

1  EXPEDITE  
2  No hearing set  
3  Hearing is set  
4 Date: June 12, 2020  
5 Time: 9:00 a.m.  
6 Judge/Calendar: Hon. Christopher Lanese

7 **SUPERIOR COURT OF THE STATE OF WASHINGTON**  
8 **FOR THURSTON COUNTY**

9  
10 C.B., an individual,

11 Plaintiff,

12 vs.

NO. 18-2-02416-34

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

**REPLY IN SUPPORT OF  
PLAINTIFF'S MOTION FOR  
SANCTIONS**

17 Defendants.

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REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR  
SANCTIONS

No. 18-2-02416-34



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**REPLY**

Defendant Black Hills Football Club (hereinafter “BHFC”) chose to withhold discovery that was critical to this lawsuit when no legitimate claim of privilege would justify withholding it. From the beginning of this lawsuit, BHFC has evaded and delayed discovery, forcing Plaintiff to file a series of motions to compel, repeatedly seeking basic discovery. The games must end, and Plaintiff asks this Court to use its considerable powers and discretion to enter an appropriate sanction that will force BHFC and its counsel, Mr. Scheer, to end violations of discovery and to act in accordance with the civil rules and this Court’s orders. In an effort to aid the Court in evaluating the willfulness of BHFC’s and Mr. Scheer’s discovery violations, as well as the prejudice it caused Plaintiff to suffer, Plaintiff has created the following outline of events:

- On August 8, 2018, Plaintiff sent her first interrogatories and requests for production to BHFC that included requests for every electronic message sent or received from BHFC employees, volunteers, or independent contractors that pertains to boundary invasions, sexual harassment, sexual misconduct, exploitation of minors, communicating with players, or sexual grooming behaviors (Requests for Production Nos. 6 and 7). It also included a request for copies of all written statements from any source related in any way to this incident (Request for Production No. 4).
- On September 7, 2018, BHFC responded to the interrogatories and requests for production. Most of the critical discovery was ignored on the basis that BHFC sought a protective order. BHFC filed the protective order, but the Court struck it when leave was granted to add David Davis.
- On November 29, 2018, Plaintiff moved to compel written discovery from BHFC. This motion to compel identified several interrogatories and requests for production at issue including, Requests for Production Nos. 4, 6 and 7.

- 1 • On December 3, 2018, BHFC filed a motion for protective order to limit the scope  
2 of discovery.
- 3 • On December 6, 2018, the Court struck Plaintiff’s motion to compel, ruling that “the  
4 most efficient manner to resolve the pending discovery dispute [was] to rule on  
5 Defendant Black Hills Football Club’s Motion for Protective Order.” It denied  
6 BHFC’s motion in part and “agree[d] that some temporal limitation is appropriate”  
7 but “disagreed with BHFC that documents created after the incident in question are  
8 irrelevant.”
- 9 • Following the Court’s order, the parties met and conferred, and Plaintiff allowed  
10 BHFC until the end of January to produce withheld discovery.
- 11 • BHFC supplemented discovery on December 11, 2018 and January 4, 2019 by  
12 providing documents that it had already produced in prior lawsuits. The supplement  
13 did not come with an accompanying pleading to identify which request the  
14 documents were responsive.
- 15 • BHFC supplemented discovery on January 31, 2019, by producing a single  
16 megabyte PDF containing a handful of redundant emails. As part of its supplemental  
17 response to RFP No. 6 BHFC provided, in part: “Withheld information is listed in  
18 BHFC’s privilege log, which is produced herewith. At this time, there are no  
19 additional responsive and non-privileged documents to produce.”
- 20 • On February 28, 2019, Plaintiff brought a motion to compel BHFC to properly  
21 identify document production with pleadings.
- 22 • On March 8, 2019, the Court granted Plaintiff’s motion and ordered that  
23 identification occur within two weeks.
- 24 • On March 7, 2019, BHFC provided Plaintiff with its first, second, third, and fourth  
25 supplemental response to Plaintiff’s first interrogatories and requests for production.  
26

- 1 • On March 15, 2019, BHFC produced their first “updated” privilege log, which was  
2 four pages long. This document did not identify the Anna Boatright messages at  
3 issue.
- 4 • On April 25, 2019, BHFC provided their fifth supplemental response to Plaintiff’s  
5 first interrogatories and requests for production.
- 6 • On August 26, 2019, BHFC disclosed its primary fact witnesses. BHFC did not  
7 name Anna Boatright in its list even though BHFC knew she had material  
8 information.
- 9 • In response to a letter Plaintiff sent to BHFC regarding concerns with its March 15,  
10 2019, privilege log, BHFC produced another “updated” privilege log on October 11,  
11 2019 which was 34 pages long. This document did not identify Anna Boatright’s  
12 messages or even mention her name. Rather, BHFC obscured her messages in a  
13 privilege log entry listing only that it withheld an email from Bret Wilhelm dated  
14 November 16, 2015, on the basis that the document was created in anticipation of  
15 litigation.
- 16 • On November 6, 2019, Plaintiff brought a motion to compel BHFC to produce all  
17 documents identified in the privilege log in redacted form.
- 18 • On November 15, 2019, the Court entered an order requiring BHFC to produce a  
19 privilege log that identifies the senders and recipients of electronic communications  
20 and dates of transmission. BHFC continued to hide the identity of Anna Boatright  
21 and her electronic messages with Scott Kee.
- 22 • BHFC produced another “updated” privilege log on December 6, 2019 which was  
23 100 pages long. This time, the withheld evidence was labelled as emails between  
24 Scott Kee to Bret Wilhelm dated November 16, 2015, withheld on the basis that they  
25 were documents created in anticipation of litigation. These emails had been  
26 forwarded from a source BHFC purposely did not identify.

- 1 • Plaintiff's counsel identified troublesome entries within this 100-page privilege  
2 (specifically identifying the two entries at issue) and immediately demanded a CR  
3 26(i) with Mr. Scheer. Anticipating Plaintiff would file a motion that addressed  
4 those entries, BHFC's attorney, Mr. Scheer, decided to write a letter directly to the  
5 Court as opposed to properly filing a motion, asking for the Court to review the  
6 enclosed documents. The Court declined the improper request by BHFC's attorney  
7 to look at the letter and enclosed documents.
- 8 • On December 11, 2019, Plaintiff brought another motion to compel BHFC to  
9 produce the documents Plaintiff identified in BHFC's privilege log. The Court  
10 granted *in camera* review of the documents. However, BHFC continued to withhold  
11 these documents, only filing the documents under seal for the Court's *in camera*  
12 review until after losing its summary judgment motion.

13 This record is ripe for the imposition of sanctions under the civil rules as set forth by *Fisons*.  
14 As this timeline demonstrates, BHFC's behavior since 2018 constitutes a willful attempt to  
15 withhold documents, which ultimately affected Plaintiff's ability to build a liability case. In  
16 response to Plaintiff's motion, BHFC claims that because Plaintiff ultimately received these  
17 documents, "the discovery process worked." However, BHFC blatantly disregards the extreme  
18 efforts Plaintiff undertook to compel BHFC to produce relevant discovery she is entitled to. It took  
19 almost two years and numerous motions to compel, privilege logs, court orders, and *in camera*  
20 review before Plaintiff finally received these documents. In its response, BHFC also misstates  
21 several sources of authority which give the Court the power to sanction a party for engaging in  
22 misconduct during a judicial proceeding. Plaintiff responds to each issue raised by BHFC below.

23 **A. Sanctions Under CR 26(g) and CR 37(b) for BHFC's Discovery Violations Should be**  
24 **Imposed**

25 CR 26(g) provides that "the signature of the attorney or party constitutes a certification that  
26 the attorney or the party has read the request, response, or objection, and that to the best of their

1 knowledge, information, and belief formed after a reasonable inquiry it is [. . .] consistent with [CR  
2 26] and warranted by existing law or a good faith argument for the extension, modification, or  
3 reversal of existing law” and “not interposed for any improper purpose, such as to harass or to  
4 cause unnecessary delay or needless increase in the cost of litigation.” CR 26(g). As BHFC  
5 correctly recognizes, in determining whether an attorney or party has complied with discovery  
6 certification, “the court should consider all of the surrounding circumstances, the importance of  
7 the evidence to its proponent, and the ability of the opposing party to formulate a response or  
8 comply with the request.” *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp*,  
9 122 Wn.2d 299, 343 (1993).

10 Despite multiple motions to compel (as early as November 29, 2018), supplemental  
11 discovery responses, and “updated” privilege logs, as well as a court order requiring BHFC to  
12 produce the names of senders and recipients of electronic messages in the privilege log it did  
13 produce, BHFC purposely failed to produce the wrongfully withheld documents or disclose Anna  
14 Boatright’s name, knowing that she was a witness with firsthand knowledge of the issues most  
15 critical to this and several other cases and knowledge of the identity of other children abused by a  
16 BHFC coach. There is no question that these electronic communications were wrongfully withheld  
17 for years as Ms. Boatright’s messages do not fall anywhere close to the penumbra of legitimate  
18 claims of privilege and they are directly relevant to C.B.’s claims. There is no other reason for this  
19 willful violation of the rules of discovery than to prevent Plaintiff from finding the fountainhead  
20 of additional discovery that this new evidence represents: more percipient witnesses with  
21 knowledge of the key members of BHFC and the identity of other child soccer players victimized  
22 by a BHFC coach.

23 The strategy employed here had numerous advantages for Defendant: deny Plaintiff  
24 discovery helpful to her case and protect the BHFC organization from potentially facing future  
25 cases involving other victims. This is precisely what occurred in the *B.W.* case where C.B.’s  
26 identity was suppressed until B.W.’s counsel independently came upon her identity. The difference

1 in the procedural posture here compared to the *B.W.* case is that Plaintiff has not settled her claims  
2 against BHFC and, importantly, the Court is not presented with an issue of a witness with  
3 convenient amnesia as to C.B.'s identity as it was with James Charette but rather BHFC's knowing  
4 suppression of evidence it knew was not privileged from production. There is no good cause for  
5 BHFC's withholding of this evidence for years. There is no question that this evidence would have  
6 led to the discovery of additional evidence critical to the issues in this case. Lastly, there is no  
7 question that this improper and intentional withholding impacted every deposition, expert report,  
8 and discovery request in this case. BHFC's claim that this withholding was the result of an earnest  
9 mistake does not cure the damage its decision has caused. Nor can that decision to withhold this  
10 evidence be characterized as an earnest mistake given that the evidence is obviously not protected  
11 by any claim of privilege. Parties must be held accountable when there is no legal or legitimate  
12 basis for their harmful actions.

13 Moreover, under CR 37(b) this Court has authority to impose sanctions for failing to  
14 comply with a court order. On November 15, 2019, this Court ordered BHFC to:

15 [P]roduce a privilege log that identifies the senders and recipients and dates  
16 of transmission and privilege for each document withheld. If a document is an email  
17 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.

18 Even after this Court's order, BHFC failed to identify Anna Boatright as a sender or recipient of  
19 the documents at issue. In its response, BHFC attempts to justify violating the order by arguing  
20 that the emails in question were not an email thread and that the email sent from Anna Boatright  
21 on November 16, 2015 "was not within BHFC's possession in its native form." However, the  
22 Court's order did not only apply to email threads or native documents. This Court specifically  
23 used language that required BHFC to identify the senders and recipients for "each document  
24 withheld," and "to make clear the identities and dates of transmission for each separate email" if it  
25 "contains multiple senders and recipients." Contrary to BHFC's assertions, the Court's order  
26 clearly required BHFC to identify Anna Boatright, which it willfully failed to do.

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1 **B. BHFC Misstates the Law Regarding the Court’s Inherent Power to Sanction Parties that**  
2 **Engage in Conduct Which Conflicts with the Legislature’s Intent that There be Order**  
3 **in All Judicial Proceedings**

4 BHFC misstates the law entirely regarding the powers of courts both as an independent  
5 branch of government responsible for executing its duties and functions in judicial proceedings but  
6 also as a court of justice invested with specific powers granted by the legislative branch of  
7 government, namely Chapter 2.28 RCW. Superior court judges have power in any part of the state  
8 to “*exercise any power*” and perform any duty conferred or imposed upon them by statute. RCW  
9 2.28.080. Every judicial officer has power to compel obedience to his or her lawful orders as  
10 provided by law. RCW 2.28.060. “Judicial power is never exercised for the purpose of giving  
11 effect to the will of the courts, but always for the purpose of giving effect to the will and intent of  
12 the legislature; or, in other words, to the will of the law.” *Buffelen Lumber & Mfg. Co. v. State*, 32  
13 Wash. 2d 40, 42, 200 P.2d 509, 511 (1948). The legislature’s will and intent is made clear through  
14 the enactment of RCW 2.28.010: every court of justice has power to enforce order in the  
15 proceedings before it and to provide for the orderly conduct of proceedings before it or its officers.  
16 RCW 2.28.010. Nowhere in Chapter 2.28 RCW does the legislature derogate from its principal  
17 interest in judicial officers maintaining order in the courts of justice by exercising its enforcement  
18 powers.

19 BHFC incorrectly asserts that CR 26 is the exclusive controlling authority over discovery  
20 violations and is the sole authority through which the Court may exercise its power to sanction a  
21 party’s conduct as it relates to discovery. BHFC states that the Court “cannot unilaterally impose  
22 sanctions when specific rules govern the alleged violation.” BHFC’s argument misses the point  
23 entirely and if accepted as true would undermine the purpose and intent of the legislature in  
24 enacting Chapter 2.28 RCW. The clear and unambiguous intent of the legislature is for there to be  
25 orderly conduct of all judicial proceedings. Where sanctions are not expressly authorized, “the  
26 trial court is not powerless to fashion and impose appropriate sanctions under its inherent authority  
to control litigation.” *State v. S.H.*, 102 Wash. App. 468, 473, 8 P.3d 1058, 1060 (2000); *In re*

1 *Firestorm 1991*, 129 Wn.2d 130, 139, 916 P.2d 411 (1996) (applying the principles embodied in  
2 CR 11, CR 26(g), and CR 37 to CR 26(b) violations). It is clear that this language reflects the  
3 legislative intent to *empower* judicial officers with the means to maintain order in his or her court,  
4 *not* to limit power as BHFC misguidedly suggests.

5 In the present matter, Plaintiff requests that the Court impose sanctions upon BHFC  
6 considering the legislative intent behind the enactment of Chapter 2.28 RCW to ensure that orderly  
7 conduct is maintained from parties and especially attorneys who are officers of the court within the  
8 courts of justice. The request to sanction BHFC here is not for the purpose of giving effect to the  
9 will of the Court itself but rather for purpose of giving effect to the will of the legislature's intent  
10 to ensure orderly conduct in all judicial proceedings. There is nothing more prejudicial to parties  
11 involved in a judicial proceeding or as disorderly for the courts of justice than a party or attorney  
12 willfully defying court orders by failing to produce wrongfully withheld evidence. As is the case  
13 here, the evidence withheld by BHFC impacted litigation spanning several cases and undermines  
14 the legislature's intent for there to be orderly conduct of judicial proceedings. The significant  
15 legislative interests involved warrant the sanction requested by Plaintiff.

## 16 II. CONCLUSION

17 For the foregoing reasons, Plaintiff respectfully requests an order granting her motion for  
18 sanctions against Defendant Black Hills Football Club.

19 RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of June, 2020.

20 PFAU COCHRAN VERTETIS AMALA PLLC

21  
22 By /s/ Darrell L. Cochran  
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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 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:

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DATED this 10th day of June, 2020.

/s/ Jessica Gott  
Jessica Gott