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COURT OF APPEALS NO. 69026-4

COURT OF APPEALS  
DIVISION ONE  
OF THE STATE OF WASHINGTON

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JAMES BUMP, APPELLANT,

v.

TAK CHANG, RESPONDENT.

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BRIEF OF JAMES BUMP, APPELLANT

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2012 JUN 27 11:10:45  
COURT OF APPEALS  
STATE OF WASHINGTON

Submitted by: James Bump  
Pro Se  
5414 25<sup>th</sup> Avenue SW  
Seattle, WA 98106

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**A. Assignments of Error**

1. The trial court erred when it did not grant James Bump's Motion for Reconsideration and thereby upheld its summary judgment dismissal of James Bump's case. (CP 31)

**Issues Pertaining to Assignment of Error**

1. Did the trial court err when it did not grant Bump's Motion for Reconsideration and thereby upheld its dismissal even though defense attorney Michael Abrahamson did not prove that a mandatory CR 26(i) conference was held between he and pro se Bump prior to his motion to dismiss? (Assignment of Error 1).
2. Did the trial court err when it upheld the most severe sanction, namely dismissal of James Bump's cause of action, and did not impose the least severe sanction and more specific sanction that would have served the purpose of the particular sanction? (Assignment of Error 1).
3. Did the trial court commit reversible error when it upheld its imposition of the most severe sanction even though the record did not show the court considered a lesser sanction nor that Defendant was substantially prejudiced by Bump's discovery

violation, and despite the record showing that Bump's discovery violation was not willful? (Assignment of Error 1).

4. Did the trial court err when it upheld its prior dismissal even though there was no evidence or reasonable inference from it that defense counsel held a CR 26(i) discovery conference and because the decision was contrary to law? (Assignment of Error 1).

**B. Statement of the Case**

On December 13, 2007, Bump was injured when Defendant Tak Chang drove a vehicle into Bump's vehicle. Pro se, Bump filed his lawsuit just prior to the expiration of the three year anniversary. His case against Tak Chang was subsequently dismissed on April 20, 2012 by Judge Cayce due to discovery violations by this pro se plaintiff who worked as a Longshoreman on the docks of Seattle and who had no legal knowledge or experience with an injury claim in the court process. CP 35, lines 16-18. Bump's failings were not willful nor were they intentional. CP 35, lines 19-20. They were not intended to deceive or dodge his obligations nor to disrespect Mr. Abrahamson. CP 35, line 21. They were not meant to disregard the court's Case Schedule, nor the court's authority. CP 35, line 22. He acknowledges his failings but his failings were due to a lack of legal knowledge and experience with an

injury claim in the court process, and occurred during a very difficult period in his life when he was dealing with the death of his mother (who suffered from terminal cancer), a stabbing in his face soon after her death, and a third degree chemical burn in that same period of time. CP 36, lines 11 – 21.

The only way that he was even able to draft the legal papers was to go to the library and look through a bunch of forms and piece together what he could. CP 34, lines 20-21. He didn't understand what he was doing other than trying to file the legal papers before the three years ran. CP 35, lines 1 – 2.

From the time he filed his lawsuit he received several calls from a Farmers person, not Mike Abrahamson, and thought that that person was in charge of the claim and all the stuff that was going on. CP 35, lines 5 – 7. So when Mr. Abrahamson sent him things in the mail, he was confused and couldn't figure out what they were about, because he thought that the Farmers person was in charge of things and he was thinking that he was doing what he needed to do. CP 35, lines 10 – 12, and CP 36, lines 4-5.

Mr. Bump couldn't understand the words that were used in the whole legal process and was very confused about what was going on and

didn't know the importance of the case schedule, deposition, and interrogatories and all those legal things. CP 36, lines 1 – 5.

He didn't ever intend to not give Mr. Abrahamson the information – he just didn't know the legal process and how all of this fits together to get Mr. Abrahamson what he asked for. CP 37, lines 1-2.

**C. Argument**

**A. THE COURT SHOULD HAVE GRANTED JAMES BUMP'S MOTION FOR RECONSIDERATION AND REVERSED ITS PRIOR DISMISSAL BECAUSE DEFENSE ATTORNEY MICHAEL ABRAHAMSON DID NOT PROVE THAT A MANDATORY CR26(i) DISCOVERY CONFERENCE WAS HELD PRIOR TO THE MOTION TO DISMISS.**

In considering whether to grant a motion to vacate a judgment, a trial court should exercise its authority liberally and equitably to preserve the substantial rights of the parties. Shaw v. City of Des Moines, 109 Wn.App. 896, 37 P.3d 1255 (2002).

The court must take the evidence and reasonable inferences in light of the movant. Pfaff v. State Farm Mutual Auto. Ins. Co., 103 Wn.App. 829, 14 P.3d 837, review denied 143 Wash.2d 1021, 25 P.3d 1019 (2000).

Among the substantial rights of a party is the right to have a discovery conference prior to the imposition of sanctions. CR 26(i) mandates a discovery conference and any motion seeking a sanction for a discovery violation SHALL include counsel's certification that the conference requirements WERE MET.

CR 26(i) provides:

**The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference** in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). **Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.**  
(emphasis added)

In the present case, defense counsel relied on a lacking declaration on this issue. He provided no **certification** that the conference requirements of this rule were met. The record is void of any proof that a hearing WAS held. And when taking the evidence (and lack thereof) in the light most favorable to Bump, one can reasonably conclude that a discovery conference was not held. As a result, the trial court should have reversed its prior dismissal and reinstated the case.

**B. EVEN IF THE COURT WAS CONVINCED THAT A CR 26(i) DISCOVERY CONFERENCE WAS HELD, THE COURT SHOULD HAVE GRANTED JAMES BUMP'S MOTION FOR RECONSIDERATION AND REVERSED ITS PRIOR DISMISSAL BECAUSE IT MISAPPLIED LCR 37 AND CASE LAW INTERPRETING THAT STATUTE WHEN THE COURT DID NOT IMPOSE THE LEAST SEVERE SANCTION.**

CR 37 by its own terms “allows” particular sanctions, dependent upon the issue at hand. It does not mandate any sanction, let alone dismissal of a cause of action. “Shall” is nowhere found in the statute when discussing discovery sanctions.

KCLR 41(g) is even less stringent than CR 37 and provides that “failure to comply with the Case Schedule **MAY** be grounds for impositions of sanctions, including dismissal, **or terms.**” (emphasis added).

Case law interpreting CR 37 follows the same reasoning as the legislature and establishes that “the court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery.” Blair v. TA-Seattle E. No. 176, 171 Wn.2d 342, 348, 254 P.3d 797 (2011) (citing Burnet v. Spokane Ambulance, 131 Wash.2d 484, 495-96, 933 P.2d 1036 (1997)).

There are several guiding principles to establish the appropriate sanction, as outlined in Physicians Exchange v. Fisons, 122 Wn.2d 299, P.2d 1054 (1993), a Washington Supreme Court case:

First, **the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed.**<sup>1</sup> (emphasis added)

The sanction is meant to fulfill the purpose of discovery and 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.<sup>2</sup>

The **wrongdoer's lack of intent to violate the rules ... may be considered** by the trial court in fashioning sanctions.<sup>3</sup> (emphasis added)

**The purposes of sanctions orders are to deter, to punish, to compensate and to educate.**<sup>4</sup>

Fisons, 122 Wn.2d, 299, 355-56, P.2d 1054 (1993).

This case involves a *discovery violation*. The least severe sanction that would be adequate to serve the purpose of the discovery violation would be a penal fine and an Amended Case Schedule.

Such a monetary sanction would fulfill the purpose of the sanction and correct the wrong while also not undermining the purpose of discovery. Mr. Bump would not profit from the wrong either. Such a sanction would also take into consideration Mr.

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<sup>1</sup> Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 225, 829 P.2d 1099 (1992).

<sup>2</sup> Gammon v. Clark Equip. Co., 38 Wn. App. 274, 282, 686 P.2d. 1102 (1984) (sanction award of \$2,500 was disapproved for being "cheap at twice the price in the context of a \$4.5 million wrongful death case").

<sup>3</sup> Schwarzer, Sanctions Under the New Federal Rule 11 – A Closer Look, 104 F.R.D. 181, 200 (1985).

<sup>4</sup> Miller v. Badgley, 51 Wn. App. 285, 303, 753 P.2d 530, review denied, 111 Wn.2d 1007 (1988).

Bump's lack of intent to violate the rules and seems justified as a means to not only deter him from the same actions later, but will serve to punish him in a fiscal manner, will compensate Defendants, and will most importantly educate Mr. Bump, who has no prior legal knowledge, training, or experience. His failings were unintentional and due to a lack of legal knowledge.

An amended case schedule would cure the prejudice alleged by defense counsel, and also provide all litigants in this matter a fair hearing with the merits of the case being judged by a jury of their peers, fulfilling the basics premise tort law was established to serve.

**C. IT WAS REVERSIBLE ERROR FOR THE COURT TO UPHOLD ITS IMPOSITION OF THE MOST SEVERE SANCTION BECAUSE THE RECORD DID NOT SHOW THE TRIAL COURT'S CONSIDERATION OF A LESSER SANCTION NOR THAT DEFENDANT WAS SUBSTANTIALLY PREJUDICED BY BUMP'S DISCOVERY VIOLATION AND DESPITE THE RECORD SHOWING THAT BUMP'S VIOLATION WAS NOT WILLFUL.**

Prior to dismissing a case for discovery violations, case law requires that "the record must show three things - the trial court's consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it." Blair, 171 Wash.2d at 348 (citing Mayer v. Sto Indus., Inc., 156 Wash.2d 677, 688, 132 P.3d 115 (2006))

(relying on Burnet, 131 Wn.2d at 494)). And bare directives don't suffice. Blair used the word "and" not "or," thereby requiring that all three prongs be established on the record prior to dismissal; if it only shows one or two, dismissal is not warranted.

Blair went further when it provided the following guidance on this issue:

We review a trial court's sanctions for discovery violations for abuse of discretion. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). This court in Mayer stated, "[We] hold that the reference in Burnet to the "'harsher remedies allowable under CR 37(b)'" applies to such remedies as dismissal ... sanctions that affect a party's ability to present its case..." Id. at 690.

**Neither of the trial court's orders striking Blair's witnesses contained any findings as to willfulness, prejudice, or consideration of lesser sanctions, nor does the record reflect these factors were considered. For example, there was no colloquy between the bench and counsel. There was no oral argument before the trial court entered its orders, and the orders themselves contain bare directives.** Under Burnet and Mayer, the trial court therefore abused its discretion by imposing the severe sanction of witness exclusion in the August 14 and October 15 orders.

Blair v. TA-Seattle E. No. 176, 171 Wn.2d 342, 254 P.3d 797 (2011). (emphasis added)

In the present case, the written record upon reconsideration (the trial court did not allow oral argument on April 20, 2012) does not establish that the court considered a lesser sanction.

The record also fails to show any substantial prejudice that Bump's discovery violations would have caused to Defendant. Time delay does not rise to substantial prejudice, especially when considering that the cause of action arose from a car accident and the grounds to defend that cause would be derived from photos of the vehicles, the police report, and Bump's own medical records. All these documents could be reasonably and readily accessible on short notice without a practical concern of spoliation.

The record upon reconsideration however does show that Bump did not violate the discovery rules willfully, as it provided:

1. Bump's failings were not willful nor were they intentional. CP 35, lines 19-20.
2. They were not intended to deceive or dodge his obligations nor to disrespect Mr. Abrahamson. CP 35, line 21.
3. They were not meant to disregard the court's Case Schedule, nor the court's authority. CP 35, line 22.
4. He acknowledges his failings but his failings were due to a lack of legal knowledge and experience with an injury claim in the court process, and occurred during a very difficult period in his life when he was dealing with the death of his mother (who suffered from terminal cancer), a stabbing in his face soon after her death, and a third degree chemical burn in that same period of time. CP 36, lines 11 - 21.
5. He didn't understand what he was doing other than trying to file the legal papers before the three years ran. CP 35, lines 1 - 2.

6. Bump has been overwhelmed and he has been on the verge of a nervous breakdown. CP 36, lines 20 – 21.
7. He didn't ever intend to not give Mr. Abrahamson the information –he just didn't know the legal process and how all of this fits together. CP 37, lines 1-2.

Consistent with the ruling of Pfaff, supra, and taking the evidence and reasonable inferences in light of the movant, the court should have reversed itself and found that the dismissal was unwarranted because there were lesser sanctions that should have been considered and imposed, that Bump's violation was not willful, and because the prejudice could have been cured. A monetary fine would deter future behavior, while issuance of an amended case schedule would preserve the substantial rights of the parties.

**D. CR 59 MANDATES REINSTATEMENT OF JAMES BUMP'S CASE BECAUSE THERE IS NO EVIDENCE OR REASONABLE INFERENCE FROM IT THAT DEFENSE COUNSEL HELD A CR 26(i) DISCOVERY CONFERENCE AND THE DECISION WAS CONTRARY TO LAW.**

CR 59 provides, in relevant part:

- (a) The verdict or other decision may be vacated . . . on the motion of the party aggrieved for any one of the following reasons materially affecting the substantial rights of such parties:

\*\*\*

- (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

\*\*\*

(9) That substantial justice has not been done.

1. **NO EVIDENCE OR REASONABLE INFERENCE THAT DEFENSE COUNSEL HELD A MANDATORY CR 26(i) DISCOVERY CONFERENCE.**

CR 26(i) mandates a discovery conference prior to a motion to dismiss. And defense had the burden to show that he HELD a discovery conference:

**The moving party must identify those portions of the pleadings ... on file which it believes demonstrate the absence of a genuine issue of material fact. If the moving party does not meet this burden, summary judgment may not be entered, regardless of whether the opposing party submitted responding materials. White v. Kent Medical Center, Inc., 61 Wn. App. 163, 810 P.2d 4 (1991); LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975); Rossiter v. Moore, 59 Wn.2d 722, 370 P.2d 250 (1962); see also Graves v. P.J. Taggares Co., 94 Wn.2d 298, 302, 616 P.2d 1223 (1980) (if the moving party does not sustain its burden of establishing the absence of a genuine issue of material fact, the court **shall not** grant summary judgment, regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition to the motion). (emphasis added).**

In the present case, the record is void of the required **certification** that the conference requirements of this rule were met. In accord with Pfaff, supra, where the court must take the evidence and reasonable inferences in the light most favorable to Bump, one can reasonably conclude that a discovery conference was not held. As a result, the trial court should have reversed its prior dismissal and reinstated the case.

## **2. DECISION WAS CONTRARY TO LAW.**

The court abused its discretion and rendered a decision contrary to law when it upheld its dismissal of Bump's case because the record on reconsideration did not establish all three (3) of the Blair factors prior to upholding its dismissal. Namely, the record did not show the trial court's consideration of a lesser sanction nor did it show substantial prejudice on the part of Defendant. And the court's decision flew in the face of the evidence, which showed that Bump's actions were not willful. See Blair, supra.

In the present case, by way of curt review, the written record upon reconsideration proves that Bump did not violate the discovery rules willfully:

1. Bump's failings were not willful nor were they intentional. CP 35, lines 19-20.
2. They were not intended to deceive or dodge his obligations nor to disrespect Mr. Abrahamson. CP 35, line 21.
3. They were not meant to disregard the court's Case Schedule, nor the court's authority. CP 35, line 22.
4. He acknowledges his failings but his failings were due to a lack of legal knowledge and experience with an injury claim in the court process, and occurred during a very difficult period in his life when he was dealing with the death of his mother (who suffered from terminal cancer), a stabbing in his face soon after her death, and a third degree chemical burn in that same period of time. CP 36, lines 11 – 21.

5. He didn't understand what he was doing other than trying to file the legal papers before the three years ran. CP 35, lines 1 – 2.
6. He didn't ever intend to not give Mr. Abrahamson the information –he just didn't know the legal process and how all of this fits together. CP 37, lines 1-2.

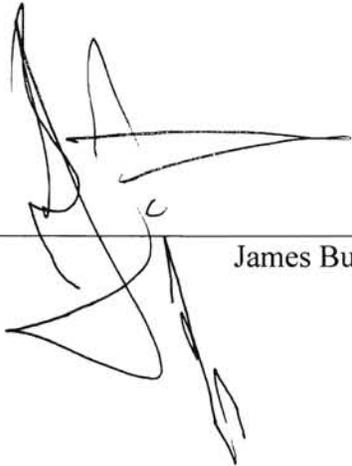
The record also failed to show any substantial prejudice that Bump's discovery violations caused Defendant. Time delay does not rise to substantial prejudice, especially when considering that the cause of action arose from a car accident and the grounds to defend that cause would be derived from photos of the vehicles, the police report, and Bump's own medical records. All these documents could be reasonably and readily accessible on short notice without a practical concern of spoliation.

In so ruling, the court also abused its discretion under Blair when it imposed the most severe sanction without a proper record. For this reason, reinstatement is the only cure.

#### **D. Conclusion**

The court has the authority to reinstate the case even if the court does not reason that any one error standing on its own would justify reversal. State v. Badda, 63 Wash.2d 176, 385 P.2d 859 (1963) (New trial may be required for accumulation of errors even though no one of them, standing alone, would be of sufficient gravity to constitute grounds for reversal.).

For the reasons set out above, Mr. Bump respectfully requests that the Court of Appeals find that the trial court erred when it did not grant Bump's Motion for Reconsideration and upheld its dismissal and asks that this court reverse the trial court and remand the case to the trial court with orders to set the case for trial.



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James Bump. Pro Se