94245-5

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.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioners Andrew G. Cooley and Keating, Bucklin & McCormack, Inc. P.S., ("Cooley") ask this Court to grant review of the Court of Appeals decision set forth in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its opinion on February 21, 2017. A copy of the opinion is in the Appendix at pages A-1 through A-23.

C. ISSUES PRESENTED FOR REVIEW

1. Where the Court of Appeals concluded that the trial court erroneously believed that City of Mercer Island ("City") fire department records were not specifically protected from production by state and federal health care privacy laws, and that destruction of tort claim records was properly undertaken by the City in accordance with state law, did the Court of Appeals err in affirming sanctions on Cooley where Cooley responded to plaintiff Susan Camicia's discovery requests on behalf of the City in good faith, in an objectively reasonable manner, and Camicia delayed moving to compel on the discovery issues?

2. Did the Court of Appeals err in failing to differentiate the circumstances in which an attorney, as opposed to the client, merits the imposition of discovery-related sanctions?

D. STATEMENT OF THE CASE

The Court of Appeals was largely correct in its discussion of the facts in this case. Op. at 2-8. However, that court's treatment of the facts in some instances was erroneous or omits salient facts that require this Court's attention.

Camicia's counsel issued broad and vague discovery requests in October 2007 that Cooley and the City answered 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 reports, including health care records from the City's 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 was an abuse of discretion.

Cooley met his obligation as the City's counsel to respond to Camicia's discovery requests. Among Camicia's 2007 interrogatories to the City in 2007 was interrogatory 14, a central focus of Camicia's motion to compel, in which she asked:

> Have you or your agents, investigators, lawyers or anyone else investigated any incidents involving danger, injury or death to bicyclists or pedestrian 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.

CP 1342.

The City objected to the interrogatory on October 30, 2007, *seven and a half years before Camicia's motion to compel*, stating:

> 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 incident in the City since its incorporation.
>
> There was one bike accident in October 2007, where a bicyclist turning around fell off a bicycle and partially struck a cement post on EMW. See police report.

CP 1342.

Thus, the City filed a timely objection to what was objectionable and responded to the remainder of Camicia's interrogatory. Camicia understood as much. There was no doubt that the City was objecting to the unbound timeframe, and was also explicitly objecting to the request's overly broad scope as to location and nature of the condition. CP 1342.

To answer these interrogatories, Cooley went to the City departments that would be logical holders of accident reports, including the police department (charged by the law to investigate all accidents including bicycle accidents),[1] the public works department (with jurisdiction over roads and streets) and the parks department (with jurisdiction over park paths). CP 217-18, 833, 1054. No one, including Camicia, suggested that the City's attorney should check with the fire department for what were medical incident report forms. CP 1054.[2]

The City was only able to obtain Camicia's medical incident report form by preparing a release that was compliant with state and federal medical information privacy laws. CP 236. This release was first reviewed by Camicia's attorney and then executed by her, CP 234-36, and, the City's

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[1] RCW 46.61.755 states that bicycles "shall be subject to all of the duties applicable to the driver of a vehicle by the chapter." RCW 46.52.030 requires both drivers and police to prepare accident reports on a form approved by the Washington State Patrol. The Supreme Court has said: "state law requires police to report accidents (RCW 46.52.070)." *Lane v. City of Seattle*, 164 Wn.2d 875, 883, 194 P.3d 977, 980 (2008). The City police prepared a police accident report for Camicia's accident.

[2] Both the City and Camicia knew the fire department has EMTs and paramedics who would respond to injury accidents and prepare reports. CP 233-36, 1086. Indeed, Camicia received medical treatment at the scene from both the Mercer Island and Bellevue fire department paramedics. CP 233-36, 394. The records created following that treatment were viewed by both the City and Camicia as confidential health care records, available only with a valid signed release. CP 233-36, 242, 1086. (Budlong letter to Regence warning it not to release Camicia medical billings without RCW 70.02-compliant discovery request).

fire department disclosed Camicia's confidential medical records that it held. CP 236.

Cooley never reviewed any confidential medical records held by the City fire department. CP 218. Such reports were never provided to him or anyone else at the City by the fire department. CP 218, 790-811, 1054-57. The only fire department records he reviewed were the reports created for Camicia's accident, and then only after she executed the referenced voluntary release. CP 236, 394, 1056. Cooley never saw or knew of the incident reports subsequently referenced in the trial court's order.[3] Contrary to the trial court's assertion, this was not a matter of "studied ignorance."

With regard to police records of accident investigations on park property, the police department was charged with investigating such accidents, as noted *supra*. But, *in 2015*, Cooley's firm found and produced to Camicia a 2005 email between the police department and the parks department in which the police department specifically stated that it did not investigate bicycle accidents on park property and that the fire department

[3] These include the 2005 Plein accident, and accidents that occurred after 2006 involving Petty, Elmer, and Easton. CP 1054. There was a 2014 accident involving Gjerdrum that was referenced in both a police report and a medical incident report, but no evidence the City produced that to its lawyer. The trial court ultimately allowed the introduction of evidence of the Plein and Gjerdrum accidents as an evidentiary sanction. CP 1353.

was the only City agency that responds to injury accidents on park property. CP 304.[4]

On the eve of trial, in late April 2015, Camicia filed a broad motion to compel. CP 186-201. Camicia's motion was extensive, demanding production of all City fire department medical incident reports relating to bicycle injuries, the alleged investigation materials she claimed were generated by Officer Parr, and tort claims forms filed in connection with bicycle-related injuries. *Id.*

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED[5]

(1) The Court of Appeals Decision Confirms that the Trial Court's Sanction of Cooley Was an Abuse of Discretion

The Court of Appeals was correct in noting that discovery is important to the conduct of civil litigation in Washington. Op. at 9.[6] However, this Court has also indicated that "[f]air and reasoned resistance

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[4] The police department did, in fact, investigate Camicia's bicycle accident. The trial court correctly noted that "City officials" were aware of this "underlap," CP 1343, but there was never any evidence that *Cooley* was aware that the fire department had more records than the police department. CP 1054.

[5] This Court is familiar with the criteria in RAP 13.4(b) governing acceptance of review and Cooley will not repeat them here.

[6] Decisions pertaining to discovery violations fall within the trial court's discretion and are reviewed for abuse of that discretion. *Wash. Physician Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) ("*Fisons*"). However, an abuse of discretion is present if the trial court applies the wrong legal standard in making its sanctions decision. *Kreidler v. Cascade Nat'l Ins. Co.*, 179 Wn. App. 851, 866, 321 P.3d 281 (2014).

to discovery is not sanctionable." *Fisons*, 122 Wn.2d at 346. The City was substantially justified in resisting Camicia's broad discovery requests.[7] Cooley's response on the City's behalf to Camicia's overly broad, vague interrogatories was not itself a discovery violation.

Unacknowledged by the Court of Appeals, op. at 9, historically, sanctions have been reserved for egregious misconduct.[8] Cooley did not engage in egregious misconduct. Even if the City's decision to resist discovery was improper, that does not mean that *Cooley* should have been the subject of severe sanctions separate from those imposed on the City.

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[7] Interpreting a rule identical to Washington's CR 37(a)(4), the United States Supreme Court said the "test for avoiding the imposition of attorney's fees for resisting discovery in district court is whether the resistance was 'substantially justified,'" *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 2550, 101 L. Ed. 2d 490 (1988) "[D]iscovery conduct should be found 'substantially justified' under Rule 37 if it is a response to a genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action." Rutter, *Prac. Guide Fed. Civ. Proc. Before Trial* (Nat Ed.) Ch. 11(V)-B. In cases where "there is legitimate difference of opinion" about whether an objection and refusal to answer is proper, a court should not find a sanctionable discovery violation.

[8] *See, e.g., Fisons, supra* (party persistently and deliberately withheld two "smoking gun" letters); *Magaña v. Hyundai Motor America*, 167 Wn.2d 570, 226 P.3d 191 (2012) (sophisticated multinational corporation, experienced in litigation, willfully, deliberately, and continually failed to comply with discovery requests); *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012) (exclusion of key witness); *Barton v. State*, 178 Wn.2d 193, 308 P.3d 597 (2013) (failure of counsel to disclose settlement agreement); *Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2014) (exclusion of late disclosed witnesses). The Court of Appeals has similarly treated discovery violations. *E.g., Gammon v. Clark Equipment Co.*, 38 Wn. App. 274, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985) (deliberate withholding of accident reports); *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 696 P.2d 28, *review denied*, 103 Wn.2d 1040 (1985) (manufacturer unilaterally determined what was relevant in responding in discovery requests); *Smith v. Behr Processing Corp.*, 113 Wn. App. 306, 54 P.3d 665 (2002) (manufacturer violated court order requiring witness disclosure in failing to disclose expert opinions or deliver product tests that revealed defects).

The trial court and the Court of Appeals were obliged to document how Cooley specifically merited sanctions.

The trial court here imposed discovery-related sanctions on Cooley ostensibly for three reasons – the failure to produce fire department records, the City's destruction of tort claim records, and the City's failure to produce bicycle accident reports. CP 1344.[9]

The Court of Appeals *agreed with Cooley* that the fire department records were health care records subject to state and federal privacy statutes. Op. at 10.[10] However, it did seem to believe that there were materials in the fire department medical treatment records that could have been produced by the City that were "investigative" in nature. Op. at 10-11. That is

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[9] There was an issue regarding certain photographs taken by Officer Parr at the Camicia accident scene that were inadvertently not produced to Camicia by the City. The photographs were specifically referenced in the City's response to Camicia's discovery requests. CP 1110, 1116. They were produced when the inadvertence was noticed in 2010. CP 118. Such a mistake is not sanctionable, as even the trial court concluded. CP 1346-47.

[10] Washington's Uniform Health Care Information Act ("UHCIA"), RCW 70.02, broadly protects the privacy of person's health care information generated by a health care provider, foreclosing access by the City to such records. Br. of Appellants at 20-25. As noted *supra,* Camicia's counsel *knew* the UHCIA applied to fire department records. 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 other patient's health care records the City fire department possessed. CP 218. HIPAA, 42 U.S.C. § 1320d, *et seq.* is similarly broad and forecloses access to patient records. Br. of Appellants at 26-29. The trial court concluded in its May 6 order that the UHCIA and HIPAA were inapplicable here. CP 420. That was wrong.

nowhere supported in this record and was not the basis for the trial court's decision. Moreover, the impracticality of this notion is staggering. The court seems to believe that the City, and Cooley, should have sought permission from all of the persons whose records were at issue – that permission was *mandatory* under state and federal law before any part of those records could be given to Camicia.

The Court of Appeals further *agreed with Cooley* that the City did not engage in spoliation by routinely destroying tort claims in accordance with State Archivist policy. Op. at 13-15.[11]

The Court of Appeals' treatment of health care privacy and spoliation should have resulted in a reversal of the trial court's sanctions ruling that was largely predicated on those determinations. *See, e.g.*, CP 1343-44 (¶ 7), 1348 (¶ 26). However, the court ultimately concluded that the trial court did not abuse its discretion in sanctioning Cooley. The Court of Appeals was wrong, particularly where it had so clearly removed the legal predicate for concluding that Cooley violated discovery principles by its decision.

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[11] The routine destruction of tort claims by the City consistent with State Archivist policy is not spoliation as understood in Washington case law. *See* Br. of Appellants at 29-32. The Court of Appeals claimed the trial court's error was harmless, op. at 15, but that is wrong where the trial court used its spoliation decision as part of its analysis to sanction Cooley. CP 1348.

Additionally, Camicia failed to timely raise any discovery-related concerns, a point left unaddressed by the Court of Appeals. Despite the 2007 discovery requests and the City's response, Camicia took *no contemporaneous action on this timely response* to her interrogatories — no CR 26(i) discovery conference, no motion to compel. While this issue has not arisen in Washington law, Camicia should not have been rewarded for her dilatory conduct in failing to timely assert any discovery-related concerns she might have had and waiting until the last minute before trial to assert an entitlement to 18 years of information on all types of bicycle incidents in the City.[12] Camicia was not entitled to wait *8 years* to act on discovery.

Further, the Court of Appeals appeared to conclude that even with the trial court's errors as to the fire department records and spoliation, the trial court's sanctions order as to Cooley could be sustained because he was somehow complicit in the City's deliberate refusal to fully respond to Camicia's discovery. Op. at 15-18. But after *Fisons*, courts must assess whether an attorney's inquiry of a client as to materials responsive to

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[12] *See, e.g., Rivera-Almodovar v. Instituto Socioeconomico Comunitario, Inc.*, 730 F.3d 23, 26 (1st Cir. 2013) ("Plaintiff cannot simply sit on her hands until after the discovery period has expired and then claim the defendants have not complied with their discovery obligations."); *Rosario v. Livaditis*, 963 F.2d 1013, 1019 (7th Cir. 1992), *cert. denied*, 506 U.S. 1051 (1993) (A party who fails to pursue discovery in the face of a court ordered cut-off cannot plead prejudice from his own inaction).

discovery requests is objectively appropriate; subjective belief or good faith is not enough to avoid sanctionable conduct under CR 26(g) or CR 37(d). Here, Cooley's actions were objectively reasonable and in good faith. Given the circumstances surrounding the discovery requests, Cooley's conduct was not sanctionable.

The trial court's sanctions order concluded that the City willfully failed to respond to discovery without reasonable excuse or justification, CP 1348, but its legal basis for discovery sanctions was certainly flawed where statutory privacy protections applied to the City fire department records, and the City properly destroyed records in accordance with State law, Cooley did not deliberately withhold production of materials in light of what Camicia specifically requested. In fact, some of the records requested did not exist. Nevertheless, the trial court opined that Cooley's responses to the discovery requests were false or misleading, and his invocation of health care information privacy laws as to fire department records was unjustifiable. CP 1349-50. The trial court was wrong and the Court of Appeals so ruled. Ultimately, the trial court was unreasonable in asserting that Cooley had a duty to somehow seek out records to which he had no access. CP 1344.[13]

[13] Also, before the trial court, Camicia took inconsistent opinions. First, she claimed that the City did not possess any privileged records, arguing that she was not seeking health care records and the UHCIA and HIPAA did not apply to fire department

More critically, Cooley made an objectively reasonable request to the City departments most likely to produce materials responsive to Camicia's discovery request. Here, the fire department did not share its medical records from bicycle incidents with other City departments, recognizing privacy restrictions. CP 218, 810-11. Neither Cooley or those other departments would know of those records. Contrary to the trial court's assertion regarding "institutional knowledge" on the City's part, CP 1349, it was a correct response to state what the City's institutional knowledge was. Cooley was not responsible for discovering what five separate City departments actually possessed, including the fire department records, to which he had no access. He acted reasonably in seeking the records from his municipal client's logical departments where they would likely exist.[14]

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paramedics. CP 363. She also suggested that the City needed to produce a privilege log. CP 361. She never explained how the failure to produce a privilege log could be squared with her position that no privilege existed. Moreover, she never explained how failure to produce a privilege log prejudiced her in any way. Camicia and her counsel knew that the City viewed fire department medical reports as privileged.

[14] In *Magaña*, the corporate lawyer only looked at the legal department files for evidence of other seat back failure claims. 167 Wn.2d at 198. But it was the Consumer Affairs Department that worked with consumers to report defects. *Id.* Indeed, consumers were directed by the owner's manual to report issues to the Consumer Affairs Department. *Id.* Thus it was the logical place to look.

Here the logical place to look was the police department (with jurisdiction over accident reports) and the parks department (with jurisdiction over park property). RCW 46.52.030(1). Cooley could not know that both the police and bike accident victims would abrogate their duty to file statutorily required reports.

The trial court's determination that Cooley "strategically ignored looking at Fire Department records" is unsupported by the record. CP 1344.[15]

The Court of Appeals' conclusion that a municipal attorney engages in "egregious misconduct" justifying severe sanctions when she/he asks what are believed to be the most likely municipal departments to have relevant records expands the obligation of government attorneys beyond any recognizable reasonable boundaries. Under this reasoning, an assistant attorney general receiving a discovery request in a case involving a Department of Corrections tort must nevertheless canvass *all* state agencies for potentially responsive records. That is an unnecessary burden.

Similarly, the Court of Appeals appears to agree with the trial court that the City should have sought a protective order. CP 1343. Op. at 17-20. But if the records were indeed privileged, then no protective order was needed. CR 26(a) (prohibiting discovery of "privileged" information); 3A Karl B. Tegland, *Wash. Prac., Rules Practice* CR 26 (6th ed.) ("evidence

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[15] Cooley also did not know that the City police department was not undertaking its statutory duty to investigate all accidents. RCW 46.52.030; AGO 1961-62 No. 63 (RCW 46.52.030 requires the reporting of accidents on both public and *private roads and property*). He also did not know that bicyclists like Plein, when his accident was not investigated by the police, were not filing their own reports under the statute. In Camicia's case, she crashed on a park path, and the Mercer Island Police prepared a full police report. CP 352. It was only days before the May 2015 motion to compel that Cooley became aware anyone knew that the City Police were not investigating bike accidents on park property. CP 304. There is simply no records to support the trial court's conclusion of a "strategic" intent.

that would be objectionable at trial on the basis of a privilege is likewise protected against discovery.").

Washington courts have never 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 Wash.*, 176 Wn.2d 686, 695, 295 P.3d 239, 244 (2013) (dicta). In *Lowy*, this Court suggested that a hospital had a duty to look at its own files to determine possible discoverable information even if privileged, 175 Wn.2d at 790, but it never suggested that simply by suing a governmental entity, a duty to review all privileged information from all agencies of that governmental entity generally arises. 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.

The Court of Appeals opinion implies that if an attorney and its counsel respond to a discovery request and believe that it is overly broad or

vague, they must invariably file a motion for a protective order. Op. at 19-20. That court, in effect, purports to alter a civil rule adopted by this Court – CR 26(c) on protective orders, invading this Court's paramount responsibility to establish rules of court. If Washington courts now invariably require a motion for a protective order as to overly broad discovery requests, this is a matter for this Court to establish, not the Court of Appeals. Review is merited. RAP 13.4(b)(4).

Finally, in order for the records at issue to be discoverable at all, that materials sought must lead to the discovery of admissible evidence. CR 26(b)(1). Washington law bars the admissibility of evidence of other accidents to prove negligence in another setting; evidence of other accidents is only admissible for limited purposes to establish a dangerous or defective condition or notice of a defect. *Porter v. Chicago, M. St. Paul & Pac. R.R. Co.*, 41 Wn.2d 836, 841-43, 252 P.3d 306 (1953); *Blood v. Allied Stores Corp.*, 62 Wn.2d 187, 189, 381 P.2d 742 (1963). Critically, however, because the introduction of such evidence introduces *collateral matters* into the case, the other accidents must be *substantially similar* to the accident at issue in the case. *Id. See generally,* 5 Karl B. Tegland, *Wash. Prac., Evidence Law and Practice* (5th ed.) § 402.11. Moreover, "[i]f

dangerousness is the issue, a high degree of similarity will be essential." Weinstein and Berger, *Weinstein's Evidence* § 401[10].[16]

Camicia's 2007 discovery request seeking any bike accident, anywhere on Mercer Island, was not reasonably calculated to lead to admissible evidence in this case, as a matter of law, contrary to the belief of the Court of Appeals. Op. at 19.[17] Accidents involving a car hitting a bicycle in a driveway far removed from the park path where Camicia crashed are not substantially similar to the accident here anymore than the collision of two kids on a sidewalk would be. Yet that is what Camicia's 2007 discovery sought, and the trial court ultimately ordered. Even the one prior bollard accident that was disclosed (the Plein 2005 accident) was admitted as a discovery sanction, not because it met the test for sufficient

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[16] *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1269 (7th Cir. 1988) provides a good illustration of such similarity. Following an accident, the plaintiff sued an airplane manufacturer alleging that a defect prevented the plane from de-icing, and eventually forced it into a nosedive. *Id.* at 1264. At trial, the plaintiff attempted to offer evidence of another Beech Aircraft accident that occurred near St. Anne, Illinois. The St. Anne accident involved a report by the pilot that he was "having a little trouble with ice," during icy conditions. The airplane ended up going into a nosedive and crashing. *Id.* at 1266-67. The Seventh Circuit excluded the St. Anne crash for lack of foundation establishing substantial similarity. *Id.* at 1269. This ruling is supported by the common sense principle that accidents happen for many reasons. *See also, Read v. Mount Tom Ski Area, Inc.*, 639 N.E.2d 391, 393 (Mass. App. 1994) ("[e]vidence that accidents similar to the plaintiff's have occurred at the same location generally is viewed with disfavor, precisely because the earlier mishap may have been the consequence of idiosyncratic circumstances (*e.g.*, the weather, the physical condition of the injured person, the light conditions) not present in the incident now the subject of trial").

[17] That court's notion that these accidents might have been relevant to notice is unsupported. It is unclear how bicycle accidents elsewhere would have given "notice" of the bollard collision potential here.

similarity. CP 1353 ("As a discovery sanction, the court will...allow evidence of the Plein accident...").

Cooley's responses to Camicia's discovery requests on the City's behalf were proper. It was reasonable for the City to resist this overly broad discovery. Cooley's actions in connection with the City's response were appropriate and did not constitute "egregious misconduct." If the Court of Appeals' decision is allowed to stand, it has profound implications for what will constitute objectively reasonable responses to discovery requests by municipal attorneys and will establish a requirement for a mandatory motion for a protective order, *nowhere* required by the Civil Rules, or this Court's jurisprudence, any time an attorney believes a discovery request is overbroad or vague. That will needlessly involve already busy trial courts in the discovery process. This Court should grant review. RAP 13.4(b)(4).

(2) The Court of Appeals Failed to Address Why Any Sanctions Should Be Assessed Against the City Rather than Cooley

The Court of Appeals sought to explain why Cooley was subject to sanctions, as opposed to the City, in its opinion at 22-23. But its analysis is fundamentally undercut by its earlier rulings on fire department records and spoliation.

Washington has not articulated outside the CR 11 context[18] when an attorney, as opposed to the client, should be the subject of sanctions.[19] In *Johnson v. Jones*, 91 Wn. App. 127, 955 P.2d 826 (1998), the Court of Appeals upheld the imposition of CR 37 sanctions against both the attorney and the client where both acted in violation of the discovery rules and engaged in obstructionist conduct. *Id.* at 132-35. The court went on to approve of CR 11 sanctions awarded only against the attorney. In *Breda v. B.P.O. Elks Lake City 1800 SO–620*, 120 Wn. App. 351, 90 P.3d 1079 (2004), the Court of Appeals approved of sanctions against the attorney only. These cases suggest, but do not fully articulate, that the attorney may not be liable for misconduct that is the client's fault; plainly, the client is not sanctioned for conduct that is only the attorney's.

Federal law indicates that while both the client and the attorney may be sanctioned, *Hyde & Drath v. Baker*, 24 F.3d 1162, 1172 (9th Cir. 1994), the sanctions should fall on the attorney only when the violations are the

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[18] Because an attorney signs a pleading, the attorney, as well as the client, can be sanctioned for pursuing a frivolous action under CR 11. *See, e.g., Watson v. Meier*, 64 Wn. App. 889, 891, 827 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992); *Madden v. Foley*, 83 Wn. App. 385, 392-93, 922 P.2d 1364 (1996) (attorney and firm); *Splash Design, Inc. v. Lee*, 104 Wn. App. 38, 41 n.1, 14 P.3d 879 (2000), *review denied*, 143 Wn.2d 1022 (2001); *Wash. Motorsports Ltd. P'ship v. Spokane Raceway Park, Inc.*, 168 Wn. App. 710, 282 P.3d 1107 (2012).

[19] This Court in *Rivers v. Wash. State Conference of Mason Contractors,* 145 Wn.2d 674, 679, 41 P.3d 1175 (2002) noted that "The 'sins of the lawyer' are visited upon the client." The Court did not address the opposite point as whether the "sins" of the client are visited upon the lawyer. Here, it appears they were.

result of the attorney's specific neglect or other misconduct. *Butler v. Pearson*, 636 F.2d 526, 531 (D.C. Cir. 1980). In *Hyde & Drath*, the Ninth Circuit stated that the burden should fall on the party being sanctioned to demonstrate substantial justification or special circumstances. 24 F.3d at 1171. Indeed, as the D.C. Circuit observed in *Jackson v. Washington Monthly Co.*, 569 F.2d 119, 123-24 (D.C. Cir. 1977):

> When the client has not personally misbehaved and his opponent in the litigation has not been harmed, the interests of justice are better served by an exercise of discretion in favor of appropriate action against the lawyer as the medium for vindication of the judicial process and the protection of the citizenry from future imposition. Public confidence in the legal system is not enhanced when one component punishes blameless litigants for the misdoings of another component of the system; to laymen unfamiliar with the fundamentals of agency law, that can only convey the erroneous impression that lawyers protect other lawyers at the expense of everyone else.

Of course, the converse of this proposition is true as well. Attorneys who do not engage in discovery misconduct should not be sanctioned for the behavior of their clients. *Humphreys Exterminating Co. v. Poulter*, 62 F.R.D. 392, 395 (D. Md. 1974).

Apart from its general aspersions cast upon Cooley, the trial court did not explain in its sanction order why Cooley, as opposed to the City, should have been the subject of sanctions. CP 1350.

Applying the federal standards noted *supra*, any failure to produce documents here was the responsibility of the City, not Cooley. Cooley never possessed the records that allegedly should have been produced, according to the trial court, and there is no evidence in this record that Cooley condoned or failed to produce records. Rather, Cooley asked the City to produce bicycle accident records from the most likely City departments that would have had such records. He never told the City not to comply with discovery requests. If the City knew that records existed compliant with Camicia's discovery requests, and it was the City's obligation to produce them. Cooley's good faith insistence on the City's behalf that the production of records would violate legal restrictions on disclosure is proper advocacy and did merit CR 11 sanctions.

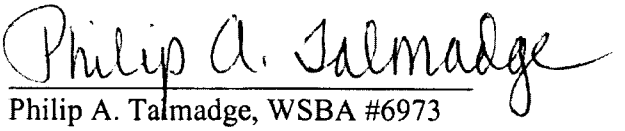
This Court should grant review to articulate the circumstances under which counsel is subject to discovery-related sanctions for the conduct of the client. RAP 13.4(b)(4).

F. CONCLUSION

This Court should grant review and 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 10th day of March, 2017.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SUSAN CAMICIA, Respondent, v. ANDREW G. COOLEY and KEATING BUCKLIN & MCCORMACK, INC., P.S., Appellants, HOWARD S. WRIGHT CONSTRUCTION COMPANY, a Washington corporation and CITY OF MERCER ISLAND, a municipal corporation, Defendants.	No. 74048-2-I DIVISION ONE UNPUBLISHED OPINION FILED: February 21, 2017

MANN, J. — Andrew Cooley and his law firm Keating Bucklin & McCormack (collectively Cooley), challenge discovery sanctions of $10,000 imposed jointly and severally against Cooley and their client the City of Mercer Island (City), for willful violations of the discovery rules. Cooley asserts that the trial court abused its discretion in concluding: (1) that the City and Cooley failed to produce Fire Department records

pertaining to bicycle injuries, (2) that Cooley violated discovery rules based on the City's destruction of tort-claim records, and (3) that the trial court generally erred in imposing sanctions on Cooley. Because the trial court did not abuse its discretion in imposing sanctions, we affirm.[1]

FACTS

On June 19, 2006, Susan Camicia hit a wooden bollard while riding her bicycle on the I-90 Trail in the City. The accident left her a quadriplegic. Mercer Island Police Officer Ryan Parr responded and photographed the scene on the day of Camicia's accident. The following day, the City hired Cooley to defend it against potential personal injury claims arising from Camicia's accident.

Cooley is an experienced defense attorney and has practiced law for over thirty years. Cooley was involved in Camicia's case from its beginning. He directed the case's themes and strategy, took depositions, defended depositions, conducted witness interviews, worked with experts, and oversaw discovery. In defending the City, Cooley worked closely with the City Attorney from June 20, 2006, until 2015.

Camicia sued the City in August 2007. In October 2007, she served her first discovery requests on the City. Relevant requests and the City's October 30, 2007, responses are as follows:

> **[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

[1] Camicia attached a declaration and documents that were not part of the record to her opening brief. After Cooley moved to strike the extra-record materials, Camicia moved to supplement the record. We grant Cooley's motion to strike and deny the motion to supplement. We did not considered the extra-record materials.

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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.

There was one bike accident in October 2007, where a bicyclist turning around fell off of a bicycle and partially struck a cement post on EMW. See police report.

[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."

. . . .

[Interrogatory] 20. Do you, your representatives, agents or attorneys have any photographs, movies, videos, diagrams, models, surveillance photography or videos or any other depictions concerning the physical facts or scene of the incident, the plaintiff, plaintiff's injuries, or any other potentially relevant object, matter or issue in this case? If so, please identify the subject, date and person preparing each such representation, the nature of the representation (whether map, diagram, model, photograph, movie, etc.), and the name and address of the present custodian.

ANSWER: Yes, see attached.

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> Please produce genuine, authentic originals or copies of the following documents and things:
>
> **11.** All incident reports, investigative reports or other documents, drawings, computer data, photos, movies, videos or depictions relating to other bicycling and pedestrian accidents and related safety concerns as referenced in Interrogatory Nos. 14 and I5.
>
> **RESPONSE:** See documents previously attached. [The City produced a 2007 police report about a bicyclist who turned around and fell off his bicycle.]

The City's responses did not indicate that it was withholding any information responsive to Camicia's discovery requests. Nor did the City seek a protective order to limit or eliminate its obligation to respond fully to Camicia's requests.

City officials knew, since before Camicia's accident, that records of bicycle accidents, including bike-bollard collisions, were kept by the City's Fire Department. Despite knowing this, neither the City nor Cooley searched for records of other bicycle accidents responsive to Camicia's discovery requests in the City's Fire Department. The trial court found that "Cooley strategically ignored looking at Fire Department records."[2] "Nor was a complete review made of the Police Department, City Clerk's or City Attorney's files or records where they should have known that responsive information might be located."[3]

There were records of other bicycle accidents. In July 2005, a bicyclist was injured when his bicycle struck a bollard on a portion of the I-90 Trail that was located on a Washington Department of Transportation right-of-way within the City. Mercer Island Fire Department responded to the accident and prepared a report of the incident.

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[2] Clerk's Papers (CP) at 1344.
[3] CP at 1344.

In August 2005, the City Parks Director wrote in an e-mail to the City Engineer that a "cyclist-bollard post collision" had recently occurred. The Parks Director's e-mail was also sent to the City's Traffic Engineer and other City personnel. The City did not produce this e-mail in response to Camicia's initial discovery requests.

There were numerous complaints made about the wooden bollards. One week after Camicia's accident, David Smith complained to the City about the bollard posts and the danger they posed to bicyclists. Smith's complaint was documented in City records. Between February and June 2007, attorney John Duggan made a series of complaints to the City about the risks that the wooden bollards on the I-90 Trail posed to bicyclists. The City Attorney communicated with Duggan about these complaints, and the City's Traffic Engineer and Attorney documented these complaints in the City's records. In August 2007, Rebecca Slivka of the Bicycle Watchdog group also complained to the City about the risks posed by the bollards to bicyclists. The City Attorney was informed of this complaint. Later, in August 2009, Joshua Putnam also complained about the risks posed by the bollards to bicyclists. The City's Development Director documented Putnam's complaint in the City's records. The City and Cooley did not disclose records of other bicycle accidents or safety concerns in its response to Camicia's initial discovery requests.

The photos that Officer Parr took of the scene on the day of Camicia's accident also were not produced in the City's October 2007 discovery responses. These photos were not produced to Camicia until May 6, 2009, after Cooley had deposed Camicia twice and all but one of Camicia's expert witnesses. The trial court found that the photos that Officer Parr took were relevant because they showed the scene conditions

soon after the accident occurred. For example, they showed lighting conditions and construction signs in Camicia's lane of travel. Cooley did not explain why these photos were not produced to Camicia 18 months after her first discovery requests in October 2007.

After Camicia issued her first discovery requests, the City destroyed claims and complaints that were potentially responsive to Camicia's requests. Thus, potentially responsive records were lost. For example, during the court's review of the discovery issues, the City disclosed that it had not searched its "claims for damages forms prior to their destruction. It is unclear why the City destroyed these records during pending litigation; the Deputy City Clerk testified that the destruction was in accordance with the general record-retention policy as set forth by the Washington State Archives.

On June 28, 2014, the City learned of another bicycle accident that occurred on the same day, and on the same unmarked bollard, that Camicia hit. On April 23, 2015, however, Cooley represented to Camicia's counsel in writing that "there are zero reports (of accidents) connected to [Camicia's] accident site." This was despite the City's knowledge that the Mercer Island Police Department had prepared an incident report of the accident.

On May 6, 2015, in response to concerns that the City had not responded to Camicia's initial discovery requests, trial court Judge Laura C. Inveen issued a broad discovery order. The order required the City to produce "[a]ll of its records of other bicycle accidents, including bike-bollard collisions, on its streets and bicycle trails from 1997-2014." Between May 11 and May 14, 2015, the City produced hundreds of

records of other bicycle accidents, claims, complaints, and related safety concerns responsive to Camicia's discovery requests and the May 6, 2015 discovery order.

The delay in discovering records of other bicycle accidents and other bike-bollard accidents impacted Camicia's preparation for the trial date scheduled for May 11, 2015. This resulted in a continuance of the trial date to October 2015.

After the trial was continued, Camicia moved for discovery sanctions. After briefing and argument, on September 14, 2015, the trial court issued its order on motion for sanctions and admitting evidence of other accidents. The court found that the City's "failure to respond fully to discovery was willful, as it was without reasonable excuse or justification." The court found further that the "City's and its defense counsel's responses to [Camicia's] first discovery requests were false, misleading and evasive." With respect to Cooley, the court found: "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."

The trial court concluded:

> The defendant City and its defense counsel willfully violated the discovery rules by not conducting a reasonable search for records; by not seeking a protective order if they wished to narrow the scope of discovery; by not disclosing the City's records of complaints; by falsely representing to Plaintiff "*there have never been any bicycle vs. bollard accidents to the City's institutional knowledge*"; and by not supplementing its discovery responses with correct responses when it new the response was incorrect when made.[4]

For sanctions, the trial court determined,

> a substantial monetary fine is necessary to deter future discover violations, and to punish for the violations. Given the magnitude of potential damages, the cost to the Plaintiff and to the Court for the

[4] CP at 1350.

> resources devoted to these issues, and continuing the trial on the date scheduled, a substantial fine is in order. The Court finds that $10,000 is a conservative figure to accomplish the goals of discovery sanctions.[5]

The court ordered "as a joint and several obligation the City and Defense Counsel to pay a fine of $10,000 to the Legal Foundation of Washington . . . for the provision of legal services to those with financial need."[6] The trial court also ruled that it would allow certain evidence to be admitted and consider a "spoliation of evidence" jury instruction. The court did not exclude any of the City's witnesses or evidence.

Cooley, but not the City, timely appeals.

ANALYSIS

Cooley assigns error to both the May 6, 2015, order on motion to appeal, and the September 14, 2015, order on motions for sanctions and admitting evidence of other accidents.[7] Cooley asserts that the trial court abused its discretion in concluding: (1) that the City and Cooley failed to produce Fire Department records pertaining to bicycle injuries, (2) that Cooley violated discovery rules based on the City's destruction of tort-claim records, and (3) that the trial court generally erred in imposing sanctions on Cooley.

We review a trial court's imposition of sanctions for noncompliance with court orders or rules for abuse of discretion. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp, 122 Wn.2d 299, 338-39, 858 P.2d 1054 (1993). The abuse of discretion standard recognizes that deference is owed to the judicial actor who is "better

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[5] CP at 1352.
[6] CP at 1352.
[7] Cooley challenges the court's orders as errors of law and does not assign error to the court's findings of fact. Findings of fact to which no error has been assigned are accepted as verities on appeal. Gannon v. Robinson, 59 Wn.2d 906, 371 P.2d 274 (1962).

positioned to decide the issue in question." Fisons, 122 Wn.2d at 339 (internal quotations omitted). A trial court abuses its discretion if its order is manifestly unreasonable or based on untenable grounds. Fisons, 122 Wn.2d at 339. "A trial court would necessarily abuse its discretion if it based its rulings on an erroneous view of the law." Fisons, 122 Wn.2d at 339.

"The right of discovery and the rules of discovery are integral to the civil justice system." Lowry v. Peacehealth, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012). Discovery is associated with the right of access to the courts protected by article I, § 10 of our constitution. Lowry, 174 Wn.2d at 776. The "right of access includes the right of discovery by the civil rules, subject to the limitations contained therein." Doe v. Puget Sound Blood Center, 117 Wn.2d 772, 780, 819 P.2d 370 (1991) (citing WASH. CONST. art. I, § 1.). The intent of discovery is to facilitate the exchange of information between the parties without delay, excessive expense, and undue burden. Fisons, 122 Wn.2d at 340-43. A "spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials." Fisons, 122 Wn.2d at 342. "Trial courts need not tolerate deliberate and willful discovery abuse." Magana v. Hyundai Motor America, 167 Wn.2d 570, 576, 220 P.3d 191 (2009).

When the discovery process breaks down, sanctions are appropriate "to deter, to punish, to compensate, and to educate." Magana, 167 Wn.2d at 584. As the Magana court directed:

> The discovery sanction should be proportional to the discovery violation and the circumstances of the case. "[T]he least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it

> undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong."

167 Wn.2d at 590 (quoting Fisons, 122 Wn.2d at 355-56).

II

Cooley argues first that the trial court erred as a matter of law in sanctioning him for failing to produce Fire Department records because they are protected from production by Washington's Uniform Health Care Information Act of 1996 (UHCIA), chapter 70.02 RCW, and the federal Health Insurance Portability and Accountability Act (HIPAA). 42 U.S.C § 1320d Pub. L. No. 104-191, 110 Stat. 1936. We disagree.

At the outset, we agree with Cooley that UHCIA and HIPAA apply to the Fire Department's medical records. Emergency Medical Technicians (EMTs) are health care providers under Washington's UHCIA. A "health care provider" under UHCIA is a "person . . . otherwise authorized by the law . . . to provide health care in the ordinary course of business or practice of a profession." See RCW 70.02.010(18) (defining health care provider). EMTs are "authorized" by law to render "emergency medical care"; RCW 18.73.030(12) (defining EMT). EMTs are also "health care providers" under HIPAA. HIPAA defines a "health care provider" as "any person furnishing health care services." 42 U.S.C. § 1320d(3). EMTs provide health care services. Because EMTs are health care providers, the Fire Department's medical records are subject to UHCIA and HIPAA. Under UHCIA, "health care information" may not be provided in response to discovery without written consent of the patient. RCW 70.02.060(1).

But Cooley's argument fails for two reasons. First, contrary to Cooley's assertion, the trial court did not conclude that UHCIA and HIPAA do not apply to Fire Department records. As the trial court explained:

> To this date, Defense counsel argues that reports of accidents maintained within the City's Fire Department are not subject to disclosure due to "HIPPA". In his 4/29/15 Declaration he writes "I do not believe that it occurred to anybody that Plaintiff was also seeking medical records prepared by the Fire Department." The fact of the matter is that Plaintiff never asked for medical records.[8]

The trial court was correct, Camicia did not request health care records. "Health care records" under UHCIA "means any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care." RCW 70.02.010(16) (emphasis added). Camicia's 2007 discovery requests asked for investigation reports or accident reports involving bicyclists or pedestrians, including the location of the accidents. Similarly, the trial court's May 6, 2015, order required the City to produce "[a]ll of its records of other bicycle accidents, including bike-bollard collisions." The court made clear that "Plaintiff is not requesting 'health care information.'" A search of accident records in the Fire Department may well have produced responsive information concerning whether and where accidents occurred without disclosing protected "health care information." Yet, despite knowing that accident records were kept by the Fire Department, neither the City nor Cooley investigated.

Second, even if Cooley believed that all records with the Fire Department were privileged, it was not up to them to unilaterally decide to ignore the request. "A party must answer or object to an interrogatory or request for production. If the party does

[8] CP at 1349-50 (emphasis added).

not, it must seek a protective order under CR 26(c). CR 37(d). The party cannot simply ignore or fail to respond to the request." Magana, 167 Wn.2d at 584.

Lowry is instructive. The plaintiff in Lowry brought a medical negligence action against PeaceHealth Hospital claiming she sustained nerve damage as a result of an improper intravenous (IV) procedure. Through a CR30(b)(6) deposition, the plaintiff sought information concerning other instances of IV infusion complications or injuries. Lowry, 174 Wn.2d at 773-74. The hospital maintained a database of such instances as part of its quality improvement program but claimed that these records were privileged and exempt from discovery under RCW 70.41.200(3) (the quality improvement statute). Lowry, 174 Wn.2d at 787. Our Supreme Court disagreed, holding that while the quality review committee records themselves could not be disclosed, the hospital could consult its privileged database to identify discoverable information that fell outside of the privilege. Lowry, 174 Wn.2d at 789-90.

The Court summarized:

> Finally, the burden of disclosure is upon the party who is requested to disclose. Records created for and maintained by quality improvement committees are privileged. If a hospital believes that use of this privileged information to identify unprivileged information will compromise the purpose of the statute to promote candid discussion and careful self-assessment by the hospital of its care of patients, the hospital may seek an appropriate protective order. But under our discovery rules, the burden is on the hospital to "*fully* answer all interrogatories and all requests for production." When a database such as PeaceHealth's Cubes database exists and is relevant to a discovery request, its existence must be disclosed even if the information itself is protected. It is up to the hospital to move for a protective order if it "[does] not agree with the scope of production or [does] not want to respond."

Lowry, 174 Wn.2d at 789 (quoting Fisons, 122 Wn.2d at 354). Here, while health care records maintained at the Fire Department may be privileged, this did not prevent the

City from reviewing the records to determine if there was discoverable information within those records. The City had an obligation to review the records for discoverable information, disclose the existence of the records, and if necessary, the City had the burden to seek a protective order.

City officials knew since before Camicia's accident that records of bicycle accidents, including bike-bollard collisions, were kept by the City's Fire Department. Despite knowing this, neither the City nor Cooley reviewed the Fire Department records, disclosed their existence in response to Camicia's requests nor sought the necessary protective order. As the trial court found, "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."[9]

The trial court did not abuse its discretion in basing part of its decision to sanction Cooley and the City on the failure to review the Fire Department records.

III

Cooley argues next that the trial court abused its discretion in concluding that the City and Cooley engaged in sanctionable spoliation of evidence. Specifically, Cooley argues that the tort-claim records were destroyed in the "normal course of business and in compliance with the document retention schedule issued by the State Archivist, and followed by the local agencies." While we agree that the record does not support a

[9] CP at 1350.

finding of spoliation, because the trial court did not base its monetary sanction on its finding of spoliation, any error is harmless.

Spoliation is "[t]he intentional destruction of evidence." Henderson v. Tyrrell, 80 Wn. App. 592, 605, 910 P.2d 522 (1996). To determine whether spoliation occurred, a court examines (1) the potential importance or relevance of the missing evidence, and (2) the culpability or fault of the actor. Henderson, 80 Wn. App. at 605. Under the second factor, the court considers three factors: (1) the party's bad faith, (2) whether the party had a duty to preserve the evidence, and (3) whether the party knew that the evidence was important to the pending litigation. Henderson, 80 Wn. App. at 609-10. Under Washington law, there is no general duty to preserve evidence. Cook v. Tarbert Logging, Inc., 190 Wn. App. 448, 469-70, 360 P.3d 855 (2015). A party may, however, have a duty to preserve evidence "on the eve of litigation." Homeworks Const., Inc. v. Wells, 133 Wn. App. 892, 901, 138 P.3d 654 (2006).

Under the first Henderson factor, the destroyed tort-claim records may have contained potentially relevant evidence. The trial court's September 2015 sanctions order found that the destruction may have prevented Camicia from proving whether the City had "prior notice of bicyclists being injured by bollards or other obstruction hazards."[10] Under the second Henderson factor (the culpability or fault of the destructing party), however, the record does not support a finding that the City destroyed the evidence in bad faith, knew that the evidence was important to the pending litigation, or had a duty to preserve the evidence. The City Clerk's declaration states that she followed the Secretary of State's Local Government Common Record

[10] CP at 1348.

Retention Schedule "GS50-01-10 Rev. 1" in destroying the claims after six years. Here, it is not clear that spoliation occurred.

But any error by the trial court was harmless. While the September 2015, sanctions order included a statement that the "court will favorably consider a spoliation of evidence jury instruction relating to the destroyed claims, should one be offered," the trial court did not base its decision to fine Cooley and the City on spoliation. Instead, the trial court's imposition of the $10,000 fine was based on the following conclusion:

> The defendant[,] City[,] and its defense counsel willfully violated the discovery rules by not conducting a reasonable search for its records; by not seeking a protective order if they wished to narrow the scope of discovery; by not disclosing the City's records of complaints; by falsely representing to Plaintiff "*there have never been any bicycle vs. bollard accidents to the City's institutional knowledge*"; and by not supplementing its discovery responses with correct responses when it knew the response was incorrect when made."[11]

The trial court's conclusion is supported by its findings of fact and was not an abuse of discretion.

IV

Cooley's third issue asserts that the trial court abused its discretion when it sanctioned Cooley because Cooley's responses to Camicia's discovery requests were objectively reasonable and in good faith.[12] Cooley makes five brief arguments in support. We disagree and address each argument in turn.

A

Cooley argues first that his responses to Camicia's 2007 interrogatories were not misleading because he timely objected to what was objectionable and provided

[11] CP at 1350.
[12] Br. of Appellant at 33.

responses to the remainder. The trial court, however, found in its September 2015 sanctions order that Cooley's responses to Camicia's 2007 interrogatories were false, misleading, and evasive. The court's unchallenged findings are verities on appeal. In re Disciplinary Proceeding Against Osborne, ___Wn.2d___, 386 P.3d 288 (Wash. 2016).

In support of this finding, the trial court included several examples. First, in response to Camicia's Interrogatory 14, seeking information whether the City knew of any bicycle accidents involving bollards, the City answered that there "have never been any bicycle vs. bollard accidents to the City's *institutional* knowledge." The trial court found that the qualification of "institutional knowledge" was designed to "insulate the City from making full disclosure."[13] Second, Interrogatory 15 sought information relating to incidents "in any sidewalk, path or public right-of-way in the City of Mercer Island, either before or after this incident." Cooley, however, rephrased the question to change the meaning by inserting "Mercer Island right-of-way." He then argued that since the 2005 bike-bollard accident occurred in the WSDOT right-of-way, there was no need for the City to disclose. As the trial court explained, "The Court's experience with defense counsel has demonstrated that he is extremely well-spoken and talented with words. The court can only assume this re-phrase was intentional."[14] Finally, the court noted that Cooley's insistence that the accident records maintained by the City's Fire Department could not be disclosed due to state and federal medical-privacy laws was misleading when Camicia never asked for medical records.

[13] CP at 1349.
[14] CP at 1349.

The trial court's conclusion that the initial discovery responses were false, evasive, and misleading is supported by its findings of fact and was not an abuse of discretion.

B

Cooley argues second that it was unreasonable of the trial court to assert that he had a duty to "somehow seek out records to which he had no access," and that he was "not responsible for discovering what five separate City departments actually possessed."

"[CR 33(a) and CR 34(b)] are clear that a party must fully answer all interrogatories and all requests for production, unless a specific and clear objection is made." Fison, 122 Wn.2d at 353-54. As explained in Magana, barring either an agreement to a limited search, or disclosure that the search was limited, "A corporation must search all of its departments, not just its legal department, when a party requests information about other claims during discovery." Magana, 167 Wn.2d at 585-587. The City and Cooley unilaterally limited their search to the police department without either disclosing the limited search, seeking agreement from Camicia to a limited search, or seeking a protective order against what Cooley apparently believed was an overbroad request.

As the trial court's unchallenged findings explained,

> City officials have known since before [Camicia's] accident that records of bicycle accidents, (including bike-bollard collisions) are kept by its Fire Department. Neither the City nor Mr. Cooley searched for records of other bicycle accidents responsive to [Camicia's] discovery requests in the City's Fire Department. Cooley strategically ignored looking at Fire Department records. 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.
>
> After [Camicia's] first discovery requests were propounded, the City destroyed claims and complaints that were potentially responsive to [Camicia's] discovery requests, causing such records preceding [Camicia'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 [Camicia's] accident had been destroyed.[15]

The trial court's conclusion that Cooley violated the discovery rules by not conducting a reasonable search for records is supported by its findings of fact and was not an abuse of discretion.

C

Cooley argues third that "it was reasonable for the City to resist [Camicia's] overly broad discovery under the relevancy standard applicable to prior accidents evidence."

CR 26(b)(1) governs the scope and limits of discovery. Information that will be inadmissible at trial is discoverable if it appears reasonably calculated to lead to the discovery of admissible evidence. The standard of relevance for purposes of discovery is much broader than the standard required under the evidence rules for admissibility at trial. Beltran v. State, Department of Social and Health Services, 98 Wn. App. 245, 255, 989 P.2d 604 (1999) (citing Barfield v. City of Seattle, 100 Wn.2d 878, 886, 676 P.2d 438 (1984)). "CR 26 is to be liberally construed 'to eliminate the hide and seek trial practices encouraged by earlier procedures.'" Cook v. King County, 9 Wn. App. 50, 51,

[15] CP at 1343-44.

510 P.2d 659 (1973) (quoting McGugart v. Brumback, 77 Wn.2d 441, 444, 463 P.2d 140 (1969)).

While it is true that evidence of a previous similar accident is generally inadmissible to show a general lack of care or negligence, see, e.g., Breimon v. General Motors Corp., 8 Wn. App. 747, 754, 509 P.2d 398 (1973), this does not mean that Camicia's discovery requests were not reasonably calculated to lead to the discovery of admissible evidence. For example, Camicia's requests could have led to discovery of evidence of the City's notice of the danger. As the court explained that the "City's destruction of all pre-incident records of claims and complaints about bicycle accidents . . . may have prevented [Camicia] from proving whether [the City] had prior notice of bicyclists being injured on bollard or other obstruction hazards." Construing CR 26(b)(1) liberally, we agree with the trial court that Camicia's October 2007 discovery requests were reasonably calculated to lead to admissible evidence.

Moreover, the City did not object to the relevancy of the information sought by Camicia. In response to Interrogatory 14, seeking information on prior investigations of accidents, the City objected that the request was "Compound. Vague as to time. Overly broad as to location." Similarly, in response to Interrogatory 15, seeking notices, reports, complaints, or claims about safety concerns, the City objected that the request was "Compound. Vague as to what is meant by "notice" or "other communications" and "other obstructions or defects." As the trial court explained,

> Although the City noted broad objections, it went on to answer the questions. The City's responses did not indicate that it was withholding any information or documents responsive to [Camicia's] discovery requests. A reader would reasonably infer that the City had substantially answered the interrogatories in questions.

> The City did not seek a protective order to limit or eliminate its obligation to respond fully to [Camicia's] discovery requests.[16]

Again, the trial court's conclusion that Cooley violated the discovery rules is supported by its findings of fact and was not an abuse of discretion.

D

Cooley argues fourth that the trial court failed to consider lesser sanctions as required by Burnet v. Spokane Ambulance, 131 Wn.2d 484, 495, 933 P.2d 1036 (1997). This argument fails for two reasons.

First, a trial court has broad discretion as to the choice of sanctions for violation of a discovery order. Burnet, 131 Wn.2d at 495. When a trial court sanctions a party with one of the harsher remedies allowable under CR 37(b), such as dismissal, default, or exclusion of testimony, the trial court must explicitly consider the Burnet factors on the record: whether "a lesser sanction would probably suffice, whether the violation at issue was willful or deliberate, and whether the violation substantially prejudiced the opponent's ability to prepare for trial." Jones v. City of Seattle, 179 Wn.2d 322, 338, 314 P.3d 380 (2013) (citing Burnet, 131 Wn.2d at 494)). But where, as here, the only issue is the imposition of a monetary sanction, the trial court is not obligated to apply the Burnet test in its consideration of sanctions. Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 689-90, 132 P.3d 115 (2006).

Cooley argues that because the trial court imposed sanctions over and above the monetary sanction, including the admission of otherwise inadmissible accident reports and the potential for a spoliation instruction, consideration of the Burnet factors was

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[16] CP at 1343.

required. This argument necessarily fails because the additional sanctions do not rise to the "harsher" sanctions under CR 37(b) including default, dismissal, or exclusion of witnesses or evidence. Mayer, 156 Wn.2d at 690. And, moreover, because the underlying case was dismissed without trial, the only relevant sanction appealed by Cooley is the monetary sanction.

Second, while not necessary, the trial court did apply the Burnet test. The trial court considered whether a lesser sanction, including a monetary penalty, would suffice and concluded that it would. When considering default, the court concluded that "the imposition of all the lesser sanctions . . . will adequately deter, punish, compensate, and educat[e]."[17] The court considered whether the violation was willful and concluded that it was. The trial court concluded that Cooley and the City willfully violated the discovery rules by (1) not conducting a reasonable search of the City's records, (2) not seeking a protective order, (3) not disclosing the City's record of complaints, (4) falsely telling Camicia that there "have never been any bicycle vs. bollard accidents to the City's institutional knowledge," and (5) not supplementing its discovery requests with correct responses.[18] The court also considered whether the violation substantially prejudiced Camicia's ability to prepare for trial and concluded that it did. The court concluded that "the continuance alone is an insufficient remedy and has not adequately addressed the prejudice to the plaintiff or the judicial system."[19] In sum, the court considered the Burnet factors before sanctioning the City and Cooley.

[17] CP at 1351.
[18] CP at 1350.
[19] CP at 1351.

E

Cooley argues finally that the trial court did not explain why it sanctioned the City and Cooley jointly and severally. Cooley contends that the court should have only sanctioned the City.

"A spirit of cooperation and forthrightness during the discovery process is mandatory for the efficient functioning of modern trials." Johnson v. Mermis, 91 Wn. App. 127, 132-33, 955 P.2d 826 (1998). Rule 37 authorizes sanctions to be imposed on "*a party or its attorney* for (1) failure to comply with a discovery order or (2) failure to respond to a discovery request." Johnson, 91 Wn. App. at 133 (emphasis added). A trial court exercises broad discretion in imposing discovery sanctions, and its determination will not be disturbed on appeal absent a clear abuse of discretion. Mayer, 156 Wn.2d at 677.

Here, the trial court's sanctions order explains in detail why the court imposed sanctions on the City and its counsel. As explained above, the trial court's sanction rested on its conclusion that "City and its defense counsel willfully violated the discovery rules by not conducting a reasonable search for its records; by not seeking a protective order if they wished to narrow the scope of discovery; by not disclosing the City's records of complaints; by falsely representing to [Camicia] '*there have never been any bicycle vs. bollard accidents to the City's institutional knowledge*'; and by not supplementing its discovery responses with correct responses when it knew the response was incorrect when made."[20] Both the City's and its counsel's actions were

[20] Sanctions order at 11 (CP at 1350).

sanctionable under these facts. The trial court did not abuse its discretion in imposing the monetary penalty on both the City and Cooley.

V

Camicia argues that this court should file a grievance against Cooley and his firm with the Washington State Bar Association, as encouraged by In re Disciplinary Proceeding Against McGrath, 174 Wn.2d 813, 818, 280 P.3d 1091 (2012). Camicia's request goes too far. Attorney McGrath's discovery violations were far beyond what the trial court found here. We decline to file a bar grievance against Cooley.

Camicia argues also that Cooley is not an aggrieved party and therefore the appeal is frivolous. We disagree. "An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected." A lawyer who is sanctioned becomes a party to an action and "thus may appeal as an aggrieved party." Breda v. B.P.O. Elks Lake City 1800 SO-620, 120 Wn. App. 351, 353, 90 P.3d 1079 (2004); Ferguson Firm, PLLC v. Teller & Assocs., PLLC, 178 Wn. App. 622, 628-29, 316 P.3d 509 (2013). Because the City and Cooley were jointly and severally liable for the $10,000 obligation imposed by the trial court, Cooley is an aggrieved party.

CONCLUSION

The trial court did not abuse its discretion. We affirm.

Mann, J.

WE CONCUR:

Schindler, J.

Cox, J.

CR 26(g):

(g) Signing of Discovery Requests, Responses and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the attorney or the party has read the request, response, or objection, and that to the best of their knowledge, information, and belief formed after a reasonable inquiry it is:

(1) consistent with these ruled and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

CR 37(d):

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Production or Inspection. If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his or her deposition, after being served with a proper notice, or (2) to serve answers or objections to

interrogatories submitted under rule 33, after proper service of interrogatories, or (3) to serve a written response to a request for production of documents or inspection submitted under rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 26(c). For purposes of this section, an evasive or misleading answer is to be treated as a failure to answer.

DECLARATION OF SERVICE

On said day below I electronically served and filed a true and accurate copy of the Petition for Review in Court of Appeals Cause No. 74048-2-I to the following:

Andrew G. Cooley
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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: March 10, 2017 at Seattle, Washington.

John Paul Parikh, Legal Assistant
Talmadge/Fitzpatrick/Tribe

TALMADGE FITZPATRICK LAW
March 10, 2017 - 12:08 PM
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