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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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NO. 29205-~~2~~-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

RAYMOND DUSHEY and THE MARITAL COMMUNITY
OF MRS. and RAYMOND DUSHEY,

Appellants,

vs.

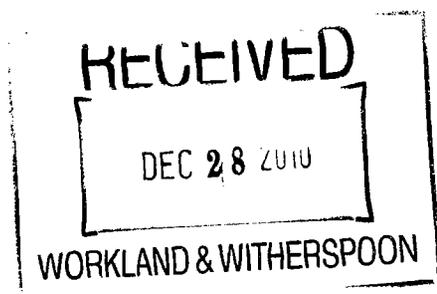
FIDELITY NATIONAL TITLE GROUP,

Respondent.

BRIEF OF APPELLANTS DUSHEY

Michael J. Beyer, WSBA #9109
Attorney for Appellants

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Spokane, Washington 99201
(509) 499-1877



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A. ASSIGNMENTS OF ERROR

1. The superior court of Spokane County, State of Washington, erred in granting the defendant's motion to strike [CP 844-46] the declarations of plaintiffs' expert witnesses, John Montgomery [CP 270-72] and Robert G. Floberg [CP 288-93, 294], which had been offered in opposition to defendant's motion [CP 40, 41-53] for summary judgment. [CP 854-66].

2. The superior court of Spokane County, State of Washington, further erred in granting the defendant's motion to strike [CP 844-46] plaintiffs' responsive "memorandum" [CP 295-307] in opposition to the exclusion of said expert witnesses of plaintiff and their declarations. [CP 854-66].

3. The superior court of Spokane County, State of Washington, likewise erred in granting the defendant's motion [CP 40, 41-53] for summary judgment. [CP 854-66, 867-81].

4. In turn, the superior court of Spokane County, State of Washington, erred in entering its "decision" on March 1, 2010. [CP 854-66].

5. The superior court of Spokane County, State of Washington, also erred on March 26, 2010 in entering its "order granting summary judgment." [CP 867-81].

6. The superior court of Spokane County, State of Washington, erred in denying plaintiffs' motion for reconsideration [CP 882-98] on June 15, 2010. [CP 909-16].

7. In turn, the superior court of Spokane County, State of Washington, erred in entering its "decision" on June 15, 2010. [CP 909-16].

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the superior court abused its discretion, by failing to properly apply and follow the governing law associated with the imposition of sanctions under Rule 37 the Washington Civil Rules for Superior Court [CR], when striking from consideration the declarations of plaintiffs' expert witnesses, John Montgomery and Robert G. Floberg, which had been offered in opposition to defendant's motion for summary judgment? [Assignments of Error nos. 1 and 4].

2. Whether the superior court also abused its discretion when striking plaintiffs' responsive "motion and memorandum," and exhibits attached thereto [CP 295-307], opposing the exclusion of the expert witnesses of plaintiff, John Montgomery and Robert G. Floberg, and their declarations in opposing to summary judgement? [Assignments of Error nos. 2 and 4].

3. Whether the superior court failed to properly followed the legal requirements mandated under Rule 56 the Washington Civil Rules for Superior Court [CR] when granting defendant's motion for summary judgment and dismissing the plaintiffs' complaint for damages? [Assignments of Error nos. 3 through 5].

4. Whether the superior court abused its discretion in denying plaintiffs' motion for reconsideration. [Assignments of Error nos. 6 through 7].

C. STATEMENT OF THE CASE

This matter concerns the central issue whether the defendant, FIDELITY NATIONAL TITLE

GROUP, and previously known as "Land America Transnational Title Insurance Company," was negligent as the closing agent for a loan (refinance) obtained on real property owned by the plaintiff, RAYMOND DUSHEY, and his wife, Jeannie Dushey. The operative facts alleged against this defendant by the plaintiffs, which underlie their amended complaint filed in the superior court of Spokane County, State of Washington, under cause no. 08-2-05646-0, are simple and to the point. [CP 21].

Those allegations are as follows. On or about October 25, 2006, without the knowledge or participation of the plaintiffs herein, the defendant closed a refinance transaction of \$500,000.00 for Ms. Dushey and the lender on property then owed by the Dusheys. [CP 21, 55, 60]. More to the point, plaintiffs alleged the defendant had a legal duty and obligation to secure the signatures of all parties affected by this loan transaction including the plaintiffs. Nevertheless, they asserted the notary, Marie York, as closing agent and employee of the

defendant failed to obtain the signature of the plaintiff, RAYMOND DUSHEY, or the marital community, when closing the subject transaction. [CP 267-69]. In this regard, it was alleged Ms. York failed to identify the person signing the subject closing documents under the husband's name, but instead relied upon the false and forged signature of the plaintiff-husband. [CP 57-154, 287, 308-538, 539-830]. As a direct and proximate result of this breach of duty of care, plaintiffs ultimately contended that they had incurred actual and general damages associated with the subject loan transaction. [CP 21-22].

These damages claimed by plaintiffs included, but were not limited to, Ms. Dushey misuse and misappropriation of the subject funds, the costs and increased interest rate associate with this illegal loan transaction, the injury to plaintiffs' credit rating which had occurred prior to Mr. DUSHEY's discovery of this transaction and Ms. Dushey's subsequent default on the mortgage payment, costs associated with the plaintiffs' efforts to remedy this default, and general

damages as well. [RP 36, 50-51; CP 21-22, 267-69, 273-74, 285]. Prior to filing suit, plaintiffs had provided an estimate of damages to the defendant in an effort to resolve this controversy. [CP 269]. This estimate was rejected forcing plaintiffs to file the within lawsuit against said defendant. [CP 269].

On January 14, 2010, the defendant moved for summary judgment alleging there is no genuine issue of material fact in this case, and contending it was entitled to judgment as a matter of law. [CP 40, 41-52]. Factually, the defendant relied upon the accompanying affidavit of Marie York. [CP 54-56]. From a legal standpoint, the defendant claimed, without any supported evidence, that the subject funds had been "used for community purposes and [the Dusheys] had obtained a community benefit," which barred plaintiff from any recovery. [CP 48]. In addition, the defendant also argued estoppel, waiver and ratification. [CP 49-51].

The plaintiffs opposed the motion [CP 277-83, 284-86], and filed the declarations of Raymond

Dushey [CP 267-69, 287], John Montgomery [CP 270-72], Jeannie Dushey [CP 273-75], and Robert G. Floberg [CP 288-93], in opposition to summary judgment. The declarations of Mr. and Ms. Dushey stated, inter alia, that (1) Mr. DUSHEY had never been a party of the transaction nor had he ever met Ms. York, the defendant's closing agent, (2) Ms. Dushey had removed the closing documents from Ms. York's office and had then forged her husband's signatures on these documents, (3) Ms. Dushey never told her husband about this loan, (4) Mr. DUSHEY only learned of the same in late December 2007, when he first discovered the documents, and (5) by this time Ms. Dushey had not kept the payments current on the loan, thus, allowing the subject real estate to be in jeopardy of foreclosure and negatively impacting the plaintiffs credit. [CP 284-86]. The expert declaration of John Montgomery set forth the standard of care and duty of a notary public to identify a signature of a document. [CP 270-72]. The expert declarations of Robert G. Floberg corroborated Mr. DUSHEY's claim that his signature

had to be forged on the closing documents. [CP 288-93, 294].

Prior to hearing on defendant's summary judgment motion, the defendant moved to strike the foregoing experts declarations of Messrs. Floberg and Montgomery on the basis they had not been timely disclosed by plaintiffs as required per the terms of the April 10, 2009, scheduling order. [CP 9, 844-46]. The plaintiff's opposed the motion arguing that (1) a lesser sanction would remedy this oversight, (2) such failure to disclose was not wilful and (3) the movant had not been unduly prejudiced. [RP 23-30; 295-307].

After taking the matter under advisement, the court granted defendant's motion to strike and also granted its motion for summary judgment. [CP 854-67, 867-881]. The court concluded that the plaintiffs' had not established either a breach of duty or damages associated with their claim of negligence against the defendant. [CP 865]. Plaintiffs' subsequent motion for reconsideration [CP 882-98] was similarly denied on June 15, 2010. [CP 909-16].

This appeal followed. [CP 917-53].
Additional facts are set forth below as they relate to plaintiffs' argument on a specific issue or issues.

D. STANDARD OF REVIEW

1. Imposition of CR 37(b) sanctions. A review of sanctions for noncompliance with a discovery order is governed by the abuse of discretion standard. Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 41 P.3d 1175 (2002). However, when the trial court imposes a harsher sanction for failure to comply with discovery, it must be apparent from the record that the trial court explicitly considered whether (a) a lesser sanction would have probably sufficed, (b) whether the wilful or deliberate and (c) whether the other party was substantially prejudiced in its ability to prepare for trial. See, Magana v. Hyundai Motor America, 167 Wn.2d 570, 582, 220 P.3d 191 (2009); Casper v. Esteb Enterprises, Inc., 119 Wn.App. 759, 82 P.3d 1223 (2004). The superior court abuses its discretion

when the court acted on untenable grounds or for untenable reasons, or has erroneously interpreted, misapplied or otherwise ignored the governing law to the circumstances at hand. See, Topliff v. Chicago Ins. Co., 130 Wn.App. 301, 122 P.3d 922, review denied, 157 Wn.2d 1018 (2006); Bar v. MacGugan, 119 Wn.App. 43, 78 P.3d 660 (2003); Stoudil v. Edwin A. Epstein, Jr., Operating Co., 101 Wn.App. 294, 3 P.3d 764 (2001); DeYoung v. Cenex Ltd., 100 Wn.App. 885, 1 P.3d 587, review denied, 146 Wn.2d 1016 (2002). State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); see also, Pybas v. Paolino, 73 Wn.App. 393, 399, 869 P.2d 427 (1994); In re Marriage of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1990).

2. Grant of summary judgment. Findings of fact and conclusions of law are not necessary upon entry of summary judgment under Rule 52(a)(5)(B) of the Washington Civil Rules for Superior Court [CR] and, if prepared and entered by the superior court, are superfluous and will not be considered by the appellate court on review of such judgment. Donald v. Vancouver, 43 Wn.App. 880, 719 P.2d 996

(1986); Felton v. Menan Starch Co., 66 Wn.2d 792, 405 P.2d 585 (1965); Sinclair v. Betlach, 1 Wn.App. 1033, 467 P.2d 334 (1970). In other words, the grant of a summary judgment motion is reviewed de novo regardless of the trial court findings and conclusions. McNabb v. Dept. of Corrections, 163 Wn.2d 393, 180 P.3d 1257 (2008).

The appellate court engages in the same inquiry as the trial court, see, Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994); and the record on appeal consists of the documents that were considered by the trial court in making its ruling with the exception that the reviewing court may take judicial notice of other matters as well. Am. Universal Inc. Co. v. Ranson, 59 Wn.2d 811, 815-16, 370 P.2d 867 (1962).

CR 56(c) requires that the moving party demonstrate "that there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law." The moving party has this burden irrespective of which party would have the ultimate burden of proof if

the case were to go to trial. Preston v. Duncan, 55 Wn.2d 678, 682, 349 P.2d 605 (1960). A material fact is one upon which the case depends either in whole or in part. Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990); Morris v. McNichol, 83 Wn.2d 491, 494-95, 59 P.2d 7 (1974). All evidence and all reasonable inferences therefrom are to be considered in the light most favorable to the non-moving party. Mountain Park Homeowners Ass'n, at 341. Any doubts are to be resolved against the moving party. Id.; Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs., at 516.

In this vein, summary judgment is not well suited to actions where the central issues of fact focus on the negligence of a party or the reasonableness of his or her actions. LaPlante v. State, 85 Wn.2d 154, 159, 531 P.2d 299 (1975); Morris, at 495. In an ordinary negligence case an affidavit containing an expert opinion on an ultimate issue of fact is sufficient to create a genuine issue of fact precluding summary judgment.

See, Pagnotta v. Beall Trailers of Oregon, Inc.,
99 Wn.App. 28, 991 P.2d 728 (2000).

Finally, CR 56(c) may not be used to try an issue of fact. Thoma v. C. J. Montag & Sons, Inc., 54 Wn.2d 20, 26, 337 P.2d 1052 (1959). Conflicting assertions of fact in opposing affidavits will normally give raise to issues such as witness credibility and the differing weight to be given contradicting evidence which goes beyond proper pale of a summary judgment proceeding. Balise v. Underwood, 62 Wn.2d 195, 199-200, 381 P.2d 966 (1963). This holds true as well on de novo review before the appellate court. Barker v. Advanced Silicon Materials, LLC., 131 Wn.App. 616, 128 P.3d 633, review denied, 158 Wn.2d 1015 (2006). In other words, the trial court may only go so far under CR 56© as to determine the single issue whether a genuine issue of material fact exists. Balise, at 199.

3. Denial of post-trial relief. Finally, with respect to issues addressing the exercise of discretion by the trial court in granting or denying post-trial relief, such decision is

ultimately reviewed and examined for manifest abuse of discretion. See, Weems v. North Franklin School District, 109 Wn.App. 767, 37 P.3d 354 (2002); State v. Dawkins, 71 Wn.App. 902, 863 P.2d 124 (1993). However, errors of law encompassed therein are reviewed under the de novo standard. Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 158, 776 P.2d 676 (1989); Lyster v. Metzger, 68 Wn.2d 216, 226-27, 412 P.2d 340 (1966). Once again, the superior court abuses its discretion when acting on untenable grounds or for untenable reasons, or has misinterpreted, misapplied or otherwise ignored the governing law. See, State v. Robinson, supra; see also, Pybas, at 399; In re Marriage of Tang, at 654.

E. ARGUMENT

1. Issues nos. 1 and 2. As indicated above, the respondent, FIDELITY NATIONAL TITLE GROUP, filed a motion to strike the declarations of certain expert witnesses of the plaintiffs, John Montgomery and Robert G. Floberg, in connection with plaintiffs' response and opposition to its

January 14, 2010, motion for summary judgment [CP 40, 41-53], along with plaintiffs' "motion and memorandum re: exclusion of expert witnesses." [844-46]. The scheduling order entered on April 10, 2009, required that the plaintiffs disclose and identify their lay and expert witness no later than August 10, 2009. [CP 9, 855].

Admittedly, the plaintiffs failed to disclose these witnesses until they were faced with the subject motion for summary judgment. [CP 844]. However, the surrounding facts should have been taken into account by the trial court, which serve to either ameliorate plaintiffs' failure to earlier identify these experts or warrant a lesser sanction under CR 37 than was imposed by the trial court in this case.

The operative facts may be summarized as follows, and were in fact brought to the attention of the trial court in "motion and memorandum re: exclusion of expert witnesses" [295-301], as well as during the summary judgment hearing held on February 23, 2010. [RP 25, 27-29, 40]. During the time period when expert witnesses who could be

expected to testify at trial were to be retained, identified and later disclosed by the parties, plaintiff and defendants had been involved in continuing negotiations for the purpose of settlement. [RP 25, 28; CP 295-97]. Because counsel for plaintiff fully expected and believed that such pre-trial settlement was eminent, and since his client had very limited assets to employ in this litigation due to his wife's failure to keep the mortgage payment current on the subject property, counsel initially decided not to retain any trial experts especially since the defendant's liability could arguably be established by way of its per se violation of RCW 64.08.050, and the related legal holding in Meyer v. Meyer, 81 Wn.2d 533, 503 P.2d 59 (1972). [RP 25, 28; CP 295-97].

Eventually, however, the well-meaning settlement negotiations of parties--the terms of which were never disclosed or made known to the court--failed, which ultimately resulted in defendant's filing of its summary judgment motion on January 14, 2010. [RP 25, 28; CP 295-97, 40, 40, 41-53]. Towards the end of these

negotiations, plaintiff's counsel determined that, if this matter were to proceed to trial, expert witnesses in handwriting and negligence would be necessary in establishing plaintiff's claims against the defendants. [CP 296-97].

Unfortunately, by this time, the date for disclosure of expert witnesses under the scheduling order had already run. [CP 9].

In order to either eliminate or, at the very least, minimize any arguable prejudice to defendants, plaintiffs filed a designation of expert witnesses on February 5, and a supplement to the same on February 12, 2009, as contemplated and required under the provisions of CR 26(e)(1)(B). [CP 276]. In this regard, local attorney, John Montgomery, had been tentatively retained as a negligence expert on December 20, 2009. [CP 276, 297]. In turn, Robert G. Floberg was retained by plaintiff as a handwriting expert on February 11, which occurred the day prior to plaintiff's supplemental disclosure of experts. [CP 276, 297].

In addition to identifying these expert

witnesses expected to testify at trial, plaintiff has on at least five [5] separate occasions attempted to accommodate defendants in terms of their discovery of the same by offering to make them available for deposition or otherwise. [RP 20, 22, 27-29, 40; CP 297, 302-07]. In fact, twice plaintiffs offered to fly Mr. Floberg from Seattle at their own expense and to pay the full cost associated with these depositions. [RP 20, 22, 27-29, 40; CP 297, 302-07].

Nevertheless, regardless of this good-faith effort on plaintiffs' part to settle this controversy, the defendant refused to respond and, instead, took the disingenuous position that the testimonies of Messrs. Montgomery and Floberg at trial should be stricken outright. [RP 17-18; CP 297, 302-07, 844-46]. On March 1, 2010, the superior court granted the respondent's motion to strike, while at the same time granting summary judgment against appellants. [CP 854-66].

Generally speaking, the purpose or rationale behind sanctions under CR 37 are to deter and educate the offending party. Magana v. Hyundai

Motor America, 167 Wn.2d 570, 582, 220 P.3d 191 (2009). If a trial court imposes one of the more "harsher remedies" under CR 37(b), such as exclusion of evidence or witness testimony, the record must clearly reflect (a) the party to be sanctioned wilfully or deliberately violated the discovery, (b) the opposing party was substantially prejudiced in its ability to prepare for trial, and © the trial court explicitly considered whether a lesser sanction would suffice under the circumstances. Magana, at 582-92; Burnet v. Spok. Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); Wash. State Physicians Ins. Exch. & Assn. v. Fisons Corp., 122 Wn.2d 299, 356, 858 P.2d 1054 (1993); Casper v. Esteb Enterprises, Inc., 119 Wn.App. 759, 82 P.3d 1223 (2004).

a. Lack of prejudice. Under the foregoing facts, plaintiff maintains that any arguable prejudice which defendant might now claim it has suffered as a result of plaintiff's admitted failure to timely disclose his expert witnesses as contemplated by the court's scheduling order should be attributed to the defendant alone. In

this regard, defendant has flatly rejected the sundry accommodations offered by plaintiff's counsel in order to afford the defendant the opportunity to conduct discovery of these witnesses and have, consequently, totally refused and neglected to mitigate any arguable or perceived prejudice to them. Clearly, the alleged offender's lack of intent to violate the rules and orders governing discovery, and the other party's failure to mitigate should be taken into account in fashioning an appropriate sanction, if any. See, Fisons Corp., at 355-56.

b. Lack of wilfulness. Nevertheless, even if CR 37 sanctions were somehow warranted in this instance, total exclusion of the testimonies of Messrs. Montgomery and Floberg at trial would be far too harsh a penalty under the facts and circumstances presented here. Certainly, there is nothing whatsoever to suggest that either plaintiff or his attorney have acted in bad-faith, or that they wilfully, deliberately or tactically chose to ignore the scheduling order of this court so as to somehow purposely circumvent the

discovery process. Suffice it to say, counsel has consistently followed the mandates of said order, save the present situation, and this failure was only a result of counsel's genuine belief that settlement was imminent and that any retention of experts at this perceived juncture would simply entail an unjustifiable expense to the plaintiff, especially in light of his meager finances which are available to fund this litigation. In sum, a violation may only be deemed wilful and deliberate if it is done without reasonable cause or excuse and, thus, a harsh sanction of any kind suggested by defendants is clearly not warranted in the instant case. See, Magana, at 584; Casper v. Esteb Enterprises, Inc., 119 Wn.App. 759, 82 P.3d 1223 (2004); Smith v. Behr Process Corp., 113 Wn.App. 306, 327, 54 P.3d 665 (2002); Viereck v. Fiberboard Corp., 81 Wn.App. 579, 915 P.2d 581 (1996); see also, Micro Enhancement International, Inc. v. Coopers & Lybrand, L.L.P., 110 Wn.App. 412, 439-40, 40 P.3d 1206 (2002).

c. Lesser sanction. The long-standing rule in Washington is that the superior court is

required to impose the least severe sanction that will adequately serve to encourage discovery. Magana, at 584; Peluso v. Barton Auto Dealership, 138 Wn.App. 65, 155 P.3d 978 (2007); Roberson v. Perez, 123 Wn.App. 320, 96 P.3d 420, review denied, 155 Wn.2d 1002 (2004). In this vein, the circumstances of a given case may well dictate that the offending party simply be warned against any future violations of discovery, and nothing more. Id.

Absent an intentional or tactical nondisclosure of evidence or witnesses, suppression of evidence or testimony is a highly inappropriate sanction for failure of a party to timely make discovery. Burnet, at 494; Peluso, at 69-71; Hutchinson Cancer Research Center v. Holman, 107 Wn.2d 693, 706, 732 P.2d 974 (1987); Alpine Industries Inc. v. Gohl, 30 Wn.App. 750, 637 P.2d 998 (1981), review denied, 97 Wn.2d 1013 (1982); Barci v. Intalco Aluminum Corp., 11 Wn.App. 342, 359-60, 522 P.2d 1159, review denied, 84 Wn.2d 1012 (1974); see also, Cameron v. Boone, 62 Wn.2d 420, 383 P.2d 277 (1963). Once again, a

violation of the discovery rules will only be deemed willful or intentional, for purposes CR 26(b)(5) and 37, if done without the presence of a reasonable excuse or justification for the same. Here, plaintiff's counsel genuinely believed that settlement was eminent at the time expert witnesses were to be disclosed under the terms of the subject scheduling order, and that such resolution of the case would render moot any further discovery. See generally, Casper v. Esteb Enterprises, Inc., supra; Smith, at 327; Viereck v. Fiberboard Corp., supra; see also, Micro Enhancement International, Inc., at 439-40. Such belief does not constitute any wilfulness, or bad faith on the part of plaintiffs. Id.

d. Summation. In light of these considerations, the superior court erred as a matter of law in granting the defendant's motion to strike on the basis of wilful misconduct. [CP 844-46, 854-66]. See, Topliff v. Chicago Ins. Co., 130 Wn.App. 301, 122 P.3d 922, review denied, 157 Wn.2d 1018 (2006); Bar v. MacGugan, 119 Wn.App. 43, 78 P.3d 660 (2003); Stoudil v. Edwin

A. Epstein, Jr., Operating Co., 101 Wn.App. 294, 3 P.3d 764 (2001); DeYoung v. Cenex Ltd., 100 Wn.App. 885, 1 P.3d 587, review denied, 146 Wn.2d 1016 (2002). State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); see also, Pybas v. Paolino, 73 Wn.App. 393, 399, 869 P.2d 427 (1994); In re Marriage of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1990). When settlement was not reached, plaintiffs made every effort to accommodate the defendant in terms of discovery associated with Messrs. Montgomery and Floberg by offering to pay any and all expenses associated with their deposition. [CP 295-307]. Consequently, and given their wilful, deliberate and tactical refusal to mitigate, the respondent was in no position whatsoever to argue for the imposition of sanctions let alone the exclusion of plaintiff's expert witnesses under CR 26(b)(5) and 37, which is one of the most harsh of all sanctions contemplated thereunder. Id.; see also, Fisons Corp., at 355-56.

Finally, as to the striking of plaintiffs' "motion and memorandum re: exclusion of expert

witnesses" [295-301], there was once again no prejudice to the defendant which warranted this harsh sanction. The defendant some three [3] days before hearing had time to consider and then file its "motion to strike" on February 22, 2010. [CP 295-307, 844-46]. The grant of this motion striking plaintiffs' CR 37(b) memorandum is further evidence of a manifest abuse of discretion warranting reversal under RAP 12.2. Id. The theory accepted by the court and proffered by the defendant, represented that the plaintiff's "motion and memorandum re: exclusion of expert witnesses" [295-301], was a second response to the motion for summary judgment [CP 84]. To the contrary, the "motion and memorandum re: exclusion of expert witnesses" [CP 295-301], had nothing to do with the summary judgment and was filed in anticipation of the defendant's motion to strike filed on February 22, 2010. [CP 844]. The summary judgment hearing was continued to February 23, 2010 [CP 844] The "motion and memorandum re: exclusion of expert witnesses" [CP295-301] was filed on February 19, 2010. [295-307] four days

prior to the scheduled summary judgment hearing.

2. Issue no. 3. Even assuming, arguendo, that the trial court properly used its discretion in striking the declarations of John Montgomery and Robert G. Floberg, along with plaintiffs' memorandum in opposition thereto, the remaining evidentiary facts and governing law did not justify the court's grant of summary judgment in favor of the defendant. CR 56(c). Again, proof of negligence requires a showing of (1) a duty owed on the part of the defendant, (2) a breach thereof, (3) causation and (4) damages. Rounds v. Nellcor Puritan Bennet, Inc., 147 Wn.App. 155, 161, 194 P.3d 274 (2008). Here, the superior court concluded that elements (2) and (4) were lacking so as to warrant the grant of summary judgment in this case.

a. Element of breach of duty of care. It is axiomatic that the moving party bears the initial burden of making a prima facie showing that there are no genuine issues of material fact in question. Id. Here, the defendant relied upon the affidavit of Marie York in its attempt to

satisfy its initial burden of proof. [CP 54-154]. However, a review of the affidavit itself [CP 54-56] makes clear that Ms. York did not recall this particular transaction but instead relied upon her alleged practice and procedure when having closing documents signed by the parties. [RP 33-35]. Even assuming, arguendo, that this evidence of Ms. York's alleged protocol was sufficient to shift the burden of proving a genuine issue of material fact to the plaintiffs under CR 56(e), it is equally clear that the remaining declarations of Mr. DUSHEY [CP 267-69, 287, 308-538, 539-830] and Ms. Dushey [CP 273-75] re-establish an issue of material fact in terms of whether Mr. DUSHEY's signatures on the closing documents were forged and, thus, whether the defendant was negligent under the governing law provisions of RCW 42.44.090(3) and the related holding in Meyer v. Meyer, 81 Wn.2d 533, 503 P.2d 59 (1972).

Here, the trial court clearly undertook to weigh the weight and credibility of these witnesses' evidence, along with that of Ms. York. This the court cannot do on summary judgment.

Thoma v. C. J. Montag & Sons, Inc., 54 Wn.2d 20, 26, 337 P.2d 1052 (1959).

Conflicting assertions of fact in opposing affidavits give rise to issues involving witness credibility and the weight to be given such contradicting evidence which are beyond the pale of resolution in a summary judgment proceedings. Balise v. Underwood, 62 Wn.2d 195, 199-200, 381 P.2d 966 (1963). Barker v. Advanced Silicon Materials, LLC., 131 Wn.App. 616, 128 P.3d 633, review denied, 158 Wn.2d 1015 (2006). In other words, the trial court may only go so far under CR 56(c) as to determine the single issue whether a genuine issue of material fact exists. Barker, at 619. Hence, the trial court erred as a matter of law when concluding that there was no genuine issue of material fact concerning the element of breach of duty of care on the part of the defendant [CP 863-65]. Id.

b. Element of damages. Here, the defendant boldly claimed in its supporting memorandum, and without any supporting evidence whatsoever [CP 40, 41-53], that the plaintiffs had suffered no

damages in this instance. Simply put, the defendant ignored [CP 57-154, 287, 308-538, 539-830] the evidence in the record suggesting the plaintiffs incurred both actual damages associated with the subject loan transaction including Mr. Dushey's use of the subject funds, the costs of obtaining the refinance and increased interest rate, and general damages as well. [RP 36, 50-51, CP 21-22, 57-154, 287, 308-538, 539-830]. Instead, and without making a prima facie showing itself as required under CR 56(c), that the marital community in fact benefited from the subject loan, the defendant opted to turn the table on the plaintiffs, suggesting in its memorandum in support of summary judgment [CP 49-53], that the plaintiffs have the initial duty on summary judgment to make a showing as to their damages.

This is clearly contrary to the defendant's burden under CR 56(c). Again, the moving party has the burden of proving a lack of any genuine issues of fact irrespective of which party would have the ultimate burden of proof if the case went

to trial. Preston v. Duncan, 55 Wn.2d 678, 682, 349 P.2d 605 (1960).

This, the defendant didn't even attempt to accomplish in terms of its burden involving evidentiary proof establishing a lack of any factual issue. Hence, the defendant's bald claims that the marital community somehow benefited from the subject loan are without substance or merit in terms of satisfying the requirement of CR 56(c), and shifting the burden of proof to the plaintiffs under CR 56(e). Thus, because of this failure to meet its burden under CR 56(c), the defendant and respondent herein was in no position, as a matter of law, to invoke such claims as of any equitable bar, estoppel or waiver [CP 48-53] on the part of these innocent plaintiffs. Id.

In sum, the trial court erred as a matter of law when concluding there was no genuine issue of material fact concerning the element of damages [CP 863-65] since the defendant never met its initial burden of proving a lack thereof. Id.; see also, CR 56(c) and (e). Therefore, the grant of summary judgment should be reversed on this

appeal, and remanded for trial. RAP 12.2.

3. Issue no. 4. For the same reasons as set forth above, it is clear that the superior court abused its discretion when denying plaintiffs' motion for reconsideration. [CP 909-16]. Here, the court acted upon untenable grounds and for untenable reasons, and erroneously interpreted, misapplied or otherwise ignored the governing law at hand. See, Topliff v. Chicago Ins. Co., 130 Wn.App. 301, 122 P.3d 922, review denied, 157 Wn.2d 1018 (2006); Bar v. MacGugan, 119 Wn.App. 43, 78 P.3d 660 (2003); Stoudil v. Edwin A. Epstein, Jr., Operating Co., 101 Wn.App. 294, 3 P.3d 764 (2001); DeYoung v. Cenex Ltd., 100 Wn.App. 885, 1 P.3d 587, review denied, 146 Wn.2d 1016 (2002). State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); see also, Pybas v. Paolino, 73 Wn.App. 393, 399, 869 P.2d 427 (1994); In re Marriage of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1990).

Hence, the challenged decisions of the trial court should be reversed on this appeal and this case remanded for trial. RAP 12.2.

F. CONCLUSION

Based upon the foregoing points and authorities, appellants, RAYMOND DUSHEY and THE MARITAL COMMUNITY OF MRS. and RAYMOND DUSHEY, respectfully request that challenged decisions of the superior court as set forth in the March 1, 2010, memorandum "decision" of the superior court granting defendant's motions to strike and summary judgment [CP 854-66], the March 26, 2010, "order granting summary judgment [CP 867-81], and June 15, 2010, memorandum "decision" of the superior court denying plaintiffs' motion for reconsideration [CP 909-16] be reversed with prejudice and, accordingly, that the present case be remanded for trial.

DATED this 28th day of December, 2010.

Respectfully submitted:



Michael J. Beyer, WSBA #9109

Attorney for Appellants

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COURT OF APPEALS
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RAYMOND DUSHEY and THE MARITAL COMMUNITY
OF MRS. and RAYMOND DUSHEY,

Appellants,

vs.

FIDELITY NATIONAL TITLE GROUP,

Respondent.

CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 28, 2010, I caused to be served the BRIEF OF APPELLANTS by delivering to and leaving a copy with Workland and Witherspoon, 714 Washington Mutual Financial Center, 601 W. Main Avenue Spokane, Washington 99201-0677.

Dated this 28th of December, 2010.

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