

NO. 328554

**FILED**

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

JUN 05 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

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**JOSHUA DRINGS, a single man,**

Plaintiff/ Respondent.

v.

**ANDREW T.G. HOWLETT, M.D. and JANE DOE HOWLETT, and  
their marital community; PROVIDENCE PHYSICIAN SERVICES  
CO, aka Providence Orthopedic Specialties, a Washington  
Corporation,**

Defendants/Appellants.

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**BRIEF OF RESPONDENT**

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## TABLE OF CONTENTS

I.	COUNTER STATEMENT OF ASSIGNMENT OF ERROR.....	5
II.	COUNTER STATEMENT OF THE CASE.....	5
	A. General Nature of Case and Identity of Parties.....	5
	B. Underlying Medical Procedure, Plaintiff Claims, etc. ....	5
	C. Discovery Process and Subject Sanctions Orders .....	5
	D. Counter Statement of Facts RE Specific Sanction Orders .....	6
	1. Counter Statement of Facts RE: Dr. Howlett’s Continuation Deposition and Trial Court’s Sanctions Order.....	6
	2. Counter Statement of Facts Re: CR 35 Examination Stipulation for Dr. Vandenbelt .....	16
	3. Counter Statement of Facts RE CR 35 Examination Stipulation for Dr. Rolfe.....	23
	4. Counter Statement of Facts Re: Nondisclosure of Dr. Howlett’s Surgical Journal .....	24
III.	ARGUMENT.....	31
	A. Standard of Review.....	31
	B. Sanctions Under CR26(g).....	33
	C. Argument Re: Dr. Howlett’s Continuation Deposition .....	36
	D. Violations of CR 35 Stipulations.....	38
	E. Nondisclosure of Dr. Howlett’s Private, Handwritten Surgery Journal.....	40
IV.	Request for Attorneys Fees and Costs .....	41
V.	CONCLUSION.....	42

## TABLE OF AUTHORITIES

### FEDERAL CASES

Thomas v. Capital Sec. Servs., 836 F.2d 866, 868, 1988 U.S. App. LEXIS 1584, *1, 45 Empl. Prac. Dec. (CCH) P37,770, 10 Fed. R. Serv. 3d (Callaghan) 329 (5th Cir. Miss. 1988).....	32
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### STATE CASES

<i>Roberson v. Perez</i> , 123 Wn. App 320 (2004).....	20
<i>Johnson v. Mermis</i> , 91 Wn App. 127, 132, (1998).....	20
<i>Physicians Ins. Exch. v. Fisons Corp.</i> 122 Wn.2d 299, 356 (1993).....	21
<i>Herron v. McClanahan</i> , 28 Wn.App. 552 (1981).....	28
<i>State v. J-R Distributors, Inc.</i> , 111 Wn.2d 764 (1988).....	29
<i>Olsen Media v Energy Sciences</i> , 32 Wn.App 579(1982). ....	29
<i>Leen v. Demopolis</i> , 62 Wn. App. 473 (1981).....	29
<i>State v Dorosky</i> , 28 Wn.App. 128 (1991).....	29
<i>Sanwick v Puget Sound Title</i> . 70 Wn.2d 438(1967).....	29
<i>Rhinehart v. Seattle Times</i> , 59 Wn. App. 332, 798 P.2d 1155 (1990).....	32
<i>Rhinehart v. KIRO, Inc.</i> , 44 Wn. App. 707, 723 P.2d 22 (1986),.....	32
<i>Sarvis v. Land Resources, Inc.</i> , 62 Wn. App. 888, 815 P.2d 840 (1991), review denied, 118 Wn.2d 1020, 827 P.2d 1012 (1992). ....	32
<i>Mayer v. Sto Indus., Inc.</i> , 2006 Wash. LEXIS 270, 156 Wn.2d 677, 132 P.3d 115 (2006).....	33

<i>Burnet</i> , 131 Wn.2d at 496 (citing <i>Wash. State Physicians Ins. Exch. &amp; Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 356, 858 P.2d 1054 (1993)) .....	33
<i>Heigis v. Cepeda</i> , 71 Wn. App. 626, 862 P.2d 129 (1993) .....	42

**OTHER REFERENCES**

CR 11 .....	passim
CR 26 .....	passim
CR 37 .....	passim
CR 35 .....	passim
CR 59 .....	28
CR 2 (A).....	40
RAP 7.2.....	15, 22, 28-31
RAP 18.1.....	41
RAP 18.9.....	42

**I. COUNTER-STATEMENT OF ASSIGNMENTS OF ERROR**

A. With respect to Dr. Howlett's claim of assignment of error A, B, and C, the trial Court was well within its discretion in assessing terms. Sanctions were appropriate under CR26, CR 37 and CR11. Dr. Howlett failed to timely bring a Motion for Protective Order causing delay of discovery, etc.; Dr. Howlett's counsel signed two CR 35 stipulations involving two IME doctors and failed to abide by the Stipulations. CR 26(g)(2), see also CR 11, CR 37, In addition, Dr. Howlett failed to provide requested discovery until the middle of trial. CR26, CR37, CR11.

**II. COUNTER-STATEMENT OF THE CASE**

In addition to Dr. Howlett's Statement of the Case, Mr. Driggs would provide the additional information:

**A. General Nature of Case and Identity of Parties**

No additional Information

**B. Underlying Medical Procedure, Plaintiff Claims, and Jury Verdict in Favor of Dr. Howlett**

Mr. Driggs has filed an appeal regarding multiple trial court rulings during trial. This appeal is under Cause# 323811.

**C. Discovery Process and Subject Sanction Orders**

Discovery was delayed on numerous occasions by Dr. Howlett's counsel refusal to respond to any request to schedule depositions, supplement discovery, or work together in this case to resolve issues. This was an ongoing issue throughout the case. (CP 147-157; 226-227; 746-804)

Dr. Howlett mentions multiple times he was sanctioned but he does not mention that the Trial Court also sanctioned Mr. Driggs for missing the date to disclose experts according to the case scheduling order.

After the trial court's ruling on Mr. Driggs' late disclosure of an expert witness, Mr. Driggs' agreed to pay attorney fees to Mr. King in the amount of \$750.00. The trial court was not biased in their sanctioning of the parties.

**D. Counter Statement of Facts Underlying Specific Sanction Orders**

**1. Counter Statement of Facts Re: Scheduling of Dr. Howlett's Continuation Deposition and Trial Court's Sanctions Order**

The first two paragraphs of Dr. Howlett's facts regarding the scheduling of Dr. Howlett's continuation deposition have no bearing on this appeal or the sanctions ordered by the trial court. Yes, Mr. Driggs had a late disclosure of an expert witness (Mr. Driggs' counsel had believed

the trial deadlines would be reset due to Dr. Howlett's counsel's Notice of Unavailability for Trial filed with the court); the trial court dealt with this by sanctioning Mr. Driggs. The Trial Court requested the parties agree a reasonable amount of attorney fees for Mr. King bring a motion to strike the expert. Dr. Howlett's counsel proposed \$750.00 in sanctions. Mr. Driggs agreed and paid the \$750.00 in sanctions. In addition, the Trial Court continued the trial schedule deadlines, so neither party was prejudiced. Again, this is irrelevant to this appeal.

Mr. Driggs began requesting Dr. Howlett's deposition in the beginning of March 2013. It took nearly 60 days to get Dr. Howlett's deposition scheduled. (CP 133) Mr. Driggs' counsel's paralegal estimated Dr. Howlett's deposition would take 3 hours. (CP 8) The deposition was set for May 3, 2013 at 1:30 p.m. Two days before Dr. Howlett's deposition, defense counsel Mr. Sestero advised he would be attending the deposition and it needed to be concluded by 4:30 p.m.. (CP 12) Mr. Driggs' counsel responded he was not sure if he could complete the deposition in 3 hours and wished to start at 12 noon. This was agreed. (CP 13)

A review of Dr. Howlett's May 3, 2013 deposition transcript shows Plaintiff's counsel was able to get through a long history of treatment, multiple surgeries, and covered most of the factual grounds for treatment. Plaintiff had a list of questions prepared for Dr. Howlett's deposition. Mr. Driggs' counsel still had 4 or 5 pages of questions to ask Dr. Howlett when Mr. Sterero became unavailable. (CP 14 to 109) Mr. Driggs' counsel completed as much of the deposition as possible. At approximately 4:30 p.m. Mr. Sestero informed Mr. Driggs' counsel that he was ending the deposition. Mr. Driggs' counsel requested the opportunity to continue the deposition. Mr. Sestero's response was "I understand your request. I oppose. Thank you" (CP 52 (Deposition Pg. 151)) The deposition was not stopped because Mr. Driggs' counsel was finished; the deposition was not stopped because Dr. Howlett could not remain; the deposition was stopped because Mr. Sterero was not able to stay to complete the deposition.

Dr. Howlett claims Mr. Driggs unilaterally set the continuation deposition. The records shows Mr. Drigg's counsel attempted to set the continuation deposition with Dr. Howlett's counsel on five separate occasions, not including telephone calls and messages. Dr. Howlett's counsel failed to respond to any of the requests. (CP 142 to 157)

On June 11, 2013 Mr. Driggs counsel sent a Subpoena for Notice of Continuation Deposition to Dr. Howlett's counsel. (CP 158 to 163) The continued deposition of Dr. Howlett was set for August 12, 2013 at 2:00 p.m. (CP 158 to 163) This allowed 62 days for Dr. Howlett to take action. More than enough time for Dr. Howlett to file for a protective order, reset the deposition to a convenient time, reset his schedule to attend the deposition, or even to communicate with opposing counsel to work cooperatively to set the deposition.

Six (6) days before the scheduled continuation deposition, Dr. Howlett filed a Motion for Protective Order requesting the continuation deposition not be had or in the alternative, restrict the length of the continuation deposition. (CP 123) The Motion for Protective Order did not meet the LR40 notification requirements, nor was a Motion to Shorten Time filed at that time. Mr. Driggs' filed a Motion to Strike the Motion for Protective Order with a Motion to Shorten Time. (CP 126-129 and CP 130-141) Dr. Howlett's Motion for Protective Order and Mr. Driggs' Motion to Strike were heard on August 15, 2013. The August 12, 2013 deposition was cancelled by Dr. Howlett.

The defendant claims the reason the Protective Order was brought so late is because Judge Plese was unavailable. This is not true. Judge Plese did not take a two month vacation in the summer of 2013. A review of the August 15, 2013 Verbatim Report of Proceedings shows the Motion for Protective Order was heard on a shortened time frame because Judge Plese was going on vacation the following week. (August 15, 2013 Verbatim Report of Proceedings Pg 5 Line 8) Dr. Howlett had two months to file the Motion for Protective Order more than ample time, but yet did not so.

Judge Plese's findings regarding both motions and reasoning for sanctioning Dr. Howlett for the emergency filing of a Motion for Protective Order are set forth in the August 15, 2013 Verbatim Report of Proceedings and the October 15, 2013 Order on Motion for Reconsideration (CP 207 to 209).

*August 15, 2013 Verbatim Report of Proceedings:*

*Ruling RE: Mr. Driggs' Motion to Strike Protective Order In Pertinent Part:*

*"I have some issues with the fact that you've [Dr. Howlett] known about this since June 11th, and it wasn't set until today. It was set on a shortened time because they [Dr. Howlett] were asking for next week, which I'm going to be on vacation, and so they asked to set it quickly.*

*Though, it could have been set well within the time period, but I am going to move forward on the motion and have it heard today for the protective order and not strike it.”*

*(August 15, 2013 Verbatim Report of Proceedings Pg 5 Ln10)*

*Ruling RE: Dr. Howlett’s Protective Order In Pertinent Part:*

*“My concern is that when I got this motion, and it was filed basically as an emergency Motion to Shorten Time, I assumed Mr. Sestero didn't have time to respond, but what concerns me is they've known about this since June 11th. They said it was unilaterally set up by Mr. Sweetser for a second deposition, and they didn't file anything or Mr. Sestero doesn't file anything until August 6th when he had ample time to have this heard and brought before the Court.*

*He, also, stated in his declaration that it was unilaterally set with no regard for talking to counsel. Though, Mr. Sweetser's declaration said they did send e-mails May 7th, May 9th, May 14th, May 23rd and May 30<sup>th</sup> requesting a second deposition with no response from Mr. Sestero. Then on June 11th seeing no response, I'm going to serve your client and tell him to appear. Still gives him two months' notice. So I do find that there is no good cause to issue a protective order.”*

*(August 15, 2013 Verbatim Report of Proceedings Pg 14:Ln8)*

*Ruling RE: Mr. Driggs’ Request for Sanctions In Pertinent Part:*

*“At this point, though, after looking over this, I don't think inconvenience is a good cause to set emergency protective order. I'm concerned about judicial resources having to set this motion, Mr. Sweetser to respond in considering he sent at least six e-mails and requesting to reset it up over about a month and a half time asking Mr. Sestero to respond and*

*then waiting almost two months before and missing that date.*

*Mr. King was here throwing a big fit that I let Mr. Sweetser go past the deadlines and asked for costs, and I awarded him because of the deadlines. I think Mr. Sestero needs to do the same. I think I'm going to award costs, attorney's fees, for having to respond to this motion. I think Mr. Sestero could have said I'd like to set a limit. Let's agree to it, and if they didn't, you could have brought it back in time. I am going to hit him with at least time to prepare for the motion and have it heard. If you can agree on a cost bill, if you can't, then submit it to the Court. You can submit it back in writing. I'm not going to set it for a hearing. I'll just make the decision based on the declarations. I would hope Mr. Sweetser is going to be reasonable in his attorney fee costs."*

*(August 15, 2013 Verbatim Report of Proceedings Pg 15 Ln 22)*

The Trial Court ordered Mr. Driggs' counsel be reasonable in his attorney's fee costs. *(August 15, 2013 Verbatim Report of Proceedings Pg. 16 Line 19)* The court did not order a specific amount of sanctions. Mr. Driggs requested Dr. Howlett counsel to pay \$750.00 for attorney cost, in lieu of Mr. Driggs preparing a declaration and setting a presentment hearing for the fees. (CP 685) Dr. Howlett's counsel would not respond. On September 9, 2013, Dr. Howlett filed a Motion for Reconsideration on the Protective Order and sanctions Order. (CP 195-199) The court's Order for Dr. Howlett's Motion for Reconsideration was filed on October 29, 2013. (CP 207-209)

Trial Court's October 29<sup>th</sup>, 2013 Findings on Dr. Howlett's Motion

for Reconsideration in pertinent part state (CP 208-209):

*"The Court found that the request for a protection order by Defense [Dr. Howlett] was not well ground in fact and not made in good faith. When an attorney signs a certification that he or she has read the request to the court and to the best of his or her knowledge, information and belief that their request is (1) consistent with the rules, (2) not interposed for any improper purpose, such as causing unnecessary delay, and (3) not unreasonable, then the Court should not sanction or impose costs. CR26(g). However, when the Court finds that the certification is made in violation of this rule, the Court shall impose upon the person or party an appropriate sanction which may include the reasonable expenses or attorney fees incurred by the other party. CR 26(g).*

*This Court found that it was not unreasonable for the Plaintiff's attorney [Mr. Driggs] to request additional time to finish the deposition and that the amount of time requested was reasonable. Plaintiff's Counsel gave Defense Counsel numerous opportunities to reschedule at their client's convenience and simply did not respond to those requests. Additionally, when Plaintiff served notice of a deposition, they gave Defense almost two full months to reschedule if needed.*

*Then just days before the scheduled deposition, Defendant files a motion for a protective order asking that it be heard on shortened time, indicating to the Court that there was not ample time to have this matter heard in the regular course. Because of this delay, the deposition of Dr. Howlett could not be handled as previously scheduled.*

*The Court found that the Defendant's last minute motion for a protection order did not meet the requirements listed*

*above and caused unnecessary delay and an increase in cost to the Plaintiff for having to respond to the motion.”*

The Trial Court denied Dr. Howlett’s Motion for Reconsideration regarding both the request for Protective Order and the costs imposed. Mr. Driggs’ counsel again attempted to reach an agreement with Dr. Howlett’s counsel on sanctions. Dr. Howlett again failed to respond. (CP 858, 863, 868, and 870). Mr. Driggs was forced to bring a Presentment Motion before the court.

Due to the Court’s busy schedule, the presentment Motion was heard after the trial. The Court ordered \$1,050.00 sanctions. The court’s opinion and reasoning are set forth in CP at 561-562 and 569-570 and in pertinent part state:

*“The Court had ordered Defendant to pay reasonable attorney fees on an untimely motion for protective order and cancellation of Dr. Howlett's deposition. The Court did not rule on the amount ordered at the time as it appeared after the hearing concluded that the attorneys would resolve the amount for reasonable attorney fees without Court intervention.*

*Subsequently, in the correspondence between the parties, Plaintiff's attorney offered to take \$750 "in lieu of preparing a declaration and setting a presentment hearing" for the fees. The Defendant's attorney seemingly acknowledges this, though without actually accepting the offer, but the Defendant did not ultimately' pay that amount. After trial, Plaintiff's attorney prepared a declaration claiming his fees totaled to \$5,985 for his*

*efforts on the original motion hearing, the cancelled deposition time, and the subsequent efforts to achieve an agreed order on fees." (CP 561-562)*

*"The Court concludes that it maintains jurisdictions under RAP 7.2 to hear these motions, as well as award the appropriate sanctions. These issues do not affect the issues being heard on appeal and are not determined by the ultimate outcome of the case. The case law on the subject not only keeps authority with the trial court to hear motions such as these, but it seems to encourage them." (CP 568)*

*"Finally, Plaintiffs request that the Court set the amount of "reasonable attorney fees" as requested from the previous motion in September 2013. Since counsel could not agree, the Plaintiff now asks for the \$5,985.00 for the hearing and the work associated with that hearing, as well as the work associated with having to bring the issue back before the Court. The Plaintiff expended efforts to try and settle with the Defendant shortly after the Order for Sanctions was issued, but the Defendant refused to agree with the claimed \$750.*

*Defendant claims that Plaintiff is barred from pursuing this claim because he waited too long. That assertion is absurd since they were in communication after the order was issued, and it appears that the original request was (in theory) agreed, but never finalized and not paid. The Plaintiff then continued for at least two months to collect or settle the matter. Since this matter was not resolved, the Plaintiff is now trying to collect the full amount for everything even remotely related to the sanction ordered in September 2013.*

*Plaintiff calculated \$5,985.00 as the "reasonable" attorney fees for this sanction and having to compel the Defense to pay. The Court does not find this reasonable in light of the fact that it is nearly eight times the amount originally asked for. While the Defendant should not profit from his further*

*delay tactics, Plaintiff, likewise, should not have a windfall because of it. Since Plaintiff's attorney declares that he personally spent 4.5 hours reviewing and drafting documents related to the sanction order on September 4, 2013, and 3 hours preparing his notice of presentment and declarations, both at a rate of \$150 an hour, the Court finds that these are reasonable costs incurred for the sanctionable offense, plus the additional time spent setting and responding to the motion for the award of reasonable attorney fees." (567-570)*

## **2. Counter Statement of Facts RE CR35 Examination Stipulations**

On March 1, 2013, Dr. Howlett filed a Notice of CR 35 Exam by Russell Vandenberg, M.D. (CP 1-3) The Notice was lacking pursuant to CR35. It did not contain the manner, conditions, or scope of the examination. Mr. Driggs' counsel agreed to the CR35 Examination by Russell Vandenberg pursuant to the CR 35 Stipulation that was signed. Defense counsel did not disclose Dr. Vandenberg was a psychiatrist and would be administering MMPI test forms. (CP 810-814)

Mr. Driggs' attended Dr. Vandenberg's CR 35 Examination on July 19, 2013. A standardized form called the MMPI-2 was issued to Mr. Driggs. Pursuant to the CR 35 Stipulation signed by Dr. Howlett's counsel and Mr. Driggs' counsel read, "If the Plaintiff is going to be asked to complete **any forms** those forms shall be delivered to the Plaintiff s

attorney not less than five (5) days before the examination.”. (CP 813 Line 9)

Dr. Howlett has argued that the MMPI-2 is not a form as intended by the CR35 Stipulation. (CP 251) The MMPI-2 can be seen at CP 322-324. The Discovery Master, Judge Schroeder, determined that it was a form. (CP 388 Ln 15-18) Judge Plese determined that it was a form. (CP 486). In addition MMPI-2-RF, which is the newest version of the MMPI-2 form, specifically has the word “form” in it, “Minnesota Multiphasic Personality Inventory-2 Restructured **Form**”. (CP 317 Ln 19

The Motion for Sanctions for Violation of the CR35 Stipulation for Examination by Dr. Vandebelt was initially heard by Judge Schroeder. Judge Schroeder ruled that while there may have been a violation he did not believe it was intentional. (CP 388 Ln 12-22) Judge Schoeder deferred any striking of Dr. Vandebelt’s testimony or use of the MMPI-2 form to Judge Plese.

Mr.Driggs’ did not receive Mr. Howlett’s Response to the Motion to Exclude Vandebelt until 3:46 p.m. on March 11, 2013 less than two days before the hearing. (CP 314-315)

At the time of filing of the initial Motion for Sanctions for Violation of the CR 35 Stipulation RE Dr. Vandebelt, Mr. Driggs' was not aware of Dr. Howlett's violation of the CR 35 Stipulation for Dr. Rolfe. (CP 318) Dr. Rolfe's IME was not received until after November 5, 2013. (CP 326) Mr. Driggs' filed a declaration on the day of the hearing advising the court of the second CR35 Stipulation violation involving Dr. Rolfe. (CP 314 to 334) Judge Schroeder did not take this into account during the November 13, 2013 hearing. (CP 385-393) Mr. Driggs' immediately requested the Verbatim Report of Proceedings for the November 11, 2013 hearing; the transcript was received on or about December 15, 2013. (CP 393)

Pursuant to the Order Appointing Discovery Master, Mr. Driggs' filed a Request for Review of Special Discovery Mater's Decision on Sanctions and Deferral of Plaintiff's Motion to Exclude Vandebelt Testimony within ten (10) days of the Order being filed. (CP 807; CP 346-394) The court would not set a hearing for Mr. Driggs' Request for Review and did not make a ruling on the review prior to trial.

Dr. Howlett claims that Mr. Driggs' did not request monetary sanctions in either his Motion to Exclude Vandebelt Testimony or his

Request for Review. While it is true that Mr. Driggs' initially only asserted a request to exclude Dr. Vandenbelt, Mr. Driggs' clearly brought up sanctions in his December 20, 2013 Request for Review.

Mr. Driggs' Request for Review states, "*Issues: A. Should Defendant's be sanctioned for violation of CR 35 Stipulations? Yes. B. Should Dr. Vandenbelt's opinions be excluded...*" (CP 350) These are obviously two separate issues. The December 20, 2013 Declaration of James R. Sweetser states "*Defense counsel's blatant disregard for CR35 agreements is unethical and should not be tolerated. The only recourse Plaintiff has is for the Court to grant sanctions.*" (CP 372)

On May 1, 2014 the trial court issued its opinion on Plaintiff's Request for Review, in pertinent part the trial court stated:

*Prior to the commencement of the trial on this case, the Plaintiff moved for sanctions against the Defense for violations of the CR 35 agreed written stipulations. (CP 484)*

*Plaintiff raised the issue of the violations of the CR 35 agreed written stipulation properly before the trial commenced. At the time, the Court chose not to address these issues until after the trial concluded for purpose of expediency for the jury. (CP 485)*

*Defense argues that these errors did not rise to a level that warrants sanctions. However, this Court does not agree. The Court finds that there should be some sanction*

*imposed to ensure that a 'Wrongdoer does not profit from the 'Wrong. Roberson v. Perez, 123 Wn. App 320 (2004). The Court should be able to rely on stipulations drawn up and signed by attorneys as contracts that will be followed allowing the Court to run more efficiently. If attorneys have to appear in court on each and every motion to have the court order their requests, the entire judicial system could come to a complete halt from overwork. (CP 489)*

*The spirit of cooperation and forthrightness during the discovery process is mandatory for the efficient functioning of modern trials. Johnson v. Mermis, 91 Wn App. 127, 132, (1998). Rule 37 is the enforcement section for the discovery process. It authorizes sanctions to be imposed on a party or its attorney for (1) failure to comply with a discovery order... Sanctions are permitted for unjustified or unexplained resistance to discovery and serve the purposes of deterring, punishing, compensating, and educating a party or its attorney for engaging in discovery abuses, *id.* at 133. (CP 489-490)*

*Defense counsel argues that ultimately neither Dr. Rolfe nor Dr. Vandenbelt testified at trial and, therefore, no harm was done. This does not justify the violations. The Court compares this argument to one of a shoplifter who didn't get away with the merchandise, but was caught and the merchandise returned so "no harm, no foul". Yet the Court still must address the violation as to deter this type of behavior from being repeated. Allowing an expert to take x-rays that were clearly prohibited by the language and asking the Plaintiff to fill out hundreds of questions on a form when the stipulation denies both of these is clear defiance of the agreement, The wording was clear and unequivocal as stated in the agreement and **signed** by the Defense attorney. The imposition of sanctions is needed to curb discovery abuses as such and is entirely appropriate. (CP 450)*

*CR 26(g) states that the signature of the attorney constitutes a certification that he has read the request, and*

*that to the best of his knowledge, information and belief formed after reasonable inquiry it is (1) consistent with these rules and warranted by existing law or good faith arguments...; and (2) not interposed for any improper purpose, An improper purpose would be to agree to a stipulation that the Court most likely would grant if heard, and then not follow it.*

*This rule clearly acknowledges that when an attorney signs their name and agrees, it is with the express intent of abiding by that Stipulations are made in good faith between parties, and it is expected that the party signing will follow the specifications as agreed.*

*A trial court has wide latitude in imposing sanctions for violations of CR 26(g). Higher courts have held that the judges should impose the least severe sanction which is adequate to serve the purpose of the particular type of sanction, without undermining the purpose of discovery. The sanction should ensure that the wrongdoer does not profit from the wrong. Physicians Ins. Exch.v. Fisons Corp. 122 Wn.2d 299, 356 (1993).” (CP 490-491)*

*The violations of the stipulated agreements, in the Court's view, warrant a higher sanction based on the unambiguous language and the clear disregard to follow these agreements. For each of these violations, the Court will award \$1,500 (total \$3,000 for the two violations)... (CP 491)*

Dr. Howlett filed a Motion for Reconsideration RE the Trial Court’s May 1, 2014 Order. The Trial Court’s Opinion on Reconsideration is set forth at CP 627 to 636, reiterated it’s May 1, 2014 and also stated:

*Contrary to the Defendant's argument, whether or not the evidence obtained in violation of the stipulation was used at trial does not mean that a violation should not be sanctionable. While Dr. Rolfe and Dr. Vandenbelt were ultimately not called as witnesses by the Defense, the discovery of the information was still a violation of the prior written agreements.*

*In addition, the Defense argues that their written and filed stipulations were not actually "orders" of the Court and should not be considered for violations. However, the Court considers signed discovery stipulations as part of the Court fostering the "spirit of co-operation and forthrightness during the discovery process". Physicians at 342. The ease of allowing attorneys to do written stipulations rather than constantly coming back to court on discovery issues works to the advantage of the spirit of collaboration and keeping the parties from obstructing the judicial process. Resistance to reasonable discovery requests and stipulations cause the parties to spend more on mounting legal costs and frustrate those who seek to vindicate their rights in courts and could bring the civil justice system into disrepute. *Id* at 341. (CP 632-633)*

*The Court concludes that it maintains jurisdictions under RAP 7.2 to hear these motions, as well as award the appropriate sanctions. These issues do not affect the issues being heard on appeal and are not determined by the ultimate outcome of the case. The case law on the subject not only keeps authority with the trial court to hear motions such as these, but it seems to encourage them.*

*As to Defendants [Dr. Howlett's] Motion to Reconsider, this Court determines that the Defendant [Dr. Howlett] has failed to present any evidence that would excuse its behavior in violating the stipulations.... Nor have they presented any reason why sanctions are not warranted. The Defendant should not profit from their delay tactics, whether intentional or not. The Defendant's position that the violations ultimately did not matter is meaningless. He*

*seems to misunderstand the purpose of discovery is to potentially find out information, but not that every document will be a smoking gun.” (CP 634)*

### **3. Facts RE: Stipulation for CR 35 Exam by Dr. Rolfe**

Dr. Howlett claims Mr. Driggs’ did not raise the issue of the CR 35 Stipulation violation regarding Dr. Rolfe until December 20, 2013. This is inaccurate. Mr. Driggs received Dr. Rolfe’s Report after the Motion to Exclude Vandebelt was filed on November 1, 2013. (CP 211) Mr. Driggs received Dr. Rolfe’s report after November 6, 2013. (CP 325-328 and CP 318 Ln 2). Mr. Driggs received Dr. Howlett’s late Response Brief on November 11, 2013. (CP 314 Ln 20) In Mr. Driggs’ Reply filed November 13, 2013, Mr. Driggs’ brought up the issue of the violation of the Stipulation for CR35 Examination by Dr. Rolfe. Specifically, *“recently received Dr. Rolfe’s IME Report (after this Motion was filed) and review of the report shows they [Dr. Rolfe] violated that Stipulation as well. The Stipulation states no x-rays or imaging will be taken, Dr. Rolfe took x-rays at the CR 35 exam. The Defendants [Dr. Howlett] don’t care whether there is a Stipulation. They will proceed with whatever testing they wish.” (CP 318 ; CP 327; CP 340-343).*

Dr. Howlett responded to Mr. Driggs' Reply by submitting a Declaration from Kathryn Schulman RE: Stipulation for CR 35 Examination by Dr. Rolfe on December 19, 2013. (CP 335-343) This was one day before Mr. Driggs filed his Request for Review on December 20, 2013 and before the Order RE Mr. Driggs' Motion to Exclude Opinions of Expert Russell Vandenbelt was signed and filed with the court. (CP 344-345 and CP 346) Howlett claims that since he sent a copy of the CR 35 stipulation to Dr. Rolfe, he is not responsible for his paid expert's violation of the Stipulation. (CP 339) Even though the Stipulation states "*Defendants' and Plaintiffs' counsel acknowledge they will comply with the above stipulation.*" And "*DEFENDANT'S ATTORNEYS SHALL BE RESPONSIBLE TO SEE THAT THE EXAMINER IS APPRISED OF THIS ORDER.*" (CP 243)

The Trial Court's rulings regarding this matter are set forth in section 2 above.

**4. Counter Statement of Facts Re: Nondisclosure of Dr. Howlett's Surgical Journal**

On June 18, 2012 Mr. Driggs' served his First Requests for Discovery to Dr. Howlett. Interrogatory #54 and Request for Production #13 of Mr. Driggs' First Requests for Discovery to Dr. Howlett, read:

*Is the Defendant aware of any of the following written documents relating to Plaintiff [Mr. Driggs]:*

- a. All Medical records;*
- b. Incident reports made by any physician, nurse, or employee regarding any matter involving the Plaintiff [Mr. Driggs] not found in the patient's medical records;*
- c. Anecdotal or informal record made by any physician, nurse, or employee regarding any matter involving this patient [Mr. Driggs] not found in the patient's records;"*

*Request for Production #13 requested any documents responsive to Interrogatory #54 be provided.*

*(CP 835-836)*

Mr. Howlett's response to this Interrogatory and Request For Production was:

*"Defendant [Mr. Howlett] is aware only of his own medical records and the medical records from Sacred Heart Medical Center, and believes there are medical records in existence from the University of Washington and from other Providers including but not limited to Group Health."*

*Request for Production #13- "Not Applicable"*

*(CP 843-844)*

Dr. Howlett's counsel, Mr. King, and Dr. Howlett signed off on the Responses to Discovery. (CP 853)

Mr. Driggs' attempted to obtain Dr. Howlett's schedule for the day of the subject surgery through two 30(b)(6) depositions. (CP 825 Ln 11). Kallie Howell was only able identify that Dr. Howlett had 8 surgeries on

the date of Mr. Driggs' surgery. (CP 460-465) Howell could not identify the type of surgeries performed or how long the surgeries took.

One of Mr. Driggs' theories at trial related to Dr. Howlett's busy schedule. During the trial, Dr. Howlett produced his personal journal which identified the Mr. Driggs' surgery, the date of surgery, and the type of surgery. It also identified 8 other patients and the type of surgery performed on that date. Dr. Howlett testified that he wrote every surgery he performed throughout his career in this journal. Apparently, Dr. Howlett forgot about this journal until mid-trial. (CP 457 and 487-488) Since the Dr. Howlett's Journal was kept at home and not at Providence, the Trial Court found sanctions against Dr. Howlett and not Providence. The Trial Court awarded sanctions of \$1,000.00 for Dr. Howlett's failure to disclose the handwritten journal as requested. (CP 491)

The Trial Court's ruling in pertinent part is below:

*"during the trial, Plaintiff asked the Court to sanction Dr. Howlett and Providence for not providing his handwritten journal that was produced in the middle of trial. This handwritten journal was brought to the Court's attention by Defense counsel, just prior to putting Dr. Howlett back on the witness stand. The Defense Counsel explained that his knowledge of the document came just prior to bring it to the Court's attention to the document. The Plaintiff strenuously objected and requested the Court suppress any information or testimony that Dr. Howlett would relate to*

*the jury from his journal as it was not produced during discovery.*

*After a short hearing outside the presence of the jury, the Court allowed Dr. Howlett to refer to this information during his testimony, but only after Plaintiff's counsel was provided a copy and a short opportunity to review the information. The Plaintiff proffered that they were extremely prejudice in their case as they tried desperately to find out prior to trial exactly how many surgeries Dr. Howlett had performed that day. Plaintiff had requested this information through both their interrogatory #54 for any "anecdotal or informal record made by a physician, nurse, or employee regarding any matter involving this patient NOT found in the patient records" and the request for production Numbers 13 and 14 asking for copies of all documents as related to that information from Interrogatory #54.*

*Providence through their CR 30(b)(6) designee stated they had 8 surgeries scheduled, though Dr. Howlett countered this during his testimony by producing this handwritten journal showing that was incorrect and he had done 9 surgeries. According to Plaintiff, this information was critical to their case as one of their theories was that Dr. Howlett was overworked and had performed numerous surgeries that day while trying to run a busy practice, thus causing him to forgo putting the rod into Plaintiff Driggs' leg and causing the alleged malpractice." (CP 487-488)*

*The Court cannot find that Providence had any knowledge as to Dr. Howlett's handwritten journal that he kept. It was clear from Dr. Howlett's testimony that he made this journal for personal reasons, and he testified he kept it at home in his safe and not at the hospital or as part of their official files. Therefore, the Court cannot find that Providence had knowledge of the journal. (CP 489)*

Dr. Howlett filed a Motion for Reconsideration regarding the

Court's May 1, 2014 findings of Sanctions RE: Dr. Howlett's failure to

provide the requested records. (CP 492-495) Claiming the defense did not profit from failing to disclose and the court did not have authority to rule on the matter of sanctions after an appeal had been filed. (CP 494-495).

The Court found as follows:

*“CR 59 states that a party has grounds for reconsideration when there is no evidence or reasonable inferences from the evidence to justify the verdict or decision or that the decision is contrary to law or that substantial justice has not been done. The trial court's discretion as to reconsideration will not be disturbed unless a manifest abuse of its discretion is shown. Herron v. McClanahan, 28 Wn.App. 552 (1981).*

*The Defendant's motion for reconsideration does not demonstrate to the Court that there was "no evidence or reasonable inferences from the evidence to justify the verdict" or that the Court's decision was "contrary to law" or "that substantial justice has not been done." The Court's decision was based on the evidence in the record and applied the law appropriately to the facts. While one or both of the parties may feel it was the wrong decision, it does not follow that it is not based in law or facts reasonably inferred to justify the decision.(CP 518-519)*

*The Court will first address whether or not it has jurisdiction to hear these motions and award sanctions. After review is accepted by the Appellate Court, the trial court has authority to act in a case only to the extent provided in this rule unless the appellate court limits or expands that authority. RAP 7.2(a). The trial court has the authority to enforce decisions in a civil case as long as it has not been stayed. RAP 7.2(c). The trial court has authority to hear and determine post judgment motions authorized by the civil rules. RAP 7.2(e). The post judgment*

*motion shall be heard by the trial court first. Id. The appellate court must give permission to the trial court's determination will change a decision that is to be decided by the appellate court. Id (emphasis added). If a trial court's post judgment motion decision does not affect the issues raised in the appeal or have the effect of dismissing the entire case, then it does not "change a decision then being reviewed by the appellate court" for purposes of RAP 7.2. State v. J-R Distributors, Inc., 111 Wn.2d 764 (1988).(CP 519)*

*A post judgment motion decision that does not affect the issues raised in the appeal or have the effect of entering revised findings and conclusions does not "change" a decision being reviewed. Olsen Media v Energy Sciences, 32 Wn.App 579(1982). In Leen v. Demopolis, 62 Wn. App. 473, the court found that CR 11 sanctions did not modify original judgment to require appellate approval. Id at 485. A request for permission for a trial court to modify its judgment under RAP 7.2(e) must be made prior to a decision of an appellate court terminating review. State v Dorosky, 28 Wn.App. 128 (1991). The Defendant cites Sanwick v Puget Sound Title. 70 Wn.2d 438(1967). which states that once notice of appeal is served and filed, the trial court loses jurisdiction and cannot consider motions to strike amendments to pleadings. This is not an issue from the May 1,2014 order by the Court. (CP 520)*

*RAP 7.2 limits the trial court jurisdiction when a case has been accepted on appeal. However, the trial court still has jurisdiction for post judgment motions and, in fact, must hear these motions if they do not affect the issue on appeal. The court has specifically stated that CR 11 sanctions do not modify judgment as to require appellate approval under RAP 7.2. Leen v. Demopolis, 62 Wn.App. 473(1981). The Defendant states that the "trial court's authority is limited to the enforcement of previously rendered orders or judgments ... [and] rule on specific post-judgment motions." While this is technically correct, the range of post judgment motions allowed include any rulings that do*

*not affect a decision being decided by the appellate court. Not allowing the court to "clean up" the final issues in a case would needlessly prolong litigation and be an added burden to the parties looking for resolution. For this reason, the Court does not believe that RAP 7.2 affect's this Court's May 1, 2014 order. (CP 520)*

*"the last minute unveiling of Dr. Howlett's journal can be considered by the Court as a violation when the Plaintiffs discovery requests included asking for all relevant records "including handwritten notes" of the Plaintiffs medical care. This language was clear and unambiguous. It seems unlikely that the journal which Dr. Howlett wrote in for every surgery he performed over the years just slipped his mind until the last moment. The Plaintiffs issue of how many surgeries Dr. Howlett performed was concerning from the beginning of this case, and this handwritten journal confirmed the number of surgeries performed. In finding a violation, the Court need not find withholding the journal intentional, simply that its existence should have been known to Defendant and was not produced. This is sufficient in finding a violation of the rules.(CP 523)*

*The Defendant's argument that the Plaintiff ultimately used the journal the same way they would have if they had discovered it earlier is not the issue. CR 26 contemplates not just false or misleading information, but, also, for "delay tactics." The time of the request for discovery compared to when the journal was actually discovered indicate a substantial delay with no reasonable explanation. The journal contained evidence that was relevant to Plaintiffs theory of the case. Stating that it was used in the same way minimizes the actual difficulties Plaintiff had to go through in order to utilize it in the same or similar fashion. As such, the Court finds that it ""as a discovery violation not to produce it as requested and unduly burdened the Plaintiff and the Court for having the delay during trial. For this reason, the Court upholds the sanction imposed. (CP 523-524)*

*Last, should the Plaintiff raise the issue of the late discovered journal on appeal, this Court already found the discovery violation during the trial. The Court, however, left the sanction to be determined at the conclusion of the trial for judicial economy. The amount and type of the sanction is not an issue currently on appeal. (CP 524)*

*The Court concludes that it maintains jurisdiction under RAP 7.2 to hear these motions, as well as award the appropriate sanctions. These issues do not affect the issues being heard on appeal and are not determined by the ultimate outcome of the case. The case law on the subject not only keeps authority with the trial court to hear motions such as these, but it seems to encourage them.*

*As to Defendant's Motion to Reconsider, this Court determines that the Defendant has failed to present any evidence that would excuse its behavior in violating the stipulations and in not disclosing Dr. Howlett's journal. (CP 524)*

### **III. ARGUMENT AND AUTHORITIES**

#### **A. STANDARD OF REVIEW**

The Trial Court is in the best position to sanction parties and has broad discretion in doing so. Sanctions shall not be overturned absent a manifest abuse of discretion.

*“The perspective of a trial court is singular. The trial judge is in the best position to review the factual circumstances and render an informed judgment, as he is intimately involved with the case, the litigants, and the attorneys on a daily basis. No advantage would result if an appellate court were to conduct a second-hand review of the facts from the trial court level, as a trial court will have a better grasp of what is acceptable trial-level practice among litigating members of the bar than will appellate judges.”*

*Thomas v. Capital Sec. Servs.*, 836 F.2d 866, 868, 1988 U.S. App. LEXIS 1584, \*1, 45 Empl. Prac. Dec. (CCH) P37,770, 10 Fed. R. Serv. 3d (Callaghan) 329 (5th Cir. Miss. 1988)

*The trial court has broad discretion to impose sanctions. Rhinehart v. Seattle Times*, 59 Wn. App. 332, 798 P.2d 1155 (1990).

*Sanctions for noncompliance with discovery orders will not be overturned absent a manifest abuse of discretion. Rhinehart v. KIRO, Inc.*, 44 Wn. App. 707, 723 P.2d 22 (1986),

The abuse of discretion standard governs review of sanctions. The trial court has broad discretion as to the choice of sanctions for violation of a discovery order. Discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. The trial court has clearly stated the reasons for sanctions on the record. (*August 15, 2013 Verbatim Report of Proceedings*; CP 207-209; CP 484-491; CP 517-526)

*“If trial court record does not reflect that a sanction was manifestly unreasonable or based on untenable grounds, the sanction should be upheld.” Sarvis v. Land Resources, Inc.*, 62 Wn. App. 888, 815 P.2d 840 (1991), review denied, 118 Wn.2d 1020, 827 P.2d 1012 (1992).

The trial court did not dismiss the action, order default judgment, exclude witness testimony, exclude evidence, or impose an unreasonable monetary sanction amount based on the number of discovery violations and Dr. Howlett's abuse of the judicial process. Harsher remedies are allowable under CR 37(b), i.e. sanctions that affect a party's ability to present its case -- but do not encompass monetary compensatory sanctions under CR 26(g) or 37(b)(2). *Mayer v. Sto Indus., Inc.*, 2006 Wash. LEXIS 270, 156 Wn.2d 677, 132 P.3d 115 (2006).

#### **B. SANCTIONS UNDER CR 26(g), CR11, and CR37**

This system obviously cannot succeed without the full cooperation of the parties. Washington State allows for provisions under three separate Civil Rules authorizing the Trial Court to impose sanctions for unjustified or unexplained opposition, and to deter wrongdoers from violating such things as are being addressed in the subject case. The choice of sanctions is within the discretion of the court. Although the sanctions imposed should insure that the wrongdoer does not profit from his wrong and deter further wrongdoing.

*"The purpose of sanctions is to deter, to punish, to compensate, to educate, and to ensure that the wrongdoer does not profit from the wrong." Burnet, 131 Wn.2d at 496*

*(citing Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 356, 858 P.2d 1054 (1993))*

CR 37 reads in pertinent part:

*(b) If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or rule 35, or if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:*

....

*In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.*

*(d) Failure of party to attend at own deposition ..... fails (1) to appear before the officer who is to take his or her deposition, after being served with a proper notice, ....the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.*

*(e) Failure to participate in the framing of a discovery plan. If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.*

CR 11 reads in pertinent part:

*(a) ....The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:*

- (1) it is well grounded in fact;*
- (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;*
- (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and*
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.*

*If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.*

Dr. Howlett has laid out CR26(g) sanctions in his Appellant Brief.

**C. ARGUMENT RE: SCHEDULING OF DR. HOWLETT'S CONTINUATION DEPOSITION**

The Trial Court found that the request for a protection order by Defense was not well grounded in fact and not made in good faith.

Dr. Howlett claims the court's sanctions order was manifestly unreasonable and based on untenable grounds and/or reasons, but doesn't set forth how the court was manifestly unreasonable. Dr. Howlett distorts the facts to the point of almost falsifying the record. The trial court clearly set forth their opinion and reasoning for the sanctions in the August 15, 2015 hearing, the October 25, 2013 Order Re Motion for Reconsideration (CP 208-209), and in July 31, 2014 Opinion of the Court on Reconsideration (CP 561-570).

Dr. Howlett's claims that Mr. Driggs did not confer with Dr. Howlett or his counsel when scheduling the continued deposition are a complete fabricated statement of the record. Mr. Driggs attempted to confer with Dr. Howlett's counsel through email, through letter, and through multiple telephone calls. How can you confer with counsel, if they refuse to respond to your requests? Dr. Howlett would not confer with Mr. Driggs and Mr. Driggs was forced to serve a subpoena after approximately 30 days of attempting to schedule a continued deposition.

Dr. Howlett then claims that it had to move for a Protective Order on shortened notice because of the Trial Court's vacation (the trial court was going on vacation after the motion was to be heard). Mr. Driggs gave Dr. Howlett 62 days to respond to the subpoena for continued deposition. Dr. Howlett chose to wait until 6 days before the continued deposition to file a Motion for Protective Order. If they knew they were going to move for a protective order at Dr. Howlett's initial deposition why wait until the last minute, except to impede Mr. Driggs ability to conclude discovery. Dr. Howlett did not confer with Mr. Driggs regarding the Continued Deposition other than notifying Mr. Driggs that he would not be attending on the day the Protective Order was filed six days before the deposition. Dr. Howlett did not request Mr. Driggs agree to a fixed time for the continued deposition. Lastly, Dr. Howlett makes a stab at claiming there are no rules requiring a Motion for Protective Order be brought within a certain time frame. Dr. Howlett's conduct goes to the heart of discovery and the judicial system. CR 37(d) and CR37(e) allow for sanctions for this conduct. In addition, CR 26(i) states:

*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. **If the court finds***

*that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.*

Dr. Howlett clearly did not participate in attempting to resolve the discovery issue prior to filing his Motion for Protective Order. Dr. Howlett clearly did not show up for his Continued Deposition scheduled for August 12, 2013, which was properly served his counsel of record.

In addition, sanctions were appropriate under CR26 where a motion interposed an improper purpose, such as to “harass or to cause unnecessary delay or needless increase in the cost of litigation”.

This Court was well within its discretion in assessing terms.

#### **D. VIOLATIONS OF CR 35 STIPULATIONS**

Dr. Howlett claims the MMPI-2 Form was not a “form”. Dr. Howlett claims that the Trial Court erred in their determination that the MMPI-2 Form was a “form”. Dr. Howlett failed to mention that not only did the Trial Court find that MMPI-2 Form was a “form” but Judge Schroeder, the discovery master, also determined the MMPI-2 Form was a “form” and that the CR 35 Stipulation was violated. The term “**any forms**” is not ambiguous.

As previously stated the MMPI-2 RF, the newest version of the MPPI-2 Form in longer form entitled the “Minnesota Multiphasic Personality Inventory-2 Restructured **Form**”. Dr. Howlett’s interpretation of the Stipulation and the definition of the words “ any forms” referring only to “patient information forms” is not founded in fact. If the parties intended the words “any forms” in Paragraph 9 to mean only “patient information forms” then that should have been clarified. It would have been very simple to put “patient information forms” in the Stipulation. But that is not what the parties intended. Dr. Howlett’s argument is a stretch and in conjunction with the admitted violation of the Stipulation for CR 35 Examination by Dr. Rolfe, Dr. Howlett did not intend to follow the stipulations they signed. The trial court clearly did not abuse its discretion when finding sanctions for multiple violations of CR 35 Stipulations signed by both Mr. Driggs’ counsel and Mr. Howlett’s counsel.

Dr. Howlett attempts to claim that he is not responsible for making sure his paid experts follow the Stipulations he signed. Mr. Driggs collates this to a contractor and subcontractor relationship. Dr. Howlett is the general contractor and has signed the contract and is responsible for making sure the subcontractor [Dr. Rolfe] abides to the contract. Mr.

Driggs did not sign an agreed stipulation with Dr. Rolfe. Mr. Driggs signed an agreed Stipulation with Dr. Howlett. If a party cannot rely on a document signed by an attorney will be followed, then all issues would need to be brought before the court for court order. This would not promote judicial economy and is contrary to the cooperative approach to discovery under the rules. CR 2(A).

**E. NONDISCLOSURE OF DR. HOWLETT'S PRIVATE,  
HANDWRITTEN SURGERY JOURNAL**

Dr. Howlett and Mr. King signed the Responses to Plaintiff's First Discovery Requests. Plaintiff's First Discovery Requests requested the handwritten surgery journal notes that Dr. Howlett withheld until mid-trial. Dr. Howlett is claiming "the defense cannot be faulted for not learning about the journal during the course of discovery." Dr. Howlett was a defendant in the subject case. Dr. Howlett signed the Discovery Responses not only from himself, but also signed the Discovery Responses from Providence Orthopaedic, stating there were no such journals. Dr. Howlett put every surgery he has ever had in that journal. This case went on over several years and Dr. Howlett wants you to believe that not once did it occur to him that Mr. Driggs had requested this document.

Mr. Driggs had set up two 30(b)(6) depositions in order to obtain the information held within Dr. Howlett's personal handwritten surgery journal. Whether it was intentional or not, Dr. Howlett's and Providence Orthopedics failure to identify the requested document impeded Mr. Driggs attempt to obtain discovery. They claim no harm no foul. Their failure to disclose created two unnecessary depositions, which did not gain the information contained in that one handwritten surgery journal. This is a big deal. The question, what was the surgeon doing on the day of the alleged negligence and failure to follow the surgical plan, is a big deal. It is a cost to Mr. Driggs that would not have occurred. CR 11 clearly allows sanctions for this behavior. Defense counsel's failure to do their due diligence in questioning their client over a two year period is not an acceptable excuse for failing to provide requested discovery.

#### **IV. REQUEST FOR ATTORNEY FEES AND COSTS**

Pursuant to RAP 18.1 the respondent, Mr. Driggs, respectfully advises that he is entitled to reasonable attorney fees and costs before this court. The court deciding the appeal shall allow to the prevailing party such additional amount as the court shall adjudge reasonable as attorneys' fees for the appeal. Mr. Driggs' will provide an Affidavit of Fees and

Expenses within 10 days of the decision. RAP 18.1 (d). In addition, Mr. Driggs should be awarded his fees for defending against this frivolous appeal. RAP 18.9. It is frivolous because it presents no issues on which reasonable minds could differ. *Heigis v. Cepeda*, 71 Wn. App. 626, 862 P.2d 129 (1993).

## V. CONCLUSION

This court should reject the challenge to the well-reasoned sanctions by the trial court. The trial court made the necessary inquiry and considered the appropriate factors in imposing sanctions. The trial court chose the least severe sanction to deter, punish, and educate Dr. Howlett and defense counsel for the violations of discovery. Dr. Howlett and defense counsel's argument that the trial court did not have the authority to order sanction for the violations is without merit. Dr. Howlett and his counsel have not shown any clear abuse of discretion, discretion manifestly unreasonable, or that the court ordered sanctions on untenable grounds or for untenable reasons. No reasonable minds could differ considering the broad discretion of the trial court to impose sanction for discovery violations.

This court should affirm the superior court's award of sanction terms and attorney fees as reasonable and within the court's discretion and grant respondent, Mr. Driggs', his attorney's fees and costs on appeal.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of June, 2015.

LAW OFFICE OF JAMES R. SWEETSER

  
\_\_\_\_\_  
JAMES R. SWEETSER, WSBA#: 14641  
Attorney for Respondent

**CERTIFICATE OF SERVICE**

I certify that I served, or caused to be served, a copy of the foregoing RESPONDENT BRIEF on the 5<sup>th</sup> day of June, 2015, to the following counsel of record at the following address:

Service was made by messenger and e-mail to:

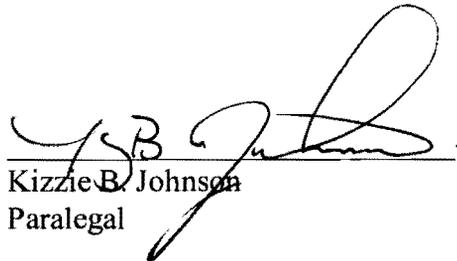
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Signed in Spokane, Washington this 5<sup>th</sup> day of June 2015.

  
Kizzie B. Johnson  
Paralegal