Supreme Court No. 98518-9

COA No. 359204-III
(consolidated with
COA No. 36227-2-III)

SUPREME COURT
OF THE STATE OF WASHINGTON

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 S. BARNETT aka SHARON S. KIM, as individuals and a marital community,

Respondents/Cross Appellants/Petitioners.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF THE PETITIONERS.

The Petitioners are Barnett & Associates, P.S., Ryan Barnett, and Sharon Kim-Barnett. Petitioners are Defendants in the trial court, and Respondents in Division III. They obtained an order dismissing the Plaintiff's case for her abandonment of her claims after she declined to respond to the Discovery Master or the trial court regarding orders compelling discovery. Fees and costs were subsequently awarded against her. Division III's ruling reverses eight separate trial court orders, and remands for further proceedings on abandoned claims.

II. CITATION TO COURT OF APPEALS DECISION.

Petitioners seek review of *Rhodes v. Barnett & Associates, P.S.*, 35920-4-III, 2020 WL 1814945, at *1 (Wash. Ct. App. Apr. 9, 2020), hereafter "Decision." [1]

III. ISSUES PRESENTED FOR REVIEW.

1. A trial court has inherent authority to dismiss a case for abandonment.

2. A civil plaintiff may be required to confirm her intention to

[1] The Superior Court case heading is "Sara Rhodes, Appellant/Cross Respondent v. Stadtmueller and Associates, P.S., d/b/a/ Barnett, Stadtmueller and Associates P.S., Ryan Barnett, and Sharon S. Barnett aka Sharon Kim, as individuals and as a marital community." Ms.Rhodes changed the heading on her notice of appeal to "Rhodes v. Barnett & Associates, P.S." Division III adopted the altered heading excluding Defendant/Appellant/Petitioner Kim as a party.

pursue her case, and contact her attorney, or have her case dismissed.

IV. SUMMARY OF THE CASE.

Division III's ruling implicates all facets of considerations governing acceptance of review under RAP 13.4. Division III rejects trial court oversight of a case that evolved as an abusive litigation against the Defendants, and reverses eight trial court orders compelling discovery, requiring that a plaintiff ultimately confirm her intent to proceed with her claims subject to dismissal, dismissing, and awarding fees for an abandoned litigation. Division III rejects the inherent authority of a trial court to administer a case efficiently, and to dismiss claims for a party's abandonment of the process. This Plaintiff filed egregiously damaging rape claims against Defendant Ryan Barnett, and felony drug claims against his wife, Dr. Sharon Kim, and then failed to cooperate with court orders to respond to discovery, or to contact her own counsel, who then himself stopped communicating with the Discovery Master. Division III's ruling confuses "privacy concerns" with abandonment of claims seemingly because the Plaintiff alleged that she was raped. The decision conflicts with this Supreme Court's precedent, and with other Division Courts of Appeals, it creates special litigation privileges for plaintiffs who unjustly accuse others of rape and then refuse to participate in the processes they have

invoked, and it is contrary to the most recent policy implemented by this state's legislature reiterating the inherent and considerable authority to curb abusive litigation. A plaintiff's inalienable right to accuse someone of felony rape carries with it the duty to show up. This decision from Division III should be reviewed.

V. BACKGROUND.

Petitioner Ryan Barnett is an accountant, and his wife, Sharon Kim, was a practicing dentist in California. Both were California citizens. Mr. Barnett acquired a small accounting practice in Spokane, Washington. He allowed an employee of the former business, Plaintiff Sara Rhodes, to remain employed in his new business. Mr. Barnett began a consensual sexual relationship with Ms. Rhodes, which took place in his office. Ms. Rhodes began disappearing from work. She texted Mr. Barnett a photo of what she represented to be a doctor's note. She returned to work, then disappeared from work again for another five days, returned, and, at Mr. Barnett's indication that he was going to hire someone else, and that she should take some time off to deal with her personal situation, she disappeared altogether from her employment. *CP 736, Answer, paras. 25-30.*

Within days, on October 28, 2014, Mr. Barnett received a demand for $950,000 from Ms. Rhodes's lawyer, detailing in graphic language how Mr. Barnett had allegedly repeatedly raped Ms. Rhodes inside his office. *CP 191-197*. The lawyer threatened Mr. Barnett's wife in California with claims. *CP321* (with emphasis added, Plaintiffs' counsel wrote, "As to Dr. Kim, you can relay to your client that we will be sending her a demand as well. If she is arrogant enough to believe that she has no liability, that is unfortunate for her *and her practice*"*); CP 308-309, 315.* Mr. Barnett and Dr. Kim rejected the demand. They characterized Plaintiff's actions as a "shakedown" over sex that occurred, but was consensual. *Decision* at *1, ref. CP 564. On December 2, 2014, Ms. Rhodes filed a verified complaint against *both* Mr. Barnett and Dr. Kim. *CP 1-19*. She accused Mr. Barnett of repeatedly raping her, and she accused Dr. Sharon Kim of illegally prescribing Mr. Barnett narcotics. *Para. 20*. The allegations destroyed Mr. Barnett's business. He left Spokane. *CP 924*.

Ms. Rhodes successfully contested the Barnetts' effort at removal to federal court, and so, on remand in October 2015, Mr. Barnett and Dr. Kim sent Ms. Rhodes their first set of interrogatories and production requests. *CP 514.* Because Ms. Rhodes's complaint alleged that she received medical treatment from more than one doctor and prescription drugs for her medical

ills allegedly brought on by Mr. Barnett's behavior,[2] Defendants asked her to identify her medical and pharmacy providers, and sign medical and pharmacy releases for those providers. *CP 576-577; Interrogatories 20, 22; Requests for Production 13, 14*.[3] Ms. Rhodes did not answer the Barnetts' discovery in 2015 or 2016, nor sign and return either release. She did not pursue her own discovery. She sent no discovery, nor request any deposition.

Defendants had begun to learn about Ms. Rhode's litigation history from other sources, and now assumed she had filed a litigation, then disappeared. *CP 516* (Defendants write of how, "given Plaintiff's litigation history, it was unclear if Plaintiff was intending on pursuing this action,…"); *CP 827-830* (detailing the procedural history of the case as to abandonment). The trial court issued a status conference notice in August 2016, and a case scheduling order on September 16, 2016. *CP 517*. Ms. Rhodes did not pursue her action. In June 2017, over a year and a half after the remand, Ms. Rhodes materialized through her counsel. *CP 517*. The Barnetts thereby asked that she respond to their October 2015 discovery. A

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2 *CP 12, paras. 26-28.*

3 Ms. Rhodes claimed that she had medical symptoms, and "The doctor*s* said it was due from stress," *Id., para. 26* (italic added); she "went to the doctor*s* for…," *Id., para. 27;* a doctor wrote two notes for her excuse from work, *Id. para. 27,28*; she was prescribed medication for her symptoms. *Id., para. 27.*

voluntarily agreed-upon date for her answers and production came and went with no response. *CP 518*. Ms. Rhodes made no request for a protective order, nor did her counsel communicate on why no response was being provided. The Barnetts filed a motion to compel answers and production, *CP 513-520*, and, on September 19, 2017, Ms. Rhodes placed a signature on a document which objected in boilerplate language to nearly everything requested of her, she produced nothing, and she returned no medical releases. *CP 576-577.*[4] Her counsel now requested a protective order in response to the motion to compel, asserting that Ms. Rhodes should have protection for questions related to "sexual behavior." He offered nothing about why Ms. Rhodes had not simply, e.g., signed releases for the claims of medical damage she was making. *CP 695-701 (Plaintiff's response to her failure to answer)*.

The trial court appointed a discovery master. The Discovery Master set deadlines for Ms. Rhodes to respond to discovery, and to execute a

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[4] Division III's opinion recognizes that the Discovery Master, trial court and Defendants were having to deal with Ms. Rhodes' unresponsiveness to at least 36 discovery requests, stating that "The discussion of these 13 discovery requests appears on approximately 19 pages of the 63-page transcript of the hearing. The remaining 23 discovery requests to which Ms. Rhodes objected were never discussed." *Decision* at *5. Her objections were asserted as, e.g., overly broad, intended to harass, unduly burdensome, and irrelevant, without providing even limited information or signing a time-limited release. *CP 576-577*.

medical release, first on a recommendation of December 8, 2017, then by court order of December 18th, giving Ms. Rhodes until December 21, 2017**.** *CP 826,* and *Decision, at *5.* The Discovery Master remained open to further discussion regarding "Attorney's Eye's Only" protection for records deserving of it. *Id.* at *5. Ms. Rhodes never responded. She did not even return the medical release. Instead, on December 20, 2017, her counsel requested another extension, attaching a news article that made no mention of Ms. Rhodes. Her counsel did not explain why she simply hadn't signed the ordered medical release. Ms. Rhodes herself provided no explanation. Consistent with their earlier position asserting Ms. Rhodes's use of litigation, by December 20, 2017, Defendants argued in detail how Ms. Rhodes had likely filed this damaging complaint "and disappeared." *CP 923-925.*[5] By December 4, 2017, they pointed out that Ms. Rhodes would not confirm she would ever respond. *CP 890-891*. By January 18, 2018, Defendants argued to the trial court that Ms. Rhodes had "plainly abandoned her claims at some point still unknown," just as they had articulated earlier. *CP 827:6; 827:13-17.* Defendants argued that "the point

[5] Defendants wrote, "If Ms. Rhodes decides to offer any evidence at all, then perhaps she can plead her case for reopening the default … *any plaintiff bringing such grossly damaging claim against others has the responsibility to show up, and to respond to court orders.* We ask that a default, with an order of dismissal, be recommended, along with further fees assessed." *CP 924-25* (emphasis added).

at which Plaintiff in fact abandoned her claims, refused to answer discovery, and disappeared from her own action is not being disclosed, and was not disclosed to the Discovery Master." *CP 831:20-23*. By January 12, 2018, Ms. Rhodes had never appeared to challenge the assertion that she had abandoned her claims. By now, her counsel *himself* stopped communicating with the Discovery Master, without explanation. *CP 830, para. 23-24.*

On January 12, 2018, in an extensively detailed recommendation, the Discovery Master found that (1) Plaintiff willfully or deliberately violated the discovery rules and orders, (2) Defendants were substantially prejudiced in their ability to prepare for trial, and (3) a lesser sanction would not suffice. The Discovery Master detailed the Plaintiff's apparent disappearance, signifying the shift in focus to the concern of whether she even intended to comply or pursue her claims:

> 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.
>
> *CP 879.*

The Discovery Master went further:

> 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.
>
> *CP 878-880* (emphasis in original).

The Discovery Master distinguished *Magana v. Hyundai Motor Am*., 167 Wn.2d 570,584 (2009), and *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) from what Ms. Rhodes was doing here, which was willful behavior:

> 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 as seen in (*Magana)* or those in (*Burnet).* 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.
>
> *CP 880*.

The Discovery Master discussed the prejudice arising from such behavior:

> 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.
>
> *CP 881*.

The Discovery Master considered, and rejected, lesser sanctions:

> 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.
>
> *CP 881.*

Critically, the Discovery Master notes that the Plaintiff was not disputing that she had abandoned her claims, nor was she affirming her intention to proceed:

> 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.
>
> *CP 881* (emphasis in original).

Ms. Rhodes never thereafter notified the Discovery Master nor the trial court that she intended to respond and participate, nor did she contact her counsel. Her counsel did not report to the trial court that she had contacted him, and he submitted the dismissal proceeding without oral argument. *CP 1016-1018*. On February 9, 2018, the trial court dismissed the action. It concluded that the Plaintiff had abandoned her case at some point still unknown. *CP 1014.* Prior to that stipulated hearing, Ms. Rhodes had still made no effort to notify the trial court of her intent to proceed with her

claims, nor had she contacted her counsel, not had counsel informed the trial court of any contact from her. By February 28, 2018, the situation remained the same. A supplemental order was entered on fees. *CP 1044-1046.*

Three months after her case was dismissed, Ms. Rhodes materialized via a May 25, 2018 affidavit declining to explain her earlier disappearance. *CP 1254-1255*. She criticized the Defendants' lawyer, but did not tell the court that she intended to answer discovery, sign a medical release, nor dispute that she had abandoned her claims. Instead, she identified the deadlines for her to "provide responses to demeaning discovery," but, she asserts, she "was in the middle of a crisis." *Id.* at 1254.

A. Division III.

Division III reversed eight separate trial court orders. Its ruling ignores that the trial court dismissal was entered for Plaintiff's abandonment of her claims, and that Ms. Rhodes never contested the allegation that she had abandoned her claims. It ignores the fact that her own counsel stopped communicating with the Discovery Master, without explanation. Division III goes out of its way to blame everyone but the Plaintiff for her refusal to simply declare her intention to proceed. It ignores the difference between a good faith discovery case, and an abandonment case. In so doing, it abrogates the duty of, and the inherent authority of, a trial court to ensure

the efficient administration of justice with a plaintiff who will not provide reassurance of her intention to proceed with damaging claims, and to cooperate with her own counsel.

VI. WHY REVIEW SHOULD BE ACCEPTED.

A. The decision of the Court of Appeals conflicts with published decisions of the Division I and II Courts of Appeals, and review should be accepted under RAP 13.4(b)(2).

Trial courts have inherent authority to dismiss cases with prejudice for a party's abandonment of a claim, even on the court's own motion, Division I holds that where a party does not "press" its claim or present evidence in support of it, the trial court "ha(s) the right to consider it abandoned and dismiss it with prejudice." *Rainier Nat. Bank v. McCracken*, 26 Wn. App. 498, 508, 615 P.2d 469 (1980). A trial court has the authority to consider a refusal to proceed an abandonment, and it may render judgment of nonsuit upon its own motion. *St. Romaine v. City of Seattle*, 5 Wn. App. 181, 182–83, 486 P.2d 1135 (1971). Even had Defendants not argued for abandonment, which they did, the trial court had the discretion to dismiss on the basis of abandonment, regardless. Division III's ruling conflicts with the precedent of Division I.

Division II holds that this authority can be exercised immediately where a plaintiff disobeys a court's order to continue with trial, that action abandons the claim and dismissal is proper. *Jackson v. Standard Oil Co. of California,* 8 Wn. App. 83, 103, 505 P.2d 139 (1972). It holds that where a party has acted in willful and deliberate disregard of reasonable and necessary court orders *and in disregard for the efficient administration of justice*, and has prejudiced the other side by doing so, dismissal is justified. *Woodhead v. Disc. Waterbeds, Inc.,* 78 Wn. App. 125, 130, 896 P.2d 66 (1995). Division III's ruling conflicts with published decisions of Division II.

B. <u>The decision of the Court of Appeals conflicts with decisions of the Supreme Court, and review should be accepted under RAP 13.4(b)(1).</u>

This Supreme Court also holds that a court of general jurisdiction has the inherent power to dismiss pending actions if they are not diligently prosecuted, and that trial courts indeed have the *duty* to do so in the orderly administration of justice. *State ex rel. Dawson v. Superior Court of Kittitas Cty.*, 16 Wn.2d 300, 304, 133 P.2d 285 (1943). A trial court holds the inherent power to dismiss pending actions <u>independent</u> of civil rule for want of prosecution. *State ex rel. Washington Water Power Co. v. Superior*

Court for Chelan County, 41 Wn.2d 484, 542, 250 P.2d 536 (1952). A trial court may dismiss a case on its own motion on an immediate act when, "upon the trial and before the final submission of the case, the plaintiff abandons it," even if such a dismissal may be without prejudice. *Gnash v. Saari*, 40 Wn.2d 59, 60, 240 P.2d 930 (1952).

Division III's ruling conflicts with this Supreme Court precedent. A trial court is plainly engaged in its duty to orderly administer justice where a Plaintiff and her counsel have stopped responding to its discovery master, and to the trial court itself, and where neither the Plaintiff nor her counsel refute the abandonment allegation. A trial court has a duty to act on an unexplained disappearance, including a duty to demand reassurance, or dismiss claims. This dismissal process was not immediate—it went on from December 2017 through February 2018's final order on fees without the Plaintiff ever declaring her intent to pursue her claims, or contacting her attorney, or simply signing and returning even a limited medical release, while she was out litigating other claims in the same court. *CP 924-925.*

Abandonment differs from Rule 41(b)(1) dismissal. The civil rule subsections (1) and (2) are subsets only of the court's inherent authority, not exclusive means. *See State ex rel. WWP Co. v. Chelan County*, 41 Wn.2d at 542. A trial court always retains authority to dismiss in cases of

abandonment. Civil rule discovery must therefore be distinguished from abandonment, even where a trial court also holds the authority to enter default orders under CR 37(d) as a discovery sanction. *Magana v. Hyundai Motor Am.,* 167 Wn.2d at 583–84. Here, all of the requisite findings to support dismissal as a discovery sanction were made, but the dismissal became a dismissal for abandonment--not simply obstruction of discovery.

Division III's ruling conflicts with this Court's precedent, it removes the authority and the duty of a trial court to dismiss for abandonment, and it should be reviewed.

C. A significant question of law under the Constitution of the State of Washington is involved, and review should be accepted under RAP 13.4(b)(3).

Division III's ruling in fact implements special rights, privileges, and immunities for accusers who make civil claims of rape. Division III avoids the principle of abandonment of claims to fashion special protections for a plaintiff who plainly didn't want to proceed. It infuses Ms. Rhodes's refusal to further communicate or proceed as one of constitutional privacy under Article I, section 7 of the Washington Constitution, citing to *State v Gunwall,* 106 Wn. 2d 54, 68-69, 720 P. 2d 808 (1986). It implies that Plaintiff's disappearance arose from her learning that her "privacy concerns

will be rejected out of hand…" *Decision* at 13, quoting from *Rhinehart v Seattle Times Company,* 98 Wn.2d 226, 254, 654 P.2d 673 (1982), *aff'd,* 467 U.S. 20, 104 S. Ct. 2199, 81 L.Ed. 2d 17 (1984). Nothing in this record supports noble intent. Ms. Rhodes refused to return even a medical release when her complaint alleges medical injury. She did not contest the assertion that she had abandoned her claims, and she did not tell the Discovery Master or the trial court, when asked, that she intended or desired to proceed.

Division III discusses this state's Article I, section 7 constitutional privacy protections, but what it neglects to consider is the counterpoint of its according special privileges for civil litigants who allege rape, which violates Article 1, section 12, the latter being intended to prevent special treatment for a few to the disadvantage of others. *Ockletree v. Franciscan Health Sys.,* 179 Wn.2d 769, 776, 317 P.3d 1009 (2014). Disappearance because of implied privacy concerns is still disappearance. This state has not adopted the self-remedy of voluntary disappearance as is accorded this Plaintiff by Division III on her claims of sexual abuse. To the contrary, this state's legislature has recently enacted law related to controlling abusive litigation that can arise between former intimate partners. *Engrossed Senate Bill 6268,* filed April 3, 2020, attached at Appendix B, and discussed below, directs trial courts to use their considerable authority and discretion to

control litigant conduct when the specter of abusive litigation appears. Here, Division III cites to other jurisdictions to promote discovery protections for those claiming sexual abuse,[6] but it fails to note how the focus here properly shifted from discovery orders to the unexplained refusal of a party to communicate with the court or affirm her intent to proceed. Division III did not have a "reasonable ground" for granting such privilege or immunity under these facts. *Ockletree,* quoting *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake,* 145 Wn.2d 702, 731, 42 P.3d 394 (2002) (Grant I). The behavior demonstrated here is abandonment, not good faith assertion of concerns deserving of special privilege at the expense of the accused. This decision should be reviewed.

D. <u>This petition involves an issue of substantial public interest that should be determined by the Supreme Court, and review should be accepted under RAP 13.4(4).</u>

Any personal litigation, including dissolution or custody matters, intrudes into "truly private affairs." *See Decision* at 12. GAL reports are

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[6] *See Decision at *12, ref. Simpson v. Univ. of Colo*., 220 F.R.D. 354, 361 (D. Colo. 2004) (some diary entries ordered disclosed, but for attorneys' eyes only); *Sanchez v. Zabihi*, 166 F.R.D. 500, 503 (D.N.M. 1996) (interrogatory about prior romantic or sexual advances narrowed, limited to three years, and with response for attorneys' eyes only); *Herchenroeder v. Johns Hopkins Univ. Applied Physics Lab*., 171 F.R.D. 179, 182 (D. Md. 1997) (two narrowed interrogatories ordered answered, but not until a protective order/confidentiality agreement was in place).

filed in custody matters with extraordinarily detailed and invasive information, and just because certain questions may be overbroad does not mean that the responding party can simply walk away. In the context of intimate relationships, the concept of abusive litigation has now become a legislative concern. ESB 6268 is now directed to the perpetuation of domestic violence after a relationship has ended through the courts. *Appendix B.* Abusive litigation "arises in a variety of contexts," including civil lawsuits. *Id.*, section 1. The legislature notes that "[e]ven if a lawsuit is meritless, forcing a survivor to spend time, money, and emotional resources responding to the action provides a means for the abuser to assert power and control over the survivor." *Id.* A civil plaintiff's use of *consensual* sexual relations to assert power over others who have rejected her demands is abuse. Engaging in consensual sex with others, then using that relationship to demand $950,000 or threaten to sue for rape, threatening damage to the Defendant's wife's professional practice, filing that action, and then abandoning it, is abusive litigation, whether or not explicitly described as such by the overseeing court. The legislature actively *directs* trial courts to use their "considerable authority to respond to abusive litigation tactics, while upholding litigants' constitutional rights to access to the courts." Dismissal for abandonment effects the policy result, and that is

exactly what was done here by the Discovery Master. It is entirely proper for a Discovery Master to direct a Plaintiff to affirm her intent to proceed, or, failing that, to implement the concept of abandonment. The evolution of this case began with what the Defendants asserted was a "shakedown," followed by Plaintiff's retaliatory claims, followed by her refusal to participate in the very processes she invoked or assure the court of her intent to participate. Division III's holding that a Defendant is not prejudiced because trial is some months away ignores the policy and personal damage done by these types of claims. This is an issue of substantial public interest. Trial courts should have the authority used here to meaningfully take action on a litigant's perceived abandonment of extremely damaging claims.

CONCLUSION.

Petitioner respectfully asks this Court for review.

Respectfully submitted this 8th day of May, 2020.

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Appendix A

2020 WL 1814945
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is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of
Washington, Division 3.

Sara RHODES, an individual,
Appellant/Cross Respondent,
v.
BARNETT & ASSOCIATES,
P.S., a Washington corporation,
and Ryan Barnett aka Ryan
Moosbrugger, a married individual,
Respondents/Cross Appellants.

No. 35920-4-III
|
consolidated with No. 36227-2-III
|
APRIL 9, 2020

Appeal from Spokane Superior Court, Docket No: 14-2-04684-1, Honorable Annette S. Plese, Judge

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UNPUBLISHED OPINION

Siddoway, J.

***1** Sara Rhodes appeals the dismissal of her complaint as a discovery sanction, after she requested an extension of time rather than comply with an order setting a deadline for her response to discovery. We reverse the dismissal, which was not warranted under the *Burnet*[1] factors. We also reverse the underlying order, since a discovery master, whose recommendations were adopted by the trial court, did not give meaningful consideration to Ms. Rhodes's objections to discovery and request for a protective order. We provisionally reverse four fee and cost awards, without constraining the trial court's authority to revisit them in future proceedings.

1 *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

FACTS

According to her amended complaint for damages, Sara Rhodes became employed by Barnett & Associates on August 11, 2014, after it acquired the business of her former employer, for whom she had worked as an administrative assistant and bookkeeper. The complaint alleges that Ryan Barnett, who became Ms. Rhodes's supervisor, began making unwanted sexual advances toward her the first week they worked together. It alleges that Mr. Barnett's conduct quickly escalated to unremitting sexual harassment, including

nonconsensual sex. Ms. Rhodes alleges that her last day of work for Barnett & Associates was October 15, 2014, and that she was constructively discharged as a result of the hostile work environment.

Within two weeks of the last day of her short tenure at Barnett & Associates, lawyer Kevin Roberts, then of the law firm of Dunn Black & Roberts, P.S., sent a demand letter to Mr. Barnett, threatening suit if Ms. Rhodes was not paid almost $1 million in settlement. Mr. Barnett's lawyer has characterized this as a "shakedown" over sex that occurred, but was consensual. Clerk's Papers (CP) at 564.

PROCEDURE

2014 — 2016

When the claim did not settle, Ms. Rhodes filed the action below in December 2014. She alleged, among other claims, sexual harassment in violation of chapter 49.60 RCW, assault, and battery.

Mr. Barnett removed the action to federal court,[2] but the district court found removal to be improper and remanded the case to the superior court in February 2015. Mr. Barnett moved for reconsideration of the remand order, filing a notice with the superior court clerk that he was challenging the remand. After reconsideration was denied, he appealed an award of attorney fees against him to the Ninth Circuit Court of Appeals.

2 This action, and certain others, were taken by Mr. Barnett and by related codefendants. For convenience, we attribute joint actions of defendants to Mr. Barnett.

On October 6, 2015, Mr. Barnett served Ms. Rhodes in the action below with interrogatories and requests for production, via e-mail directed to Mr. Roberts at dunnandblack.com. A week earlier, however, on October 1, Mr. Roberts left that law firm to start another firm, Roberts | Freebourn PLLC. On October 15, 2015, the law firm of Dunn Black & Roberts filed a notice of intent to withdraw as Ms. Rhodes's counsel, effective October 26, 2015. The notice indicated that Ms. Rhodes's last known name and address was in care of Mr. Roberts at Roberts | Freebourn. When answers and objections were not received to the discovery, Mr. Barnett took no action to compel responses for over a year and a half. His lawyer, Mary Schultz, later explained, "[W]e did not want to incur defense costs unnecessarily if [Ms. Rhodes] ultimately did not intend to [pursue the action]." CP at 516.

***2** Ms. Rhodes's briefing on appeal attributes the hiatus in state court proceedings to the Ninth Circuit appeal. Mr. Barnett's theory in the federal appeal was that attorney fees should not have been imposed because he properly removed the case to federal court, and the district court erred in ruling otherwise. But as his opening brief in the Ninth Circuit acknowledged, Mr. Barnett could effectively appeal only the fee award; appeal of the remand order was precluded by statute. Appellant's Opening Br., *Rhodes v. Barnett*, No. 15-35340 (9th Cir. Sept. 29, 2015) (ECF No. 12).

The action nonetheless remained almost entirely dormant on both sides. Roughly a year of inaction was self-attributed by superior court Judge James Triplett to a mistaken understanding in his chambers that the state court matter was stayed.

2017

On May 24, 2017, lawyers for the parties were notified by the Ninth Circuit Court that Mr. Barnett's appeal, which had been set for oral argument on June 8, would be submitted without oral argument instead. *See* Order, *Rhodes v. Barnett*, No. 15-35340 (9th Cir. May 24, 2017) (ECF No. 35). The federal district court's fee award against Mr. Barnett was affirmed in a decision filed a couple of weeks later.

On June 7, Mr. Roberts's legal assistant forwarded a stipulated motion to amend Ms. Rhodes's complaint to Ms. Schultz. Ms. Schultz responded that she would not agree to amendment until she received answers to her discovery. Mr. Roberts replied,

> I will look at the discovery. I don't recall what the procedural issues were, but now that we are remanded and the case is getting back on track I will meet with my client and get them answered. I will be out of the office [on] a vacation with my children the week of June 19 but have them to you by June 30, 2017.

CP at 694. Ms. Rhodes did not provide the promised responses by June 30 or for several months thereafter.

Mr. Barnett moved to compel responses to the written discovery a couple of months later, on September 5, 2017. Ms. Schultz struck the hearing after Mr. Roberts agreed to provide responses by September 20.

Two weeks later, Mr. Barnett moved to amend the case schedule order and continue the trial date. Ms. Schultz's supporting declaration stated that the parties were in agreement to modify the discovery cutoff or continue the trial date as necessary.

On September 20, responses and objections, signed by Ms. Rhodes and Mr. Roberts, were delivered to Ms. Schultz as agreed. Many objections were interposed. The 42 interrogatories and 18 requests for production were responded to as follows:

- 10 interrogatories were answered without objection,
- 5 interrogatories and 3 requests for production were objected to, but without waiving the objection, were answered,
- 1 request for production was objected to, but without waiving the objection, was partially answered,

- 2 interrogatories and 3 requests for production were responded to as "needs to be limited" in scope or time, and
- 25 interrogatories and 11 requests for production were objected to in their entirety.

See CP at 568-84.

In response to the many objections, Mr. Barnett supplemented and renoted his earlier-served motion to compel. He argued that Ms. Rhodes's objections were interposed in bad faith and asked that a judgment of default be entered against her as a discovery sanction. Ms. Rhodes responded, arguing that Mr. Barnett had not met and conferred before filing the motion as required by CR 26(i) and LCR 37(a). She cross moved for a protective order, arguing that the purpose of Mr. Barnett's discovery was "to annoy, embarrass and harass," characterizing the discovery as "includ[ing] requests about Ms. Rhodes sexual history, veiled accusations of illegal activity, and [as] seek[ing] to embarrass her by asking about her children and financial assistance." CP at 695-96.

***3** The several motions were on for hearing before Judge Triplett on October 18. In the limited time he had available, he first addressed Mr. Barnett's unopposed motion to amend the case schedule order. The lawyers agreed to set the trial more than a year out, to begin on November 5, 2018. The case schedule order generated that day set a discovery cutoff of August 31, 2018.

Turning to the discovery cross motions, Judge Triplett, who said he had read all the parties' submissions, expressed concern about his schedule and the time that would be required to address all of the discovery requests and objections. He told the lawyers:

> I'm a little worried about, number one, being able to just literally work my way through every one of these, and what do we have, 35 of the 40—40 interrogatories, 42 interrogatories, 18 requests for productions, most of which have objections to. I would have to work my way through each one of these and at least get some idea as to—I will have to make a call as to, first off, whether they're relevant or could lead to relevant evidence.

Report of Proceedings (RP) (Oct. 18, 2017) at 13. He continued, "I'm not sitting here saying that, you know, every one of these questions are going to lead to relevant evidence. So I literally have to go through each one." *Id*. He informed the parties that his availability "would be very limited" and solicited the lawyers' thoughts on appointing a discovery master. RP (Oct. 18, 2017) at 14. After hearing them out, he decided to appoint one.

Two individuals were suggested as possible discovery masters and Judge Triplett spoke to both telephonically, during the hearing, on the

record. The judge explained to the discovery master who was thereafter appointed:

> The defendant who is being accused of rape in the complaint is wanting to get into asking some discovery questions about other behaviors that they believe will lead to relevant evidence, and the plaintiff is opposing those, feeling that they are harassing and overly broad and not intended to result in relevant evidence, and at this point, there is 40-some questions and 18 requests for productions. There's going to be a deposition where a lot of these same objections may come up, and I just need a discovery master to help resolve those issues.

RP (Oct. 18, 2017) at 43. He also told the prospective discovery master, "I have moved the trial date to November of '18, so we do have time to work our way through things." RP (Oct. 18, 2017) at 45. The discovery master was appointed by stipulated order on October 25.

A hearing before the discovery master took place on November 30. During the hearing, the process contemplated by Judge Triplett—working through each request and objection—was not followed. Ms. Schultz, who the discovery master heard from first, argued that such a process was unnecessary, and given Ms. Rhodes's delay in responding to the discovery, "I really almost don't even see the complaint and the underlying claims as being particularly relevant." CP at 1074. Recounting that the discovery was served in October 2015, that Mr. Roberts agreed but failed to provide answers and objections by June 30, 2017, and that in responding on the second agreed deadline, he provided more objections than answers, she argued:

> [F]rom our perspective, any objections to the questions and any objections to any of the requests for production are waived because there was simply no privilege raised with anything, there's no protective order request that was made before the due date of the answers.

***4** CP at 1077. [3]

3 The federal rules of civil procedure (which permit a party to pose only 25 interrogatories) provide for waiver of objections to interrogatories in the event of an untimely response, although they also allow the court to excuse untimeliness. Fed. R. Civ. P. 33(b)(4). CR 33 does not include the federal rule's language.

When it was his turn to respond, Mr. Roberts suggested that since there had been no meet and confer process before the motion to compel

was filed, the discovery master should order that process to take place "so that we can limit it down to what's really at issue." CP at 1081. He said, "If there are specific issues remaining after that, then we can address it at a subsequent hearing." *Id.* He argued, "There's no prejudice, we've continued the trial." *Id.*

Before the discovery master or either lawyer addressed any individual discovery request, the discovery master stated, "I'm going to go ahead and make some findings that much of the information that is requested is appropriate." CP at 1093. It continued, "I have seen very similar questions, many, many questions in personal injury cases from the defense merely because allegations are made." *Id.*

After this preliminary ruling, Mr. Roberts asked for a protective order allowing him to provide at least some of Ms. Rhodes's answers as "Attorney Eyes Only," with Mr. Barnett able to contest the designation. CP at 1095-96. Ms. Schultz objected to any interference with her clients' free use of any information received.

As the hearing continued, only 13 of the challenged interrogatories and requests for production were opened up for what was mostly very limited argument.

- There was some discussion of interrogatory 32, which asked if Ms. Rhodes had been involved in any way in sexual trafficking or prostitution activity, and to "describe such involvement, with dates and activity." CP at 580.

- Interrogatory 2, which requested Ms. Rhodes's social security number was raised. Ms. Schultz observed that her client probably already had the number as Ms. Rhodes's former employer, and Mr. Roberts withdrew Ms. Rhode's objection to that request.

- Mr. Roberts brought up interrogatory 37, which inquired about his dealings with Ms. Rhodes. He had no objection to identifying the date when Ms. Rhodes sought his legal representation, but objected to the questioning about "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 at 581.

- The discovery master inquired about interrogatory 38, which asked Ms. Rhodes to identify "all attorneys you have used for any purpose" and "all legal matters that each of those attorneys handled or for which they provided consultation." CP at 581.

- There was brief discussion of two interrogatories (40 and 41) and two requests for production (17 and 18), which asked about Ms. Rhodes's fee and cost arrangements with Mr. Roberts, all payments made to him, and who had made the payments. The production requests sought copies of the fee agreement and initial correspondence.

***5** • There was discussion about discovery into Ms. Rhodes's employment history, which Mr. Roberts explained was objectionable because it was overbroad; he was requesting a shorter time frame than presented by request for production

3, which asked Ms. Rhodes to produce all applications for employment submitted or resumes used since 2005.

- There was discussion about interrogatories 9 and 17, the first of which sought information about "financial assistance" Ms. Rhodes had received in the past five years, and the second of which sought identification of "any and all forms of state or federal government aid" she had ever received, "including Public Assistance, food stamps, [and] state medical, educational grants." CP at 571, 575.

- Mr. Roberts raised interrogatory 13, which asked about any employers in the prior 10 years with whom Ms. Rhodes had engaged in consensual or nonconsensual sexual contact or a sexual relationship, and interrogatory 31, which asked if Ms. Rhodes was "involved in any way in, alleged to be involved in, [or] contacted by police ... or ... any investigator" regarding sting operations "related to alleged sexual trafficking, sex industry involvement, and/or prostitution activity." CP at 573, 580.

The discussion of these 13 discovery requests appears on approximately 19 pages of the 63-page transcript of the hearing. The remaining 23 discovery requests to which Ms. Rhodes objected were never discussed.

The discovery master's report and recommendation to the court was filed on December 10. It recommended that "[d]espite [Ms. Rhodes's] compelling arguments," she be ordered to answer all of Mr. Barnett's discovery requests without narrowing, and to execute a medical release by December 21, 2017. The December 21 date was arrived at based on Mr. Roberts's report at the hearing that he had a jury trial that was expected to run from December 11 to 15, and before December 11 would be "focused on that." CP at 1129. The report and recommendation was that Ms. Rhodes's request for a protection order be denied, but that "the parties and the Discovery Master hold a telephonic conference, once the responses are completed and served, to discuss if certain information should be held as confidential and for 'attorneys' eyes only.' " CP at 816. It recommended that Mr. Barnett's fees incurred in preparing and filing the motion be granted.

Judge Triplett entered the report and recommendation as the order of the court on December 18. He did not have a transcript of the hearing before the discovery master. It was not prepared until late February 2018, and was not filed with the court until March 16, 2018, after this appeal was filed.

On December 20, 2017, Mr. Roberts e-mailed to the discovery master and Ms. Schultz a motion for extension of time, requesting 30 additional days to provide responses to the discovery. His supporting declaration attached a December 1, 2017 article from *The Spokesman-Review* reporting on the arrest of a Spokane police officer, Nicholas Spolski, who had been charged with fourth degree domestic violence assault after allegedly hitting his girlfriend. The newspaper article stated that a no-contact order had been issued. Mr. Robert's declaration explained that Ms. Rhodes and her children had been living with Nicholas Spolski and that she was the victim of the assault. It stated that she was "currently in the

process of recovering from it and focusing on finding a home for her children and working through the issues associated with this crisis" and concluded, "Given the length of time before trial, this will cause no prejudice." CP at 1313.

***6** Mr. Roberts informed the discovery master that he would be leaving town for holiday travel. Electronic mail suggests that he would be traveling for two weeks and that the discovery master agreed his reply brief on the extension issue could be filed on January 4.

On December 28, Mr. Barnett's response to the motion for extension was e-mailed to the discovery master and Mr. Roberts. Mr. Barnett made a renewed request that a default judgment of dismissal be entered. The response was supported by filings from two other legal proceedings involving Ms. Rhodes, which it characterized as relevant because they reflected Ms. Rhodes's appearance and participation in other legal matters at times when she was not responding to discovery from Mr. Barnett. [4]

The discovery master conducted a telephonic hearing on January 10. There is no transcript or even a recording of the call. [5] The discovery master's report and recommendation, filed two days later, recommended that Ms. Rhodes's complaint be dismissed in the event she did not provide "complete and unequivocal" answers and production by January 16 at 5:00 p.m., reasoning that there had been "a sustained period of discovery noncompliance on Plaintiff's part." CP at 846, 850. The discovery master observed that the behavior alleged by Ms. Rhodes against Mr. Barnett was egregious and noted "the length of time that has gone by with such claims remaining public and unresolved." *Id.* at 846. It pointed out that it had previously found defense discovery requests were "relevant inquiries, and, in many cases, near standard issue." *Id.* It discounted Mr. Roberts's motion for an extension of time because Ms. Rhodes "herself provided ... no declaration, testimony or evidence." *Id.* It recommended that further fees be imposed against Ms. Rhodes and awarded to the defendants.

4 One proceeding began in 2009 as a parentage proceeding involving Ms. Rhodes's older child and appears to have involved ongoing custody disputes culminating in a November 2017 trial. The other appears to have been a protection order action by Ms. Rhodes against the father of her younger child that began in August 2013, and was concluded in September 2013, when neither party appeared for a hearing.

5 This was confirmed by counsel during oral argument. Because the discovery master, not the parties, requested an early morning telephonic hearing, we do not fault the parties for the lack of a record. Wash. Court of Appeals oral argument, *Rhodes v. Barnett & Assocs.*, No. 35920-4-III (Dec. 5, 2019), at 17 min., 15 sec. to 17 min., 25 sec.; 18 min. 50 sec. to 18 min., 57 sec., available at https://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?

fa=appellateDockets.showOralArgAudioList & courtId=a03 & docketDate=20191205.

Mr. Barnett moved the trial court to adopt the discovery master's January 12 recommendations. Ms. Rhodes challenged the recommendations. In the body of Mr. Barnett's response, he included a request for CR 11 sanctions against Mr. Roberts.

Judge Triplett had assumed the position of chief criminal judge, so the report and recommendations and the parties' submissions were considered by another judge. When contacted by the newly-appointed judge about whether there would be oral argument, Mr. Roberts conceded that the stipulation and order did not provide for it. Ms. Rhodes's challenge to the recommendation had been "based on the pleadings presented in Plaintiff's Motion for Extension of Time," CP at 864, but like many materials submitted to the discovery master, Ms. Rhodes's motion and counsel's supporting declaration were not filed with the clerk of court, so the trial court did not have Ms. Rhodes's briefing before it in ruling on the cross motions. [6]

6 The court might have thought it did, because Mr. Barnett filed what he characterized as "copies of communications between counsel and the Discovery Master leading to the hearing on that request," that did not include Ms. Rhodes's motion or its supporting declaration. CP at 884. We do not fault the defense for that submission, which comprised communications *other than* the parties' briefing. We only observe that it might explain why the trial court entered an order without questioning why it did not have the materials on which Ms. Rhodes relied.

The fact that Ms. Rhodes's motion for extension was missing from the record was noted on appeal, and the record was supplemented with the motion, which was filed with the trial court on December 6, 2019. In preparing the opinion, we realize that a reply from Ms. Rhodes on the extension issue also apparently exists, but remains absent from the record. *E.g.*, CP at 857, 847.

***7** The trial court adopted the discovery master's report and recommendations, signing the form of judgment and order presented by Mr. Barnett on February 9. [7] Included in that judgment and order and in additional judgments entered thereafter were the following judgment amounts in favor of Mr. Barnett and the discovery master:

Judgment Summary #; creditor	Filed Date	Amount	Representing
Judgment Summary I; Defendant Barnett	Feb. 15, 2018	$4062.50	Fees and costs incurred up to the Dec. 10, 2017 date of discovery master's first report and recommendation
Judgment Summary III; Defendant Barnett	Feb. 28, 2018	$7,477.50	Fees and costs incurred from Dec. 10, 2017 to Jan. 12, 2018
Judgment Summary IV; Discovery Master	Feb. 28, 2018	$3,812.50	Discovery master fees

7 The order with judgment summaries signed on February 9, 2018, was entered on February 15, 2018, because court staff was under the impression that the original order had been misplaced. *See* CP at 1192. The record on appeal reveals that the original order was *not* misplaced, and two copies of the order, which differ only in

> the notation in Mr. Roberts's signature block, are presently in the record. They appear to have been given different judgment numbers. *Compare* CP at 1012-15 (#18901100-1) *with* CP at 1022-25 (#18901245-7).

Ms. Rhodes timely appealed the December 18, 2017 order adopting the discovery master's first report and recommendations; the February 9, 2018 order filed on February 15, adopting the discovery master's second report and recommendations; and the February 28, 2018 order on supplemental fees and discovery master fees.

After the appeal was filed, Mr. Roberts claims to have become aware for the first time that the court's February 9 order imposed CR 11 sanctions against him. Contending that no motion ever requested that relief and it could not have been the court's intent, Ms. Rhodes moved under CR 60 to amend the judgment and order to remove him as a judgment debtor. After considering the arguments of counsel and the record, the trial court agreed that there was good cause for the requested amendment. It nonetheless ordered Mr. Roberts to pay Mr. Barnett's fees, since the infirmity was apparent in Mr. Barnett's proposed order and was not raised before the order was entered.

Mr. Barnett appealed the decision granting the motion to amend the February 15 order, the amendment, and an order denying his motion for reconsideration. Ms. Rhodes filed a supplemental notice of appeal challenging the trial court's award to Mr. Barnett of fees and costs incurred in responding to the motion to amend the judgment.

ANALYSIS

APPEAL

I. THE RECORD DOES NOT SUPPORT THE *BURNET* FACTORS, SO THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED

Generally, "the court may impose only the least severe sanction that will be adequate to serve its purpose in issuing a sanction." *Teter v. Deck*, 174 Wn.2d 207, 216, 274 P.3d 336 (2012). To dismiss an action as a sanction for discovery violations, " 'it must be apparent from the record' that (1) the party's refusal to obey the 'discovery order was willful or deliberate,' (2) the party's actions 'substantially prejudiced the opponent's ability to prepare for trial,' and (3) the trial court 'explicitly considered whether a lesser sanction would probably have sufficed.' " *Rivers v. Wash. St. Conf. of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002) (quoting *Burnet*, 131 Wn.2d at 494).

***8** We review a trial court's imposition of discovery sanctions for abuse of discretion and should not disturb their use absent a clear showing that a trial court's discretion was manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). In this case, since the trial court adopted the discovery master's recommendations, we review whether the discovery master's recommendation of dismissal was tenable. The discovery master applied the correct legal standard, so we

focus on whether its findings were based on unsupported facts.

Substantial prejudice to ability to prepare for trial. The record does not support the discovery master's finding that Ms. Rhodes's failure to comply with the December 18, 2017 order substantially prejudiced Mr. Barnett's ability to prepare for trial. The prejudice found by the discovery master was that Mr. Barnett was entitled to "a full rules discovery period" that was lost due to the long passage of time after the discovery was initially served. CP at 849. Elsewhere, it noted the egregious nature of Ms. Rhodes's allegations and the "length of time that has gone by with such claims remaining public and unresolved." CP at 846. But beginning on November 4, 2015, Mr. Barnett could have moved to compel responses to the discovery at any time. CR 33(a), 34(b)(3), 37(a)(2). *Cf. Bus. Servs. of Am. II v. WaferTech LLC*, 174 Wn.2d 304, 312, 274 P.3d 1025 (2012) (in reversing the dismissal of a complaint for five years' inaction, the court observed that after a year, defendant "could have moved at any time to dismiss [plaintiff's] claim for want of prosecution").

Ms. Rhodes had a duty under the rules to respond with objections and answers within 30 days, to be sure. But by suffering the discovery to go unanswered for over a year and a half before moving to compel responses, Mr. Barnett's argument that it was more reasonable for Ms. Rhodes's complaint to be dismissed than for him to wait another month for discovery responses rings hollow. More than six months remained before the discovery deadline. Ten months remained before trial.

Lesser sanctions. The record does not support the discovery master's finding that lesser sanctions would not suffice. It reasoned:

> 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.

CP at 849.

Repeated accommodations followed by unexplained failures to respond would be a basis for finding that imposing yet another deadline is not a viable sanction. But in this case, there had not been the five or six unexplained responses to accommodations suggested by the discovery master.

Ms. Rhodes did fail to provide responses by the June date promised by Mr. Roberts. But she responded by the deadline promised in

September. Given the aggressive nature of the written discovery, objections and a request for a protective order were to be expected. [8] Once the objections were made and the protective order was requested, Ms. Rhodes was entitled to have those matters heard.

8 We do not approve of the extent to which, in objecting, Ms. Rhodes then failed to provide requested information to the extent it was not objectionable. On the other hand, given the nature of the case, the number and scope of the written discovery requests is questionable. None of Mr. Barnett's written discovery was needed or was used to determine Ms. Rhodes's allegations against him, which had been laid out in detail in October 2014 in her demand letter and complaint to police.

***9** The trial continuance until November 2018 was ordered before the discovery master was appointed; the discovery master was even told about it when first contacted by Judge Triplett. It is not clear what the discovery master means by "the order directing compliance ... allowed Plaintiff *additional* time." *Id*. Once the ruling was made on the cross motions to compel and for a protective order, Ms. Rhodes and her lawyer obviously needed time to comply with the ruling. Given Mr. Roberts's report of an impending trial, the three weeks afforded was a reasonable but not an overly-generous period for compliance.

While the discovery master was dismissive of Ms. Rhodes's need for an extension of time to respond in December, the request for the additional 30 days was explained and was made before the original deadline. In short, of the five or six "accommodations" to which Ms. Rhodes allegedly did not respond, she failed to respond only in June 2017. She either responded or timely claimed and explained an inability to respond thereafter.

The adopted recommendation that Ms. Rhodes could avoid dismissal only by providing complete and unequivocal answers by January 16 effectively deprived her of her right to challenge the recommendation. The order appointing the discovery master gave a party five court days within which to challenge a discovery master recommendation. The discovery master's Friday, January 12 recommendation that Ms. Rhodes must answer all of the discovery by the next Wednesday (following the Martin Luther King holiday) or have her complaint dismissed left Ms. Rhodes with only two court days within which to not only challenge the recommendation, but also obtain court review.

Mr. Barnett's original motion to compel identified a different sanction that would have sufficed: a deadline for responses and execution of the medical release, with Ms. Rhodes's deposition to take place within a fixed time frame thereafter, sufficiently in advance of the discovery deadline. *See* CP at 515. And as Mr. Roberts suggested at oral argument, if the discovery master viewed it as dispositive that it see something from Ms. Rhodes personally, then a lesser sanction would be to *let him know* it viewed that as dispositive—and give him a time frame within which to respond. Wash. Court of Appeals oral argument, *supra*, at 12 min., 19 sec. to 12 min., 33 sec. [9]

9 In a declaration filed in May 2018, Ms. Rhodes responded to Ms. Schultz's argument that she had abandoned her claim and Mr. Roberts was taking unilateral unauthorized actions in her name. She testified, "I hired Kevin Roberts to represent me, as he still does"; "Kevin Roberts is my lawyer and has been acting as such in this case. There is no basis for Mary Schultz to suggest otherwise"; "In reviewing Mary Schultz's most recent claims that I am unaware of my lawyers' actions, I want the Court to know that is not true and I have been kept informed by my lawyers and made decisions presented to me about my case and how to proceed." CP at 1254.

Willful failure. Finally, the finding by the discovery master of a "willful" failure to comply with the December 21 deadline is poorly explained and documented. CP at 877. "A party's disregard of a court order without reasonable excuse or justification is deemed willful." *Rivers*, 145 Wn.2d at 698.

Ms. Rhodes moved for an extension of time on the day before the original response deadline. Mr. Roberts's supporting declaration with its attached newspaper article was evidence of a disruption in Ms. Rhodes's and her children's living situation that might be significant. The discovery master had been made aware of and had agreed to accommodate Mr. Roberts's two week holiday travel. These *are* excuses and justifications. Unless unreasonable, they negate willfulness. The discovery master does not explain why they were unreasonable, although it alludes to the absence of a declaration from Ms. Rhodes. We find nothing in the record that should have signaled to Mr. Roberts that relying on his own declaration instead of one from his client would prove dispositive to Mr. Barnett's dismissal request. On procedural matters courts routinely rely on representations from lawyers about their clients' situations.

***10** The discovery master's second report and recommendations state that during the telephonic hearing on the extension request, it gleaned from Mr. Roberts's answers and his refusal to disclose some communications that he was not in contact with his client. This was evidently the basis for the willfulness finding.[10] Mr. Roberts concedes he was sometimes unable to contact Ms. Rhodes during December 2017, but asserts he was in contact with her before the telephonic hearing on the extension request. Unfortunately, we have no record of the telephonic hearing. At a minimum, the finding of a willful failure to comply is poorly supported by the record.

10 Beginning in January, Mr. Barnett informally advanced the contention that Ms. Rhodes had abandoned her complaint. Dismissal for want of prosecution is addressed by CR 41(b), under which a defendant can file a motion based on a lack of action required under that rule. The rule contemplates that the issue will be squarely presented by a motion on 10 days' notice and that the dismissal, if ordered, is without prejudice.
The rule also authorizes a trial court to dismiss an action for noncompliance with a court order or court rules. But

> it is the general policy of Washington courts not to resort to dismissal lightly. *Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn. App. 125, 130, 896 P.2d 66 (1995). Where a court has found that a party has acted in willful and deliberate disregard of reasonable and necessary court orders and has prejudiced the other side by doing so, dismissal has been upheld as justified. *Id.*
>
> Whatever the basis for a request for dismissal under CR 41(b), a plaintiff is entitled to have it squarely presented, by a motion, to which the plaintiff can respond.

A lack of support for any one of the *Burnet* factors makes the severe sanction of dismissal unwarranted. The judgment of dismissal must be reversed.

II. MS. RHODES DID NOT GET THE CONSIDERATION OF HER OBJECTIONS AND PROTECTIVE ORDER REQUEST TO WHICH SHE IS ENTITLED UNDER COURT RULES

Ms. Rhodes also challenges the trial court's order on the discovery master's first report and recommendation, which compelled responses to all of Mr. Barnett's discovery requests, without narrowing, and denied her request for a protective order.

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs ... without authority of law." "Authority of law" generally includes authority granted by "a valid, (i.e., constitutional) statute, the common law or a rule of [the Supreme Court]." *State v. Gunwall*, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986) (emphasis omitted). The civil rules dealing with discovery provide authority of law for intruding into private affairs, but as the United States Supreme Court observed in *Seattle Times Co. v. Rhinehart*, it is important to view the discovery rules in their entirety:

> Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties. ...
>
> 467 U.S. 20, 35, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984) (footnote omitted).

Privacy rights are a matter "implicit in the broad purpose and language" of CR 26(c). *Id.* n.21. Article I, section 7 of the Washington Constitution protects individuals from intrusions into "private affairs," a privacy

interest "that the court necessarily evaluates when considering a motion for a protective order under CR 26(c)." *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 431, 138 P.3d 1053 (2006).

***11** The discovery rules gave Mr. Barnett the right to obtain discovery regarding "any matter, not privileged, which [was] relevant to the subject matter involved in the pending action." CR 26(b)(1). And it was "not ground for objection that the information sought [would] be inadmissible at the trial if the information sought appear[ed] reasonably calculated to lead to the discovery of admissible evidence." *Id.* In this case, ER 412, which imposes a heightened standard of probativeness before evidence of a victim's sexual behavior or sexual predisposition can be admitted, would inform the analysis of CR 26(b)(1) relevance. [11]

11 ER 412 provides that the probative value of the evidence must substantially outweigh the danger of harm to any victim and of unfair prejudice to any party. It also provides that the proceedings on whether the evidence can be offered must be sealed unless the court orders otherwise.

The rules gave Ms. Rhodes the right to respond to written discovery with objections if she believed Mr. Barnett's interrogatories or requests for production sought information that did not appear reasonably calculated to lead to the discovery of admissible evidence. CR 33(a), 34(b)(3)(B). And those rules gave her the right to move the court for a protective order against annoyance, embarrassment or oppression, including an order providing that discovery not be had, that certain matters not be inquired into, or that the responsive information be treated confidentially. CR 26(c). While the superior court rules give a party the right to serve discovery, a responding party's right to judicial review of the discovery is essential to the rules' constitutionality under article I, section 7 of the Washington Constitution. *State v. Reeder*, 184 Wn.2d 805, 819, 365 P.3d 1243 (2015). Mr. Barnett's right to obtain discovery was not more important than Ms. Rhodes's right to object that he was exceeding its proper scope or that the intrusive nature of the discovery warranted protection under CR 26(c).

In adopting the discovery master's report and recommendations, Judge Triplett did not have an opportunity to review the transcript of the hearing conducted by the discovery master. We do. By adopting the discovery master's report and recommendation, the court's order is reviewed against the discovery master's record.

Where the harsh remedy of dismissal is imposed, discovery decisions are appealable as a matter of right; otherwise, only discretionary review is possible—and rare. When discovery orders are eligible for review, we review them for manifest abuse of discretion. *Gillett v. Conner*, 132 Wn. App. 818, 822, 133 P.3d 960 (2006). "Judicial discretion 'means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result.' " *T.S.*, 157 Wn.2d at 423 (quoting *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 462, 303 P.2d 290 (1956)). A trial court necessarily abuses its discretion if it applies the incorrect legal standard. *Id.* at 423-24.

The discovery master abused its discretion by failing to address, in a balanced way, Mr. Barnett's right to discovery against Ms. Rhodes's right to object and seek protection. Most of Ms. Rhodes's objections were never addressed at all.[12] Those that were did not receive meaningful consideration. For example, when Mr. Roberts raised Mr. Barnett's interrogatory asking if Ms. Rhodes was ever contacted about, involved in any way, or alleged to have been involved in any way in a sexual trafficking sting operation, the discovery master gingerly asked about the possible relevance to Mr. Barnett's defense and accepted an unhelpful response:

> ***12** [DISCOVERY MASTER:] Ms. Schultz, without conveying strategy that you may feel compelled to keep confidential with your client and assert privilege, is there information in that regard that you feel is relevant that you know of?
>
> MS. SCHULTZ: There's a concern.
>
> DISCOVERY MASTER: Okay.

CP at 1122.

12 We are satisfied from review of the hearing transcript that this was not because Ms. Rhodes failed to raise the objections. The discovery master telegraphed early on that it had already concluded that the discovery requests were, as it would later describe them, "relevant ... and, in many cases, near standard issue." CP at 846.

Ms. Schultz's overarching explanation for why Mr. Barnett was entitled to discovery into, e.g., the father of Ms. Rhodes's children, any prior consensual relationships with employers, any public assistance she had received, and other personal matters, was not persuasive:

> [MS. SCHULTZ:] ... [O]n the one side here's Mr. Barnett who, you know, got himself into a despicable position because he had an affair, he was having an affair on his wife, his pregnant wife, in California, who's a dentist. Okay? So, you know, the jury's not going to be looking at him as though he's, you know, a particularly above-board kind of guy.
>
> And here's, you know, who counsel wants to represent as, you know, this poor unassuming victim that worked for him. *Well, the playing field has to be leveled here.* He's done some bad things; she's put them all over the pleadings here and accused him of rape and then filed it in the Spokane Superior Court and blown up his business.
>
> *So does he now get to understand who this person is and to be able to explain to the jury who this person is? And I think he does.*

CP at 1124-25 (emphasis added).

Turning to Ms. Rhodes's request to be able to provide some responses provisionally as "attorneys' eyes only," the discovery master's recommendation that it and the parties confer about that possibility "once the responses are completed and served" gave Ms. Rhodes no protection at all. CP at 1053. The horse would be out of the barn. Ms. Schultz was clear that Mr. Barnett was participating in preparing his case and argued for the right to make any

use of the information obtained in discovery. Even where a court might not ultimately grant protection, a more reasonable approach to discovery into truly private affairs is to allow confidential designations provisionally, subject to review and rejection by the court. *See, e.g.*, the following decisions in sexual harassment cases: *Simpson v. Univ. of Colo.*, 220 F.R.D. 354, 361 (D. Colo. 2004) (some diary entries ordered disclosed, but for attorneys' eyes only); *Sanchez v. Zabihi*, 166 F.R.D. 500, 503 (D.N.M. 1996) (interrogatory about prior romantic or sexual advances narrowed, limited to three years, and with response for attorneys' eyes only); *Herchenroeder v. Johns Hopkins Univ. Applied Physics Lab.*, 171 F.R.D. 179, 182 (D. Md. 1997) (two narrowed interrogatories ordered answered, but not until a protective order/confidentiality agreement was in place).

We do not suggest that in ruling on discovery objections a trial court must always entertain argument and orally rule on an objection-by-objection basis. Sometimes it is clear from the nature of the case that the discovery sought is relevant within the meaning of CR 26(b)(1) and is not overbroad. Sometimes it will be clear that no privacy interest is implicated that warrants protection. That is not the case with Mr. Barnett's discovery, however. While he might ultimately provide persuasive explanations for much and perhaps all of his discovery, it *does* intrude into private affairs. Some of the discovery, given the nature of the case, appears overbroad. Ms. Rhodes's objections and request for protection could not reasonably be rejected out of hand.

***13** Sometimes the parties' briefing, informed by meeting and conferring as required by CR 26(i), will provide a trial court with enough information to assess CR 26(b)(1) relevance and the need, if any, for a protective order. But there was no CR 26(i) conference in this case.[13] While the discovery master's report characterized the parties as having "briefed their positions extensively," CP at 816, Mr. Barnett's briefing was general in nature. In none of his briefing did he undertake to explain how specific requests were reasonably calculated to lead to the discovery of admissible evidence.

13 We reject Ms. Rhodes's argument that Mr. Barnett's motion to compel should automatically fail on account of his failure to comply with CR 26(i). We agree with the decision of Division One in *Amy v. Kmart of Wash., LLC*, 153 Wn. App. 846, 858, 223 P.3d 1247 (2009) that refusing to hear a party's motion to compel because it failed to comply with CR 26(i) is discretionary with the trial court.

Providing meaningful review of a responding party's objections and request for protection is required not only to protect their rights under the discovery rules, but to safeguard their even more basic right to access to the courts. As our Supreme Court observed in *Seattle Times v. Rhinehart*, individuals who learn that their privacy concerns will be rejected out of hand, may, rather than expose themselves, "forgo the pursuit of their just claims. The judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use it." 98 Wn.2d 226,

254, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20, 104 S. Ct. 2199, 81 L.Ed. 2d 17 (1984).

We reverse the trial court's December 18, 2017 order adopting the discovery master's report and recommendation, and remand for a rehearing of the parties' cross motions to compel and for a protective order.

ATTORNEY FEES AND SANCTIONS:

APPEAL AND CROSS APPEAL

Following the trial court's entry of an amended judgment and order on September 7, 2018, the following monetary judgments and orders are operative:

Judgment Summary #; creditor and debtor	Filed Date	Amount	Representing
Judgment Summary I Creditor: Barnett Debtor: Roberts and Rhodes	Feb. 15, 2018	$4062.50	Fees and costs incurred up to the Dec. 10, 2017 date of discovery master's first report and recommendation
Judgment Summary III Creditors: Barnett Debtor: Rhodes	Sept. 7, 2018	$7,477.50	Fees and costs incurred from Dec. 10, 2017 to Jan. 12, 2018
Judgment Summary IV Creditor: Discovery Master Debtor: Rhodes	Sept. 7, 2018	$3,812.50	Discovery master fees
Order Re: Opinion on Reconsideration &c Creditor: Barnett Debtor: Roberts	Sept. 7, 2018	$6,082.50	Fees and costs incurred in responding to motion to amend judgment

Ms. Rhodes appeals all the fee and cost awards. She appeals the fee and cost awards against her in Judgment Summaries I, III and IV on grounds that the trial court's orders adopting the discovery master's reports and recommendations were both in error. She challenges the imposition on Mr. Roberts of Mr. Barnett's fees incurred in responding to her motion to amend Judgment Summary I on grounds he should not have to pay fees and costs on a motion on which Ms. Rhodes prevailed.

Mr. Barnett cross appeals the trial court's decision granting Ms. Rhodes's motion to amend Judgment Summary I to remove Mr. Roberts as a joint debtor.

We begin with the trial court's order granting the motion to amend Judgment Summary I to remove Mr. Roberts as a joint debtor and imposing on Mr. Roberts the fees incurred by Mr. Barnett in responding to the motion.

III. THE TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION IN REMOVING MR. ROBERTS AS A JOINT DEBTOR IN JUDGMENT SUMMARY I BUT MIGHT HAVE ABUSED ITS DISCRETION IN IMPOSING FEES

***14** The discovery master's January 12, 2018 report and recommendation said the following about attorney fees and costs:

> 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.

CP at 1155 (emphasis added). There was no recommendation to impose CR 11 sanctions on Mr. Roberts.

On January 18, 2018, Mr. Barnett filed a "Motion to Adopt Discovery Master Recommendations, Dismiss Claims, Award Defendants' Fees and Costs, and Assess Discovery Master Fees." CP at 825. The motion did not ask for CR 11 sanctions against Mr. Roberts.

After Ms. Rhodes filed a motion challenging the discovery master's report and recommendation on January 23, 2018, Mr. Barnett filed "Defendant's Response to Plaintiff's Motion Challenging Special Master's Recommendation." CP at 869. The caption did not identify the submission as including a motion for CR 11 sanctions. Nonetheless, in the body of the response, Mr. Barnett asked the court to impose CR 11 sanctions on Mr. Roberts, asserting that Ms. Rhodes had abandoned her claims and Mr. Roberts's "[c]ontinued litigation ... after his client has abandoned the claims is litigation interposed for an improper purpose." CP at 872. Mr. Barnett was aware, and even pointed out in his response, that under the stipulation and order appointing the discovery master, Ms. Rhodes was not entitled to reply to his response nor have oral argument without leave of court.

Notes for hearing were served and filed that set Mr. Barnett's motion to adopt the discovery master's recommendation and Ms. Rhodes's challenge to the recommendation for hearing at the same time on February 9, 2018. The record on appeal contains no note for hearing of a motion under CR 11. Mr. Barnett's proposed order addressing the matters noted for hearing bears the footer, "Order Adopting Discovery Master's Recommendations." CP at 1022. It was captioned "Order Adopting Discovery Master's Recommendations, Dismissing Plaintiff's Claims and Awarding Fees." *Id.* The trial court signed Mr. Barnett's proposed order.

In moving for relief from the order under CR 60, Mr. Roberts admitted he misread Mr. Barnett's proposed order and did not realize it imposed fees against him as a CR 11 sanction. In granting his request for relief, the trial court found "good cause to amend the judgment and find that only the Plaintiff's name, Sara Rhodes, shall be listed as the judgment debtor." CP at 1259. Given Mr. Roberts's failure to review the proposed orders and judgments prior to their entry, however, it also found good cause to impose costs on Mr. Roberts for Mr. Barnett's expense incurred in responding.

With the adoption of the civil rules, a court's inherent power to modify a judgment to make it conform to the judgment actually rendered was embodied in CR 60. Philip A. Trautman, *Vacation and Correction of Judgments in Washington*, 35 WASH. L. REV. 505-06 (1960). CR 60(a) provides that "[c]lerical mistakes in judgments ... and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party." The test for distinguishing between "clerical" error, which can be corrected, and "judicial" error, which cannot, is whether, based on the record, the judgment embodies the trial court's intention. *In re Marriage of Getz*, 57 Wn. App. 602, 604, 789 P.2d 331 (1990). Clerical error can include verbiage in an order that was intentionally entered by the court if the record supports the trial court's position that inclusion of the challenged verbiage was never

its intention. *In re Estate of Kramer*, 49 Wn.2d 829, 830, 307 P.2d 274 (1957).

***15** A trial court's decision whether to vacate a judgment or order under CR 60 is reviewed for abuse of discretion. *Shaw v. City of Des Moines*, 109 Wn. App. 896, 900, 37 P.3d 1255 (2002). In considering whether to grant a motion to vacate under CR 60, a trial court should exercise its authority liberally and equitably to preserve the parties' substantial rights. *Id.* at 901.

The trial court's position that the language imposing CR 11 sanctions was not relief it intended is supported by the record. CR 11(a) provides that sanctions can be imposed upon "motion" by a party. Two motions were before the court for decision on February 9, and neither was, or included, a motion under CR 11. Mr. Barnett included his request for CR 11 sanctions in the body of a response to which Ms. Rhodes was not permitted to reply or be heard in oral argument. A court imposing CR 11 sanctions must make explicit findings as to which pleadings violated CR 11, how they constituted a violation, and what conduct was sanctionable. *N. Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 649, 151 P.3d 211 (2007). The trial court did not make the required findings here.

Mr. Barnett argued below and argues on appeal that Mr. Roberts was disqualified from bringing the motion to correct the judgments, relying on a distinguishable decision, *In re Marriage of Wixom*, 182 Wn. App. 881, 899, 332 P.3d 1063 (2014). This court held in *Wixom* that "[i]f attorney and client disagree about who is at fault and point their fingers at each other in response to a request for sanctions, the interests of the two are clearly adverse," and the client will need new counsel to represent her against her former counsel in the proceedings to determine fault. *Id.* at 901. We cautioned that a conflict does not exist every time the opposing party targets a sanction motion against attorney and client, lest sanction motions be used as a tactic to harass. *Id.* We held only that "if and when an attorney seeks to limit a sanction award against only his or her client, the attorney must withdraw from representing the client." *Id*.

Mr. Roberts was not pointing a finger at Ms. Rhodes, suggesting she was at fault. His contention was that the trial court had not intended to impose CR 11 sanctions against *anyone*. It was implicit in his motion that if the trial court intended to impose sanctions, then the sanctions would be against him.

The trial court did not abuse its discretion in granting relief under CR 60.

We question whether the trial court had grounds to order Mr. Roberts to pay Mr. Barnett's fees incurred in responding to the motion, however. In *State v. Gassman*, 175 Wn.2d 208, 211, 283 P.3d 1113 (2012), our Supreme Court set boundaries on the authority of Washington trial courts to impose sanctions, including attorney fees, when exercising their inherent authority to control and manage their calendars, proceedings, and parties. *Gassman* involved an appeal from a criminal prosecution in which the State charged several defendants with crimes alleged to have taken place "on or about" one date, and then moved on the morning of trial to

charge them as having been committed "on or about" a later date. Defense counsel objected, arguing their defenses relied on alibis for the date originally charged. The court allowed amendment of the information, continued trial, and—calling the State's conduct "careless"—awarded $2,000 to each defense lawyer as attorney fees for extra time required to deal with the alibi defense. *Id*. at 210.

***16** The Supreme Court reversed the fee awards. It observed that Washington courts have followed federal case law in holding that a sanction of attorney fees imposed under the court's inherent authority must be based on a finding of conduct that is "at least ' "tantamount to bad faith." ' " *Id.* at 211 (quoting *State v. S.H.*, 102 Wn. App. 468, 474, 8 P.3d 1058 (2000) (quoting, in turn, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767, 100 S. Ct. 2455, 65 L.Ed. 2d 488 (1980))). "Under federal case law, courts may assess attorney fees as an exercise of inherent authority only where a party engages in willfully abusive, vexatious, or intransigent tactics designed to stall or harass." *Id.* (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-47, 111 S. Ct. 2123, 115 L.Ed. 2d 27 (1991)). It has been suggested that the reason federal courts limit fee shifting as a sanction to bad faith conduct is "as a means of preventing erosion or evasion of the American Rule." *Chambers v. NASCO, Inc.*, 501 U.S. at 59 (Scalia, J., dissenting).

Gassman holds that when a sanction is imposed under the court's inherent powers, we may uphold it absent express findings if an examination of the record establishes that the court found conduct equivalent to bad faith. We are unable to conclude that the trial court found bad faith here. It appears possible, if not likely, that the trial court found carelessness or recklessness on Mr. Roberts's part. We therefore reverse the award of fees to Mr. Barnett and remand with leave to the trial court to reimpose the fees only if it makes a finding of conduct tantamount to bad faith.

IV. THE REMAINING FEE AND COST AWARDS ARE REVERSED INCIDENT TO OUR REVERSAL OF THE UNDERLYING ORDERS ON THE MERITS

We reverse the remaining orders awarding fees and costs incident to our reversal of the December 18, 2017 and February 9, 2018 orders on their merits. The trial court is not foreclosed from taking into consideration prior fees and costs incurred in connection with the parties' discovery disputes in making any awards of fees and costs hereafter.

We reverse in whole or in part the following orders:

Order on Discovery Master's Report and Recommendations re: Defendant's Motion to Compel, Plaintiff's Request for Protective Order, and Defendant's Supplemental Motion for an Order of Default and Fees entered December 18, 2017	Reverse
Order Adopting Discovery Master's Recommendations, Dismissing Plaintiff's Claims and Awarding Fees dated February 9, 2018, and entered February 15, 2018	Reverse
Order on Supplemental Fees and Fee Bill and Discovery Master Fees entered February 28, 2018	Reverse
Order Re: Opinion on Reconsideration on Motion to Amend Judgment entered February 28, 2018, dated September 4, 2018	Reverse in part
Amended Judgment and Order on Supplemental Fees and Fee Bill and Discovery Master Fees dated September 4, 2018	Reverse
Order Re: Opinion on Reconsideration on Motion to Amend Judgment entered on February 28, 2018, dated September 7, 2018	Reverse in part
Amended Judgment and Order on Supplemental Fees and Fee Bill and Discovery Master Fees dated September 7, 2018	Reverse
Order Re: Opinion on Reconsideration on Motion to Amend Judgment entered February 28, 2018, dated September 4, 2018	Reverse in part

We otherwise affirm the orders appealed. We direct the trial court to take any action required to vacate the order and judgment entered on

February 9, 2018, as described in footnote 7. We remand for further proceedings consistent with this opinion.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Korsmo, J.

Pennell, C.J. (result only)

All Citations

Not Reported in Pac. Rptr., 2020 WL 1814945

APPENDIX B

CERTIFICATION OF ENROLLMENT

ENGROSSED SUBSTITUTE SENATE BILL 6268

Chapter 311, Laws of 2020

66TH LEGISLATURE
2020 REGULAR SESSION

ABUSIVE LITIGATION--DOMESTIC VIOLENCE

EFFECTIVE DATE: January 1, 2021

Passed by the Senate March 10, 2020
Yeas 49 Nays 0

CYRUS HABIB

President of the Senate

Passed by the House March 3, 2020
Yeas 90 Nays 6

LAURIE JINKINS

Speaker of the House of Representatives

Approved April 2, 2020 2:58 PM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Brad Hendrickson, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 6268** as passed by the Senate and the House of Representatives on the dates hereon set forth.

BRAD HENDRICKSON

Secretary

Secretary

FILED

April 3, 2020

Secretary of State
State of Washington

ENGROSSED SUBSTITUTE SENATE BILL 6268

AS AMENDED BY THE HOUSE

Passed Legislature - 2020 Regular Session

State of Washington **66th Legislature** **2020 Regular Session**

By Senate Law & Justice (originally sponsored by Senators Rolfes, Kuderer, Wellman, Darneille, Hasegawa, Wilson, C., and Das)

READ FIRST TIME 01/31/20.

AN ACT Relating to abusive litigation; amending RCW 26.09.191 and 26.50.060; adding a new chapter to Title 26 RCW; creating a new section; and providing an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The legislature recognizes that individuals who abuse their intimate partners often misuse court proceedings in order to control, harass, intimidate, coerce, and/or impoverish the abused partner. Court proceedings can provide a means for an abuser to exert and reestablish power and control over a domestic violence survivor long after a relationship has ended. The legal system unwittingly becomes another avenue that abusers exploit to cause psychological, emotional, and financial devastation. This misuse of the court system by abusers has been referred to as legal bullying, stalking through the courts, paper abuse, and similar terms. The legislature finds that the term "abusive litigation" is the most common term and that it accurately describes this problem. Abusive litigation against domestic violence survivors arises in a variety of contexts. Family law cases such as dissolutions, legal separations, parenting plan actions or modifications, and protection order proceedings are particularly common forums for abusive litigation. It is also not uncommon for abusers to file civil lawsuits against survivors, such as defamation, tort, or breach of contract claims. Even if a lawsuit is meritless, forcing a survivor to spend time, money, and emotional resources responding to the action provides a means for the abuser to assert power and control over the survivor.

The legislature finds that courts have considerable authority to respond to abusive litigation tactics, while upholding litigants' constitutional rights to access to the courts. Because courts have inherent authority to control the conduct of litigants, they have considerable discretion to fashion creative remedies in order to curb abusive litigation. The legislature intends to provide the courts with an additional tool to curb abusive litigation and to mitigate the harms abusive litigation perpetuates.

NEW SECTION. **Sec. 2.** The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Abusive litigation" means litigation where the following apply:

(a)(i) The opposing parties have a current or former intimate partner relationship;

(ii) The party who is filing, initiating, advancing, or continuing the litigation has been found by a court to have committed domestic violence against the other party pursuant to: (A) An order entered under this chapter; (B) a parenting plan with restrictions based on RCW 26.09.191(2)(a)(iii); or (C) a restraining order entered under chapter 26.09, 26.26, or 26.26A RCW, provided that the issuing court made a specific finding that the restraining order was necessary due to domestic violence; and

(iii) The litigation is being initiated, advanced, or continued primarily for the purpose of harassing, intimidating, or maintaining contact with the other party; and

(b) At least one of the following factors apply:

(i) Claims, allegations, and other legal contentions made in the litigation are not warranted by existing law or by a reasonable argument for the extension, modification, or reversal of existing law, or the establishment of new law;

(ii) Allegations and other factual contentions made in the litigation are without the existence of evidentiary support; or

(iii) An issue or issues that are the basis of the litigation have previously been filed in one or more other courts or jurisdictions and the actions have been litigated and disposed of unfavorably to the party filing, initiating, advancing, or continuing the litigation.

(2) "Intimate partner" is defined in RCW 26.50.010.

(3) "Litigation" means any kind of legal action or proceeding including, but not limited to: (i) Filing a summons, complaint, demand, or petition; (ii) serving a summons, complaint, demand, or petition, regardless of whether it has been filed; (iii) filing a motion, notice of court date, note for motion docket, or order to appear; (iv) serving a motion, notice of court date, note for motion docket, or order to appear, regardless of whether it has been filed or scheduled; (v) filing a subpoena, subpoena duces tecum, request for interrogatories, request for production, notice of deposition, or other discovery request; or (vi) serving a subpoena, subpoena duces tecum, request for interrogatories, request for production, notice of deposition, or other discovery request.

(4) "Perpetrator of abusive litigation" means a person who files, initiates, advances, or continues litigation in violation of an order restricting abusive litigation.

NEW SECTION. **Sec. 3.** (1) A party to a case may request from the court an order restricting abusive litigation if the parties are current or former intimate partners and one party has been found by the court to have committed domestic violence against the other party:

(a) In any answer or response to the litigation being filed, initiated, advanced, or continued;

(b) By motion made at any time during any open or ongoing case; or

(c) By separate motion made under this chapter, within five years of the entry of an order for protection even if the order has since expired.

(2) Any court of competent jurisdiction may, on its own motion, determine that a hearing pursuant to section 4 of this act is necessary to determine if a party is engaging in abusive litigation.

(3) The administrative office of the courts shall update the instructions, brochures, standard petition, and order for protection forms, and create new forms for the motion for order restricting abusive litigation and order restricting abusive litigation, and update the court staff handbook when changes in the law make an update necessary.

(4) No filing fee may be charged to the unrestricted party for proceedings under this section regardless of whether it is filed under this chapter or another action in this title. Forms and instructional brochures shall be provided free of charge.

(5) The provisions of this section are nonexclusive and do not affect any other remedy available.

NEW SECTION. **Sec. 4.** (1) If a party asserts that they are being subjected to abusive litigation, the court shall attempt to verify that the parties have or previously had an intimate partner relationship and that the party raising the claim of abusive litigation has been found to be a victim of domestic violence by the other party. If the court verifies that both elements are true, or is unable to verify that they are not true, the court shall set a hearing to determine whether the litigation meets the definition of abusive litigation.

(2) At the time set for the hearing on the alleged abusive civil action, the court shall hear all relevant testimony and may require any affidavits, documentary evidence, or other records the court deems necessary.

NEW SECTION. **Sec. 5.** At the hearing conducted pursuant to section 4 of this act, evidence of any of the following creates a rebuttable presumption that litigation is being initiated, advanced, or continued primarily for the purpose of harassing, intimidating, or maintaining contact with the other party:

(1) The same or substantially similar issues between the same or substantially similar parties have been litigated within the past five years in the same court or any other court of competent jurisdiction; or

(2) The same or substantially similar issues between the same or substantially similar parties have been raised, pled, or alleged in the past five years and were dismissed on the merits or with prejudice; or

(3) Within the last ten years, the party allegedly engaging in abusive litigation has been sanctioned under superior court civil rule 11 or a similar rule or law in another jurisdiction for filing one or more cases, petitions, motions, or other filings, that were found to have been frivolous, vexatious, intransigent, or brought in bad faith involving the same opposing party; or

(4) A court of record in another judicial district has determined that the party allegedly engaging in abusive litigation has previously engaged in abusive litigation or similar conduct and has been subject to a court order imposing prefiling restrictions.

NEW SECTION. **Sec. 6.** (1) If the court finds by a preponderance of the evidence that a party is engaging in abusive litigation, and that any or all of the motions or actions pending before the court are abusive litigation, the litigation shall be dismissed, denied, stricken, or resolved by other disposition with prejudice.

(2) In addition to dismissal or denial of any pending abusive litigation within the jurisdiction of the court, the court shall enter an "order restricting abusive litigation." The order shall:

(a) Impose all costs of any abusive civil action pending in the court at the time of the court's finding pursuant to subsection (1) of this section against the party advancing the abusive litigation;

(b) Award the other party reasonable attorneys' fees and costs of responding to the abusive litigation including the cost of seeking the order restricting abusive litigation; and

(c) Identify the party protected by the order and impose prefiling restrictions upon the party found to have engaged in abusive litigation for a period of not less than forty-eight months nor more than seventy-two months.

(3) If the court finds by a preponderance of the evidence that the litigation does not constitute abusive litigation, the court shall enter written findings and the litigation shall proceed. Nothing in this section or chapter shall be construed as limiting the court's inherent authority to control the proceedings and litigants before it.

(4) The provisions of this section are nonexclusive and do not affect any other remedy available to the person who is protected by the order restricting abusive litigation or to the court.

NEW SECTION. **Sec. 7.** (1) Except as provided in this section, a person who is subject to an order restricting abusive litigation is prohibited from filing, initiating, advancing, or continuing the litigation against the protected party for the period of time the filing restrictions are in effect.

(2) Notwithstanding subsection (1) of this section and consistent with the state Constitution, a person who is subject to an order restricting abusive litigation may seek permission to file a new case or a motion in an existing case using the procedure set out in subsection (3) of this section.

(3)(a) A person who is subject to an order restricting litigation against whom prefiling restrictions have been imposed pursuant to this chapter who wishes to initiate a new case or file a motion in an existing case during the time the person is under filing restrictions must first appear before the judicial officer who imposed the prefiling restrictions to make application for permission to institute the civil action.

(b)(i) The judicial officer may examine witnesses, court records, and any other available evidence to determine if the proposed litigation is abusive litigation or if there are reasonable and legitimate grounds upon which the litigation is based.

(ii) If the judicial officer determines the proposed litigation is abusive litigation, based on reviewing the records as well as any evidence from the person who is subject to the order, then it is not necessary for the person protected by the order to appear or participate in any way. If the judicial officer is unable to determine whether the proposed litigation is abusive without hearing from the person protected by the order, then the court shall issue an order scheduling a hearing, and notifying the protected party of the party's right to appear and/or participate in the hearing. The order should specify whether the protected party is expected to submit a

written response. When possible, the protected party should be permitted to appear telephonically and provided instructions for how to appear telephonically.

(c)(i) If the judicial officer believes the litigation that the party who is subject to the prefiling order is making application to file will constitute abusive litigation, the application shall be denied, dismissed, or otherwise disposed with prejudice.

(ii) If the judicial officer reasonably believes that the litigation the party who is subject to the prefiling order is making application to file will not be abusive litigation, the judicial officer may grant the application and issue an order permitting the filing of the case, motion, or pleading. The order shall be attached to the front of the pleading to be filed with the clerk. The party who is protected by the order shall be served with a copy of the order at the same time as the underlying pleading.

(d) The findings of the judicial officer shall be reduced to writing and made a part of the record in the matter. If the party who is subject to the order disputes the finding of the judge, the party may seek review of the decision as provided by the applicable court rules.

(4) If the application for the filing of a pleading is granted pursuant to this section, the period of time commencing with the filing of the application requesting permission to file the action and ending with the issuance of an order permitting filing of the action shall not be computed as a part of any applicable period of limitations within which the matter must be instituted.

(5) If, after a party who is subject to prefiling restrictions has made application and been granted permission to file or advance a case pursuant to this section, any judicial officer hearing or presiding over the case, or any part thereof, determines that the person is attempting to add parties, amend the complaint, or is otherwise attempting to alter the parties and issues involved in the litigation in a manner that the judicial officer reasonably believes would constitute abusive litigation, the judicial officer shall stay the proceedings and refer the case back to the judicial officer who granted the application to file, for further disposition.

(6)(a) If a party who is protected by an order restricting abusive litigation is served with a pleading filed by the person who is subject to the order, and the pleading does not have an attached order allowing the pleading, the protected party may respond to the case by filing a copy of the order restricting abusive litigation.

(b) If it is brought to the attention of the court that a person against whom prefiling restrictions have been imposed has filed a new case or is continuing an existing case without having been granted permission pursuant to this section, the court shall dismiss, deny, or otherwise dispose of the matter. This action may be taken by the court on the court's own motion or initiative. The court may take whatever action against the perpetrator of abusive litigation deemed necessary and appropriate for a violation of the order restricting abusive litigation.

(c) If a party who is protected by an order restricting abusive litigation is served with a pleading filed by the person who is subject to the order, and the pleading does not have an attached order allowing the pleading, the protected party is under no obligation or duty to respond to the summons, complaint, petition, motion, to answer interrogatories, to appear for depositions, or any other responsive action required by rule or statute in a civil action.

(7) If the judicial officer who imposed the prefiling restrictions is no longer serving in the same capacity in the same judicial district where the restrictions were placed, or is otherwise unavailable for any reason, any other judicial officer in that judicial district may perform the review required and permitted by this section.

Sec. 8. RCW 26.09.191 and 2019 c 46 s 5020 are each amended to read as follows:

(1) The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in any of the following conduct: (a) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (b) physical, sexual, or a pattern of emotional abuse of a child; or (c) a history of acts of domestic violence as defined in RCW 26.50.010(3) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm or that results in a pregnancy.

(2)(a) The parent's residential time with the child shall be limited if it is found that the parent has

engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence as defined in RCW 26.50.010(3) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm or that results in a pregnancy; or (iv) the parent has been convicted as an adult of a sex offense under:

(A) RCW 9A.44.076 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(B) RCW 9A.44.079 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(C) RCW 9A.44.086 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(D) RCW 9A.44.089;

(E) RCW 9A.44.093;

(F) RCW 9A.44.096;

(G) RCW 9A.64.020 (1) or (2) if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(H) Chapter 9.68A RCW;

(I) Any predecessor or antecedent statute for the offenses listed in (a)(iv)(A) through (H) of this subsection;

(J) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (a)(iv)(A) through (H) of this subsection.

This subsection (2)(a) shall not apply when (c) or (d) of this subsection applies.

(b) The parent's residential time with the child shall be limited if it is found that the parent resides with a person who has engaged in any of the following conduct: (i) Physical, sexual, or a pattern of emotional abuse of a child; (ii) a history of acts of domestic violence as defined in RCW 26.50.010(3) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm or that results in a pregnancy; or (iii) the person has been convicted as an adult or as a juvenile has been adjudicated of a sex offense under:

(A) RCW 9A.44.076 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(B) RCW 9A.44.079 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(C) RCW 9A.44.086 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(D) RCW 9A.44.089;

(E) RCW 9A.44.093;

(F) RCW 9A.44.096;

(G) RCW 9A.64.020 (1) or (2) if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(H) Chapter 9.68A RCW;

(I) Any predecessor or antecedent statute for the offenses listed in (b)(iii)(A) through (H) of this subsection;

(J) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (b)(iii)(A) through (H) of this subsection.

This subsection (2)(b) shall not apply when (c) or (e) of this subsection applies.

(c) If a parent has been found to be a sexual predator under chapter 71.09 RCW or under an analogous statute of any other jurisdiction, the court shall restrain the parent from contact with a child that would otherwise be allowed under this chapter. If a parent resides with an adult or a juvenile who has been found to be a sexual predator under chapter 71.09 RCW or under an analogous statute of any other jurisdiction, the court shall restrain the parent from contact with the parent's child except contact that occurs outside that person's presence.

(d) There is a rebuttable presumption that a parent who has been convicted as an adult of a sex offense

listed in (d)(i) through (ix) of this subsection poses a present danger to a child. Unless the parent rebuts this presumption, the court shall restrain the parent from contact with a child that would otherwise be allowed under this chapter:

(i) RCW 9A.64.020 (1) or (2), provided that the person convicted was at least five years older than the other person;

(ii) RCW 9A.44.073;

(iii) RCW 9A.44.076, provided that the person convicted was at least eight years older than the victim;

(iv) RCW 9A.44.079, provided that the person convicted was at least eight years older than the victim;

(v) RCW 9A.44.083;

(vi) RCW 9A.44.086, provided that the person convicted was at least eight years older than the victim;

(vii) RCW 9A.44.100;

(viii) Any predecessor or antecedent statute for the offenses listed in (d)(i) through (vii) of this subsection;

(ix) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (d)(i) through (vii) of this subsection.

(e) There is a rebuttable presumption that a parent who resides with a person who, as an adult, has been convicted, or as a juvenile has been adjudicated, of the sex offenses listed in (e)(i) through (ix) of this subsection places a child at risk of abuse or harm when that parent exercises residential time in the presence of the convicted or adjudicated person. Unless the parent rebuts the presumption, the court shall restrain the parent from contact with the parent's child except for contact that occurs outside of the convicted or adjudicated person's presence:

(i) RCW 9A.64.020 (1) or (2), provided that the person convicted was at least five years older than the other person;

(ii) RCW 9A.44.073;

(iii) RCW 9A.44.076, provided that the person convicted was at least eight years older than the victim;

(iv) RCW 9A.44.079, provided that the person convicted was at least eight years older than the victim;

(v) RCW 9A.44.083;

(vi) RCW 9A.44.086, provided that the person convicted was at least eight years older than the victim;

(vii) RCW 9A.44.100;

(viii) Any predecessor or antecedent statute for the offenses listed in (e)(i) through (vii) of this subsection;

(ix) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (e)(i) through (vii) of this subsection.

(f) The presumption established in (d) of this subsection may be rebutted only after a written finding that the child was not conceived and subsequently born as a result of a sexual assault committed by the parent requesting residential time and that:

(i) If the child was not the victim of the sex offense committed by the parent requesting residential time, (A) contact between the child and the offending parent is appropriate and poses minimal risk to the child, and (B) the offending parent has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child; or

(ii) If the child was the victim of the sex offense committed by the parent requesting residential time, (A) contact between the child and the offending parent is appropriate and poses minimal risk to the child, (B) if the child is in or has been in therapy for victims of sexual abuse, the child's counselor believes such contact between the child and the offending parent is in the child's best interest, and (C) the offending parent has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child.

(g) The presumption established in (e) of this subsection may be rebutted only after a written finding that the child was not conceived and subsequently born as a result of a sexual assault committed by the parent requesting residential time and that:

(i) If the child was not the victim of the sex offense committed by the person who is residing with the parent requesting residential time, (A) contact between the child and the parent residing with the convicted or adjudicated person is appropriate and that parent is able to protect the child in the presence of the convicted or adjudicated person, and (B) the convicted or adjudicated person has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child; or

(ii) If the child was the victim of the sex offense committed by the person who is residing with the parent requesting residential time, (A) contact between the child and the parent in the presence of the convicted or adjudicated person is appropriate and poses minimal risk to the child, (B) if the child is in or has been in therapy for victims of sexual abuse, the child's counselor believes such contact between the child and the parent residing with the convicted or adjudicated person in the presence of the convicted or adjudicated person is in the child's best interest, and (C) the convicted or adjudicated person has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes contact between the parent and child in the presence of the convicted or adjudicated person is appropriate and poses minimal risk to the child.

(h) If the court finds that the parent has met the burden of rebutting the presumption under (f) of this subsection, the court may allow a parent who has been convicted as an adult of a sex offense listed in (d)(i) through (ix) of this subsection to have residential time with the child supervised by a neutral and independent adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(i) If the court finds that the parent has met the burden of rebutting the presumption under (g) of this subsection, the court may allow a parent residing with a person who has been adjudicated as a juvenile of a sex offense listed in (e)(i) through (ix) of this subsection to have residential time with the child in the presence of the person adjudicated as a juvenile, supervised by a neutral and independent adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(j) If the court finds that the parent has met the burden of rebutting the presumption under (g) of this subsection, the court may allow a parent residing with a person who, as an adult, has been convicted of a sex offense listed in (e)(i) through (ix) of this subsection to have residential time with the child in the presence of the convicted person supervised by a neutral and independent adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(k) A court shall not order unsupervised contact between the offending parent and a child of the offending parent who was sexually abused by that parent. A court may order unsupervised contact between the offending parent and a child who was not sexually abused by the parent after the presumption under (d) of this subsection has been rebutted and supervised residential time has occurred for at least two years with no further arrests or convictions of sex offenses involving children under chapter 9A.44 RCW, RCW 9A.64.020, or chapter 9.68A RCW and (i) the sex offense of the offending parent was not committed against a child of the offending parent, and (ii) the court finds that unsupervised contact between the child and the offending parent is appropriate and poses minimal risk to the child, after consideration of the testimony of a state-certified therapist, mental health counselor, or social worker with expertise in treating child sexual abuse victims who has supervised at least one period of residential time between the parent and the child, and after

consideration of evidence of the offending parent's compliance with community supervision requirements, if any. If the offending parent was not ordered by a court to participate in treatment for sex offenders, then the parent shall obtain a psychosexual evaluation conducted by a certified sex offender treatment provider or a certified affiliate sex offender treatment provider indicating that the offender has the lowest likelihood of risk to reoffend before the court grants unsupervised contact between the parent and a child.

(l) A court may order unsupervised contact between the parent and a child which may occur in the presence of a juvenile adjudicated of a sex offense listed in (e)(i) through (ix) of this subsection who resides with the parent after the presumption under (e) of this subsection has been rebutted and supervised residential time has occurred for at least two years during which time the adjudicated juvenile has had no further arrests, adjudications, or convictions of sex offenses involving children under chapter 9A.44 RCW, RCW 9A.64.020, or chapter 9.68A RCW, and (i) the court finds that unsupervised contact between the child and the parent that may occur in the presence of the adjudicated juvenile is appropriate and poses minimal risk to the child, after consideration of the testimony of a state-certified therapist, mental health counselor, or social worker with expertise in treatment of child sexual abuse victims who has supervised at least one period of residential time between the parent and the child in the presence of the adjudicated juvenile, and after consideration of evidence of the adjudicated juvenile's compliance with community supervision or parole requirements, if any. If the adjudicated juvenile was not ordered by a court to participate in treatment for sex offenders, then the adjudicated juvenile shall obtain a psychosexual evaluation conducted by a certified sex offender treatment provider or a certified affiliate sex offender treatment provider indicating that the adjudicated juvenile has the lowest likelihood of risk to reoffend before the court grants unsupervised contact between the parent and a child which may occur in the presence of the adjudicated juvenile who is residing with the parent.

(m)(i) The limitations imposed by the court under (a) or (b) of this subsection shall be reasonably calculated to protect the child from the physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time. The limitations shall also be reasonably calculated to provide for the safety of the parent who may be at risk of physical, sexual, or emotional abuse or harm that could result if the parent has contact with the parent requesting residential time. The limitations the court may impose include, but are not limited to: Supervised contact between the child and the parent or completion of relevant counseling or treatment. If the court expressly finds based on the evidence that limitations on the residential time with the child will not adequately protect the child from the harm or abuse that could result if the child has contact with the parent requesting residential time, the court shall restrain the parent requesting residential time from all contact with the child.

(ii) The court shall not enter an order under (a) of this subsection allowing a parent to have contact with a child if the parent has been found by clear and convincing evidence in a civil action or by a preponderance of the evidence in a dependency action to have sexually abused the child, except upon recommendation by an evaluator or therapist for the child that the child is ready for contact with the parent and will not be harmed by the contact. The court shall not enter an order allowing a parent to have contact with the child in the offender's presence if the parent resides with a person who has been found by clear and convincing evidence in a civil action or by a preponderance of the evidence in a dependency action to have sexually abused a child, unless the court finds that the parent accepts that the person engaged in the harmful conduct and the parent is willing to and capable of protecting the child from harm from the person.

(iii) The court shall not enter an order under (a) of this subsection allowing a parent to have contact with a child if the parent has been found by clear and convincing evidence pursuant to RCW 26.26A.465 to have committed sexual assault, as defined in RCW 26.26A.465, against the child's parent, and that the child was born within three hundred twenty days of the sexual assault.

(iv) If the court limits residential time under (a) or (b) of this subsection to require supervised contact between the child and the parent, the court shall not approve of a supervisor for contact between a child and a parent who has engaged in physical, sexual, or a pattern of emotional abuse of the child unless the court finds based upon the evidence that the supervisor accepts that the harmful conduct occurred and is willing to and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing to or capable of protecting the child.

(n) If the court expressly finds based on the evidence that contact between the parent and the child will not cause physical, sexual, or emotional abuse or harm to the child and that the probability that the parent's or other person's harmful or abusive conduct will recur is so remote that it would not be in the child's best interests to apply the limitations of (a), (b), and (m)(i) and (iv) of this subsection, or if the court expressly finds that the parent's conduct did not have an impact on the child, then the court need not apply the limitations of (a), (b), and (m)(i) and (iv) of this subsection. The weight given to the existence of a protection order issued under chapter 26.50 RCW as to domestic violence is within the discretion of the court. This subsection shall not apply when (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), and (m)(ii) of this subsection apply.

(3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

(a) A parent's neglect or substantial nonperformance of parenting functions;

(b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;

(c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;

(d) The absence or substantial impairment of emotional ties between the parent and the child;

(e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development. Abusive use of conflict includes, but is not limited to, abusive litigation as defined in section 2 of this act. If the court finds a parent has engaged in abusive litigation, the court may impose any restrictions or remedies set forth in chapter 26.--- RCW (the new chapter created in section 10 of this act) in addition to including a finding in the parenting plan. Litigation that is aggressive or improper but that does not meet the definition of abusive litigation shall not constitute a basis for a finding under this section. A report made in good faith to law enforcement, a medical professional, or child protective services of sexual, physical, or mental abuse of a child shall not constitute a basis for a finding of abusive use of conflict;

(f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or

(g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

(4) In cases involving allegations of limiting factors under subsection (2)(a)(ii) and (iii) of this section, both parties shall be screened to determine the appropriateness of a comprehensive assessment regarding the impact of the limiting factor on the child and the parties.

(5) In entering a permanent parenting plan, the court shall not draw any presumptions from the provisions of the temporary parenting plan.

(6) In determining whether any of the conduct described in this section has occurred, the court shall apply the civil rules of evidence, proof, and procedure.

(7) For the purposes of this section:

(a) "A parent's child" means that parent's natural child, adopted child, or stepchild; and

(b) "Social worker" means a person with a master's or further advanced degree from a social work educational program accredited and approved as provided in RCW 18.320.010.

Sec. 9. RCW 26.50.060 and 2019 c 46 s 5038 are each amended to read as follows:

(1) Upon notice and after hearing, the court may provide relief as follows:

(a) Restrain the respondent from committing acts of domestic violence;

(b) Exclude the respondent from the dwelling that the parties share, from the residence, workplace, or school of the petitioner, or from the day care or school of a child;

(c) Prohibit the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location;

(d) On the same basis as is provided in chapter 26.09 RCW, the court shall make residential provision with regard to minor children of the parties. However, parenting plans as specified in chapter 26.09 RCW shall not be required under this chapter;

(e) Order the respondent to participate in a domestic violence perpetrator treatment program approved

under RCW 26.50.150;

(f) Order other relief as it deems necessary for the protection of the petitioner and other family or household members sought to be protected, including orders or directives to a peace officer, as allowed under this chapter;

(g) Require the respondent to pay the administrative court costs and service fees, as established by the county or municipality incurring the expense and to reimburse the petitioner for costs incurred in bringing the action, including reasonable attorneys' fees or limited license legal technician fees when such fees are incurred by a person licensed and practicing in accordance with the state supreme court's admission to practice rule 28, the limited practice rule for limited license legal technicians;

(h) Restrain the respondent from having any contact with the victim of domestic violence or the victim's children or members of the victim's household;

(i) Restrain the respondent from harassing, following, keeping under physical or electronic surveillance, cyberstalking as defined in RCW 9.61.260, and using telephonic, audiovisual, or other electronic means to monitor the actions, location, or communication of a victim of domestic violence, the victim's children, or members of the victim's household. For the purposes of this subsection, "communication" includes both "wire communication" and "electronic communication" as defined in RCW 9.73.260;

(j) Require the respondent to submit to electronic monitoring. The order shall specify who shall provide the electronic monitoring services and the terms under which the monitoring must be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the respondent to pay for electronic monitoring;

(k) Consider the provisions of RCW 9.41.800;

(l) Order possession and use of essential personal effects. The court shall list the essential personal effects with sufficient specificity to make it clear which property is included. Personal effects may include pets. The court may order that a petitioner be granted the exclusive custody or control of any pet owned, possessed, leased, kept, or held by the petitioner, respondent, or minor child residing with either the petitioner or respondent and may prohibit the respondent from interfering with the petitioner's efforts to remove the pet. The court may also prohibit the respondent from knowingly coming within, or knowingly remaining within, a specified distance of specified locations where the pet is regularly found; ((~~and~~))

(m) Order use of a vehicle; and

(n) Enter an order restricting the respondent from engaging in abusive litigation as set forth in chapter 26.--- RCW (the new chapter created in section 10 of this act). A petitioner may request this relief in the petition or by separate motion. A petitioner may request this relief by separate motion at any time within five years of the date the order for protection is entered even if the order has since expired. A stand-alone motion for an order restricting abusive litigation may be brought by a party who meets the requirements of chapter 26.--- RCW (the new chapter created in section 10 of this act) regardless of whether the party has previously sought an order for protection under this chapter, provided the motion is made within five years of the date the order that made a finding of domestic violence was entered. In cases where a finding of domestic violence was entered pursuant to an order under chapter 26.09, 26.26, or 26.26A RCW, a motion for an order restricting abusive litigation may be brought under the family law case or as a stand-alone action filed under this chapter, when it is not reasonable or practical to file under the family law case.

(2) If a protection order restrains the respondent from contacting the respondent's minor children the restraint shall be for a fixed period not to exceed one year. This limitation is not applicable to orders for protection issued under chapter 26.09, 26.10, 26.26A, or 26.26B RCW. With regard to other relief, if the petitioner has petitioned for relief on his or her own behalf or on behalf of the petitioner's family or household members or minor children, and the court finds that the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner's family or household members or minor children when the order expires, the court may either grant relief for a fixed period or enter a permanent order of protection.

If the petitioner has petitioned for relief on behalf of the respondent's minor children, the court shall advise the petitioner that if the petitioner wants to continue protection for a period beyond one year the petitioner may either petition for renewal pursuant to the provisions of this chapter or may seek relief pursuant to the provisions of chapter 26.09, 26.26A, or 26.26B RCW.

(3) If the court grants an order for a fixed time period, the petitioner may apply for renewal of the order by filing a petition for renewal at any time within the three months before the order expires. The petition for renewal shall state the reasons why the petitioner seeks to renew the protection order. Upon receipt of the petition for renewal the court shall order a hearing which shall be not later than fourteen days from the date of the order. Except as provided in RCW 26.50.085, personal service shall be made on the respondent not less than five days before the hearing. If timely service cannot be made the court shall set a new hearing date and shall either require additional attempts at obtaining personal service or permit service by publication as provided in RCW 26.50.085 or by mail as provided in RCW 26.50.123. If the court permits service by publication or mail, the court shall set the new hearing date not later than twenty-four days from the date of the order. If the order expires because timely service cannot be made the court shall grant an ex parte order of protection as provided in RCW 26.50.070. The court shall grant the petition for renewal unless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of domestic violence against the petitioner or the petitioner's children or family or household members when the order expires. The court may renew the protection order for another fixed time period or may enter a permanent order as provided in this section. The court may award court costs, service fees, and reasonable attorneys' fees as provided in subsection (1)(g) of this section.

(4) In providing relief under this chapter, the court may realign the designation of the parties as "petitioner" and "respondent" where the court finds that the original petitioner is the abuser and the original respondent is the victim of domestic violence and may issue an ex parte temporary order for protection in accordance with RCW 26.50.070 on behalf of the victim until the victim is able to prepare a petition for an order for protection in accordance with RCW 26.50.030.

(5) Except as provided in subsection (4) of this section, no order for protection shall grant relief to any party except upon notice to the respondent and hearing pursuant to a petition or counter-petition filed and served by the party seeking relief in accordance with RCW 26.50.050.

(6) The court order shall specify the date the order expires if any. The court order shall also state whether the court issued the protection order following personal service, service by publication, or service by mail and whether the court has approved service by publication or mail of an order issued under this section.

(7) If the court declines to issue an order for protection or declines to renew an order for protection, the court shall state in writing on the order the particular reasons for the court's denial.

NEW SECTION. **Sec. 10.** Sections 1 through 7 of this act constitute a new chapter in Title 26 RCW.

NEW SECTION. **Sec. 11.** This act shall be construed liberally so as to effectuate the goal of protecting survivors of domestic violence from abusive litigation.

NEW SECTION. **Sec. 12.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 13.** This act takes effect January 1, 2021.

Passed by the Senate March 10, 2020.
Passed by the House March 3, 2020.
Approved by the Governor April 2, 2020.
Filed in Office of Secretary of State April 3, 2020.

--- END ---

MARY SCHULTZ LAW PS

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Appellate Court Case Title:	Sara Rhodes v. Stadtmueller & Associates, et al
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