COA No. 359204-III
And COA No. 362272-III Consolidated

SUPREME COURT
OF THE STATE OF WASHINGTON
No. 98518-9

SARA RHODES, an individual

Appellant/Cross Respondent/Respondent,

v.

STADTMUELLER AND ASSOCIATES, P.S. d/b/a/ BARNETT, STADTMUELLER & ASSOCIATES, P.S., a Washington Professional Services Corporation; RYAN BARNETT aka RYAN MOOSBRUGGER and SHARON BARNETT aka SHARON S. KIM, as individuals and a martial community,

Respondent/Cross Appellants/Petitioners.

SARA RHODES' ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Court Rules

I. IDENTITY OF ANSWERING PARTY

Sara Rhodes, Plaintiff in the Superior Court action and Appellant in Division III, respectfully requests the Court deny the Petition for Review.

II. RE-STATEMENT OF ISSUES PRESENTED FOR APPEAL

1. Did the Court of Appeals correctly conclude the Court abused its discretion by entering the severe sanction of dismissal for the discovery delay?
2. Are Respondents Petitioning for Review on "abandonment," where factually that was not the Order of the Discovery Master or the Trial Court and the argument is not supported by the evidence?

III. STATEMENT OF THE CASE

A. OVERVIEW

Sara Rhodes was subjected to the worse kind of sexual quid pro quo sexual harassment imaginable by Defendant Barnett. Ms. Rhodes is a single mother who relied on her position as a bookkeeper/administrative assistant to survive. After Defendant Barnett purchased the client list for the accounting firm Ms. Rhodes worked for, Ms. Rhodes became employed by Defendant Barnett. Barnett immediately began making sexual advances and within a week assaulted Ms. Rhodes with non-consensual sex. From that point forward, Defendant Barnett subjected Ms. Rhodes to an atmosphere of untenable quid pro quo, hostile

workplace harassment and retaliation. This included calling her a "*whore,*" "*slutter butter*" and telling her that sex was "*part of your job.*" See CP 28-44 (verified Complaint) and CP 799-813 (Amended Complaint).

When this action was filed, Defendant Barnett engaged in delay tactics which included improperly removing the action to Federal Court (the Federal Court awarded attorney fees based upon the fact there was not a basis for the removal) and appealing the Order of Remand from Federal Court. After these delays, Defendant Barnett served a set of discovery on Ms. Rhodes which continued the demeaning attacks. The discovery included asking Ms. Rhodes to identify prior sexual partners and accused her of being a prostitute. Unfortunately for Ms. Rhodes, this discovery was served at the time her Counsel had left his firm, which resulted in delay and confusion. When Ms. Rhodes attempted to answer the discovery, her Counsel properly objected based on the lack of relevance, ER 404, and ER 412. A motion to compel and a request for a protective order followed.

Instead of being provided a fair opportunity to have her case heard and decided, Ms. Rhodes was subjected to demeaning discovery intended solely to harass. Unfortunately for Ms. Rhodes, a Discovery Master was appointed that viewed this case as being similar to a "*car*

wreck case" and ordered she answer questions about her sexual history, personal relationships unrelated to the employer and Defendant at issue and generally attacking her character. This discovery was propounded to harass and embarrass Ms. Rhodes. This discovery is a prime example of the types of personal attacks that discourage victims from coming forward when they are subjected to sexual harassment and abuse. There is no justice when our Court's do not implement the rules which are intended to prevent this type of stereotypical and improper attack on victims of sexual assault.

On December 10, 2017, the Discovery Master entered an order compelling the production of the harassing and irrelevant discovery. During that time-period, Ms. Rhodes experienced a family crisis of domestic violence. Ms. Rhodes had to take her child and find shelter outside the home. Counsel for Ms. Rhodes requested an extension of time for Ms. Rhodes to comply with the Order. Despite the fact Trial was not until November 5, 2018, more than eleven (11) months away, and the fact Defendants did not identify any prejudice in allowing Ms. Rhodes time to respond, the Discovery Master denied the extension and wrongfully dismissed Ms. Rhodes case as a sanction. See Appendix A. The Court adopted the rulings by the Discovery Master. The Discovery Master entered the sanction of dismissal based upon Ms. Rhodes failure

to comply with the deadline the Discovery Master had Ordered. See Appendix A. The Dismissal was because of "abandonment" and was not the result of any motion for failure to prosecute.

B. BARNETTS' HARASSING DISCOVERY

The discovery at issue included, among others, the following requests which had no legitimate purpose except to harass, embarrass and annoy:

- "*List by date each and every one of your marriages, and dates of separation and divorce...*" CP 709 - Rog. No. 7.
- "*List the names of each and any child of yours, each's respective date of birth, and the name(s) of the father(s) of each child.*" CP 709 – Rog. No. 8.
- "*Identify all prior or current employers identified in Int. 10 above, if any, with which you engaged in any sexual contact and/or engaged in any sexual relationship, the duration of any such relationship, and whether you claim such sexual contact was forced or voluntary.*" CP 711 – Rog. No.13.
- "*Other than Defendant Ryan Barnett, have you ever accused any other individual of rape, assault, or sexual misconduct?...*" CP 712 – Rog. 15.
- "*Identify any and all forms of state or federal government aid that you have received, including Public Assistance, food stamps, state medical, educational grants, or otherwise...*" CP 713 – Rog. 17.
- "*Have you ever received unemployment compensation;...*" CP 713 – Rog. 18.
- "*Have you ever received labor and industries (L&I) compensation?..*" CP 713 – Rog. 19.

- "*Were you involved in any way in, alleged to be involved in, contacted by police regarding, or contacted by any investigator regarding, any 'sting' operation in Spokane County or elsewhere, related to alleged sexual trafficking, sex industry involvement, and/or prostitution activity?...*" CP 718 – Rog. 31.

- "*Have you been involved in any way in Spokane County or elsewhere in any sexual trafficking, and or sexual or prostitution activity?...*" CP 718 – Rog. 32.

- "*Identify when you first met your attorney Kevin Roberts, where and how you met him, on what legal matters you had used him previously, and whether you socialized with him, or had business or personal dealings with him prior to filing your action.*" CP 719 – Rog. 37.

- "*Identify all attorneys you have used for any purpose...*" CP 719 – Rog. 38.

On September 19, 2017, Plaintiff provided responses and objections to the improper discovery requests. CP 706-722. On October 18, 2017, Trial was set for November 5, 2018. The Trial was not set sooner because Defendant's Counsel was insistent that she could not do it any of the other months offered. The discovery cut-off was not until August 31, 2018. CP 791. The Court did not rule on the Discovery Motions. Instead, it appointed a Discovery Master. CP 793.

The Discovery Master heard the Motion to Compel and a Motion for Protective Order. During the hearing, the Discovery Master ignored the type of case at issue and instead compared asking Ms. Rhodes for

private information about her sex life and character attacks, including insinuating Ms. Rhodes is a prostitute, to "*very similar questions, many, many questions in personal injury cases from the defense merely because allegations are made.*" CP 1093. The Discovery Master ignored ER 412 and 404 and decided "*Ms. Schultz is entitled to find out information about her past.*" Id.

On December 10, 2017, the Discovery Master recommended granting the Motion to Compel and denying the Protective Order. CP 814 – 817.

On December 18, 2017 the Court adopted the Discovery Master's recommendations which ordered "*Despite Plaintiff's compelling arguments,...Plaintiff provide complete and full responses to Defendant's First Set of Interrogatories and Requests for Production, and execute a medical release form by December 21, 2017.*" CP 816-817.

On December 20, 2017, Plaintiff's Counsel filed a motion requesting an extension of time to provide the discovery responses based on the fact that Ms. Rhodes had been subjected to domestic violence and was seeking shelter outside the residence of her abuser and was unavailable to her Counsel.

C. The Discovery Master Did Not Dismiss The Case Based On "Abandonment."

On January 12, 2018, despite the personal crisis, the Discovery Master issued a recommendation that Ms. Rhode's case be dismissed if she did not provide discovery by January 16, 2018. CP 845-850. This despite the fact that Trial was still nearly eleven (11) months away, the Discovery cut-off was nearly nine (9) months away and there was no finding of prejudice to the Defendant if additional time was provided.

Notwithstanding the foregoing, Plaintiff should be allowed to provide full, complete, unequivocal answers to all interrogatories and all production requested by Tuesday, January 16, at 5:00 p.m. If she fails to meet that deadline and that quality criteria-complete unequivocal answers and production by Tuesday at 5:00 p.m. – then I recommend that her claims be dismissed.

Appendix A - CP 850.

IV. ARGUMENT

A. The Unpublished Court of Appeals Decision Does Not Conflict With Court of Appeals Decisions From Division I or Division II.

The Court of Appeals Decision does not hold that a case may not be dismissed for lack of prosecution. As explained above, that issue was not before the Court. The only reference to "*abandonment*" was in the CR 11 language the Defendants included that was not found or the basis for the dismissal of the action in the Discovery Master's recommendation. The Court of Appeals correctly reviewed the record and pointed out the

argument about abandonment was directly addressed by the testimony of Ms. Rhodes. CP 1253-1254. There was no evidence of "abandonment." There simply is nothing about the Court of Appeals decision which conflicts with the cases cited by Barnetts'.

Rainier Nat. Bank v. McCracken, 26 Wash. App. 498, 507–08 (1980) was a case addressing the Court acted correctly in denying a request by a party to take a voluntary nonsuit.

> *After service of a responsive pleading or, if there is no such pleading, after the introduction of evidence at the trial or hearing, the allowance of the dismissal of a counterclaim is not a matter of right, but is subject to the discretion of the court. The involuntary dismissal of a counterclaim, cross-claim, or third-party claim, except for lack of jurisdiction, improper venue, or failure to join a party under Rule 19, is an adjudication of the merits unless the court otherwise specifies.*
> *(Footnotes omitted.) This correctly states the law. White v. E. L. Bruce Co., 62 F.Supp. 577, 578 (D.Del.1945).*
>
> *Where, as here, the plaintiff had filed a responsive pleading to the counterclaim, the trial court had the discretion to deny the taking of a voluntary nonsuit without prejudice on the counterclaim. Since the trial was ready to begin when the voluntary nonsuit motion was made, and since this would have necessitated plaintiff's witnesses being called again if a separate trial were held on the counterclaim (as the trial court pointed out in ruling on the motion), the trial court did not abuse its discretion when it denied the motion for voluntary nonsuit without prejudice as to the counterclaim.*
>
> *Furthermore, when the defendant did not press its counterclaim in any way or present evidence in support of it, the trial court also had the right to consider it abandoned and dismiss it with prejudice. Edward B. Marks Music Corp. v. Borst Music Publishing Co., 110 F.Supp. 913, 914-15 (D.N.J.1953); Walt Disney Prods. v. Fred A. Niles Communication Center, Inc., 253 F.Supp. 1, 11-12 (N.D.Ill.1966).*

Rainier Nat. Bank v. McCracken, 26 Wash. App. 498, 507–08, 615 P.2d 469, 475 (1980).

Similarly, the St. Romaine case dealt with a voluntary nonsuit. Notably, this case was decided prior to the existence of CR 41.

> *Appellant next asserts that the trial court erred in granting a voluntary nonsuit, especially in view of the potential significance the statute of limitations would have on his action after granting the nonsuit. However, RCW 4.56.120(4) allows the trial court to render upon its own motion a judgment of nonsuit when the plaintiff abandons his case before its final submission. Despite repeated requests by the trial court to proceed, coupled with suggestions that he could take the witness stand and testify, it is apparent from the record that de St. Romaine was determined not to proceed with his case. Such conduct is tantamount *183 to abandonment. Although the trial court did grant a voluntary nonsuit rather than a nonsuit on the basis of abandonment, the trial court's decision will be upheld on appeal. Lundgren v. Kieren, 64 Wash.2d 672, 677, 393 P.2d 625 (1964).*

St. Romaine v. City of Seattle, 5 Wash. App. 181, 182–83 (1971).

As the Court of Appeals correctly pointed out, dismissal for want of prosecution is addressed by CR 41(b) and in this case, there was never a motion for dismissal pursuant to CR 41(b). The real problem is Defendants Barnett ignore the case was not dismissed due to lack of prosecution or "abandonment." As a result, there simply is nothing about the holding in Rainier Nat. Bank or St. Romaine, or any Supreme Court decision that conflicts with or addresses the issues addressed by the unpublished Court of Appeals decision.

B. Barnetts' Constitutional and Public Interest Arguments Are Baseless.

The Court of Appeals decision stands for the unremarkable proposition that a party has the right to be heard with regard to objections to harassing discovery and that courts should follow the Burnet factors when deciding what sanction to apply in the case of CR 37 sanctions. Nothing about this unpublished opinion remotely effects Constitutional issues or any public policy. Applying the existing law with regard to discovery and sanctions does not create a "special privilege" nor does enforcing the limitations placed on harassing discovery seeking evidence that cannot lead to anything admissible violate public policy.

V. CONCLUSION

Barnetts have not and cannot meet the requirements of RAP 13.4 for review. Therefore, Rhodes respectfully requests the Petition be denied.

DATED this 5th day of June, 2020.

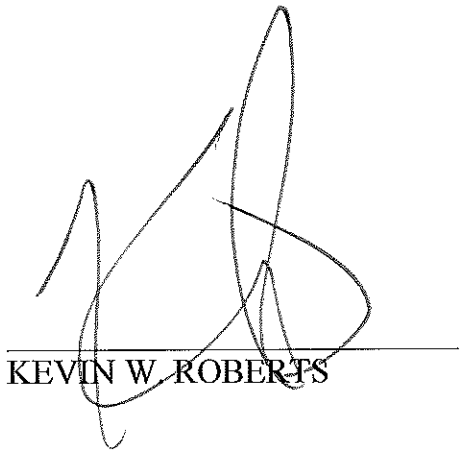
ROBERTS | FREEBOURN, PLLC

KEVIN W. ROBERTS, WSBA #29473
Attorney for Sara Rhodes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of June, 2020, I caused to be served a true and correct copy of the foregoing document to the following via counsel of record using the Washington State Appellate Courts' Portal:

Mary Schultz
Mary Schultz & Associates
211 E. Red Barn Lane
Spangle, WA 99031



KEVIN W. ROBERTS

APPENDIX A

HONORABLE JAMES M. TRIPLET

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SPOKANE

SARA RHODES, an individual, Plaintiff, v. STADTMUELLER & ASSOCIATES, P.S. d/b/a BARNETT, STADTMUELLER & ASSOCIATES, P.S., a Washington professional services corporation, and RYAN BARNETT AKA RYAN MOOSBRUGGER and SHARON S. BARNETT AKA SHARON S. KIM, as individuals and a marital community, Defendants.	NO.: 14-2-04684-1 **DISCOVERY MASTER'S REPORT AND RECOMMENDATIONS REGARDING OUTSTANDING DISCOVERY**

Motion/Response.

By order of December 18, 2017, Plaintiff Sara Rhodes was ordered to provide full and complete answers, and a medical release form, to Defendants no later than December 21, 2017. On December 20, 2017, Plaintiff's counsel requested that Plaintiff be allowed an extension to the ordered Dec. 21st compliance deadline. Defendants responded, objected to any further extension, and requested dismissal of Plaintiff's claims on grounds of willful non-compliance. Both requests are properly before this Discovery Master for hearing.

Plaintiff requested that this matter be decided on the pleadings without oral argument, but this Discovery Master set oral argument given the severity of the sanction requested, and the

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circumstances of the Plaintiff's request.

Background.

After a sustained period of discovery noncompliance on Plaintiff's part, this Discovery Master recommended on Dec. 10, 2017, and the Superior Court ordered, on Dec. 18, 2017, that Plaintiff provide all answers and all requests for production to Defendants' First Set of Interrogatories and Requests for Production, which were issued to Plaintiff over two years ago in October 2015. Plaintiff was ordered as follows: "Plaintiff (is) to provide complete and full answers to Interrogatories and Requests for Production, and execute a medical release form by December 21, 2017." The behavior being alleged by Plaintiff against the Defendants is egregious, and the Discovery Master notes the length of time that has gone by with such claims remaining public and unresolved, and without the Defendants receiving answers from Plaintiff per their rule right to investigate and obtain information relevant to their defenses against such claims. On Defendants' earlier motion to compel answers, the Discovery Master found that the inquiries made of the Plaintiff by the Defendants were relevant inquiries, and, in many cases, near standard issue in a personal injury action. The Discovery Master recommended that the Defendants be awarded their fees for the necessity of preparation and presentation of the motion to compel. As noted, the Superior Court signed that recommendation into effect on December 18, 2017.

There is no dispute that the ordered compliance date of Dec. 21st was not met by Plaintiff. Instead, on December 20, 2017, Plaintiff's counsel filed a motion on her behalf. But the Plaintiff herself provided no attested information supporting any extension. She provided no declaration, testimony or evidence. Defendants objected to an extension on such grounds and moved for the severe sanction of dismissal under Rule 37, pointing to not just the failure of compliance with the order, but pointing also to the record as a whole since October 2015, while various indicia exist of

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the Plaintiff's availability and pursuit of other litigation matters during this time. The Discovery Master granted the Plaintiff additional time over the holiday to present her reply to this response and request for dismissal, frankly anticipating some response from Plaintiff herself. On January 4, after reply, the Discovery Master set this hearing for January 10, 2018. As of the reply, and as of this hearing date, Plaintiff has provided no attested information.

At hearing, Plaintiff's counsel was unable to provide a date by which his client will provide compliance. Counsel asserts attorney-client confidentiality in response to more pointed inquiries by this Discovery Master about Plaintiff's status, whereabouts, and situation in not responding. The best that can be gleaned is that Plaintiff has had no contact with her counsel since, at least, his filing of the motion for an extension on her behalf.

Sanction Issue.

The record and argument shows Plaintiff's willful disregard of a court order without reasonable excuse or justification, and it shows that no lesser sanctions will reasonably suffice to motivate compliance. Defendants are, and continue to be, prejudiced in preparing for trial on very serious allegations.

Specifically, the above case was filed in 2014. The Defendants' First Set of Interrogatories and Requests for Production were served on the Plaintiff on October 6, 2015. They remain outstanding. No answers have been provided, and no production has been provided.

The Court previously granted the Plaintiff additional time to complete discovery. The trial date of December 7, 2017 was moved, and this Discovery Master appointed because of the motion to compel process initiated in June 2017. The trial court thus already gave Plaintiff additional time to respond. This Discovery Master also gave Plaintiff additional time to respond on its' compel recommendation, as did the trial court on the ensuing compel order. Plaintiff has simply not

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responded to these accommodations. She has not complied in any fashion with the order directing answers, production or a medical release form. Even the timing of her counsel's request for more time was the day before these materials were required. But even that extension request is not attested to by her. The Discovery Master gave her additional time over the holidays to reply and Plaintiff remains unresponsive. She has provided no signature, no release form, and no evidence of her status, nor evidence of willingness to comply. She has not been in contact with her own counsel. There is no evidence even that she is set up to *talk* with her counsel about answers. Plaintiff thus offers no reasonable excuse nor justification for an order granting her an extension on her non-compliance. There is no evidence that would support such an extension to the present order under the circumstances, because there is no evidence demonstrating any effort being made by Plaintiff to comply. Evidence does not show fair and reasoned resistance to discovery; it shows willful failure to comply with discovery, now including an order.

Plaintiff's counsel argues an emergency situation, but this record does not comport with a rational, expected, required, and open disclosure process of *Teter v. Deck,* 174 Wn.2d 207, 218, 274 P.3d 336, 341-42 (2012), when difficulties arose with expert witnesses. It does not comport with open discussions for noncompliance as seen in *Magana v. Hyundai Motor Am., 167 Wn.2d 570,584 (2009),* or those in *Burnet v. Spokane Ambulance, 131 Wash. 2d 484, 933 P.2d 1036 (1997), as amended on denial of reconsideration (June 5, 1997).* This emergency follows a party who previously ignored and failed to respond to requests, then submitted answers that evaded discovery requests, via assertions that the requests were overbroad and not reasonably calculated to lead to the discovery of admissible evidence, *Magana, at 584,* and who now violates an order. This cannot be construed as other than willful behavior.

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The Defendants are necessarily suffering severe prejudice from a continued inability to prepare for trial. The actions Plaintiff claims occurred are egregious and are alleged to have taken place in August 2014—three and a half years ago. The interrogatories still outstanding were issued in the fall of 2015. Defendants are entitled to a full rules discovery period and orders throughout in order to investigate and defend against egregious claims. Depriving them of this right because the discovery cutoff is "not until August" is not well taken. Defendants cannot process discovery still outstanding, much less follow up on that discovery with depositions or further inquiries, and thus still cannot prepare for their trial without answers even to a now two-year old first set of discovery. This has gone on since October 2015, without real explanation. Defendants have already lost over two years of discovery and trial preparation. The prejudice being suffered is that of *preparing* for trial, not necessarily *obtaining* a fair trial. *Hyundai, at* 589.

The Discovery Master cannot find that lesser sanctions will suffice in this situation. Plaintiff has been accommodated by Defendants with additional time to respond last summer and again in early fall, and this accommodation did not result in answers. The trial continuance from Dec. 7th, the Court's referral of the compel motion to this Discovery Master, the order of directing compliance itself--all allowed Plaintiff additional time. The Court's order awarding fees for non-compliance affirmed the seriousness of this matter. Plaintiff has not responded to any of these accommodations. Moreover, the Plaintiff herself has not said that any sanction will convince her to respond. She has not provided any testimony. If Plaintiff had some intent to respond, there would and should have been some effort on her part to so advise the Court, and to keep in communication with her counsel. The evidence shows a lack of concern on her part to comply with this Court's order. Under these circumstances, the Discovery Master cannot reasonably find that lesser sanctions will suffice.

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Recommendations.

The Discovery Master recommendation is as follows:

Notwithstanding the foregoing, Plaintiff should be allowed to provide full, complete, unequivocal answers to all interrogatories and all production requested by Tuesday, January 16, at 5:00 p.m.[1]. If she fails to meet that deadline and that quality criteria—complete, unequivocal answers and production by Tuesday at 5:00 p.m.—then I recommend that her claims be dismissed.

The Discovery Master recommends that further fees be imposed against Plaintiff and awarded to the Defendants for the continued necessity of their pursuit of answers to their 2015 first set of interrogatories. Ms. Schultz should provide a supplement on fees to the date of the entry of this recommendation, and those fees and costs should be awarded.

Dated this 12th day of January, 2018.

Special Discovery Master

[1] Monday was ordered, but it is a holiday.

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