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COURT OF APPEALS
DIVISION II
OCT 27 2011 PM 1:03
STATE OF WASHINGTON
BY cm
DEPUTY

NO. 38953-3II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Matter of

Erin Hamrick, fka Erin Collier

Appellant,

vs.

Benjamin James Collier

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Petitioner/Appellant, Erin Hamrick, fka Erin Collier (hereinafter Appellant) posed a simple question: Did the court err in failing to follow the mandates of CR 26(i)? The facts submitted to the trial court were uncontroverted. Appellant filed a petition for dissolution and proceeded pro se. Based upon an alleged discovery violation, the court granted a default against her, divided personal property and liabilities, granted primary residential placement of the children to the father, allowed for supervised visits only, imputed income to her and set child support. In her motion to set aside these default orders, it was uncontroverted that CR 26(i) had not been complied with. Nonetheless, the trial court denied Appellant's motion to set aside the default orders.

It is also uncontroverted that CR 37(b) had also not been complied with. Although Appellant had answered discovery, appeared and attempted to comply, the court jumped from a minor sanction to default. The court imposed the default remedy without first finding Appellant's conduct willful and without considering lesser sanctions.

Nothing in Respondent's brief provides a supportable basis for the trial court's failure to follow the mandates of CR 26(i) and CR 37(b). The

Respondent's brief is a deliberate attempt to confuse the issues and misdirect this appellate court regarding three very simple questions: 1) Doesn't failure to comply with the "two-way communication" requirement of CR 26(i) mandate vacation of the subsequent default?; 2) Doesn't failure to consider lesser remedies, find willfulness by Appellant and prejudice to Respondent under CR 37(b) require vacation of a subsequent order of default?; 3) Should attorneys fees have been awarded?

II. REPLY TO STATEMENT OF THE CASE

The Respondent sets forth eight full pages of facts, most of which are simply not relevant to the issues presented in this appeal. In *Case v. Dundom*, 115 Wn. App. 199, 58 P.3d 919 (2002), a court commissioner ordered Dundom's compliance within two weeks, ordered sanctions, granted Dundom's motion for "continued motion for discovery compliance," ordered Dundom to respond by "next Friday," and thereafter granted a default against Dundom. Because CR 26(i) had not been complied with, none of those facts were relevant. Similarly here the subsequent hearings discussed by Respondent are irrelevant.

It is interesting that Respondent does acknowledge that Appellant attempted to answer the interrogatories: "One week after Respondent filed

the Motion to Compel, Ms Hamrick served Respondent's attorney with her answers to the discovery request." Brief of Respondent page 2 (hereinafter BR 2). At no point did Respondent make the questions and answers part of the record. What were the questions, what were Ms. Hamrick's answers, and how were they "insufficient" are all left out of the record. However, it is clear from the Respondent's statement of the facts that, with the exception of the August 22, 2008 hearing, Ms. Hamrick appeared in court and was attempting to comply. (BR 2-4).

The bottom line is that pursuant to CR 26(i) the trial court did not have the authority to hear the motion to compel and therefore the subsequent hearings are irrelevant and submitted by the Respondent for the sole purpose of misdirection and confuse the issues. In other words, the various orders of the court granting extensions of time to answer are irrelevant if the court had no authority to entertain the motion in the first instance.

Next, Respondent states that it was, "almost four months" until Appellant retained a new attorney and brought the motion to set aside the default (BR 6). Prior to entering the default and imputing income to the Respondent and setting child support at \$418 per month (CP 5-7, 8-14, 15-19, 21-31, 32-37, 38-45), the Respondent was required to pay the minimum \$25

per month per child for child support. RB 11, lines 20 - 22. Ms. Collier had been and was unemployed and therefore could not afford an attorney. RB 13, lines 3-6. It was an issue of access to justice that Ms. Hamrick requested attorney fees against the Respondent, who was employed. RB13, lines 3-6. Lack of income was the reason Ms. Hamrick was forced to represent herself pro se.

Next, without any authority, the Respondent states that “default was the only sanction left to the court . . .” RB 6. How so? There is no indication why the court didn’t consider establishing the facts or prohibiting evidence under CR 37(b)(A) and (B) or why those remedies were not even explored. The court simply jumped from a minor monetary sanction to default and default orders. The court did so without requiring the Respondent to make the questions and Ms. Hamrick’s answers of record. It is the Respondent who has failed to make the questions and the alleged “insufficient” answers a matter of record with the trial court. Furthermore, in ruling that Ms. Hamrick had “an obligation to provide due diligence in producing the requested documentation under her control” nowhere was there an indication of which documents Respondent needed to adequately prepare the case and how those documents were of such importance that default of

the entire divorce case, including parenting plan issues, was justified. RB ages 7-8, CP 73-75 paragraph 7.

III. REPLY ARGUMENT

A. APPELLANT HAS SUBMITTED SUFFICIENT RECORD TO ADEQUATELY ADDRESS THE ISSUES.

The Respondent cites *State v. Wheaton*, 121 Wn.2d 347, 850 P.2d 507 (1993) for the proposition that the court will not consider an issue on direct appeal “if the record is inadequate for review.” RB page 9. *Wheaton* deals with the Frye Test as it relates to multiple personality disorders and its effect on an insanity plea. The court there specifically ruled that “We do not decide any Frye issue in this case. We do not have the record to assess it, nor is it an issue raised by the state.” *Wheaton* at 354. Here, the facts are uncontroverted and the appellate court has sufficient record to allow its review.

The Respondent’s initial position is two-fold: 1) that Appellant was required to submit hearings held on 7/22/08, 8/1/08, and 8/22/08 and; 2) that this court needs to review a copy of the discovery and alleged inadequate responses. Neither of these arguments are supported by the facts of this case or have a basis in law.

With regards to the first issue, subsequent court hearings are irrelevant. *Case v. Dundom*, 115 Wn. App. 199, 58 P.3d 919 (2002). The trial court lacks the authority to hear a motion to compel when the required contemporaneous two-way communication has not occurred. See *Case v. Dundom, supra*; *Clarke v. Office of Attorney General*, 133 Wn. App. 767, 138 P.2d 144 (2006); *Rudolph v. Empirical Research Sys. Inc.*, 107 Wn. App. 861, 866, 28 P.3d 813 (2001). Here, the two-way communication requirement admittedly did not occur and therefore, the court lacked authority to “**entertain the motion**” CR 26(i) (Emphasis added). Therefore, the subsequent hearings are irrelevant.

With regards to Respondent’s second issue, the questions and answers are not relevant to the CR 26(i) inquiry and are not required to be submitted. What is required to be submitted is the motion together with a certification that the two-way communication occurred prior to the motion. *Case v. Dundom, supra*. Here, admittedly that requirement was not met.

In the alternative, if the questions and answers are required to be made part of the record on appeal, then it is the Appellant’s position that it was Respondent’s duty. Respondent has admitted that Ms. Hamrick answered the interrogatories. RB2. Those answers were in the dominion and control of the

Respondent. Respondent further states that Appellant's attorney came in, "some four months after" the granting of the default, which was months after Appellant had submitted her answers to Respondent's attorney. RB 6. Appellant's attorney was never provided with the questions nor the alleged insufficient answers. Respondent had the opportunity to submit the questions and alleged insufficient answers to the trial court at any of the several hearings held, and did not. In the face of Appellant's motion to vacate the default, you would have thought the Respondent would have submitted the questions and alleged insufficient answers to show willfulness in response to Appellant's CR 37(b) argument. They chose not to. It is the Respondent who has not perfected the record sufficiently to establish the necessity of granting a default under these circumstances.

B. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED AN ORDER OF DEFAULT.

(1) Failure to assign error does not create verities on appeal.

Here the Respondent's first position is that the appellant failed to assign error and therefore the findings are verities. Appellant disagrees. Appellant assigned error to the court's entire finding and order denying the motion to vacate the default. Brief of Appellant page 2 (hereinafter BA 2). Specifically, Appellant stated that it assigned error to the court's "denying the

Appellant's motion to set aside the default dated January 10, 2009." BA2

Thus Appellant assigned error to the entire ruling of the court.

In the alternative, it is Appellant's position that failure to assign error does not create verities. In that this is the interpretation of a court rule, the review is *de novo*. *Rudolph v. Empirical Research Systems, Inc.*, 107 Wash 861 866, 28 P.3d 813 (2001). Findings of fact entered in summary judgment proceeds are "merely superfluous and of no prejudice;" therefore, failure to assign error to them does not make them verities. *State ex rel Carroll v. Simmons*, 61 Wn.2d 146, 149 377 P.2d 421 (1962);

In *Chelan County Deputy Sheriffs-Assn. v. County of Chelan*, 109 Wn.2d 282, 294 n6, 745 P.2d 1 (1987), the court stated as follows:

" . . . the court of appeals treated the trial court's findings of fact regarding the restrictions on deputies during their on-call time as verities, because they were unchallenged. However, because these findings were entered in the course of a summary judgment, they carry no weight on appeal. Findings of Fact are superfluous in summary judgment proceedings. A failure to assign error to them has no effect on the case. Citing *Duckworth v. Bonney Lk*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978); *Washington Optometric Assn. v. County of Pierce*, 71 Wn. 2d 445, 448, 438 P.2d 861 (1968). The parties now agree that because the issues before us were decided on summary judgment, we must review the record *de novo* according to CR 56."

(2) CR 26(i) applies and the Respondent did not comply with its requirements.

The Respondent's position is that CR 26(i) does not apply to pro se appellants and, even if it does, they complied. Neither of these statements are true. In *Case v. Dundom, supra* nowhere is it indicated that Dundom was represented by counsel. In fact there is no indication that either party was represented by attorneys. Specifically, the court stated:

“In his correspondence with **Dundom** before and after July 16, which consisted of three letters (fn1) **Case** never mentioned CR 26(i) or a discovery conference. **Case** did, however, submit two affidavits in support of his July 16 motion. The first stated, in relevant part, ‘That on June 26, 2001 I mailed correspondence to the **Defendant’s** [sic] regarding the non-compliance of the discovery process and the **Defendant’s lack of cooperation herein.**’ Clerk’s Papers (CP) at 11. The second affidavit stated ‘The **Defendant has failed to answer** the Complaint filed herein and has failed to comply with discovery despite written requests for the same.’ CP at 13. As **Case** submitted no other relevant affidavit, one of the cited statements must constitute **Case’s** ‘certification’ under CR 26(i); **if not, the trial court lacked discretion to entertain the motion.**” *Case v. Dundom*, 115 Wn. App. pages 202-203. Emphasis added.

Here, similarly a letter was sent to Ms. Hamrick and therefore the two-way communication is absent and the court lacked authority to entertain the motion. There is simply no authority for the Respondent's position that these rules do not apply to pro se litigants.

Respondent relies on Washington Practice's statement that CR 26(i) is "to encourage professional courtesy between attorneys." RB page 19. However, that is inaccurate secondary authority not supported by the decisions of the appellate court. In *Case v. Dundom, supra*, at page 204, the court specifically ruled:

"CR 26(i) is designed to facilitate non-judicial solutions to discovery problems by requiring a conference before a court order."

Not even the trial court here accepted Respondent's position. At hearing on the motion to vacate, the court ruled:

"We say over and over again that pro ses are held to the same standards as attorneys. That should apply for good or for ill, and the fact that 26(i) only refers to counsel probably is more an indication of the lack of thought that went into the wording of the rule than anything else." RB 23, lines 8-14.

"Pro se" is Latin for "for self." For self what? Answer: attorney for self; counsel for self; representative for self. All the terms are synonymous. A pro se litigant is his own attorney, his own counsel, and represents himself in a court of law. As indicated by the trial court, the pro se litigant is "held to the same standards as an attorney." To rule otherwise would require pro se's to be subject to the requirements of CR 26(i) without receiving any of the benefits, i.e. the opportunity to have a two-way communication to resolve

discovery issues. Clearly, under the rules, a pro se litigant is required to comply with CR 26(i) before bringing a motion to compel discovery. The reverse is the case in that the rules, “should apply for good or for ill” to the pro se’s. RP 23, lines 8-14.

Next, the Respondent cites several rules in support of the proposition that had the Supreme Court intended pro se’s to be included they would have stated so. Although CR 41(e) references attorneys and parties representing themselves pro se, none of the other rules cited by Respondent support that proposition. RAP 12 deals with limited practice officers and does not reference parties representing themselves pro se. RAP 10.10 and RAP 16.22 allow criminal defendants to file supplemental grounds for review even though they are represented by attorneys.¹

The Respondent’s strained interpretation of the rules is made more difficult upon examination of other court rules. For example, only parties are allowed to conduct oral depositions under CR 30. CR 12 specifically requires a defendant, as opposed to a defendant’s counsel, to serve an answer within specific time periods. Generally, attorneys are not parties to an action. Under Respondent’s strained interpretation, attorneys could not do these tasks

¹Appellant could not find a GR 47 referenced on page 18 of Respondent’s Brief.

that they now do routinely and without objection. Clearly, the Supreme Court intended the rules to be read inclusively to cover pro se counsel. This court ruled accordingly in *Case v. Dundom, supra* at page 204, as stated above: to facilitate non-judicial solutions to discovery problem the court cannot entertain litigation until a conference is conducted regardless of whether the parties are represented.

(3) Respondent did not comply with the requirements of CR 26(i).

Despite Respondent's statement to the contrary. Respondent's letter of May 15 is a one-way communication in violation of the two-way communication requirement of CR 26(i). See *Case v. Dundom*, 115 Wn. App. 199 58 P.3d 919 (2002), *Rudolph v. Empirical Research Systems, Inc.*, 107 Wash 861 866, 28 P.3d 813 (2001), *Clarke v. Office of Attorney General*, 133 Wn. App. 767, 138 P.2d 144 (2006).

Rather than violating the mandates of CR 26(i), Respondent's counsel had numerous other discovery remedies available and ignored them. For example, Respondent's attorney could have noted the matter for a discovery conference under CR 26(f). Respondent's attorney could have taken the deposition of Ms. Hamrick under CR 30. Requests for admissions could have been served under CR 36, which become admitted if not answered after

30 days. What Respondent was prohibited from doing was bringing a motion to compel without first complying with CR 26(i). Again, *Case v. Dundom, supra*; *Rudolph v. Empirical Research Systems, Inc., supra*; *Clarke v. Office of Attorney General, supra* are all directly on point. The court lacked authority to entertain the motion to compel.

C. THE TRIAL COURT DID NOT COMPLY WITH CR 37(b).

Respondent acknowledges that in order for the court to chose the harsher remedies allowed under CR 37(b) “it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed, and whether it found the disobedient party’s refusal to obey a discovery order was “willful or deliberate and substantially prejudiced the opponent’s ability to prepare for trial.” RB 22 citing *Snedigar v. Hodderson*, 53 Wn.App. 476, 487, 768 P.2d 1 (1989).

Nowhere does the Respondent show where the court considered lesser sanctions or a finding that the disobedient party’s refusal to obey was willful or deliberate, because none exists. Furthermore, nowhere does the Respondent show how he was substantially prejudiced by a failure of Ms. Hamrick to properly answer interrogatories, again, because no such discussion occurred and no such finding exists. What were these very

important questions that prevented the Respondent from preparing his dissolution case is left a mystery. How is it that a pro se petitioner for dissolution should be defaulted and orders entered against her regarding a parenting plan over failure to answer discovery? How are the children involved in these discovery requests? At no point did the court consider designating facts or prohibiting evidence as provided by CR 37(b)(A and B). As set forth in *Snedigar, supra*, the court abused its discretion and not on the record considering these alternatives.

In addition, CR 26(i) also requires a finding of willfulness. In particular, the court ruled in *Case v. Dundom*, 115 Wn.App., *supra* at 203:

“Before addressing the relevant portion of CR 26(i), we emphasize that the trial court **made no findings concerning ‘willful refusal’** or failure to confer in good faith. Because the willful refusal provision of CR 26(i) contemplates an attempt at conferencing, and no such attempt appears on the record before us, the provision does not apply to our discussion. Emphasis added.

Here, Ms. Hamrick answered interrogatories and appeared at hearings. There is no finding that she willfully refused to conference regarding discovery. The only showing is the attorneys bent on pursuing a default without conferencing with this pro se litigant. In that there was no willful refusal on the part of Ms. Hamrick to conference under CR 26(i), nor a

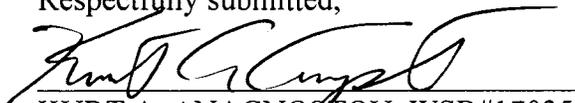
willful refusal to submit discovery under CR 37(b), the court abused its discretion in granting the motion for default and refusing to subsequently vacate those orders.

V. CONCLUSION

This is an appeal *de novo*. The facts have been admitted. The Appellant made a simple request that the default order taken in violation of CR 26(i) and CR 37(b) be set aside. The court lacked authority to “entertain” the CR 26(i) motion, should not have granted a default, did not find Ms. Hamrick’s conduct to be willful, and should have granted the motion to vacate under CR 26(i) and CR 37(b). In addition, the court should have awarded attorney fees to Ms. Hamrick for having to hire an attorney and bring the motion to vacate. The Appellant respectfully requests that this court reverses the trial court’s order.

Dated this 24 day of Sept, 2009.

Respectfully submitted,


KURT A. ANAGNOSTOU, WSB#17035
Of Attorneys for Appellant

CERTIFICATE OF MAILING

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 24 day of September, 2009, I caused to be served upon counsel listed below, in the manner indicated therein, a true and correct copy of the Appellant's Reply Brief.

Addressed to:

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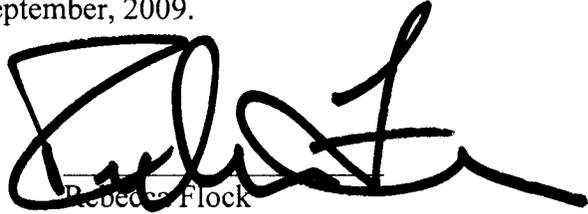
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Dated this 24 day of September, 2009.



Rebecca Flock

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