☐ EXPEDITE
☐ No hearing set
X Hearing is set
Date: December 20, 2019
Time: 9:00 a.m.
Judge/Calendar: Hon. Christopher Lanese

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

C.B., an individual,

Plaintiff,

vs.

BLACK HILLS FOOTBALL CLUB, a Washington nonprofit corporation; DAVID E. CROSS, individually; JAMES CHARRETTE,

Defendants.

NO. 18-2-02416-34

PLAINTIFF'S MOTION TO SANCTION CROSS AND CHARETTE FOR WILLFUL DISCOVERY VIOLATIONS

I. RELIEF REQUESTED AND INTRODUCTION

Plaintiff respectfully requests that the Court grant Plaintiff's motion for sanctions for Defendants Cross and Charette's failure to comply with the Court's order on November 1, 2019. For over a year, Plaintiff has been asking for electronic discovery and any pretense that Defendants are just becoming aware that they need to turn over information in all their devices is dishonest. This Court ruled on November 1 that Defendants Cross and Charette had two (2) weeks to turn over to Plaintiff *all responsive data* from their electronics and email accounts. More than a month has passed since the Court's order, but Defendants have turned over only the same emails they previously produced, only this time in native format. Plaintiff has deep and continued reservations regarding Defendants refusal to produce the requested information and the possibility

PFAU COCHRAN VERTETIS AMALA
A Professional Limited Liability Company

911 Pacific Avenue, Suite 200
Tacoma, WA 98402
Phone: (253) 777-0799 Facsimile: (253) 627-0654

of evidence being destroyed, especially given the history of discovery in this and related lawsuits, coupled with the failure to produce critical documents throughout the course years of litigation.

The Court's order at the last hearing was crystal clear: Cross and Charette were to produce all responsive data that Plaintiff has requested within two weeks. The Court also expressly stated its expectation that defense counsel would review documents for privilege or other concerns and make the production within two weeks. Despite the Court's clear order, these Defendants have not complied, and Plaintiff now brings this motion to sanction them for willful discovery violations.

II. RELEVANT FACTS

On November 27, 2018, Plaintiff sent her first interrogatories and requests for production to Charette and Cross separately.[1] Request for Production Nos. 6, 20, 21, 23, 24, and 27 requested electronic transmissions relevant to this case in digital format with metadata intact.[2] On March 18, 2019, Plaintiff sent her third interrogatories and requests for production to Charette and second interrogatories and requests for production to Cross. In these requests for production Plaintiff asked for every cell phone and computer Charette and Cross ever owned, leased, borrowed, or otherwise possessed.[3] Despite multiple CR 26(i) conferences, Defendants failed to ever produce this information. On October 10, 2019, Plaintiff brought her motion to compel Defendants James Charette and David Cross to produce their cellular phones, computers, and email accounts.[4]

On November 1, 2019, this Court ruled that Defendants were required to produce all responsive data within two weeks.[5]

On November 4, counsel for Defendants Cross and Charette, Mr. Penn Gheen, emailed Plaintiff's counsel stating that he wanted to follow up on "some of the issues raised by the court's rulings" including "computer protocol issues, and which devices you feel are relevant." Plaintiff's

[1] Cochran Decl. at Exs. 1, 2.
[2] Cochran Decl. at Exs. 1, 2.
[3] Cochran Decl. at Exs. 3, 4.
[4] Cochran Decl. at Ex. 5.
[5] Cochran Decl. at Ex. 6.

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counsel, Mr. Kevin Hastings, said he needed more specific questions about protocol in order to consult with his expert, but that "we believe the court's order included [all devices]."[6]

Again Mr. Gheen brought up "relevancy" stating, "[t]he list of devices include many that post-date the relevant time period and are not going to have any data on them which will be responsive including devices used by other members of Mr. Charette's family."[7] Plaintiff informed Mr. Gheen, "I can tell you that we will not take additional delay lightly. We disagree with your manufactured 'misunderstanding' over the Court's order. Judge Lanese was clear, and it's time to produce all electronic data – in native format – that we have been asking for since last year."[8]

In the afternoon on November 15—the Court's deadline for Defendants to produce data—Mr. Gheen sent another email to Plaintiff's counsel stating:

> Kevin - I am writing to give you a status update regarding our production related to electronic devices and homeowners insurance policies.
>
> First, within the last week we provided, in native format, copies of all relevant and responsive data from Mr. Charette's soccer related computer containing data from the time period in question. This provides you all responsive data in the format you have requested despite the fact our previous production also provided all the relevant data as well.
>
> In addition, although we have every reason to believe the remaining devices have no relevant responsive data and stand on our objections regarding the relevance of these devices, I have made arrangements to have all extant devices forensically examined by Lighthouse to verify this. ***I am not able to physically complete this in the two weeks allotted by the court*** but the work is underway and I will provide additional information to you on this project as soon as it is available . . . .[9]

Plaintiff's counsel responded:

> Please help us understand (1) what devices were given to Lighthouse and when, (2) whether Lighthouse will be capturing a mirror image of the devices, (3) whether Lighthouse will be searching for deleted information, and (4) ***why you are***

[6] Cochran Decl. at Ex. 7.
[7] Cochran Decl. at Ex. 7.
[8] Cochran Decl. at Ex. 8.
[9] Cochran Decl. at Ex. 9.

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unable to comply with the Court's order – or better, why it's taken a year to get to the point where we are now.

The Court's order was in no way limited to simply providing native versions (although we have been requesting that for over a year). ***The order was for ALL responsive information, which includes all emails and transmissions. You need to go through all of them and determine which ones are relevant. That has not been done.*** The last that was done on this was Holly asking us for search terms in an effort to minimize the number of responsive documents generated. The Court's order also encompassed Cross's and Charette's email – have those been searched by Lighthouse? Accessed by Lighthouse?

We are deeply concerned with the status of this discovery now over a year later, and we are also troubled with this note being sent at 3:21 p.m. on the deadline set by the Court. Please give us answers to the questions raised, which seems to be in your best interest because the next motion we will be filing will be seeking sanctions.[10]

Defendants Cross and Charette never responded to this email. On November 20, Plaintiff's counsel deposed Defendants James Charette and David Cross. When Defendant Charette was asked when he had produced his electronic devices for downloading, Charette responded that he had produced his computers only the week before and that he had produced his phone that day (November 20).[11] Defendant Cross testified that his counsel only notified him the week before that the Court had entered an order compelling production of his electronic devices. He further testified that he had just brought in his electronic devices that day, November 20.[12] To-date, discovery is still outstanding in direct contradiction to this Court's order.

III. EVIDENCE RELIED UPON

This motion relies upon the Declaration of Darrell L. Cochran, as well as the existing file on record.

IV. LEGAL ARGUMENT

A trial court has a right to enter liability judgment where a party has willfully violated its discovery order in a manner that prejudices his opponent's ability to prepare for trial. *Rivers v.*

[10] Cochran Decl. at Ex. 9.
[11] Cochran Decl. at Ex. 10.
[12] Cochran Decl. at Ex. 11.

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Washington State Conference of Mason Contractors, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002). And the law is well-settled that "'[u]nder CR 41(b), a trial court has the authority to dismiss an action for noncompliance with a court order or court rules.'" *Id.* (quoting *Woodhead v. Disc. Waterbed, Inc.*, 78 Wn. App. 125, 129, 896 P.2d 66 (1995)).

This Court should impose a liability judgment as the appropriate sanction here because Defendants Cross and Charette (1) "willfully or deliberately violated the discovery rules," namely, CR 37(b)'s requirement to obey an order to provide discovery, (2) Plaintiff was "substantially prejudiced in her ability to prepare for trial," and (3) this Court should consider and reject lesser sanctions as insufficient. *Id*. (citing *Burnet v. Spokane Ambulance,* 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)). "The purposes of sanctions orders are to deter, to punish, to compensate and to educate." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 325, 54 P.3d 665 (2002).

A. Defendants Cross and Charette's Misconduct Was Intentional and Calculated, Done in Bad Faith.

"A spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials." *Fisons*, 122 Wn.2d at 342. A "willful" violation of discovery obligations is a violation "without reasonable excuse." *Magana*, 167 Wn.2d at 584 (citations omitted); *Anderson v. Mohundro*, 24 Wn. App. 569, 574, 604 P.2d 181 (1979) ("any violation of an explicit court order without reasonable excuse or justification must be deemed a willful act."). The standard does not require deliberate misconduct, but here we unquestionably have both deliberate misconduct and no reasonable excuse.

In *Rivers*, the trial court's order to compel compliance required Petitioner to fully answer Respondent's first interrogatories and request for documents without objections. *Rivers*, 145 Wn.2d at 690. Instead, she continued to object to interrogatories and many of her answers were evasive and incomplete. *Id.* at 690-91. The *Rivers* court held that there was substantial evidence in the record to justify the trial court's finding of a "repeated and continuing" violation of the Court's order. *Rivers*, 145 Wn.2d at 693.

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In *Magana*, Hyundai "ignored or evaded Magana's discovery requests" to justify not disclosing prior seatback incidents, and Hyundai did not seek a protective order to obtain judicial approval for its construction of Hyundai's discovery obligations. The *Magana* court held that Hyundai had unjustifiably searched only its Legal Department for such seatback claims instead of looking for responsive documents elsewhere in the company. *Id*. at 584-87.

Likewise, here, Defendants Cross and Charrette had a direct, personal, and bad-faith role in purposefully withholding evidence from Plaintiff and not even looking through devices until either the week of or days after the Court's deadline. Prior to the Court's deadline for Defendants to produce all responsive data, Plaintiff specifically reminded Defendants that the Court's order applied to all responsive data for all devices. Yet, despite this, on the Court's deadline for all responsive data, Defendants Cross and Charette failed to comply with the Court's order. Defendants' counsel stated:

> In addition, although we have every reason to believe the remaining devices have no relevant responsive data and stand on our objections regarding the relevance of these devices, I have made arrangements to have all extant devices forensically examined by Lighthouse to verify this. ***I am not able to physically complete this in the two weeks allotted by the court*** but the work is underway . . .[13]

Defendants willful violation is further seen in how Defendants Cross and Charette testified that their counsel did not notify them of the Court's order for electronic devices until the week before November 20. As of November 20, they were still producing electronic devices to their counsel even though Plaintiff has been requesting electronic discovery for over a year. This case involves a decision to willfully fail to comply with the Court's order. There is no way to avoid the fact that Cross and Charette acted in bad faith and without reasonable excuse.

B. Plaintiff Has Been Substantially Prejudiced in Her Ability to Prepare for Trial.

Defendants Cross and Charette's failure to disclose all responsive data has substantially prejudiced Plaintiff's trial preparation. In *Magana*, Hyundai produced the missing responsive claim documents weeks before trial, but the trial court found (and the Washington Supreme Court

[13] Cochran Decl. at Ex. 7.

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A Professional Limited Liability Company

911 Pacific Avenue, Suite 200
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Phone: (253) 777-0799 Facsimile: (253) 627-0654

affirmed) that such belated production "substantially prejudiced" Magana, because once Magana got the list of seatback claims, he discovered that some claimants were not available or had disposed of their records. *Magana*, 167 Wn.2d at 590.

A ***major*** pre-trial issue has been whether Defendants Cross and Charette knew or should have known about David Davis' danger to athletes and what Defendants Cross and Charette knew about David Davis' rape of C.B. and when they knew this. Defendants will claim that they had no idea about the rape soon after it happened, but the evidence shows otherwise. Why would David Davis simply quit as a Black Hills Football coach in the middle of a tournament? Why would C.B. quit soccer, which she loved, around the same time after playing for years? Why would David Davis be so mad that he was throwing cones at a team manager before storming off the field never to return? Why would a coach leave and never offer an explanation? At the moment, Plaintiff does not have full answers to these questions because Defendants Cross and Charette failed to disclose all responsive data from their electronics and email accounts when it was first requested more than a year ago. And due to the Defendants' history of withholding documents receiving this data is of even greater importance. In the related *B.W.* case Charette was deposed during trial and testified that in contradiction to his previous statement, he revealed what he knew about David Davis.[14] Plaintiff does not to be prejudiced by even more late disclosure and thus, production of this data is of utmost importance.

C. The Court Should Reject Lesser Sanctions Than Entry of Default Judgment.

A lesser sanction than liability judgment would not deter or punish the bad actors in this tawdry drama. In *Behr*, the Court held that any sanction less than default judgment would not be adequate. The trial court's analysis, affirmed on appeal, applies directly here:

> V. (1) a continuance would be unfair to the class and would not punish Behr; (2) financial sanctions do not "rectify a wrong; it just sets a price on it. It punishes the defendant to some extent, but it doesn't' determine the plaintiffs' damages. It doesn't do anything to resolve the reason the plaintiffs came to court in the first place;" (3) striking witnesses or testimony could "add some complications for the plaintiffs in proving their cases. And it certainly doesn't give

[14] Cochran Decl. at Exs. 12, 13.

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A Professional Limited Liability Company

911 Pacific Avenue, Suite 200
Tacoma, WA 98402
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> plaintiffs the effect of the evidence that they were entitled to;" (4) striking Behr's affirmative defenses would result in the plaintiffs "still [having] to prove liability without the opportunity to explore these suppressed and very positive leads. This evidence, if they had a chance to develop it, may very well help to prove liability, but by striking the affirmative defenses, they would be deprived of that opportunity;" and (5) any other sanctions would not fully address the "goals of deterrence, punishment, compensation, and education."

Behr, 113 Wn. App. at 329-30.

Here, Defendants have no counterclaims to dismiss so that is not a viable lesser sanction. *Magana*, 167 Wn.2d at 592. The Court could strike Defendant Cross and Charette's affirmative defenses, but the prejudice to Plaintiff, as in *Behr*, goes to impeding their trial preparation to prove liability. Financial sanctions alone would do nothing to rectify the wrong here. The Court could make a finding or negative inference that Cross and Charette knew or should have known that Cross was a danger to athletes, and that Cross and Charette received notice of and failed to report known sexual abuse of C.B., CR 37(b)(2), but such a sanction would not deter or punish, and Plaintiff will remain impaired in fully preparing for trial, because she will never discover the full story of David Davis.

Whatever judgment, finding, or evidentiary sanction the Court imposes, the Court also should award Plaintiff her fees in litigating against Cross and Charette to this point in the case. The additional monetary sanction here should ensure that the Court's sanction both punishes and deters. It is the nature of the contingent fee litigation that lawyers will forego income, front expenses, and represent plaintiffs to the fullest, in the hope of obtaining compensation from plaintiffs through the jury's award. Accordingly, defendants in a contingent fee litigation attempt to draw out a case, make it expensive, and to pinch the resources of plaintiff's counsel in the hope that their initial fervor will grow tepid in the face of mounting debt. The financial penalty the Court imposes should ensure that Cross and Charette are not rewarded for their malfeasance or emboldened by their misconduct. *See Magana*, 167 Wn.2d at 576 (where untimely disclosures resulted in loss of evidence, default judgment of $8 million, plus attorney fees in litigating claim, was supported by record). This Court has considerable discretion to award monetary sanctions

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911 Pacific Avenue, Suite 200
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pursuant to Civil Rule 37 and its inherent authority, particularly when faced with extensive misconduct.

VI. CONCLUSION

For the foregoing reasons, the Court should enter an order imposing sanctions against Defendants Cross and Charette for willfully failing to comply with the Court's discovery order.

RESPECTUFLLY Submitted this 11th day of December, 2019.

PFAU COCHRAN VERTETIS AMALA PLLC

By: /s/ Darrell Cochran
Darrell L. Cochran, WSBA No. 22851
Kevin M. Hastings, WSBA No. 42316
Bridget T. Grotz, WSBA No. 54520
Attorneys for Plaintiff

PFAU COCHRAN VERTETIS AMALA
A Professional Limited Liability Company

911 Pacific Avenue, Suite 200
Tacoma, WA 98402
Phone: (253) 777-0799 Facsimile: (253) 627-0654

CERTIFICATE OF SERVICE

I, **Sarah Awes**, hereby declare under penalty of perjury under the laws of the State of Washington that that I am employed at Pfau Cochran Vertetis Amala, PLLC, and that on the below date I caused to be served the foregoing document on:

Mark P. Sheer
Matthew Erickson
Scheer Law Group PLLC
600 University Street, Suite 2100
Seattle, WA 98101

Counsel for Black Hills Football Club

Michael A. Guadagno
Holly D. Brauchli
Penn Gheen
Bullivant Houser Bailey PC
1700 Seventh Ave., Ste. 1810
Seattle, WA 98101

Counsel for David Cross and James Charette

( ) Via U.S. Mail
( ) Via Facsimile
( ) Via Hand Delivery
(X) Via Email

SIGNED this 11th day of December, 2019.

/s/ Sarah Awes
Sarah Awes

PFAU COCHRAN VERTETIS AMALA
A Professional Limited Liability Company

911 Pacific Avenue, Suite 200
Tacoma, WA 98402
Phone: (253) 777-0799 Facsimile: (253) 627-0654