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No. 82245-4-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MARJORIE CARROLL, Individually and as a Personal Representative of the Estate of LAWRENCE CARROLL, deceased,

Respondent,

v.

NISSAN MOTOR CO., LTD. and NISSAN NORTH AMERICA, INC,

Petitioners,

and

THOMAS J. OWENS,

Respondent,

and

AKEBONO BRAKE CORPORATION, HONEYWELL INTERNATIONAL, INC. and OLYMPIC BRAKE SUPPLY, INC.

Defendants.

DEFENDANT OLYMPIC BRAKE SUPPLY'S ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Defendant Olympic Brake Supply ("Olympic Brake") responds to Petitioner Nissan Motor Co., Ltd. and Nissan North America, Inc.'s ("Nissan") Petition for Review of the Court of Appeals' Opinion reversing the order striking Marjorie Carroll's ("Carroll") Complaint for willful and deliberate discovery violations and for contempt.

Olympic Brake was substantially prejudiced in its ability to prepare for trial due to Carroll's ongoing discovery violations and deceptions. The Court of Appeals' Opinion failed to consider the prejudice suffered by Olympic Brake.

The Opinion also mistakenly found that the trial court did not properly consider the lesser sanction of an adverse inference instruction. The trial court had before it a request for an adverse inference instruction on two occasions and properly found that the more severe sanction of dismissal was appropriate for the detailed reasons set out in the trial court's Findings of Fact and Conclusions of Law. CP 876-891.

Olympic Brake adopts the facts, arguments, authorities, and requests in Nissan's Petition for Review, incorporating them by reference herein.

B. STATEMENT OF FACTS

On August 23, 2021, Olympic Brake filed a Joinder in Nissan's Response Brief to Carroll's Brief of Appellants.

a. Prejudice to Olympic Brake Not Considered by Court of Appeals

The Court of Appeals' Opinion fails to address Olympic Brake's Joinder or the prejudice suffered by Olympic Brake due to Carroll's and her counsel's willful and deliberate discovery violations and violations of court orders resulting in a finding of contempt by the trial court.

i) Carroll's Violations of the King County Revised Pretrial Style Order and Order Setting Case Schedule Prejudiced Olympic Brake

Carroll filed her Complaint on April 10, 2018. CP 1-8. Carroll served Olympic Brake with her Complaint on April 24,

2018. Olympic Brake filed its Answer on June 14, 2018. The Order Setting Case Schedule set June 8, 2018 as the deadline for Carroll to serve responses to Defendants First Style Interrogatories. CP 260. Plaintiff did not serve the required lay down style discovery responses until September 28, 2018, almost four months late. CP 268-292. Carroll's verification under penalty of perjury for those responses was not served until two weeks later on October 10, 2018. CP 287-288. Carroll's non-compliance with and violation of the Order Setting Case Schedule prejudiced Olympic Brake in its preparation for trial. Carroll had the information contained in her responses to lay down style interrogatories and kept it from Olympic Brake for four months after Carroll was ordered to disclose it.

Not only did Carroll keep the information in her responses from Olympic Brake for four months beyond the deadline, Carroll hid key information from Olympic Brake by providing false responses. Carroll did not disclose in response to style

interrogatory number 13 that Carroll contended Lawrence Carroll had been exposed to asbestos from his father's work at Kaiser Shipyard during WWII. CP 276. Carroll did not provide that information until July 12, 2019, in response to Nissan's second interrogatories and requests for production (CP 112, 343-97), over a year after Carroll was required by the Second Revised Consolidated Pretrial Style Order and the Order Setting Case Schedule (CP 260) to provide that information in responses to lay down style interrogatories. This intentional non-disclosure of required information for over a year severely prejudiced Olympic Brake's ability to prepare for trial. Not only did Carroll hide the information regarding Lawrence's childhood exposure to take-home shipyard asbestos, Carroll knowingly provided false responses to court-ordered interrogatories number 21 and 22 when she denied an autopsy had been performed. CP 280.

ii) Olympic Brake Had No Knowledge of an Autopsy until Seven Days Before Discovery Cut-off

The first notice Olympic Brake had that an autopsy had been performed in this case was when Nissan filed its Motion to Strike the Complaint on September 14, 2020. CP 67-102. This was *seven days* before the discovery cut-off and eight weeks before trial. Carroll's withholding of this key information from Olympic Brake relating to what caused Lawrence Carroll's death severely prejudiced its ability to prepare for trial. The Court of Appeals did not consider this substantial prejudice in its Opinion. The Court of Appeals ignored the trial court's Findings of Facts and Conclusions of Law as they applied to *all* defendants, not just Nissan. CP 876-891.

iii) With the Dissolution of RPAS, Olympic Brake Forever Lost the Opportunity to Test Tissue Blocks for Asbestos Fiber Amounts and Types in Lawrence Carroll's Lungs

Regional Pathology and Autopsy Services ("RPAS") was hired by Carroll to perform the autopsy Carroll hid from Olympic Brake. RPAS dissolved on April 15, 2019, one year

after Carroll filed her Complaint and seven months after Carroll served her responses to lay down discovery falsely stating, under penalty of perjury, there had not been an autopsy. The contract Carroll entered into with RPAS stated that tissue blocks and slides were to be maintained indefinitely. Had Carroll answered the lay down style interrogatories truthfully, Olympic Brake would have had seven months to obtain the tissue blocks. Those tissue blocks could have been examined to determine the type of asbestos fibers and quantity in Lawrence Carroll's lungs. Olympic Brake would have known if it was amphibole asbestos fibers from his father's shipyard work in WWII or if there were any chrysotile fibers, the type that had been used in automotive products. Olympic Brake was severely prejudiced because it forever lost the opportunity to test those tissue blocks. It also lost the opportunity to test wet lung tissue or any other organs that RPAS may have still had in its possession prior to dissolution, as well as autopsy photos that have not been located. This substantially prejudiced

Olympic Brake's ability to prepare for trial. An adverse inference instruction could not cure this prejudice. The testing of available tissue would tell the jury how many amphibole fibers were in Lawrence Carroll's lungs. Telling a jury that the results of a fiber burden study of Lawrence Carroll's lung tissue would be adverse to the Plaintiff would not be as impactful as being able to tell them, for example, there were 1 million amphibole fibers in his lung tissue. The Court of Appeals did not consider the substantial prejudice to Olympic Brake *to prepare for trial* in its Opinion or that an adverse instruction would not cure that prejudice.

b. The Trial Court Did Consider the Lesser Sanction of an Adverse Inference Instruction

On two occasions the subject of an adverse inference instruction was before the trial court. The trial court considered that as a possible sanction and found it insufficient.

i) Defendant Honeywell's Motion/Joinder in the Motion to Strike Complaint Addressed

an Adverse Inference Instruction as an Alternative Sanction

At oral argument on Nissan's Motion to Strike the Complaint, counsel for defendant Honeywell advised the trial court of Honeywell's similar motion, except Honeywell had requested an alternative sanction if dismissal was not granted of an adverse inference instruction. RP 29:12-32:3. In Carroll's Response to Honeywell's motion, Carroll specifically stated "Plaintiff opposes, however, the imposition of an adverse inference instruction." CP 718. This lesser sanction was before the Court and rejected by Carroll. The Opinion of the Court of Appeals overlooked the trial court's acknowledgement of the lesser sanction of an adverse inference.

ii) Carroll's Motion for Reconsideration Requested the Sanction of an Adverse Inference Instruction

The Court of Appeals' Opinion also overlooked Carroll's reversal of position in her Motion for Reconsideration when faced with the trial court's ruling striking her Complaint,

Carroll then requested an adverse inference instruction. CP 761-769. The trial court considered Carroll's Motion for Reconsideration, with its request for an adverse inference instruction, and denied it. CP 867.

Discretionary review should be granted due to the Court of Appeals' failure to consider the prejudice to Olympic Brake and failure to acknowledge the trial court's consideration of the lesser sanction of an adverse inference instruction.

C. ARGUMENT FOR GRANTING DISCRETIONARY REVIEW

The trial court considered the factors set out in *Burnet v. Spokane Ambulance,* 131 Wn.2d 484, 933 P.2d 1036 (1997) regarding consideration of lesser sanctions prior to imposing the most severe sanction. The trial court did not abuse its discretion. The Court of Appeals should have affirmed the Order striking Carroll's Complaint.

a. *Burnet* Factors Do Not Require the Trial Court to List Every Possible Lesser Sanction Considered

Pursuant to this Court's Opinion in *Burnet*, a trial court must consider the following factors: (1) did a party willfully or deliberately violate discovery rules and orders; (2) was the opposing party substantially prejudiced in their ability to prepare for trial; and (3) were lesser sanctions explicitly considered and would not suffice.

In *Magaňa v. Hyundai Motor America et al.,* 167 Wn.2d 570, 220 P.3d 191 (2009), this Court affirmed the trial's court's order striking defendant Hyundai's Answer applying *Burnet* factors. In that case, the defendant, Hyundai, withheld evidence of other similar incidents of vehicle defects, without objecting or seeking a protective order. When Hyundai finally disclosed the information regarding other similar incidents, it was so stale that it was not useful. The court found, applying the *Burnet* factors, that lesser sanctions would not suffice, and struck defendant's Answer and entered a default judgment. The Court found that in order to strike defendant's Answer under CR 37(b)(2), the Court needed to find (1) Hyundai willfully or

deliberately violated discovery rules and orders, (2) the plaintiff was substantially prejudiced in his ability to prepare for trial, and (3) that lesser sanctions had been explicitly considered and would not suffice. *Id. at* 584. The trial court in *Magaňa* did not set out every possible lesser sanction that could have been considered because that was not required.

In this case, the trial court painstakingly set out in Findings of Fact numbers 35-39 and Conclusions of Law numbers 9 and 10 the lesser sanctions she considered and why they were not sufficient and the substantial prejudice to Olympic Brake and the other defendants. CP 876-891. The trial court considered the *Burnet* factors. However, those factors did not require a trial court to list every possible lesser sanction considered as the Court of Appeals' Opinion in this case implies.

In the interests of judicial economy, Olympic Brake will not repeat the well-stated arguments and legal analysis set out in Nissan's Petition for Review, but in response to that Petition, adopts and incorporates them herein.

D. CONCLUSION

This Court should grant review of the Court of Appeals' Opinion. Carroll and other plaintiffs should be held to the same high standard of discovery conduct as defendants were in *Magaňa* and suffer the same severe sanctions for egregious discovery violations.

I certify that this brief is in 14-point Times New Roman font and contains 1,760 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

RESPECTFULLY SUBMITTED this 2nd day of November, 2022.

SINARS SLOWIKOWSKI TOMASKA LLC

s/ Virginia Leeper
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CERTIFICATE OF SERVICE

The undersigned states:

I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of 18 years; I am not a party to this action; and I am competent to be a witness herein.

On this 2nd day of November, 2022, I caused to be filed the foregoing Answer to Petition for Review with the State Court Administrator.

I also served a copy of said document via Email and Electronic filing on the following parties below:

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I declare under penalty of perjury under the laws of the State of Washington that foregoing is true and correct.

Executed at Seattle, Washington, this 2nd day of November, 2022.

/s/ Traci Clark
Traci Clark, Legal Assistant

SINARS SLOWIKOWSKI TOMASKA LLC

November 02, 2022 - 10:23 AM

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