Honorable Barbara Mack
Hearing Date: June 1, 2016
Without Oral Argument

Trial Date: July 11, 2016

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

MARIA LUISA JOHNSON, CARMELIA DAVIS-RAINES, CHERYL MUSKELLY, PAULINE ROBINSON, ELAINE SEAY-DAVIS, TONI WILLIAMSON, and LYNDA JONES

Plaintiffs,

v.

SEATTLE PUBLIC UTILITIES, a department of the CITY OF SEATTLE, a municipality,

Defendants.

Case No.: 15-2-03013-2 SEA

REPLY IN PLAINTIFFS' MOTION TO COMPEL

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I. REPLY

Instructing a witness not to answer a question is an improper and sanctionable violation of the Civil Rules:

> *Instructions Not to Answer.* Instructions to the deponent not to answer questions are improper, except when based upon privilege or pursuant to rule 30(d). When a privilege is claimed the deponent shall nevertheless answer questions related to the existence, extent, or waiver of the privilege, such as the date of communication, identity of the declarant, and in whose presence the statement was made.

CR 30(h)(3). The defendant claims that the deposition was closed, but at the first deposition, the defendant produced current SPU Supervisor Faustino, and he brought documents pursuant to the subpoena not in paper form, but on a thumb drive, which could not be opened at the deposition, so they could not be reviewed or used. A second deposition was required. At his first deposition, Faustino admitted to making ageist statements (calling older women workers "old hags"), and denied that he made a racist video of two of the plaintiffs. Moments after the deposition, he apologized to Plaintiff Toni Williamson for lying at the first deposition.

In setting up the follow up deposition, plaintiffs' counsel agreed, "not to cover ground already covered." At the second deposition, he did not cover old ground. Defense counsel improperly instructed Faustino not to answer the questions about his admissions to Ms. Williamson even though those questions could not have been posed at the first deposition, because Faustino's admissions did not happen until after the deposition concluded for the day.

No doubt opposing counsel prepared in advance to improperly instruct the witness not to answer in violation of the Civil Rules, because he came armed with printed emails to justify his misconduct, which *he entered into the record at the deposition*, and he made a speech, which was prepared in advance, for the record, again to justify his misconduct.

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Opposing counsel's misconduct also amounted to coaching Faustino, because he interrupted a pending question, which is also improper under the Civil Rules.

> A defendant or his counsel cannot unilaterally determine the relevancy of evidence during discovery nor unilaterally limit the scope of the deposition. Counsel must instruct witnesses to answer all questions directly and without evasion to the extent of their testimonial knowledge, unless properly instructed not to answer. Also, evidence objected to in the deposition must be taken subject to the objection. Because Jones did not assert a privilege nor seek an order to cease or limit the scope of Mermis's deposition, Jones's instructions not to answer questions were improper.

Johnson v. Jones, 91 Wn. App. 127, 134, 955 P.2d 826, 831 (1998). There, "Jones violated the Civil Rules when he privately conferred with Mermis between a question and an answer during Mermis's deposition." *Id*. at 134-135. The Court of Appeals found that, "[s]uch a private consultation is expressly prohibited except for the purpose of determining the existence of a privilege." *Id*. at 135. The Johnson court "ordered another deposition of Mermis and appointed a Special Discovery Master to supervise it. The court properly found that Jones and Mermis's conduct was obstructionistic and sanctionable." *Id*. Here, the prejudice to plaintiffs is severe. Since the deposition, Faustino has entered into a "private consultation" with opposing counsel, and been heavily coached between question and answer. Proof of that coaching is the submission of a declaration purportedly answering the very questions he was instructed not to answer before. This is witness tampering.

Opposing counsel's conduct is sanctionable, but need not be addressed here. For now, plaintiff seeks to redepose Faustino. Sanctions can be addressed after the next deposition, so that any further misconduct by the defendant can be considered *in toto*.

II. CONCLUSION

Plaintiffs' motion to compel should be granted. The Court should make the following findings:

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1. Attorney Arthur Simpson's instruction to Mr. Faustino not to answer a question properly posed at his deposition was a willful violation of CR 30(h)(3).
2. By submitting a declaration of Mr. Faustino, Mr. Simpson's conduct amounted to coaching the witness between the question and the answer, which was obstructionistic and sanctionable under *Johnson v.* Jones, 91 Wn. App. 127, 134, 955 P.2d 826 (1998).
3. By coaching the witness between the question and the answer, plaintiffs have been prejudiced.

The Court should order the following:

1. Plaintiffs' motion to compel the testimony of Mr. Faustino is GRANTED.
2. Mr. Faustino shall appear at a time and place to be determined by the plaintiffs.
3. The Court will consider at a later time whether and what types of sanctions are appropriate.
4. The attorneys for the defense are ordered not to interfere again in the conduct of any deposition.

Respectfully submitted this 31st day of May, 2016.

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By: s/*John P. Sheridan*

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CERTIFICATE OF E-FILING AND E-SERVICE

I, Melanie Kent, certify under penalty of perjury under the laws of the State of Washington, that on May 31, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ECR E-Filing system, and served the following persons using the ECR E-Serve system:

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DATED this 31st day of May, 2016.

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