☐ EXPEDITE
X No hearing set
☐ Hearing is set
Date: June 12, 2020
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 CHARETTE, Defendants.	NO. 18-2-02416-34 **PLAINTIFF'S MOTION FOR SANCTIONS**

I. RELIEF REQUESTED AND INTRODUCTION

Plaintiff respectfully asks the Court to enter an order imposing discovery sanctions against Defendant Black Hills Football Club ("BHFC") for withholding evidence throughout the course of years of litigation. Defendant BHFC and its lead counsel, Mark Scheer, have represented to this Court in the beginning of this lawsuit that they "don't play games," are "not hiding the ball," and "have nothing to hide here."[1] And yet the recent production of documents as ordered by the Court after an *in camera* review demonstrate only that BHFC and its lawyers have failed to honor their obligations to comply forthrightly with discovery under the civil rules. Importantly, as this Court knows from prior, related litigation, this misconduct marks a continuation of serious

[1] Cochran Dec. at Ex. 4.

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discovery abuses, not an anomaly. Sanctions are warranted to help "curb discovery abuse" in the future, *Washington State Physicians Insurance Exchange v. Fisons Corporations*, 122 Wn.2d 299, 342 (1993), by compensating Plaintiff for attorney's fees and costs she incurred building a liability case that was missing what Defendants always knew existed: Evidence that a disinterested third party named Anna Boatright observed over the years regarding all three defendants' and their willful failure to protect young women from sexual abuse.

The emails that the Court ordered to be produced – and the Facebook chat conversation attached to them – are nowhere close to meeting the definition of "work product" or "attorney-client" privilege. They are merely a conversation among two board members regarding concerns that Ms. Boatright had observed over the years since the formation of BHFC. The decision to withhold this evidence, and even refusing to produce Ms. Boatright's name, was a calculated gamble designed to further deprive Plaintiff from evidence that she has been seeking for years. The substance of the emails and attached Facebook conversation cannot be understated in their importance and relevance: the evidence establishes that BHFC Coach Dennis Jones had groomed and sexually abused multiple players when it was previously known that he had only abused A.R.; BHFC, Charette, and Cross likely knew of Jones's "obvious" abuse at the time it occurred; and BHFC, Charette, and Cross failed to monitor and oversee coaches.[2]

Defendant BHFC's decision to withhold this evidence is particularly troubling not only in light of their substance, but also considering the effort Plaintiff undertook to discover this very information. When motion practice started to focus on what BHFC had withheld in a privilege log, the Court will recall that the initial effort by Plaintiff was to force a decipherable privilege log – in fact one that simply met the basic requirement of identifying all the senders and recipients and times of transmission. The Court agreed and ordered BHFC to "make clear the identities and dates of transmission and privilege for each document withheld," and yet even this order did not

[2] This is not the first time Defendants have withheld valuable evidence. On the first day of jury selection in the *B.W.* trial, BHFC disclosed to *B.W.*'s counsel for the first time that BHFC Coach David Davis raped C.B. in or around 2005. Two days later, Defendant BHFC wrote a letter identifying additional documents that had been withheld, including emails from Charette regarding C.B.

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yield the name "Anna Boatright" because the privilege log identified only Brett Wilhelm and Scott Kee, intentionally burying Ms. Boatright in the obscure legalese, "Forwarded correspondence regarding lawsuits." Plaintiff asked for the underlying information contained in Ms. Boatright's conversation – as well as her name – in numerous written discovery requests over the years of discovery, and it is clear that omitting her name was but a further step toward denying Plaintiff the information that ultimately came to her only recently.

Plaintiff is requesting sanctions in this case for two purposes: (1) to help "curb discovery abuse" in the future and (2) to punish Defendant BHFC and compensate Plaintiff. *Fisons,* 122 Wn.2d at 342, 356 (1993). As the *Fisons* Court aptly remarked, "'Sanctions to deter discovery abuse would be more effective if they were diligently applied not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.'" *Fisons,* 122 Wn.2d at 342 (quoting *Amendments to the Federal Rule of Civil Procedure,* Advisory Committee Note, 97 F.R.D. 166, 216-29 (1983)). Plaintiff respectfully submits that sanctions are needed at this juncture not only to punish Defendants from their discovery practices, but also to restore integrity in the discovery process and help dissuade others—if not themselves again—from engaging in similarly unfair tactics. The effective amount to accomplish these dual purposes flows from the record and the Court's own experiences to set a sanction that serves justice—most likely after considering the willfulness of the discovery violation, the prejudice it caused, the importance of the evidence withheld, the duration of abuses, and the impact a sanction would have based upon the relative resources of the offending parties. Respectfully, Plaintiff suggests that one potential measuring stick is the costs and attorney's fees that Plaintiff incurred in building a liability case that was missing the very evidence BHFC always knew existed. Plaintiff's experts, discovery targeting, and depositions would have all covered and further explored evidence offered by Anna Boatright and would be, in some ways, better focused had this evidence been made available earlier.

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II. FACTS

A. Plaintiff's Discovery from The Beginning Was Targeting Electronic Messages.

On August 8, 2018, C.B. sent her first interrogatories and requests for production to BHFC, which included:

> **REQUEST FOR PRODUCTION NO. 6:** Please produce every electronic message sent or received from Black Hills Football Club employees, volunteers, or independent contractors that pertains to boundary invasions, sexual harassment, sexual misconduct, exploitation of minors, communicating with players, socializing with players, or sexual grooming behaviors.
>
> **REQUEST FOR PRODUCTION NO. 7:** Please produce every electronic message sent or received from Black Hills Football Club employees, volunteers, or independent contractors that pertains to or concerns the allegations in the complaint.[3]

Plaintiffs in related cases sent identical requests for production to BHFC in *K.H.* on February 22, 2018 and in *B.W.* as early as September 14, 2015.[4]

B. BHFC Did Not Produce the Messages or Accurately Identify the Senders and Recipients of the Messages.

As part of its response to Plaintiff's discovery requests,[5] BHFC produced a number of privilege logs that did not identify the withheld documents at issue and left out the key name of Anna Boatright, one of the primary senders and recipients of messages to BHFC board members containing critical underlying factual information. BHFC's first "updated" privilege log dated March 15, 2019, was four pages long and did not describe or identify the messages at issue here.[6] After discovery conferences and several weeks of waiting, BHFC gave Plaintiff another "updated" privilege log on October 11.[7] This "updated" privilege log was 34 pages long, but also too vague for anyone to identify the privileges being asserted. Similar to the first "updated" privilege log, this privilege log did not identify the Boatright messages, let alone mention her name. Instead, there was one entry where BHFC intentionally left the "author" and "destination" boxes blank:

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[3] Cochran Dec. at Ex. 6.

[4] Cochran Dec. at Exs. 7, 8.

[5] Cochran Dec. at Exs. 5, 34, 35, 36, 37.

[6] Cochran Dec. at Ex. 10.

[7] Cochran Dec. at Ex. 11.

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wilhelmfam@comcast.net			Forwarded correspondence regarding lawsuits	11/16/15	Not responsive or relevant to the present suit. Withheld. Document created in anticipation of litigation.

This prompted Plaintiff to file a motion to compel BHFC to (1) produce all the documents identified in the privilege log in redacted form; and (2) revise its "updated" privilege log to identify individuals in the emails. After the hearing, the Court granted Plaintiff's motion to compel in part and ordered:

> BHFC shall produce a privilege log that identifies the senders and recipients and dates of transmission and privilege for each document withheld. If a document is an email thread or otherwise contains multiple senders and recipients, BHFC shall make clear the identities and dates of transmission for each separate email. The privilege log shall be produced in 3 weeks.[8]

On December 6, Defendants produced another "updated" privilege log that had grown to 100 pages. Buried in the middle of this 100 page privilege log on page 51 were two entries labelled from "Scott Kee" to "Bret Wilhelm" and dated "11/16/15."[9] These emails had been forwarded from a source who was not identified—directly contrary to the Court's order to "make clear the identities and dates of transmission and privilege for each document withheld."[10] Despite BHFC's attempts to hide these entries in the middle of the 100 pages, Plaintiff's counsel immediately flagged these entries among others and set up a CR 26(i) conference with counsel for BHFC, Mark Scheer.[11]

wilhelmfam@comcast.net	Scott Kee	Bret Wilhelm	Forwarded correspondence regarding lawsuits	11/16/15	Not responsive or relevant to the present suit. Document created in anticipation of litigation.	Yes
wilhelmfam@comcast.net	Scott Kee	Bret Wilhelm	Forwarded correspondence regarding lawsuits	11/16/15	Not responsive or relevant to the present suit.	Yes

[8] Cochran Dec. at Ex. 13.

[9] Cochran Dec. at Ex. 14.

[10] Cochran Dec. at Ex. 13.

[11] Cochran Dec. at Ex. 14.

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During this CR 26(i) conference on December 10, 2019, Mr. Scheer stated for the first time that he had "ethical concerns" regarding two documents that BHFC had withheld in this case since discovery was first served in August 2018 (and that BHFC withheld in the previous *K.H.* and *B.W.* cases).[12] Mr. Scheer further said, "Although these documents are not relevant, and the basis for withholding is asserted properly, we believe that your office would find them to be relevant."[13] Instead of properly bringing a motion, Mr. Scheer then proceeded to write a letter directly to the Court stating, "in reviewing all of the withheld documents, the undersigned has determined that there are two particular withheld documents that WE would like to have reviewed, by the court, in camera, regardless of whether plaintiff counsel brings a motion to compel."[14] Recognizing the documents were wrongfully withheld, the letter further provided:

> The subject of our concern are two email correspondences, which are listed on our privilege log. Although we believe these documents are not relevant, and the basis for withholding them was asserted properly, we believe that Plaintiff's counsel would argue differently, and there is no way to resolve the dispute about these particular documents without an in camera review. The emails themselves contain sensitive and incendiary material that is damaging to our client and harmful to others, but we do not believe they relate to the present lawsuit. As such, your determination as to whether the documents were properly withheld is necessary, and we are therefore requesting an immediate in camera review of these documents.
>
> I fully expect plaintiff counsel will assert impropriety on the part of the undersigned in withholding these documents (whether they are produced or not), and I take full accountability for the withholding of these documents. I made the decision to withhold them, and I am making the decision to bring them to the court's attention at this time.[15]

In response to Mr. Scheer's letter, the Court refused to look at the letter and documents that were improperly before it.

On December 11, Plaintiff brought another motion to compel BHFC to produce all the documents Plaintiff identified in BHFC's privilege log.[16] On January 10, Plaintiff, upon the

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[12] Cochran Dec. at Exs. 15, 16.

[13] Cochran Dec. at Ex. 15.

[14] Cochran Dec. at Ex. 17.

[15] Cochran Dec. at Ex. 17.

[16] Cochran Dec. at Ex. 18.

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Court's request, then filed a supplemental brief regarding the motion to compel to assist the Court in its review of documents identified in the privilege log.[17] The Court granted *in-camera* review of the documents.[18] Weeks went by, and then during the hearing on Defendants' motions for summary judgment to dismiss Plaintiff's case, Plaintiff was surprised to discover that Defendant BHFC delayed (yet again) in filing the documents under seal for the Court's *in camera* review, despite Plaintiff's reminders.[19] Finally, on the eve of trial and only after losing their motion for summary judgment, BHFC filed the documents under seal on January 31, 2020.[20] On February 20, 2020, the Court ordered that the "two e-mails forwarded from Scott Kee to Bret Wilhelm on November 16, 2015 (the two documents referenced in the bottom two rows of page 51 of the Second Revised Privilege Log) were improperly withheld."[21] The Court further ordered that these documents be produced immediately.[22] Only upon this order, more than a year and a half after Plaintiff C.B.'s first discovery request to BHFC, Plaintiff finally received the documents that had been the subject of discovery requests for almost five years.

C. The Documents that BHFC Withheld Are Directly Relevant to C.B.'s Claims and Reveal What BHFC Knew About BHFC Coaches' Abuse of Female Soccer Players.

When Plaintiff opened the documents identified only in the last updated privilege log as from "Scott Kee" to "Bret Wilhelm," these emails contained forwarded emails between Anna Boatright to Scott Kee as well as Facebook messages between Anna Boatright and Scott Kee. Before this time, Defendant BHFC had never named or identified Ms. Boatright on any of the privilege logs for documents withheld, and Plaintiff's counsel had never seen her name before.[23]

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[17] Cochran Dec. at Ex. 19.

[18] Cochran Dec. at Ex. 27.

[19] Cochran Dec. at Ex. 20; Cochran Dec. at Ex. 28.

[20] Cochran Dec. at Ex. 21. The letter mistakenly states January 31, 2019, when the documents were filed on January 31, 2020.

[21] Cochran Dec. at Ex. 21.

[22] Cochran Dec. at Ex. 21.

[23] Cochran Dec. at Exs. 1, 2, 3.

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BHFC also had not described or identified the Facebook messages in their privilege log which were dated 5/28—all of which were directly responsive to Plaintiff's first discovery requests.

In her email to BHFC President Scott Kee on November 16, 2015, Ms. Boatright described how she had been a high school soccer coach in the 90's and that one of her players had a "relationship" with BHFC soccer coach Dennis Jones, but never came forward.[24] Ms. Boatright expressed to Mr. Kee, "[i]t was very upsetting to me how obvious the abuse was and how there did not appear to be an appreciation for the damage inflicted and the severity of the crime."[25] She also informed Mr. Kee that Charette, "has not been able to manage his coaches as a [Director of Coaches], with several extreme failures but a general pervasive lack of leadership."[26] And that she "would have to write a very long email to detail the dozens of incidents that have accumulated to produce an opinion on my part from 1989 to 2015" regarding BHFC.[27] Scott Kee then forwarded these emails to Bret Wilhelm.

Boatright's Facebook messages to Mr. Kee went into even more detail. She described how both the Jones and Cross instances of abuse had been "circulating prior to surfacing" and that she had heard about them months prior to the public accusations.[28] She stated that Cross "was horrific prior the public allegations. I have been hearing horror stories about his behavior and remarks for years."[29] She had also heard from a former manager of Cross that there had been suspicions of his abuse "two years back."[30] And she believed that if "there was someone paying attention to Dave that was perceptive that would have encouraged them to come forward and you would have known about this years ago (Dave was very intimidating to these parents/ players.)"[31]

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[24] Cochran Dec. at Ex. 1.

[25] Cochran Dec. at Ex. 1.

[26] Cochran Dec. at Ex. 1.

[27] Cochran Dec. at Ex. 1.

[28] Cochran Dec. at Ex. 2.

[29] Cochran Dec. at Ex. 2.

[30] Cochran Dec. at Ex. 2.

[31] Cochran Dec. at Ex. 2.

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BHFC President Mr. Kee himself admitted that when he came to BHFC "it was clear to me [Cross] had too much control over certain things."[32] She questioned how Charette was at BHFC for both of these instances and had no knowledge that they were occurring, particularly the Dennis Jones incident.[33] His "inability to manage his coaches and the repercussion of that are horrific."[34] With Jones, Boatright informed Mr. Kee that "it was fairly well known that he had inappropriate sexual contact with ***multiple players*** (I happen to have five players on that team from CHS where I was coaching the varsity)."[35]

After Plaintiff's counsel reviewed this material from BHFC, they sent a subpoena and subpoena duces tecum to Mr. Kee. Mr. Kee responded, "Frankly, the SDT is a little troubling to me. I believe I produced everything I had **quite a long time ago**. I presume I do not need to reproduce that information."[36] Prior to this subpoena, Mr. Kee had testified in a related case on April 26, 2016, that he had produced communications to BHFC and he stated, "When I say we produced, I think we produced. I produced them and all three of us know how that works."[37]

D. Anna Boatright's Testimony Is Directly Relevant to C.B.'s Claims and Reveals What BHFC Knew About BHFC Coaches' Abuse of Female Soccer Players.

As a result of the production of these documents, Ms. Boatright was deposed on March 26, 2020.[38] Ms. Boatright, who has been personally involved in the soccer community for years, described how BHFC was founded in part by James Charette and Dennis Jones as a "'pay to play'" organization that was "about money, not level of ability."[39] BHFC and its coaches were "willing to sacrifice their morality and their ethics and the truth . . . for their business."[40] In her

[32] Cochran Dec. at Ex. 2.

[33] Cochran Dec. at Ex. 2.

[34] Cochran Dec. at Ex. 2.

[35] Cochran Dec. at Ex. 2. (Emphasis added).

[36] Cochran Dec. at Ex. 23. (Emphasis added).

[37] Cochran Dec. at Ex. 33 at 18:13-20:1.

[38] Cochran Dec. at Ex. 32.

[39] Cochran Dec. at Ex. 32 at 36:16-24.

[40] Cochran Dec. at Ex. 32 at 93:16-18.

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deposition, Ms. Boatright confirmed statements made in her Facebook messages and testified that Jones abused one of her high school players, but this player "never came forward because it was too traumatic."[41] She described incidents of Jones exhibiting blatant inappropriate behavior and in particular, she had heard about an incident where Jones placed his hand on a player's breast at a tournament.[42] After Ms. Boatright learned about Jones' sexual misconduct with young players and the obvious signs, she met with Charette and offered to coach at BHFC to give a female's perspective and help "identify what should be red flags."[43] Charette told Ms. Boatright that she could only start as an assistant coach, and she rejected this proposition because she was overqualified.[44]

Ms. Boatright further expressed that her extreme frustration with BHFC was rooted in "having to personally witness players suffer the consequences over and over because [BHFC] won't be transparent about what has happened."[45] She testified that BHFC had a "cult-like" system where they were not allowed to call out issues, and where parents of players, like Ms. Boatright, were told they could not criticize the club or coaches."[46] "[T]heir policy was not to question their programs and that was a verbally stated policy."[47] As a result, she had to "travel all over the state" to get a decent soccer program for her kids because BHFC "abused and hurt people in deep personal ways" and they "took the soccer community and fractured it."[48] With respect to Defendant Charette, she explained that as BHFC's director he "showed a very poor ability to govern and monitor and administer" adults.[49] When questioned about Defendant Cross,

[41] Cochran Dec. at Ex. 32 at 47: 6-10.

[42] Cochran Dec. at Ex. 32 at 76:5-77:11.

[43] Cochran Dec. at Ex. 32 at 64:6-13; 135:12-136:9; 141:2-24.

[44] Cochran Dec. at Ex. 32 at 129:19-130:5.

[45] Cochran Dec. at Ex. 32 at 68:7-17.

[46] Cochran Dec. at Ex. 32 at 80:18-82: 12.

[47] Cochran Dec. at Ex. 32 at 83:11-13.

[48] Cochran Dec. at Ex. 32 at 89:7-13; 90:8-18; 91:23-92:13.

[49] Cochran Dec. at Ex. 32 at 72:21-73:4.

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Ms. Boatright testified that "anyone who spent time with Dave would know that he was, A, alcoholic, and, B, abusive verbally."[50] With her years of experience as a soccer player, soccer coach, and parent of soccer players, Ms. Boatright further testified that it would be "bizarre and dangerous" to prohibit parents from staying at the same hotel as players at a soccer tournament.[51]

E. Plaintiff's Costs and Fees Resulting from the Withheld Documents.

From these documents and the resulting testimony, Plaintiff learned for the first time that there were multiple victims of BHFC Coach Jones' abuse that BHFC knew or should have known about especially because "it was fairly well known that he had inappropriate sexual contact with ***multiple players*** (I happen to have five players on that team from CHS where I was coaching the varsity)."[52] This is particularly relevant to C.B.'s case to show that BHFC was on notice that *multiple players* were being sexually groomed and abused by coaches prior to C.B.'s rape in 2005, and thus, her own rape by BHFC Coach David Davis should have and could have been prevented by BHFC. These documents are also relevant to establish the lack of oversight by BHFC, Charette, and Cross; particularly the claims regarding Charette's "inability to manage his coaches" and Cross' "horrific" behavior for years.

Due to BHFC's withholding of these documents for years, C.B.'s counsel was unable to conduct depositions where they could explore and investigate these specific allegations that Ms. Boatright raised in her messages to Mr. Kee. At this point, there have been about 30 depositions taken in this case, including depositions of: James Charette, David Cross, David Davis, and Dennis Jones.[53] In all of these depositions, BHFC's withholding prevented C.B. from questioning important witnesses about these messages. With respect to Jones alone, Plaintiff incurred significant costs in obtaining a Utah attorney to subpoena Jones in Utah and to conduct a hearing

[50] Cochran Dec. at Ex. 32 at 79:23-80:1.

[51] Cochran Dec. at Ex. 32 at 144:13-145:5.

[52] Cochran Dec. at Ex. 2.

[53] In the related cases where BHFC also failed to produce documents there were about 9 depositions taken in the *K.H.* case and more than 30 depositions in the *B.W.* case.

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regarding Jones' deposition. And because of the significance of Jones' testimony, which was trial preserved testimony, Plaintiff's lead counsel, Mr. Cochran and Mr. Hastings, flew to Utah to question him. Plaintiff also has retained three liability experts – Dr. Donna Lopiano, Katherine Starr, and Matthew Logan – all of whom have provided expert reports that are now necessarily incomplete without information from the withheld messages and the testimony that *could have been* derived from them had Defendants shared what they knew all along.[54]

III. EVIDENCE RELIED UPON

This motion relies upon the Declaration of Darrell L. Cochran In Support of Plaintiff's Motion for Sanctions (Cochran Dec.), as well as the existing file on record.

IV. LEGAL ARGUMENT

A. Sanctions Should Be Imposed Due to BHFC's Violations of CR 26(g) and CR 37(b).

Sanctions in this case are mandated under Civil Rule 26(g), the rule that governs sanctions for violation of the discovery rules. *Fisons*, 122 Wn.2d at 339-340. CR 26(g) is specifically designed to reduce "delaying tactics, procedural harassment and mounting legal costs." *Fisons*, 122 Wn.2d at 341. These practices "tend to impose unjustified burdens on other parties, frustrate those who seek to vindicate their rights in the courts, obstruct the judicial process, and bring the civil justice system into disrepute." *Fisons*, 122 Wn.2d at 341. The rule provides that counsel's signature on a discovery response constitutes a certification that the response is warranted by existing law and not interposed for an improper purpose. CR 26(g). If certification is made in violation of the rule, the trial court must impose "upon the person who made the certification, the party on whose behalf the request response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee." CR 26(g); *Fisons*, 122 Wn.2d at 355 (noting that rule authorizes imposition of sanctions against either attorney, client, or both). "In determining what sanctions are appropriate, the trial court is given wide latitude." *Fisons*, 122 Wn.2d at 355;

[54] Cochran Dec. at Exs. 24-26.

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see Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494 (1997) ("a trial court has broad discretion as to the choice of sanctions for violation of a discovery order."). "[T]he least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong." *Fisons*, 122 Wn.2d at 355–56.

In *Fisons*, a child suffered severe and permanent brain damage after taking a drug manufactured and distributed by the Fisons Corporation. *Fisons*, 122 Wn.2d at 307. The child sued the physician who prescribed the drug for medical malpractice, and the physician filed a crossclaim against Fisons for failure to warn him of the risks associated with the drug. *Fisons*, 122 Wn.2d at 306-307. More than one year after the child settled with the physician, a letter was produced from an anonymous source that showed Fisons was aware of the drug's potential danger. *Fisons*, 122 Wn.2d at 307-308, 337. The physician moved for sanctions, but the motion was denied in lieu of an order compelling the production of other documents related to the drug's danger. *Fisons*, 122 Wn.2d at 308, 337. The following day after this order, Fisons produced approximately 10,000 documents to the physician, including an internal memo acknowledging that the recommended dosage was a significant "mistake" or "poor clinical judgment" promoted by a physician with a financial interest in Fisons. *Fisons*, 122 Wn.2d at 308, 337. Our Supreme Court held that denying sanctions was error because the trial court used a subjective standard to find that the violation was not intended. *Fisons*, 122 Wn.2d at 345. "Whether an attorney has made a reasonable inquiry is to be judged by an objective standard," and if a violation is found, then sanctions "are mandated." *Fisons*, 122 Wn.2d at 343, 346, 355. "In applying the rules to the facts of the present case, the trial court should [ask] whether the attorneys' certifications to the responses to the interrogatories and requests for production were made after reasonable inquiry and (1) were consistent with the rules, (2) were not interposed for any improper purpose and (3) were not unreasonable or unduly burdensome or expensive." *Fisons*, 122 Wn.2d at 344.

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Here, like in *Fisons*, sanctions are required because there can be no dispute that a clear CR 26(g) discovery violation occurred. Plaintiff's discovery should have captured both the emails at issue (RFP 6 and 7) as well as the underlying facts and witness names. Plaintiff issued these requests in August 2018, and the messages BHFC withheld messages had been available to it since 2015 – withheld over the course of the *B.W.*, *K.H.*, cases. It was only after multiple motions to compel and Plaintiff's committed persistence that BHFC was finally forced to produce these documents that they had been concealing for years. Not only was critical inculpatory evidence withheld, but Mr. Scheer actively worked to hide the truth. More than a year ago, on March 8, 2019, BHFC counsel Mr. Scheer told the Court that he wanted to look the Court in the eye and tell it they were "not hiding the ball." This is in sharp contrast to Mr. Scheer's December 11, 2019, letter to the Court taking "full accountability for the withholding of these documents:"

March 8, 2019	**December 11, 2019**
I want you to look me in the eye or me to look you in the eye to tell you that we don't play games. We're not hiding the ball. I've been practicing for over 30 years, almost 35 now. I'm not going to stake my reputation on withholding anything. We're doing our best to produce anything and everything. We have nothing to hide here. It's a horrible case. It's horrible what happened to her, the plaintiff. We don't think we're at fault for it because of obvious circumstances, but we're not playing games. We're exercising every effort we can to get responsive documents or whatever that is being asked for.[55]	The emails themselves contain sensitive and incendiary material that is damaging to our client and harmful to others, but we do not believe they relate to the present lawsuit. As such, your determination as to whether the documents were properly withheld is necessary, and we are therefore requesting an immediate in camera review of these documents. I fully expect plaintiff counsel will assert impropriety on the part of the undersigned in withholding these documents (whether they are produced or not), and I take full accountability for the withholding of these documents. I made the decision to withhold them, and I am making the decision to bring

[55] Cochran Dec. at Ex. 4.

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	them to the court's attention at this time.[56]

Mr. Scheer made these initial March 8, 2019, representations knowing that he was hiding the documents and that BHFC had been hiding them for years.[57] Mr. Scheer failed to produce these documents in response to Plaintiff's discovery requests that he had signed.[58] He also filed numerous opposition motions without any basis in privilege to withhold these documents,[59] and actively hid these documents from the privilege log, even after the Court ordered BHFC to "identify all senders and recipients and dates of transmission and privilege for each document withheld." It was only after Plaintiff specifically identified the withheld documents in a CR 26(i) conference, that Mr. Scheer, recognizing the seriousness of withholding these documents for years and the potential that the Court might order these documents produced, wrote a letter directly to the Court requesting in-camera review and "tak[ing] full accountability for the withholding of these documents."

Moreover, CR 37(b) provides the Court with authority to impose sanctions for failing to comply with a court order. "'A party's disregard of a court order without reasonable excuse or justification is deemed willful.'" *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 584 (2009) (quoting *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 686-87 (2002)); *Anderson v. Mohundro*, 24 Wn. App. 569, 574 (1979) ("any violation of an explicit court order without reasonable excuse or justification must be deemed a willful act."). This case involves a decision to not only withhold documents for years, but also to subsequently violate a Court order by failing to identify all senders and recipients of communications in the privilege log as required by this Court's order on November 15, 2019:

[56] Cochran Dec. at Ex. 17.

[57] Former counsel Tom Stratton likely took himself off the case because he would not participate in litigation where the malfeasance was occurring.

[58] Cochran Dec. at Ex. 5.

[59] Cochran Dec. at Exs. 29-31.

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> BHFC shall produce a privilege log **that identifies the senders and recipients and dates of transmission and privilege for each document withheld. If a document is an email thread or otherwise contains multiple senders and recipients, BHFC shall make clear the identities and dates of transmission for each separate email.** The privilege log shall be produced in 3 weeks.[60]

There is no way to avoid the fact that BHFC acted in bad faith. The egregiousness of the conduct here cannot be understated: BHFC knew that other victims had been sexually abused by BHFC's coaches and that Charette and Cross failed to monitor and manage coaches. Despite multiple motions to compel, and even a court order requiring BHFC to produce the names of senders and recipients of messages in the privilege log, BHFC purposefully failed to disclose Anna Boatright's name. This is an egregious example of a massive discovery violation.

B. The Court Should Impose Sanctions Under Its Inherent Equitable Power to Discourage Bad Faith Litigation.

Where litigation misconduct does not fit within the provisions of any court rule, the court has the inherent authority to impose sanctions against a party who attempts in any way to obstruct the orderly administration of justice. *State v. S.H.*, 102 Wn. App. 468, 8 P.3d 1058 (2000). "Every court of justice has power . . . [t]o enforce order in the proceedings before it… [and] [t]o provide for the orderly conduct of proceedings before it[.]" RCW 2.28.010(2)-(3). Where sanctions are not expressly authorized, "the trial court is not powerless to fashion and impose appropriate sanctions under its inherent authority to control litigation." *In re Firestorm 1991*, 129 Wn.2d 130, 130 (1996) (applying the principles embodied in CR 11, CR 26(g), and CR 37 to CR 26(b) violations). "[D]ecisions either denying or granting sanctions… are generally reviewed for abuse of discretion." *Fisons.*,122 Wn.2d at 338. Division One has considered a trial court's authority to sanction in detail. *State v. S.H.*, 102 Wn. App. 468, 474 (2000). The *S.H.* Court ultimately held that the trial court's inherent authority to sanction is properly invoked upon a finding of bad faith, which can be demonstrated by conduct that delays or disrupts the litigation process, or by other "inappropriate and improper" conduct. *S.H.*, 102 Wn. App. at 475.

[60] Cochran Dec. at Ex. 13. (Emphasis added).

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Even if sanctions were not warranted under CR 26(g) and CR 37(b), the Court should nonetheless impose sanctions under its inherent authority to curb BHFC's bad faith litigation misconduct. The Facebook messages, emails, and subsequent testimony of Anna Boatright provide C.B. with information directly relevant to her claims regarding BHFC's willful failure to protect young women from sexual abuse. There is no question that these electronic communications did not fall under any claims of privilege. Thus, BHFC's extreme efforts to withhold this information, and even the name of Anna Boatright, after years of litigation (spanning several cases) and numerous motions to compel and a number of "revised" privilege logs demonstrate a tactical decision designed to deprive C.B. of this information and any additional evidence that would be gleaned from the production of these documents. Withholding these documents was highly prejudicial to C.B., as the messages contained evidence of other victims of sexual abuse by a BHFC coach prior to C.B.'s rape, as well as information regarding BHFC, Charette, and Cross's horrific actions and failures to address obvious red flags. BHFC's decision to withhold these documents for years also prevented C.B. from investigating Ms. Boatright's allegations and have prevented C.B.'s liability experts from having complete reports.

Plaintiff therefore requests the Court to enter an order imposing sanctions against BHFC and BHFC's counsel, Mr. Scheer, for withholding evidence throughout the course of years of litigation.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks the Court to enter an order sanctioning BHFC and Mr. Scheer as provided above.

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RESPECTFULLY Submitted this 3rd day of June, 2020.

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CERTIFICATE OF SERVICE

I, **Jessica Gott**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed at Pfau Cochran Vertetis Amala PLLC and that on today's date, I served the foregoing via **Email** by directing delivery to the following individuals:

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