

No. 46814-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

VELMA WALKER, et al.,

Respondents,

v.

HUNTER DONALDSON, LLC, et al.,

Appellants.

STATE OF WASHINGTON
BY _____
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COURT OF APPEALS
DIVISION II

On Appeal From Pierce County Superior Court
No. 13-2-08746-0

BRIEF OF APPELLANTS RALPH WADSWORTH AND REBECCA
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I. INTRODUCTION

Individual defendants in the case below, Ralph Wadsworth and Rebecca Rohlke (“Appellants”), appeal the trial court’s entry of \$139,300 in discovery sanctions against them for their purported failure to produce documents in response to discovery requests served by named plaintiffs Velma Walker, et al. (“Plaintiffs”). The trial court’s decisions awarding these sanctions were based on errors of law, and on factual findings unsupported by any substantial evidence in the record.

The trial court also ignored well-settled Division Two precedent that required Plaintiffs to hold an in person or telephonic CR 26(i) discovery conference with Appellants before the trial court had authority to hear Plaintiffs’ motions to compel and for sanctions. The parties did not confer “in person or by telephone” as required by CR 26(i) before Plaintiffs filed their May 15, 2014 motion to compel and for sanctions. The trial court expressly disregarded this failure, granted Plaintiffs’ motion, and began imposing daily sanctions on Appellants. It also is undisputed that the parties never met and conferred in connection with any of the sanctions motions themselves, despite CR 26(i)’s clear language that it applies to *every* motion brought under “rules 26 through 37.”

While these errors alone are grounds for this Court to vacate the trial court’s orders, the trial court also abused its discretion in other

respects. This dispute arises out of Plaintiffs' requests for Appellants to produce certain documents, and Appellants' good-faith efforts to comply with those orders. Appellants' effort to fully comply with the court's orders was complicated by the fact that the relevant court orders and transcripts often were ambiguous, if not contradictory, with respect to what the court was ordering be produced.

Eventually, the dispute focused on Plaintiffs' requests that Appellants produce documents in the possession of defendant Hunter Donaldson, LLC ("Hunter Donaldson"), which had filed for Chapter 11 bankruptcy protection. Appellants responded to these requests that they did not have possession or control over these documents.

The trial court held hearings on May 23 and August 1, 2014. After both hearings, Appellants reasonably believed that the court was not ordering them to produce these documents over which they did not have control. At a hearing in September 2014, however, the trial court specifically imposed sanctions on Plaintiffs for having not produced Hunter Donaldson's documents. The September 2014 order was based on the court's mistaken belief that a prior judge in this case had already resolved the issue of control, as well as an incorrect application of the law under CR 34.

The trial court also abused its discretion in rendering \$139,300 in

sanctions against Appellants, where the record demonstrated that any non-compliance by Appellants was not intentional, but rather the consequence of the ambiguity of the court's orders.

For these reasons, Appellants request that this Court vacate the trial court's May 23, August 1, September 26, and December 19 orders.

II. ASSIGNMENTS OF ERROR

1. Did the trial court err as a matter of law when it granted Plaintiffs' May 23, 2014 motion to compel and for sanctions, and Plaintiffs' subsequent motions for sanctions, where the parties had not participated in a CR 26(i) discovery conference?
2. Did the trial court abuse its discretion in ordering Appellants to produce documents over which Appellants averred they lacked control, and where Plaintiffs failed to meet their burden of producing evidence to the contrary?
3. Did the trial court abuse its discretion in entering \$139,300 in non-compensatory monetary sanctions without explicitly considering the "*Burnet* factors" set forth by the Washington Supreme Court, and where the sanctions amount was not the least severe sanction necessary to compel Appellants' compliance?

III. STATEMENT OF THE CASE

A. The Lawsuit.

This case concerns Washington's medical lien statute, which allows health care providers to recover unpaid health care costs incurred when they treat tort victims. The statute automatically creates a lien in favor of the provider on any recovery a victim later receives from the

tortfeasor; the liens are then perfected by recording a notice of the lien with the county auditor. *See* RCW Ch. 60.44.

Defendants MultiCare Health Systems (“MultiCare”) and Mt. Rainier Emergency Physicians (“MREP”) are Washington health care providers who retained Hunter Donaldson to file and recover on their medical liens. The named plaintiffs are tort victims who received medical treatment from these providers. CP 1-32. Wadsworth is one of Hunter Donaldson’s principals; Rohlke was a Hunter Donaldson employee.

All but one of the plaintiffs obtained some monetary recovery from tortfeasors or their insurers, a portion of which was put in “trust” to satisfy the MultiCare’s and/or MREP’s medical liens, which were notarized and filed by Hunter Donaldson. CP 1-32.

In April 2013, Plaintiffs filed this action alleging, among other things, that the liens were invalid and could not be used as a basis for the recovery of hospital charges from the money they received in settlement for their injuries. CP 20-31. These claims were based, in large part, on Plaintiffs’ allegation that liens notarized by Rohlke were invalid because she had notarized them as a Washington notary while actually residing in California. *Id.* In short, Plaintiffs complained that the money put “in trust” to satisfy the medical services liens should have gone directly into their own pockets. CP 8-15.

B. The Parties' Discovery Dispute.

On April 30, 2013, Plaintiffs served Appellants and Hunter Donaldson with their complaint in this matter, along with discovery requests directed to each of them. On May 30, 2013, the action was removed to federal court, and shortly thereafter, Appellants notified Plaintiffs that they believed removal had rendered Plaintiffs' discovery requests ineffective. CP 244. The district court remanded to the state court on January 23, 2014, and a discovery stay that had been negotiated by the parties was lifted on February 17, 2014. *See* CP 205.

At that point, the parties still disagreed whether Plaintiffs initial discovery requests remained operative in light of the removal to, and subsequent remand from, federal court. The parties held a CR 26(i) discovery conference on this single issue on March 6, 2014. CP 118; 232.

Plaintiffs filed a motion to compel Wadsworth and Hunter Donaldson to provide discovery responses to the outstanding requests ("First Motion to Compel"). CP 113-114. Importantly, Plaintiffs did *not* move to compel Rohlke's responses. CP 113.

At the March 28, 2014 hearing on Plaintiffs' First Motion to Compel, the Court ruled that the discovery did not need to be re-served, but granted Wadsworth and Hunter Donaldson until April 25, 2014 to serve responses and objections, and in doing so make "a good faith

attempt to fully answer each interrogatory or request for production, or provide an objection justified in law.” CP 282. The Court did *not* order that any documents actually be produced by that date, only that responses be served. CP 282

Appellants and Hunter Donaldson served responses to Plaintiffs’ discovery requests on April 25, 2014, and supplemented their document productions on May 2 and May 6. CP 308-350; 381. Their responses indicated that certain documents were being gathered and would be produced. *Id.*

After making supplemental productions in early May, counsel for Appellants and Hunter Donaldson, Stephen Perisho, tried to contact Plaintiffs’ counsel to arrange a CR 26(i) conference to discuss Appellants’ objections. Plaintiffs’ counsel never returned his calls. CP 494.

On May 15, 2014, without ever having conducted the discovery conference required under CR 26(i), and despite Appellants’ and Hunter Donaldson’s ongoing efforts to respond to Plaintiffs’ discovery requests and to resolve their objections, Plaintiffs filed a second motion to compel and for sanctions (“Second Motion to Compel”), in which Plaintiffs sought attorneys’ fees and per diem sanctions of up to \$1,000. CP 287-294.

In their Second Motion to Compel, Plaintiffs argued that

Appellants and Hunter Donaldson had failed to timely produce any responsive documents.¹ CP 289. That representation was false, as noted by Plaintiffs in their reply; a number of documents had been produced. CP 394. Further, Plaintiffs wholly disregarded the fact that Hunter Donaldson had been working in good faith toward producing documents requested of it. CP 375.

Appellants opposed Plaintiffs' Second Motion to Compel on the basis that Plaintiffs had failed to satisfy the discovery conference requirements under CR 26(i). CP 376.

On May 22, 2014, before the trial court heard Plaintiffs' Second Motion to Compel, Appellants served supplemental discovery responses, further answering Plaintiffs' requests. *See* CP 455-470. Among other things, these supplemental responses articulated that many of Plaintiffs' requests sought documents owned by Hunter Donaldson, over which Appellants lacked possession or control. CP 455-458; 463-467.

At the hearing on Plaintiffs' Second Motion to Compel, the Court

¹ Plaintiffs' counsel misrepresented in the moving papers that the trial court had set a deadline in its March 28, 2014 Order for the actual production of documents. The order only set forth a deadline to provide written responses and objections. *Compare* CP 281 ("All outstanding discovery responses will be produced by no later than close of business on April 25, 2014; and ...[t]he responses will include a good faith attempt to fully answer each interrogatory or request for production, or provide an objection justified in law") *with* CP 287 (Second Motion to Compel) ("Here, the Hunter Donaldson Defendants have failed to produce any documents in response to Plaintiffs' requests, despite the Court's earlier order."). *In reality*, Wadsworth and Hunter Donaldson had fully complied with the court's earlier order.

ruled that Plaintiffs' failure to comply with CR 26(i) prior to filing their motion was "moot" in light of the earlier meet and confer conducted by counsel for Plaintiffs, Wadsworth, and Hunter Donaldson on Plaintiffs' First Motion to Compel. 05/23/14 Verbatim Report of Proceedings ("VRP") at 5. In fact, the Rule 26(i) issue was not moot, as the only CR 26(i) conference that had occurred at that point related to a different motion, seeking different relief, against only some of the parties (Wadsworth and Hunter Donaldson, but not Rohlke) to Plaintiffs' Second Motion. *See* CP 118, 232.

After the hearing, the trial court issued the following order:

Hunter Donaldson, Wadsworth [sic] and Rohlke are hereby Ordered to produce full and complete responses to Plaintiff's first Interrogatories and Requests for Production of Documents, specifically including all responsive documents and sign the same. It is further ORDERED that [] Hunter Donaldson, Wadsworth and Rohlke are jointly ordered to pay \$2,500.00 in attorneys' fees, and pay sanctions until they comply with this order, as follows: Wadsworth, Rohlke, and Hunter Donaldson shall *jointly pay* \$100.00 per day through May 30, 2014, and \$1000.00 per day for each day after May 30, 2014, for each day that Hunter Donaldson, Rohlke, and Wadsworth have not fully answered Respondents' interrogatories, produced full and complete responses to Respondents' requests for production, signed the discovery responses, and delivered the same to Respondents' counsel.

CP 402 (Emphasis added). Critically for purposes of this appeal, at no point in the hearing or in its order did the trial court issue any findings or

conclusions establishing that Wadsworth or Rohlke had control over documents belonging to Hunter Donaldson.

Six days later, on May 29, 2014, Appellants served their Second Supplemental Responses to Plaintiffs' Interrogatories and Requests for Production. CP 433-453. Appellants' purpose in doing so was to confirm that they had produced all responsive documents in their possession, custody, and control (save for tax returns that were the subject of an objection never disputed or ruled on by the Court). The supplemental responses also reiterated that Appellants did not have possession or control over Hunter Donaldson's company documents. CP 439, 449. Rohlke also produced documents responsive to other requests that Plaintiffs had served on her. CP 496. At that point, Appellants reasonably believed that they were in compliance with the Court's May 23 order.

Hunter Donaldson filed for Chapter 11 bankruptcy on June 18, 2014, largely because of the extraordinary costs of defending this suit. A Notice of Automatic Stay was filed with the trial court the same day. CP 404-408. Plaintiffs retained counsel to represent their interests in Hunter Donaldson's bankruptcy proceeding. CP 859. They participated in the Section 341 meeting of creditors, filed motions to dismiss and transfer venue (both of which were denied), and eventually filed a proof of claim. CP 859-860. At no point did Plaintiffs seek Hunter Donaldson's company

records in the bankruptcy proceeding.

Instead, on July 17, 2014 Plaintiffs filed a Motion for Sanctions and Entry of Judgment (“First Sanctions Motion”) against Appellants and their counsel, Perisho. CP 409-421. Plaintiffs sought continuing sanctions against Appellants through the date of filing the motion, notwithstanding that Appellants’ May 29, 2014 Second Supplemental Responses clearly stated that (except for their tax returns) all documents within Appellants’ possession, custody, and control had been produced.² CP 409-421.

In their motion, Plaintiffs argued that the Court should sanction Appellants for their failure to produce Hunter Donaldson’s company documents. However, the court had never determined whether Appellants had “control” over the documents, or whether Hunter Donaldson (by then a debtor in possession) had authorized Appellants to exert control over these records. In fact, Hunter Donaldson had not. CP 485-486.³

In their opposition, Appellants again pointed out that they had fully responded to Plaintiffs’ discovery requests, produced all responsive documents in their personal possession, custody, or control, and indicated

² This motion, too, was filed without certification of compliance with CR 26(i), and in fact, after the Court ruled in its May 23, 2014 Order that the CR 26(i) issue was “moot”, Plaintiffs never again sought to confer prior to filing their CR 37 motions. Nor did they include the requisite certification in their motion papers. CP 409-421, 575-587, 939-947.

³ Plaintiffs have not argued that Appellants were alter egos of Hunter Donaldson.

that there were no other responsive documents to produce. CP 483.⁴

Appellants also noted that the bankruptcy stay prevented any further action, including discovery or sanctions orders, against Hunter Donaldson. CP 484.

At the hearing on Plaintiffs' First Sanctions Motion, the trial court made a number of ambiguous and seemingly inconsistent comments regarding Appellants' obligations to respond to Plaintiffs' outstanding requests. The court began with a discussion of the issues arising from the bankruptcy of Hunter Donaldson and confirmed that there was no stay of proceedings against Appellants as a result. 8/1/14 VRP at 9. The discussion then turned to whether Appellants could be held individually liable for sanctions imposed on them jointly with a now bankrupt entity. *Id.* at 10-11. Counsel for Appellants argued that an award and judgment of sanctions against the Appellants could not be made if it required a finding of misconduct by Hunter Donaldson. *Id.* The court seemed to agree. *Id.*

Counsel next argued that a judgment on a sanctions award could not be entered against his clients for failing to produce company records which they were never authorized by the company to produce, stating that the court could not sanction the Appellants for "failure to produce records as you've [the Court] described, E-mails at the company, their work cell

⁴ With the exception of Appellants' tax returns, over which Appellants retained an objection that the trial court had not ruled on.

phone records from their work phones at the company, and other electronic communications, calendars, et cetera, that are part of the company's records." 8/01/14 VRP at 17. In response, the court stated:

I'm not putting that in the order. I appreciate exactly what you're trying to have me do, which is to suggest that I am ordering the company to produce those; I am not. *I'm ordering – I already ordered Wadsworth and Rohlke to produce those records and they've failed to do it.* I mean, at the very least what I could do is enter a judgment that would go right up to the date of the bankruptcy stay was filed.

Id. (Italics added). This statement is inaccurate, as the Court had never previously ordered Wadsworth or Rohlke to produce Hunter Donaldson records, or made the requisite findings that they even had control over Hunter Donaldson's documents that would permit them to produce them.

At a different point in the hearing, the court seemed to focus not on whether Appellants had control over Hunter Donaldson's company records, but rather on what documents were in Appellants' actual possession:

What I'm going to order is that they have failed to produce what's in their possession. And I can't believe that they don't have written electronic communications between Wadsworth and Adams, work schedules or calendars, cell phone bills. I mean that's pretty straightforward.

Id. It is not clear from this statement whether the trial court was referencing documents owned by Hunter Donaldson but within Appellants' physical possession, or rather that the Court was expressing

disbelief that Appellants did not have personal emails and cell phone bills to produce.

Moreover, the Court's August 1, 2014 order granting Plaintiffs' motion and imposing sanctions failed to (1) identify which specific documents or categories of documents were not produced; (2) apportion the judgment between the Wadsworth and Rohlke based on their own acts; (3) address the impact of the entry of judgment on the earlier May 23, 2014 order imposing joint liability with Hunter Donaldson; or (4) address how an order of sanctions could issue against Appellants for failing to produce company records when such an order might require a finding that the company itself must produce them. CP 568.

Plaintiffs filed a Second Motion for Sanctions and Entry of Judgment on September 17, 2014 ("Second Sanctions Motion"). CP 575-587. Appellants at that point believed they were in full compliance with the Court's orders. They had produced all responsive documents within their personal possession, custody, and control, produced their tax returns despite their unresolved objections, and had averred that they did not personally possess any other responsive documents. CP 588-779.

At the time of the hearing on Plaintiffs' Second Sanctions Motion, a new judge, Judge Costello, had been assigned to the case. At that hearing the trial court incorrectly interpreted the prior court's August 1,

2014 Order to have required Appellants to produce Hunter Donaldson's corporate documents on the basis that those documents were under Appellants' "control."

But the August 1 transcript does not support Judge Costello's reading that the earlier court had made any finding of "control" by Appellants, or that the court had definitively ordered Wadsworth and Rohlke to produce documents in Hunter Donaldson's possession, as opposed to their own.

Nonetheless, following the September 26 hearing, the court entered an order finding Appellants in "contempt of court pursuant to CR 37(b)(2)(D) for their willful failure to comply with the Court's May 23, 2014 order compelling discovery responses," and awarded another \$70,000 in sanctions (July 18-Sept. 26, 2014) against Appellants. CP 912.

On October 24, 2014, Appellants filed their Notice of Appeal from the September 26, 2014 order and judgment, and from all related orders and judgments prior thereto, including, without limitation, the May 23, 2014 and August 1, 2014 orders and judgments compelling discovery and awarding sanctions. CP 919-930.

While Appellants disagreed with the trial court's decision, they nonetheless complied with it. CP 986. This process was complicated because Plaintiffs had expanded their request for documents beyond those

sought in their motion. *See* CP 986. Appellants began producing responsive documents on October 13, 2014 and finished producing responsive documents on October 15. CP 1079-1082.

On December 4, 2014 Plaintiffs filed a third (and final) motion for sanctions and entry of judgment (“Third Motion for Sanctions”), arguing that Appellants’ delay in producing Hunter Donaldson’s documents between September 26 and October 15, 2014 represented a continuing violation of the May 23, 2014 order compelling discovery responses. Plaintiffs sought entry of judgment for an additional \$18,000 in sanctions. CP 939-947. The trial court granted Plaintiffs’ motion on December 19. CP 1145.

Appellants filed their Notice of Appeal from the December 19, 2014 order and judgment on January 15, 2015. That appeal was consolidated with Appellants’ earlier appeal from the September 26 and August 1 judgments. As a result, this appeal involves all of the related orders and judgments prior to and including, without limitation, the May 23, August 1, September 26 and December 19, 2014 orders and judgments compelling discovery and awarding sanctions against Appellants.

C. Plaintiffs Suffered No Prejudice as a Result of the Delay in Production.

On the very day, October 13, 2014, that Appellants were producing

documents, Plaintiffs and co-defendant MultiCare announced that they had reached a classwide settlement. CP 1084-1086. Plaintiffs had alleged in the underlying lawsuit that MultiCare collected approximately \$8 million based on purportedly invalid liens, and Plaintiffs' settlement with MultiCare created a \$7.5 million settlement fund. CP 1088-1112. As part of the settlement, Plaintiffs' claims against Appellants and Hunter Donaldson were assigned to MultiCare. *Id.* Each named plaintiff received an incentive award of \$15,000, and Plaintiffs' counsel received an attorneys fee award of approximately \$2,500,000. *Id.*

At that point, Plaintiffs no longer had any need for documents wrongfully sought from Appellants. Plaintiffs were no longer litigating the claims related to the specific discovery requests that had been the subject of their discovery motions.

IV. ARGUMENT

A. Standard of Review

Under controlling Division Two precedent, whether a trial court has authority to hear a motion to compel is a question of law, and a challenge to that authority on appeal is reviewed *de novo*. *Rudolph v. Empirical Research Sys., Inc.*, 107 Wn. App. 861, 866, 28 P.3d 813, 816 (2001) (“A trial court’s authority to entertain a motion, as opposed to its authority to decide that motion, is a question of law that we review de

novo.”); accord *Clark v. Office of Attorney General*, 133 Wn. App. 767, 779–80, 138 P.3d 144 (2006) (same).

This Court reviews a trial court’s award of discovery sanctions for an abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (citing *Phillips v. Richmond*, 59 Wn.2d 571, 369 P.2d 299 (1962)). A trial court abuses its discretion when it misinterprets and misapplies the law. See *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 17, 330 P.3d 168 (2014).

B. The Trial Court Had No Authority to Consider Plaintiffs’ Second Motion to Compel, or any of Plaintiffs’ Subsequent Motions for Sanctions, Because Plaintiffs Wholly Failed to Comply with CR 26(i).

1. Plaintiffs Did Not Comply With CR 26(i)’s Mandatory Requirements Before Filing their Second Motion for Sanctions.

CR 26(i) provides, in relevant part:

(i) Motions; Conference of Counsel *Required*. The court *will not* entertain *any* motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient *conference in person or by telephone....*

Id. (italics supplied). The rule further requires that, “[a]ny motion seeking an order to compel discovery or obtain protection shall include counsels’ certification that the conference requirements of this rule have been met.”

Id.

Controlling precedent in Division Two establishes that compliance with CR 26(i)'s requirements is mandatory, and that a trial court lacks authority to hear a motion to compel when the movant has not complied with CR 26(i)'s requirements. *Rudolph*, 107 Wn. App. at 867; *Case v. Dundom*, 115 Wn. App. 199, 203, 58 P.3d 919 (2002). Division Three likewise requires compliance with CR 26(i) before the trial court can entertain a motion to compel under CR 37. *Thongchoom v. Graco Children's Products, Inc.*, 117 Wn. App. 299, 308, 71 P.3d 214 (2003) ("A court may not entertain a CR 37(a) motion to compel unless the motion includes counsel's certification that the conference requirements of CR 26(i) have been met.")⁵

This Court's decision in *Rudolph* is dispositive. In *Rudolph*, the plaintiff moved to compel and sought discovery sanctions. Instead of

⁵ Division One has adopted a different standard, finding that strict compliance with the CR 26(i) requirements is not necessary. *Amy v. Kmart of Washington LLC*, 153 Wn. App. 846, 855–56, 223 P.3d 1247, 1252 (2009). But *Case* and *Rudolph* are the controlling precedent in this division, not *Amy*. *State v. Schmitt*, 124 Wn. App. 662, 669 n. 11, 102 P.3d 856 (2004). *Amy* also is easily distinguishable, as there, the issue was not whether the parties had actually met and conferred telephonically or in person; they had. The only issue was whether the actual language contained in the movant's CR 26(i) certification was satisfactory, because it did not specifically state that the parties had conferred in person or by telephone, or that they had conferred about the motion as opposed to the "underlying discovery dispute." *Amy* at 860–61. Moreover, *Amy* does not stand for the proposition that there is no meet and confer requirement, or that courts are free to disregard it in its entirety; Division One only held that *strict* compliance with CR 26(i) is not necessary. Even in Division One, a trial court would abuse its discretion by excusing entirely a plaintiff's failure to meet and confer before filing a discovery motion.

conferring with the defendant telephonically or in person before filing his motion, the plaintiff sent a letter stating that if the defendant did not provide the requested documents, the plaintiff would seek an order of dismissal from the court, or in the alternative, seek to exclude documents until the defendant complied. 107 Wn. App. at 862. The defendant objected that the plaintiff had failed to comply with CR 26(i), and did not produce responsive documents. The trial court granted the plaintiff's motion and dismissed the case. On appeal, this Court held:

In drafting CR 26(i), our Supreme Court selected the words "will not" and "shall." These words are mandatory, as opposed to "may" which is permissive....

If counsel for the parties have not conferred with respect to a CR 37(a) motion to compel discovery or if such motion does not include counsel's certification that the conference requirements were met, the trial court does not have discretion to entertain the motion. The rule precludes the trial court from hearing such a motion if the conference requirements are not met.

Id., 107 Wn. App. at 867. In response to the plaintiff's argument that he had complied with CR 26(i) by sending a letter, this Court held:

This argument is meritless as it is contrary to the plain language of the rule requiring a conference in person or by telephone. The trial court lacked authority to entertain a motion to compel that did not contain a certification that the parties had complied with the conference requirements of CR 26(i).

Id.

Similarly, in *Case*, the moving party filed a motion to compel without certifying that the parties had complied with CR 26(i)'s requirements. The only evidence in the record to support the movant's contention that the requisite CR 26(i) conference occurred was the movant's statement that he had mailed correspondence to the responding party regarding the discovery dispute. *Id.*, at 202. The Court of Appeals held that this did not comply with CR 26(i)'s requirements:

The 'in person or by telephone' requirement illustrates the policy of contemporaneous, two-way communications. Although traditional mail is a form of communication, it is not a contemporaneous, two-way communication and is certainly not a communication "in person or by telephone." As such, *Case*'s statements that he "mailed correspondence" and made "written requests" for discovery compliance do not certify that he complied with CR 26(i).

Id. at 204.

Because the plaintiff had not complied with CR 26(i) before filing his motion to compel, the trial court lacked authority to grant it. As a result, this Court vacated both the order compelling production and the resulting sanctions order. *Id.*, at 204.

Here, the record is clear that Plaintiffs did not satisfy CR 26(i)'s requirements before filing their Second Motion to Compel on May 15, 2014. Plaintiffs' CR 26(i) Certification states:

Plaintiffs' attorney Darrell Cochran certifies that he discussed these issues *by email* with the Hunter Donaldson

Defendants' attorney Stephen Perisho on May 13, 2014.

CP 292 (*italics added*).

The law in this Division is clear that merely sending an email does not satisfy a party's obligation to confer "in person or by telephone."

Rudolph, 107 Wn. App. at 867; *Case*, 115 Wn. App. at 204. Moreover, the email to which Plaintiffs refer does not even mention CR 26(i), or seek to schedule a discovery conference. Instead, it stated only:

I'm taking mortar rounds from my own troops for not pushing harder to get discovery from your folks. I would love to hear from you that it is coming today or tomorrow so we can avoid the motion practice I can stave off for only so long.

CP 372.

Appellants' argued that Plaintiffs' motion was improper and premature because they had failed to comply with CR 26(i) prior to filing it. CP 373. Additionally, Appellants stressed both in their opposition and at the hearing that they had intended to produce documents, but that Plaintiffs' counsel refused to participate in a call to discuss the scope of Plaintiffs' document requests. CP 373.

At the hearing on Plaintiffs' Second Motion to Compel, the trial court *sua sponte* ruled that Plaintiffs were not required to comply with CR 26(i) before moving to compel under CR 37(a). 05/23/14 VRP at 5. That decision is directly at odds with this Court's decisions in *Rudolph* and

Case. The trial court's ruling on this issue also was inconsistent with both Plaintiffs' and Appellants' interpretation of CR 26(i).

The trial court apparently based its ruling on the fact that counsel for Plaintiffs, Wadsworth and Hunter Donaldson (but not Rohlke) had conducted a CR 26(i) conference in connection with Plaintiffs' First Motion to Compel. But, as Appellants' counsel argued to the court, Plaintiffs' First Motion to Compel arose out of the parties' disagreement over the effect the case's removal to federal court (and subsequent remand) had on Plaintiffs' outstanding discovery to Hunter Donaldson and Appellants. It had nothing to do with the substance of Plaintiffs' requests or Appellants' responses. 05/23/14 VRP at 10.

The continuing validity of Plaintiffs' requests in light of the removal and remand was the only topic discussed in the initial CR 26(i) conference. As Plaintiffs' counsel wrote in an email summarizing the conference:

I understand from our CR 26(i) conference last week that you will take the position that the removal somehow eviscerated that set of discovery so we will file our motion to compel on Thursday and obtain guidance from the Court on that issue.

CP 232. At no point in that conference did the parties discuss the actual substance of the parties' responses. *See id.*

Further, even if the two motions were related, that did not excuse

Plaintiffs' from failing to conduct a discovery conference under CR 26(i) before filing their Second Motion to Compel. CR 26(i) requires that "the court will not entertain *any* motion...with respect to rules 26 to 37 unless counsel have conferred with respect to *the* motion." (Italics supplied). In other words, CR 26(i) must be met each time a party files a motion under Rules 26 through 37, without exception. It even applies to motions for an award of sanctions under CR 37, such as the type Plaintiffs filed here. CR 26(i); *see also Rudolph* (requiring compliance with CR 26(i) before the court had authority to hear motion styled as one to compel, but which really sought imposition of discovery sanctions).⁶ Motions for sanctions under CR 37 almost always relate to earlier motions to compel, demonstrating the invalidity of the trial court's reasoning.

Simply put, nothing in CR 26(i) or CR 37 excuses Plaintiffs' noncompliance with CR 26(i) in this instance. The trial court erred in so holding. Because Plaintiffs failed to meet and confer prior to filing their Second Motion to Compel, the Court had no authority to hear that motion. As a result, the trial court erred as a matter of law when it issued its order granting Plaintiffs' second motion to compel, and all of the subsequent

⁶ *See also Amy*, 153 Wn. App. at 863 ("CR 26(i) is applicable to any motion or objection with respect to CR 26 through 37, including motions for sanctions). The trial court's sanctions orders and judgments also should be vacated because a separate CR 26(i) conference was required before Plaintiffs could file *each* sanctions motion, and Plaintiffs do not even purport to have complied with that obligation.

sanctions orders and judgments flowing therefrom.⁷ Those orders should be vacated. *Case*, 115 Wn. App. at 204.

2. The Court Erred in Hearing Plaintiffs' Second Motion to Compel as to Rohlke, Where it is Undisputed that Plaintiffs' First Motion to Compel Did Not Involve Her.

If the Court holds that Plaintiffs were not required to comply with CR 26(i) before filing their Second Motion to Compel because they met and conferred before filing their First Motion to Compel, the Court nevertheless should vacate the trial court's orders as to Rohlke. Rohlke was not a party to that motion. Nor was she the subject of the court's order on that motion.

Plaintiffs' First Motion to Compel was directed only at Hunter Donaldson and Wadsworth. It was captioned "Plaintiffs' Motion to Compel Discovery Responses from Defendants Hunter Donaldson LLC, [sic.] and Ralph Wadsworth." CP 113. The first sentence of the motion makes it clear that Plaintiffs were requesting only that the trial court

compel Defendants Hunter Donaldson, LLC, and Ralph Wadsworth, (collectively, "Hunter Donaldson Defendants") to fully respond to their requests for production.

CP 114. Plaintiffs sought no relief as to Rohlke. In support of their First Motion to Compel, Plaintiffs attached the discovery propounded to

⁷ *I.e.*, the August 1, September 26, and December 19 sanctions orders and judgments. CP 568, 912, and 1144.

Wadsworth and Hunter Donaldson, but not the discovery requests issued to Rohlke. CP 132-188. Only Wadsworth and Hunter Donaldson responded to the motion. CP 235. And the trial court's order was directed at only Wadsworth and Hunter Donaldson. CP 282.

Rohlke was not the subject of, and was not a party to, Plaintiffs' First Motion to Compel or the court's order granting that motion. Nor does Plaintiffs' CR 26(i) certification indicate that Plaintiffs' counsel met and conferred with Rohlke's counsel regarding her discovery requests.

As such, Plaintiffs' Second Motion to Compel was the first motion seeking relief against Rohlke. Even if this Court were to hold that no CR 26(i) conference on Plaintiffs' Second Motion to Compel was necessary before it could be heard as to Wadsworth and Hunter Donaldson because it somehow was part of Plaintiffs' First Motion to Compel (it was not), the Second Motion to Compel cannot have been part of an earlier motion to compel with respect to Rohlke, because no earlier motion to compel was made as to her. As such, Plaintiffs were required to hold a CR 26(i) conference "in person or by telephone" with Rohlke before they could file their Second Motion to Compel against her. *See Rudolph*, 107 Wn. App. at 867 (requiring strict compliance with CR 26(i)); *Case*, 115 Wn. App. at 202 (same).

Because they did not, the trial court lacked authority to consider

Plaintiffs' Second Motion to Compel as to Rohlke, and erred as a matter of law in doing so. The trial court's orders with respect to Rohlke should be vacated.

C. The Trial Court Abused Its Discretion when It Sanctioned Appellants for Failing to Produce Documents.

1. The Trial Court Abused its Discretion By Awarding Sanctions Based on Unclear and at Times Contradictory Orders.

It is well settled that "a trial court's reasons for imposing discovery sanctions should "be clearly stated on the record so that meaningful review can be had on appeal." *Magaña v. Hyundai Motor America*, 167 Wn.2d 570, 583, 220 P.3d 191 (2009) (citing *Burnet*, 131 Wn.2d at 494). "If a trial court's findings of fact are clearly unsupported by the record, then an appellate court will find that the trial court abused its discretion." *Id.* Further, "fair and reasoned resistance to discovery is not sanctionable." *Id.* at 584 (citing *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 346, 858 P.2d 1054, 1079 (1993)).

Here, the trial court's orders and hearing transcripts are consistently ambiguous, and at times contradictory. As a result, throughout this discovery dispute it was unclear what Appellants were being ordered to produce, and on what precise basis sanctions were being imposed against them.

For example, on March 28, 2014, the trial court entered an order

on Plaintiffs' First Motion to Compel. That Order required only that Wadsworth and Hunter Donaldson produce "all outstanding discovery responses...by no later than close of business on April 25, 2014; and [that] the responses ... include a good faith attempt to fully answer each interrogatory or request for production, or provide an objection justified in law." CP 282. Appellants (and Hunter Donaldson) served discovery responses and valid objections on April 25, 2014 as required by the Court's order. CP 308-370.

On May 15, 2014, Plaintiffs filed their Second Motion to Compel (which included a request for sanctions). In it, Plaintiffs argued that Appellants were violating the court's March 28 order by failing to produce documents. But the clear language of the Court's March 28, 2014 order (which Plaintiffs drafted) did not require that all responsive documents be produced by April 25, 2014, CP 282. Nor does CR 34 require that documents be produced on the date that responses are due; all that is required is that responses and objection be served on that date.

On May 22, 2014, Appellants served supplemental responses to Appellants' discovery requests. With respect to a number of Plaintiffs' requests, Appellants responded that:

after conducting a reasonable search, there are no responsive documents within [Wadsworth's or Rohlke's] possession or control. Without waiving any objection [Mr.

Wadsworth/Ms. Rohlke] further represents that any documents responsive to this request would be in the possession or control of Hunter Donaldson, LLC.

See, e.g., CP 456, 466.

At the hearing on Plaintiffs' Second Motion for Sanctions a week later, counsel for Appellants explained that Appellants had served supplemental responses demonstrating that, in many instances, they did not have responsive documents in their possession or control.

When pressed by the trial court why sanctions should be entered against Appellants when they had stated in response to Plaintiffs' requests that they had no such documents, Plaintiffs' counsel changed course and argued grounds that he conceded Plaintiffs had not specifically raised in their motion:

THE COURT: My question for you, Mr. Gallagher, is you said you did receive response from Rohlke and Wadsworth yesterday that they do not have any documents in their possession; why would you then get a joint and several liability order against them for sanctions?

MR. GALLAGHER: Your Honor, it's not just that, it's the interrogatory objections as well. And they only responded to some of the request for production, I didn't have a chance to really outline which ones those were. They only responded to several of them.

05/23/14 VRP at 9.

Plaintiffs implicitly abandoned their request for documents to which Appellants argued they lacked possession or control, and instead

focused on interrogatories and requests that Plaintiffs' counsel "didn't have a chance to really outline" in his five page motion. In fact, Appellants' answers and objections to Plaintiffs' interrogatories were not only "not outlined" in Plaintiffs' motion, they were not even referenced; the motion focused exclusively on Appellants' alleged failure to produce documents. Notwithstanding Plaintiffs' shifting arguments, the trial court's own concession that it had not "looked at [Appellants' original objections and answers] in detail" prior to the hearing, and the fact that the trial court had not reviewed Appellants' recently filed supplemental responses, the trial court entered the following order:

Defendant Hunter Donaldson, Wadsworth and Rohlke are jointly ordered to pay \$2,500.00 in attorney's fees, and pay sanctions until they comply with this order, as follows:

Wadsworth, Rohlke and Hunter Donaldson shall jointly pay \$100.00 per day through May 30, 2014, and \$1000.00 per day for each day after May 30, 2014, for each day that Hunter Donaldson, Rohlke, and Wadsworth have not fully answered Plaintiffs' interrogatories, produced full and complete responses to plaintiffs' requests for production, signed the discovery requests, and delivered the same to Plaintiffs' counsel.

CP 402. Entry of this order was an abuse of the court's discretion.

On May 29, 2014, six days after the court entered its May 23, 2014 Order (and after only \$600 in sanctions had accrued), Appellants served their Second Supplemental Responses to Plaintiffs' Discovery Requests.

CP 433-453. These supplemental responses included responses to Plaintiffs' outstanding interrogatories. Appellants also answered all of the outstanding requests to production to them, either by indicating that documents were in the process of being produced, or that "after conducting a reasonable search, there are no responsive documents within [their] possession, custody, or control...and any documents responsive to this request would be in the possession, custody, or control of" Hunter Donaldson. *Id.* Appellants maintained only one objection, to production of their tax returns. Upon service of their Second Supplemental Responses on May 29, 2014, Appellants reasonably believed that they were in substantial, if not complete, compliance with the court's order and that the per diem sanctions had stopped running.

On July 17, 2014, despite Appellants having served full and complete answers, Plaintiffs filed their First Sanctions Motion, arguing, in part, that:

Wadsworth failed to produce any documents in response to requests for production numbers (nos.) 1 (documents supporting whether Wadsworth legally, properly, or validly executed medicals services liens from 2010 to present); 6 (copies of all written or electronic communications sent to or from Jason Adams from 2009 to present); 10 (work schedules or calendars from 2010 to present); or 12 (copies of any bills for cellular phones used for the Months of January, February, March and April 2013).

CP 412. Plaintiffs likewise argued that Rohlke "refused to produce any

documents in response to request for production 12 (cellular phone bills for January through April 2013).” CP 415:

But Wadsworth and Rohlke had not produced documents in response to these requests because they did not have responsive documents within their custody or control. All of the requested documents, to the extent any existed, were in the possession of, and under the control of, Hunter Donaldson, not Appellants. Significantly, by that time Hunter Donaldson was in bankruptcy, and a stay had been imposed in this case as to it.⁸

At the hearing on Plaintiffs’ First Sanctions Motion, the trial court made a number of ambiguous and seemingly contradictory statements, a number of which also contradicted or misconstrued its own previous orders. Specifically, at one point the trial court stated that it had already directed Wadsworth and Rohlke to produce Hunter Donaldson’s corporate documents at the May 23 hearing. 08/01/14 VRP at 16:13-18. But a review of the May 23 hearing transcript shows that statement is not supported by the record. *See* 05/23/14 VRP. The trial court never made any findings at the May 23 hearing that would suffice to establish that

⁸ While Plaintiffs could have attempted to serve discovery on Hunter Donaldson as part of the bankruptcy proceeding, they chose not to, instead attempting an end-run of the bankruptcy court’s jurisdiction by requesting that Appellants produce Hunter Donaldson’s documents.

either Wadsworth or Rohlke had the requisite “control”⁹ over Hunter Donaldson’s documents to produce them.

The Court also engaged in the following exchange with Appellants’ counsel over the trial court’s ability to require the production of Hunter Donaldson’s corporate documents:

MR SMITH: And there may be an issue that Stephen [Perisho, co-counsel] can [address] about whether or not Mr. Wadsworth should be sanctioned for not providing his tax returns. That’s a whole different issue. **The documents they want is they want every piece of paper or every file at [Hunter Donaldson], and our bankruptcy counsel said the Court cannot order that. You just cannot do that.**

THE COURT: **I will not.**

Id., at 10-11 (Emphasis supplied).

At another point in the hearing the trial court stated that, “[a]t the very least what I could do is enter a judgment that would go right up to the date that the bankruptcy stay was filed.” 08/01/14 VRP at 17.

And at yet a different point in the hearing, the court stated that it was not sanctioning Appellants for their failure to produce documents owned by Hunter Donaldson, but rather because the trial court simply did not believe that they did not have personal emails, work calendars or cell phone bills in their possession that would be responsive to Plaintiffs’

⁹ The issue of “control” for purposes of CR 34 is briefed in further detail, *infra*, at Section C(2).

requests, despite there being no evidence supporting the court's speculation:

What I'm going to order is that they have failed to produce what's in *their possession*. And I can't believe that they don't have written electronic communications between Wadsworth and Adams, work schedules or calendars, cell phone bills. I mean, that seems to be pretty straightforward.

Id., at 14 (Emphasis supplied).

Ultimately, the trial court granted Plaintiffs' motion and awarded \$53,000 in sanctions against Appellants. CP 572. However, it remained unclear on what basis the trial court imposed the sanctions. Plaintiffs reasonably interpreted the court's award to be based on its disbelief that they did not have cell phone bills, emails, and other responsive documents in their personal "possession," despite their having stated so in response to Plaintiffs' discovery requests. *Id.*, at 14.

On September 17, Plaintiffs filed their Third Sanctions Motion. At that point, Appellants had produced their tax returns.¹⁰ However, Plaintiffs again argued that Appellants remained non-compliant because they had failed to produce Hunter Donaldson's documents.

In response, Appellants submitted declarations stating that they had no responsive documents in their possession or control, and that any

¹⁰ Appellants produced them on September 19, 2014, while preserving their objections. See CP 865, 870.

responsive documents belonged to Hunter Donaldson. At the September 26, 2014 hearing, the trial court made it clear, for the first time, that it was imposing sanctions because it believed that Wadsworth and Rohlke had the practical ability to get responsive documents from Hunter Donaldson. The trial court's ruling on this issue was an abuse of discretion (*see* Section C(2), *infra.*), but in order to stop the sanctions from continuing to accrue, Appellants fully complied with the court's order and had those documents produced to Plaintiffs.

Appellants completed their production on October 15, 2014. CP 987. On December 4, 2014, Plaintiffs moved for entry of a third judgment, for \$18,000 in per diem sanctions running through October 15. The court granted the Motion on December 19, 2014.

The Court's orders leading up to September 26 all were ambiguous, and failed to adequately describe the reasons on which the court was imposing sanctions. Plaintiffs reasonably believed they were in compliance with the court's orders as of, at the latest, May 29, when they served their Second Supplemental Discovery Responses, only for the court to impose \$50,000 in additional, and wholly unexpected, sanctions at the August 1, 2014 hearing. And at that hearing, it was unclear on what basis the Court was imposing sanctions. It was not until September 26, when the court for the first time expressly stated the basis for the sanctions, that

Appellants were able to fully understand and comply with the trial court's order. The court's failure to reasonably articulate what specifically it was requiring of Appellants, and the basis for such an enormous sanctions award against Appellants, was an abuse of discretion. *See Magaña*, 167 Wn.2d at 583-84. The trial court's orders should be vacated.

2. The Trial Court Abused Its Discretion in Awarding Sanctions Against Appellants Where Plaintiffs Failed to Establish Appellants Had "Control" over Hunter Donaldson's Corporate Documents.

CR 34 provides, in relevant part:

Any party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party, or the party's representative, to inspect, copy, test, photograph, record, measure, or sample the following items in the responding party's possession, custody, or control: any designated documents, electronically stored information, or things including writings, drawings....

Id.

Rule 34(b)(3) sets forth the manner in which parties are expected to respond to requests for production:

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state a specific objection to the request, including the reasons.

(C) Objections. An objection to part of a request must specify the part and permit inspection of the rest.

Id.

If a party on whom a request for production is served has no responsive documents within his or her “possession, custody, or control,” the party may respond accordingly. If the propounding party wishes to challenge this answer, the burden is on the propounding party to establish that the responding party does have sufficient possession, custody or control that the court can compel the responding party to produce the responsive documents. *See Diaz v. Washington State Migrant Counsel*, 165 Wn. App. 59, 265 P.3d 956 (2011); *see also Golden Trade v. Lee Apparel Co.*, 143 F.R.D. 514, 525, n.7 (S.D.N.Y. 1992) (“In the face of a denial by a party that it has possession, custody or control of documents, the discovering party must make an adequate showing to overcome this assertion.” (citing 4A James Wm. Moore et al., *Moore’s Federal Practice* ¶ 34.17 at 34–68 to 69 (2d ed. 1992) (“A party who denies under oath that the requested documents exist, or that they are within his or control, may not be compelled to produce them.”))). In meeting its burden, the moving party must come forward with evidence (as opposed to mere speculation) contradicting the responding party’s position. *See Golden Trade*, 143 F.R.D. at 525. In the absence of such a showing, the court cannot impose sanctions on a party for failing to produce the responsive documents.

Here, the trial court erred when it found, without any supporting

evidence and based on a misapplication of the law, that Appellants had sufficient “control” over Hunter Donaldson’s documents such that the trial court could sanction Appellants for failing to produce them.

The only Washington appellate court to have considered the definition of the term “control” is Division Three, in *Diaz*. 165 Wn. App. at 78. In *Diaz*, the plaintiff served document requests on the corporate defendant seeking citizenship records of its board of directors. The defendant refused to allow inspection of its own records and argued it had no control over the directors’ documents. The court agreed, holding that the defendant did not have “control” over whatever responsive documents the directors had within their own possession.

Noting the scarcity of Washington case law, and the similarities between CR 34 and FRCP 34, Division Three turned to federal law for guidance regarding the definition of the term “control.” *Id.*, at 77. The court held that the term “control,” for purposes of CR 34, apart from possession “is defined as ‘the legal right to obtain the documents requested upon demand.’” *Id.*, at 78. This is consistent with the definition used by the Ninth Circuit, as well as every other federal circuit court to have addressed the issue. *In re Citric Acid Litigation*, 191 F.3d 1090, 1107 (9th Cir. 1999).

The *Diaz* court then noted, relying on two federal district court

cases, that in certain instances, “[c]ontrol may also be found where an entity has access to and the ability to obtain the documents.” *Diaz at 78*. But the court in *Diaz* failed to note that this more expansive view of the term “control” is not shared by all federal courts. In fact, the more persuasive interpretation of the term “control,” and the interpretation that has been adopted by both the Ninth Circuit and every other federal appellate court to have considered the issue, is that “control” is limited to situations where the propounding party has met his burden of establishing that the responding party has the “legal right to obtain the documents requested upon demand.” *In re Citric Acid*, 191 F.3d at 1107. It is this definition of “control,” not the broader definition referenced by Division Three and employed by a few district courts, that this Court should adopt.¹¹

But even under the broader standard cited in *Diaz*, the trial court abused its discretion. The cases cited by *Diaz* are easily distinguishable. In *Bank of New York v. Meridien Biao Bank Tanz.*, the court required the responding party corporation, DIB, to produce documents of a third party because DIB was an assignee of that third party’s claims in the litigation, and even without an express provision in the assignment regarding

¹¹ As noted above, Division Three’s decision in *Diaz* is not binding on this Court. *Schmitt*, 124 Wn. App. at 669 n.11 (explaining, “[w]e need not follow the decisions of other divisions of this court. But we must follow our Supreme Court’s decisions”).

authority to produce records of the assignor, the court held that as assignee it had the legal right to obtain them and, as a practical matter, had access to them. 171 F.R.D. 135, 148-49 (S.D.N.Y. 1997).

And in *Addamax Corp. v. Open Software Found., Inc.*, 148 F.R.D. 462, 467 (D. Mass. 1993), the plaintiffs' motion to compel raised a single, discrete issue: whether a U.S. corporate defendant could be compelled to produce documents from the files of its German corporate parent, where the evidence reflected that, in connection with the subject matter of the plaintiff's request, the two entities "acted as one." *Id.*, at 467.

The facts in this case are far closer to those present in *Noaimi v. Zaid*, 283 F.R.D. 639 (D. Kan. 2012). In *Noaimi*, the defendants requested that individual plaintiffs, Nader and Nuaman, produce records pertaining to two corporations in which they had ownership interests. Plaintiffs responded that records from these companies were not within their "possession, custody, or control." Defendants moved to compel, arguing that the plaintiffs' ownership interests or influence with the companies was tantamount to "control" of the records. Defendants argued that plaintiffs had "control" over the documents because Nuaman had an ownership interest in the two corporations and the "practical ability to obtain the documents from another, irrespective of legal entitlements to the documents." *Id.* at 641.

The *Noaimi* court specifically rejected the standard on which Plaintiffs rely in this case, that “production of documents not in a party's possession is required if a party has the practical ability to obtain the documents from another, irrespective of legal entitlements to the documents.” The court further stated that it was “not persuaded that merely being a stockholder or officer of a corporation satisfies the ‘control’ standard set forth in Fed. R. Civ. P. 34(a)(1).” *Id.* at 642. Control required a finding of a legal right to obtain the documents on demand.¹²

Likewise, here, Plaintiffs have not met their burden of establishing that either Wadsworth or Rohlke had a legal right to obtain documents from Hunter Donaldson to produce to Plaintiffs. This is especially true after Hunter Donaldson filed for bankruptcy and a stay was entered as to it in the litigation.

Nor did the trial court ever make findings that Wadsworth or

¹² Similarly, in *Calhoun v. Robinson*, No. C08-5744 RJB/KLS, 2009 WL 3326760 (W.D. Wash. Oct. 13, 2009), the issue was whether the defendants, who were then employed by the Special Commitment Center (SCC), had the legal right to demand their own personnel files from their employer. The Court ruled that if they had this control, then the personnel files would have to be produced by them absent some other basis for objection. *Id.* at *3. The record was devoid of any evidence of control, and the issue was not fully briefed, so the Court directed the defendants to provide the court with further briefing on the issue of whether the personnel files were within their “control” and if so, why the files should not be available for review by the plaintiff. The court deferred ruling on the request pending receipt of the additional briefing. At a minimum, it was an abuse of discretion for the trial court not to make the same inquiry of Appellants.

Rohlke had legal control over Hunter Donaldson's documents. On the contrary, in the August 1 hearing the trial court stated, "[w]hat I'm going to order is that they have failed to produce what's in their *possession*." 08/01/14 VRP at 14:3-4.

At the September 26, 2014 hearing – the first hearing before a new judge assigned to the case – the trial court incorrectly stated that it had already determined that Wadsworth and Rohlke had access to the Hunter Donaldson materials sought by Plaintiffs. 09/26/14 VRP at 24. But the court had not previously made such a ruling. Moreover, the trial court also made it clear that it viewed "control" more expansively than do federal appellate courts:

THE COURT: Well, when you say you don't have them, does that mean that they are unable to access them or does that mean that, you know, Wadsworth and Rohlke are saying, It's on this company's server, and so in that sense we don't have them?

MR. CRAMER: I think it's – that it's both. I think that with respect to the – the cell phone bills, they don't have personal cell phones. They're someplace at the company. I don't know who has them. I can't say that Mr. Wadsworth can get them. I can't say that Ms. Rohlke can get them. I also think there's a distinction between what they say may or may not have been able to access prior to the bankruptcy versus after the bankruptcy. I don't – I'm not a bankruptcy attorney. I don't know what the –

THE COURT: I'm not talking about legally access. I'm not talking about your – you know these – these individuals deciding that, well, that's the property of the company. What I'm asking is this: Can they, through a keyboard or through a filing cabinet, access this information? That's what I want to know.

THE COURT: Well, Judge Serko seemed to – seemed to conclude, didn't she, that – they could access this information.

MR. CRAMER: I don't – I don't think so. I think that the sentence after the sentence that Mr. Gallagher read to the Court was Judge Serko saying, ["I could – and, I mean – at the very least I could do is enter a judgment up to the date of the bankruptcy stay.""] So even she's acknowledging, that after the bankruptcy stay, they don't have custody or control over these documents anymore.

9/26/14 VRP at 23-24.

Again, there was no evidence in the record at the time of the September 26, 2014 hearing to support either a finding that Appellants had legal access to Hunter Donaldson's documents, or even that they had practical access to those documents. It was Plaintiffs, not Appellants, who bore the burden on this issue, and they presented no evidence that control of either type existed, and they failed to meet that burden

The trial court abused its discretion in finding that Plaintiffs had sufficient control over Hunter Donaldson to require them to produce documents solely within *its* possession, custody, or control because that finding was based on an erroneous application of the law and was unsupported by any substantial evidence in the record.

D. The Trial Court Abused Its Discretion When It Imposed Non-Compensatory Monetary Sanctions Without Expressly Considering Less Severe Sanctions.

The trial court ultimately awarded Plaintiffs a total of \$139,300

against Appellants in discovery sanctions as a penalty for Appellants' alleged willful disobedience of the trial court's May 23, 2014 order, as well as its subsequent orders following from the May 23, 2014 order. Because these monetary sanctions were not "compensatory," the trial court was obliged to consider on the record whether lesser sanctions might have been adequate. Because it failed to do so, it abused its discretion in awarding the sanctions, and the orders should therefore be vacated.

In *Burnet*, the Washington Supreme Court held:

When the trial court 'chooses one of the harsher remedies allowable 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 that 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.

131 Wn.2d at 494 (quoting *Snedigar v. Hodderson*, 53 Wn. App. 476, 487, 768 P.2d 1 (1989), *rev'd in part*, 114 Wn.2d 153, 786 P.2d 781 (1990)). It also specified that a trial court abuses its discretion when it imposes such sanctions without considering lesser sanctions on the record. *Id.* at 497.

Each of the trial court's sanctions orders in this case was entered under CR 37(b). At issue here is whether, by failing to apply and make findings on the record on the *Burnet* factors, the trial court abused its discretion.

In *Mayer v. Sto Indus., Inc.*, the Washington State Supreme Court

held that trial courts need not make findings on the *Burnet* factors when imposing “compensatory monetary sanctions” under 37(b)(2), which allows a prevailing party in a discovery dispute to recover “the reasonable expenses, including attorneys’ fees,” caused by the other party’s discovery violation, in lieu of the specific list of non-monetary sanctions identified in CR 37(b)(2)(A) through (E). 156 Wn.2d 677, 132 P.3d 115 (2006).

The Court specifically contrasted the type of “compensatory monetary sanctions” that do not require application of the *Burnet* factors with those type of harsh sanctions awards that do, noting:

the *Burnet* factors make little sense in the context of a compensatory award: the trial court’s calculation of a compensatory award will necessarily involve consideration of greater and lesser amounts; the willfulness of the offending party (a requirement specifically rejected in *Fisons*, in any case) does not change the amount needed to compensate the wronged party; and incurring attorney fees because of discovery abuse is by definition prejudicial and can, in extreme cases, make litigation prohibitively expensive.

Id., at 690.

Here, it is clear the trial court’s sanctions awards were not intended to compensate Plaintiffs for any harm caused by Appellants. This is evidenced by the fact that the trial court did not undertake “consideration of greater or lesser amounts,” which “necessarily” would have occurred had the sanctions been intended to be compensatory. *Id.* Instead, as with

imposition of the other “harsh” sanctions for which application of the *Burnet* factors is necessary, the court imposed sanctions because it found that Appellants had acted willfully, a factor that is not relevant in determining the amount necessary to compensate the movant.

Thus, despite being monetary in nature, the sanctions awarded by the trial court therefore fall within the category of “harsher” sanctions to which *Burnet* applies.¹³ By awarding sanctions against Appellants without analyzing the *Burnet* factors, the trial court abused its discretion. *See Burnet*, 131 Wn.2d at 497. The orders awarding sanctions and entering judgment against Appellants should therefore be vacated.

Even if the trial court were not obligated to apply the *Burnet* factors, it nevertheless abused its discretion in awarding \$139,300 against Appellants. The purposes of sanctions orders are to deter, to punish, to compensate and to educate. *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054, 1084 (1993).

As the Washington State Supreme Court noted in *Fisons*,

¹³ Plaintiffs may cite *Blair v. Ta-Seattle E. No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011) for the proposition that *Burnet* applies to *all* monetary sanctions. However, the first reference to *Burnet* in the *Blair* opinion quotes its specific language referring to “monetary *compensatory*” sanctions. *Blair* at 351 (emphasis added). Particularly in light of the *Mayer* court’s statement that “harsher” sanctions include all sanctions under CR 37(b)(2)(A)–(E), the *Blair* court’s later blanket references to “monetary sanctions” are best understood merely as short-hand for the specific monetary compensatory sanctions at issue in *Mayer*.

In determining what sanctions are appropriate, the trial court is given wide latitude. However certain principles guide the trial court's consideration of sanctions. First, the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong. The wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions.

Id., at 355-56.

The trial court did not adequately consider these factors. The trial court failed to adequately consider Appellants' good faith belief that (i) they were in compliance with the court's orders beginning at least as early as May 29, 2014, when they served supplemental discovery responses; (ii) the trial court had not found that they had legal, or even practical, control over Hunter Donaldson; (iii) the trial court did not articulate that they were obligated to produce Hunter Donaldson's company documents until September 26, 2014.

The trial court also ignored Appellants' swift efforts to comply – despite the bankruptcy stay over Hunter Donaldson and their lack of control over the documents – once the trial court entered its September 26, 2014 order. Despite their compliance, the trial court imposed another \$18,000 in sanctions against Appellants in December 2014. This additional award was unjustified and excessive.

The court also abused its discretion by not considering Plaintiffs' failure to mitigate any damages that Appellants' failure to produce Hunter Donaldson's documents may have caused. Appellants repeatedly advised Plaintiffs and the trial court that the Hunter Donaldson documents sought by Plaintiffs could, and should, be obtained by Plaintiffs through the bankruptcy proceeding, to which Plaintiffs already were parties. But Plaintiffs refused to do so, instead repeatedly coming back to the court for additional money by way of a sanctions award. Plaintiffs also could have obtained many of the documents from MultiCare, given that the vast majority of the Hunter Donaldson documents sought from Appellants related to Hunter Donaldson's dealings with MultiCare.

Finally, Plaintiffs presented no evidence of any prejudice resulting from Appellants' delay in producing Hunter Donaldson's documents. The documents at issue were all directed exclusively to Hunter Donaldson's relationship with MultiCare, many of which were also obtainable, if not actually obtained by Plaintiffs, from MultiCare (*e.g.* emails between Hunter Donaldson and MultiCare employees). None of the discovery related to Hunter Donaldson's relationship with the other medical lien provider in the action, MREP. On the same day Appellants began their final production of Hunter Donaldson documents, Plaintiffs notified the trial court that they had settled their claims against MultiCare for \$7.5

million dollars, based on approximately \$8 million of allegedly defective liens. Plaintiffs presented no evidence to establish that they were prejudiced by Appellants' good faith belief that they were not obligated to produce Hunter Donaldson's documents, nor did the trial court enter any findings of prejudice. For this reason, as well, the trial court's decision should be reversed.

V. CONCLUSION

For the reasons set forth herein, this Court should vacate the trial court's orders compelling production of documents and awarding sanctions against Appellants.

Respectfully submitted this 1st day of July, 2015.

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CERTIFICATE OF SERVICE

I, Florine Fujita, declare that I am employed by the law firm of Calfo Harrigan Leyh & Eakes LLP, a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On July 1, 2015, I caused a true and correct copy of the foregoing document to be served on counsel listed below in the manner indicated:

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