attached Declaration of John Budlong was filed with the court and delivered via e-mail to the following persons:

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DATED this 19th day of May, 2016.

Starla M. Hohbach

EXHIBIT NO. 1

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January 19, 2016

COPY RECEIVED
JAN 20 2016
THE BUDLONG LAW FIRM

Via Legal Messenger

John Budlong
Plaintiff's Attorney
Law Offices of John Budlong
100 Second Avenue South, Suite 200
Edmonds, WA 98020

RE: *Camicia v. Howard S. Wright Constr., et al.*
Our File No.: 1002-093

Dear Mr. Budlong:

Enclosed please find the check in full settlement of this matter. Please confirm that I can execute your signature on the Stipulated Order of Dismissal.

Very truly yours,

Andrew Cooley

AGC:dbe
Enclosure

Cc: Reed Hardesty
Kari Sand

1002-00093/208647

Washington Cities Insurance Authority
P.O. BOX 88030
TUKWILA, WA 98138

BANK OF AMERICA
SOUTHCENTER BRANCH
P.O. BOX 88199
TUKWILA, WA 98188

19-2
1250

097932

DATE
01/14/2016
AMOUNT
$6,950,000.00

PAY Six Million Nine Hundred Fifty Thousand and 00/100 Dollars**********

TO THE ORDER OF
The Budlong Law Firm IOLTA for Susan Camicia
100 Second Ave S, Ste 200
Edmonds, WA 98020

Settlement

OVER $35,000 REQUIRES TWO SIGNATURES

⑈097932⑈ ⑆125000024⑆ 63213 714⑈

RUB OR BREATHE ON THE PINK LOCK & KEY ICONS—COLOR WILL FADE AND THEN REAPPEAR ON AN AUTHENTIC CHECK—IF COLOR DOES NOT FADE DO NOT ACCEPT