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COURT OF APPEALS

05 JUN -8 PM 3:10

JULIA A. GILBERT

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33857-2-11

REPLY BRIEF OF APPELLANT

COURT OF APPEALS, DIVISION II

STACIA AND JOHN DORMAN, APPELLANTS

v.

BRIAN HOFFMAN RESPONDENT/APPELLEE

vs.

JOHN DOE AND JANE DOE dba RICHARDSONS WELL DRILLING CO., a.k.a.
Richardson's Well Drilling Co., Inc., CROSS/APPELLEES

John and Stacia Dorman
Appellants
Address: 17531 Elhi Rim Rd., Bonney Lake, WA. 98391
Phone: (253) 863-5211

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I. ISSUES

1. Whether an unopposed order of default and a subsequent order on reconsideration are “final orders” subject to appeal where a motion to vacate the default has not been filed?
2. Whether granting a unopposed motion for default in response to failure to comply with a mandatory case schedule constitutes reversible error?
3. Whether the trial Court failed to explicitly consider whether a lesser sanction would suffice?
4. Whether the trial Court abused its discretion when it determined that the Petitioners/Appellants failure to comply with a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial?

II. STATEMENT OF THE CASE

In July of 2000, the Petitioners/Appellants; who are owners of real property identified as 17531 Elhi Rim Road, Bonney Lake, Washington, developed and cleared said property, and caused to be constructed upon such property, a septic system, drain field and water well. Plans therefore were approved by the Tacoma Pierce County Health Department in November of 2000. (CP 181-188)

In August of 2001, Petitioners/Appellants hired Richardson’s Well drilling, identified as cross-appellants, to drill a well upon said property.

Believing that Defendants/Appellants actions constituted a trespass upon their property, Plaintiffs/Appellees, who are adjoining property

owners, filed a complaint in the Pierce County Superior Court on or about May 24, 2004, seeking entry of an Order of Quieting Title to Defendants/Appellants property, enjoining the Defendants/Appellants construction, seeking an ordered requiring that Plaintiffs/Appellants cease and desist their entry and trespass upon Appellees property, ordering the removal of the aforementioned well, and ordering restoration of said property. (CP 192-195)

III. PROCEDURAL HISTORY

On or about May 24, 2004, Plaintiffs/Appellees filed a Summons and Complaint for quiet title and for Injunctive Relief with the Pierce County Superior Court. On that same date, the Pierce County Superior Court entered an Order setting the original case schedule. The case schedule identified the discovery cutoff date as May 9th, 2005. (RP 9/30/2005 p. 3 lines 4-6) Trial was scheduled to begin on May 23rd 2005. (RP p. 4 lines 4-5) On or about June 8, 2004, Plaintiffs/Appellees served the Summons and Complaint upon the Petitioners/Appellants.

On June 21, 2004, Petitioners/Appellants filed and served upon Plaintiffs/Appellees, their Answer in response to the Plaintiffs/Appellees Complaint.

On March 15, 2005, the Superior Court entered an Order Continuing the Trial Date, and on March 16, 2005, the Court entered an order Amending the Case Schedule, setting the discovery cutoff date as August 29th, 2005. (RP 9/30/2005 p. 3 lines 11-12)

Per Order of the Court, a settlement conference was also scheduled for April 25, 2005. The settlement conference was not confirmed and was subsequently cancelled. An Order setting a new settlement conference date of May 02, 2005 and a new trial date of May 23rd 2005 was set. (RP 9/30/2005)

On May 02, 2005, by Order of the Pierce County Superior Court, the Settlement Conference was again continued, and was rescheduled for September 24th 2005. An Order Amending the Case Schedule was likewise entered setting a new trial date of October 17, 2005. (CP) (RP)

Thereafter, Mr. Finnigan, counsel for Cross-Defendants, filed a Motion with the Court to Compel compliance with the Case Schedule; however, that Motion was subsequently withdrawn and the hearing thereon was subsequently stricken. (RP p. 8 lines 16-22)

On August 29, 2005, Mr. Burk, counsel for Respondents/Appellees filed a Motion to Compel Discovery with the Court. (RP p. 5 lines 19 –20) The record is unclear regarding any hearing conducted or ruling rendered by the trial Court with respect to Respondents/Appellees Motion to Compel. However, based upon the docket from the trial Court, and based upon a review of the record of testimony provided by Mr. Burke during hearings held on September 23, 2005, the Court did, in fact, issue an Order Compelling Discovery.

On or about September 1, 2005, The Petitioners/Appellants filed a Motion for Reconsideration of the Respondents/Appellees Motion to Compel, and a hearing with respect to Petitioners/Appellants Motion for Reconsideration was conducted on September 23, 2005. (RP 9/23/2005)

The Court denied the Petitioners/Appellants Motion for Reconsideration. (RP p. 6 lines 16-17) However, the Court did not expressly state on the record that the Respondents/Appellees Motion to Compel was granted, or that the Court intended that their Motion be granted. The Court, in its oral ruling, simply Ordered that the Petitioners/Appellants Motion for Reconsideration be denied.

On or about September 21, 2005, prior to hearing on Respondents/Appellees Motion to Compel, Appellants filed a Motion for Default requesting a Default Judgment and a Motion to Quiet Title. (CP p. 80-87)

On September 30, 2005, a hearing was conducted with respect to Respondents/Appellees Motion for Default and for Default Judgment. See (RP 9/30/2005)

At the time of hearing thereon, Petitioners/Appellants moved the Court for an Order to Continue, to allow them the opportunity to secure counsel. (RP p. 12 lines 1-2) In support thereof, Petitioners/Appellants sought admission of evidence, specifically, a declaration of a local attorney with whom the Petitioner/Appellants had consulted regarding legal representation. (RP p. 10 lines 15- 17)

The Court denied the defendants/appellants Motion for Continuance and denied admission of the aforementioned documentation, concluding the same to be hearsay.

Based upon information and argument presented during such hearing, the Honorable Judge Stolz, found that the Appellant failed to timely respond to requests for discovery as required pursuant to the terms of the case schedule, (RP 9/30/2005 p. 12 lines 8-11) and concluded that the acts and/or omissions on the part of the Petitioners/Appellants was grounds for default.

Based thereon, the Honorable Judge Stolz denied the Petitioners/Appellants Motion for Continuance, and denied the Petitioners/Appellants Motion for Reconsideration. (CP p. 118-119)

The discretion exercised by the trial Court was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons and the determination by the trial Court constituted an abuse of discretion.

IV. SUMMARY OF THE ARGUMENT

Cases should be decided upon their merits, rather than upon strict compliance with draconian rule limitations.

The civil rules with respect to the time and procedure for the filing of papers are not set in stone, nor are they absolute. The rules are subject to modification according to the discretion of the Court, and any material offered at a time later than required by rule, over objection of counsel,

may be accepted or considered by the Court upon the discretionary ruling of the Court and consideration of the imposition of appropriate terms.

Failure on the part of the Court to follow the longstanding legal precedent of deciding cases upon their merits, rather than upon strict compliance with draconian rule limitations constituted reversible error.

The Default judgment in this case was entered in violation of the notice requirements, and was thus void, and the Petitioners/Appellants were prejudiced in their right to notice and right be heard and to make the record complete.

VI. ARGUMENT and AUTHORITY

(a). **An unopposed Order of Default and a Subsequent Order On Reconsideration Are “Final Orders” Subject to Appeal Even Though a Motion To Vacate The Default Was Not Filed.**

On September 26, 2005, Appellants filed their Notice of Appeal.

Respondents argue that the order entered by the trial Court denying the Appellants Motion for Reconsideration of the Default Judgment was not a “final Judgment” subject review on appeal, due to the fact that Appellants did not present a motion to the trial Court to vacate the judgment entered, and that Appellants Appeal should be dismissed.

In determining whether a trial Court’s determination is an appealable final judgment or an order or final order, substance controls over form; content and not merely title of the instrument will be examined. *Nestegard v. Investment Exhc., Corp.*, 5 Wn. App. 618, 489 P.2d 1142 (1971)

The Doorman's filed a Notice of Appeal from the order of the trial Court denying their Motion for Reconsideration pursuant to CR 59, which encompasses and includes Motions for Reconsideration and Motions for New Trial.

Appellants appeal arose out of and was based upon the Judgment of Default, Regardless of the name one wishes to give it, title of the instrument is not dispositive. The motion brought by the Doorman's was one for new trial.

R.A.P. 2.2 (a) (9) allows for an appeal from an order granting or denying a motion for new trial or amendment of judgment. Additionally, R.A.P. 2.4 provides that an appeal from a ruling on a motion for new trial brings the final judgment up for review. *2A H. Orland, K. Tegland, WA. Prac.*, RAP 2.2 (1997)

The question whether a judgment is final for appeal purposes is not always clear.... CAROA 2 defines judgment as "any judgment, order or decree which determines the rights of the parties in the action." *State-First Nat'l Bank v. Marshall*, *16 Wn. App. 503, 557 P.2d 352 (1976)*

The order denying Appellants Motion for Reconsideration was entered subsequent to and based upon a Judgment which determined the rights of the parties. CAROA 14 permits appeals from orders entered subsequent to a final judgment where the record demonstrates that the later Order

prejudicially affects a substantial right other than rights adjudicated by the earlier final judgment. *Nestegard v. Investment Exch. Corp., supra.*

The Order and Judgment of Default, and the Order of the Court denying Plaintiffs/Appellants Motion for Reconsideration, or “new trial” entered by the Court was one essentially adjudging the Plaintiffs/Appellants guilty of Contempt.

In *State of Washington v. Superior Court King County, 30 Wn.2d 692 (1948)*, the Court determined that an order which is entered adjudging a party guilty of contempt for refusal to comply with the Court’s order is appealable, and that when an appeal has been taken from a contempt order, as in the case at bar, in the manner prescribed by statute, this Court acquires jurisdiction of the cause.

(b.) Granting An Unopposed Motion For Default In Response to Failure to Comply With The Mandatory Case Schedule Constitutes Reversible Error.

Hearing on Respondents/Appellees Motion for Order of Default was held on September 30, 2005, before the Honorable Judge Katherine Stolz. (RP 9/30/2005) The Court found that Petitioners/Appellants did not file a timely response to Respondent/Appellees request for Discovery, and found that Petitioners/Appellants failed to comply with the case schedule. (RP p. 13 lines 4-19)

Based thereon, the Court entered an Order granting Respondents/Appellees Motion to Strike Petitioners/Appellants pleadings, and for Default. (CP p. 118-119) (RP p. 13 lines 4-19)

Relief from a Default Judgment is governed by equitable principles, and the grounds and procedures for vacating a judgment are provided in CR 60. The overriding reason should be whether or not justice is being done.' " *Id.* at 582 (quoting *Widucus v. S.W. Elec. Coop.*, 26 Ill. App. 2d 102, 109, 167 N.E.2d 799 (1960)).

In ruling on Respondents/Appellees Motion for Default Judgment the Court disregarded a long-standing legal principal and precedent that cases should be decided upon their merits, rather than upon strict compliance with draconian rule limitations. Failure by the Court to follow this legal principal and precedent constituted reversible error.

Irregularity occurred in the aforementioned proceeding of the Court as a result of hearings on Respondents/Appellees Motion for Default Judgment that prejudiced the Petitioners/Appellants right to be heard.

Irregularities concern and are defined as departures from prescribed rules and regulations. *Summers v. Dept. of Revenue for the State of Washington*, 104 Wn. App. 87, 14 P.3d 902 (2001).

The Order of the Court granting Respondents/Appellees Motion for Default Judgment was entered in spite of the fact that the Court had been put on notice of and understood that discovery had not been fully completed, and was granted in spite of the fact that the

Petitioners/Appellants appeared and defended in the action, and the Default Judgment was also entered in violation of the notice requirements. As previously indicated, the Court granted Respondents/Appellants Motion for Default and denied Petitioners/Appellants Motion for Reconsideration based at least in part, upon finding that Petitioners/Appellants failed to comply with the Case Schedule. (RP p. 13 lines 4-19)

Case Schedules establish deadlines by which various matters must be completed prior to trial and have been given the same status as a Court order. Local rules specify the sanctions that may be imposed for noncompliance, and usually contain a number of additional details and should be consulted. *D. Wolf and K. Allen, Washington Civil Practice and Procedure, 14 Wn. Prac sec. 7.7 (2005)*

Here, Pierce County Local Rule 1(4)(K) is specifically applicable to the issue of enforcement of Case Schedule compliance and provides:

“The assigned Court, on its initiative or on motion of a party, may impose sanctions or terms for failure to comply with the Case Schedule established by these rules. If the Court finds that an attorney or party has failed to comply with the Case Schedule and has no reasonable excuse, the Court may order the attorney or party to pay monetary sanctions to the Court, or terms to any other party who has incurred expense as a result of the failure to comply, or both; in addition, the Court may impose such other sanctions as justice requires. As used in this rule, “terms” means costs, attorney fees, and other expenses incurred or to be incurred as a result of the failure to comply; the term “monetary sanctions” means a financial penalty payable to the Court; the term “other sanctions” includes but is not limited to the exclusion of evidence”.

While PCLR 1 does authorize the Court to impose “other sanctions” in addition to monetary penalties and exclusion of evidence, PCLR 1 limits the authority of the Court in imposing “other sanctions” to those situations where “justice requires”.

Justice requires a Court enter an Order of Default where the alleged wrongdoer has failed to appear, plead, or otherwise defend or where the alleged wrongdoer has failed to attend a status conference, CR 55(a)(1) and if counsel for the parties have not conferred with respect to a CR 37(a) Motion to Compel discovery, or if such motion does not include counsel's certification that the conference requirements were met – Justice has not been met.

The Petitioners/Appellants appeared, they plead and they did defend, and the Respondents/Appellees did not provide “certification” that the conference requirements of CR 26(i) had been met.

Additionally, the trial Court granted relief that the Court did not have the inherent power to grant. Pierce County Local Rule 1(4)(K) is specifically applicable to the issue of enforcement of Case Schedule compliance. The Court granted Respondents/Appellees Motion for Sanctions, and did so pursuant to CR 37, CR 11 and CR 26.

CR 11 sanctions are not appropriate where, as here, other Court rules more properly apply. *D. Wolf and K. Allen, Washington Civil Practice and Procedure, 14 Wn. Prac sec. 7.7 (2005)*

Even if such other rules were applicable, if counsel for the parties have not conferred with respect to a CR 37(a) motion to compel discovery, or if such motion does not include counsel's certification that the conference requirements were met, the rule precludes the trial Court from hearing such a motion.

While the record in this case indicates that the parties did confer to discuss issues related to discovery, counsel for the Respondents/Appellees did not provide "certification" that the conference requirements of CR 26(i) were met. There was a departure on the part of the Court from prescribed rules and regulations when the Court granted the Respondents/Appellees motion for sanctions, pursuant to CR 37, CR 11 and CR 26. The State Supreme Court in *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979), in an analogous situation held that default judgments are not favored. While the record in this case indicates that the Petitioners/Appellants did not timely respond to the interrogatories addressed to them, and that Petitioners/Appellants delayed in filing and serving their witness lists until the defendants moved to compel, such answers and responses to requests for discovery were, in fact, filed and served. And, although the judge concluded that the Petitioners/Appellants had not complied with the order of the Court, a careful review of the record shows that the Petitioners/Appellants' actions were not willful and deliberate.

While an orderly system of justice requires compliance with judicial process and finality to judicial proceedings, *Griggs v. Averbek Realty Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979); Default Judgments are disfavored because the law prefers determination of controversies on their merits. *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960).

For instance, under the rules of civil procedure, most specifically CR 56, the Court may refuse the application for Judgment or may order a continuance to permit discovery to be obtained, and the rule does not even expressly require a motion for Continuance for the Court to take such action.

For instance, in *Cofer v. Pierce County*, 8 Wn. App. 258, 505 P.2d 476 (1973), the nonmoving party in a Summary Judgment proceeding was unable to obtain an affidavit of a material witness in time to properly respond to a summary judgment motion. In response, the Court held that when the trial Court has been shown a good reason why an affidavit of a witness cannot be obtained in time for a summary judgment proceeding the Court has a duty to accord the parties a reasonable opportunity to make their record complete before ruling on a Motion for Summary Judgment. *Cogle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990)

The record in this case indicates that Petitioners/Appellants contacted, and attempted to make arrangements with opposing counsel for obtaining more time to complete discovery.

The record in this case also indicates that at the time of hearing thereon, Petitioners/Appellants moved the Court for an Order to Continue to permit them the opportunity to secure counsel, (RP p. 12 lines 1-2). In support thereof, Petitioners/Appellants sought admission of evidence of a Declaration of a local attorney with whom they had consulted regarding legal representation. (RP p. 10 lines 15- 17)

Additionally, justice requires that a Court enter an order of default where the alleged wrongdoer has failed to appear, plead, or otherwise defend or where the alleged wrongdoer has failed to attend a status conference. CR 55(a)(1)

Under CR 55(a)(3), “any party who has appeared in the action for any purpose shall be served with written notice of such a motion for default at least five (5) days before hearing on the Motion”.

A Defendant is deemed to have "appeared" and "pleaded" for purposes of CR 55(a)(1) by filing an appearance, submitting responsive pleadings, and by attending a status conference.

The record here clearly shows that the Petitioners/Appellants were entitled to 5 days' notice prior to the entry of default. CR 55(a)(3)

The record further indicates that, despite the fact that the Petitioners/Appellants had appeared and defended, the Court granted Appellees Motion for Default and for Default Judgment, based solely upon finding that Appellants failed to timely file answers to Plaintiffs

Interrogatories, and that Appellants failed to timely file their List of Witness per the Case Schedule. The Court did so without showing that notice was properly provided to the Petitioners/Appellants prior entry of said order, even though they were present at the time of hearing.

The Order of Default was entered in violation of the notice requirement and is hence, void. *Summers, supra. 104 Wn. App. 87, 14 P.3d 902 (2001)*. A void Judgment is a "judgment, decree or order entered by a Court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to issue such an order." *Id.* at 87.

The State Supreme Court in an analogous situation, after pointing out that default judgments are not favored under the laws balanced against that principle is the necessity of having a responsive and responsible system, which mandates compliance with judicial summons, that is, a structured, orderly system not dependent upon the whims of those who participate therein, whether by choice or by the coercion of a summons and complaint. *Griggs v. Averbeck Realty, Inc., 92 Wn.2d 576, 581, 599 P.2d 1289 (1979)*. While the record in this case indicates that the Petitioners/Appellants did not respond to the interrogatories addressed to them, and that Petitioners/Appellants delayed in filing and serving their witness lists until the Respondents/Appellees moved to compel, such answers the responses to requests for discovery were, in fact, filed and served. Although the Judge concluded that the Petitioners/Appellants had

not complied with the order of the Court, a careful review of the record shows that the Petitioners/Appellants' actions were not willful and deliberate.

For instance, under the rules of civil procedure, most specifically CR 56, the Court may refuse the application for Judgment or may order a continuance to permit discovery to be obtained, and the rule does not even expressly require a motion for Continuance for the Court to take such action.

As previously cited, in *Cofer v. Pierce County*, 8 Wn. App. 258, 505 P.2d 476 (1973), the nonmoving party in a Summary Judgment Proceeding was unable to obtain an affidavit of a material witness in time to properly respond to a summary judgment motion. In response, the Court held that when the trial Court has been shown a good reason why an affidavit of a witness cannot be obtained in time for a summary judgment proceeding the Court has a duty to accord the parties a reasonable opportunity to make their record complete before ruling on a Motion for Summary Judgment. The record in this case indicates that Petitioners/Appellants contacted, and attempted to make arrangements with opposing counsel for obtaining more time to complete discovery.

- (c). **The trial Court abused its discretion when it determined that the Petitioners/Appellants failure to comply with a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial.**

While the record indicates that the Petitioners/Appellants failed to timely respond to discovery requests and to comply with the case schedule, the record does not reflect that Petitioners/Appellants failure to timely respond was, in fact, “willful”.

For instance, the record in this case from hearing on Appellant’s Motion for Reconsideration indicates that the Petitioners/Appellants not only met with and attempt to confer with opposing counsel regarding discovery matters, the record reflects testimony that Petitioners/Appellants justifiably relied upon and proceeded based upon statements made to them by opposing counsel which led them to reasonably believe that discovery had been completed or that such matters had been “taken care of”. (RP p. 4 lines 17).

Petitioners/Appellants acknowledge certain discovery violations, and acknowledge that the provisions of CR 37(b)(2) authorizes a variety of sanctions for discovery violations, from the exclusion of evidence to a default judgment, and that use of sanctions under an abuse of discretion standard gives the trial Court wide latitude in determining appropriate sanctions. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338-39, 858 P.2d 1054 (1993); *E.G., Rhinehart v. Kiro, Inc.*, 44 Wn. App. 707, 710, 723 P.2d 22 (1986), REVIEW DENIED, 108 Wn.2d 1008, APPEAL DISMISSED SUB NOM. *Rhinehart v. Tribune Pub'g Co.*, 484 U.S. 805, 98 L. Ed. 2d 16, 108 S. Ct. 51 (1987).

The trial Court's discretion is not without limits. The rule specifically provides that the order must be "just." CR 37(b)(2). Due process considerations require that before a trial Court dismisses an action or counterclaim, or renders a judgment by default, there must have been "a willful or deliberate refusal to obey a discovery order, which refusal substantially prejudices the opponent's ability to prepare for trial." Associated Mortgage Investors v. G.P. Kent Constr. Co., 15 Wn. App. 223, 228-29, 548 P.2d 558, REVIEW DENIED, 87 Wn.2d 1006(1976). Pursuant to CR 37(a)(3) unexplained failure to furnish complete and meaningful answers to material interrogatories in the face of the Court's order impels a conclusion that the refusal was willful. In this connection we note that the rule allows the Court to treat an evasive or incomplete answer as a "failure to answer," and any violation of an explicit Court order without reasonable excuse or justification must be deemed a willful act.

CR 37(b)(2) provides in part:

If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or rule 35, or if a party fails to obey an order entered under rule 26(f), the Court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party; In lieu of any of the foregoing orders or in addition thereto, the Court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the Court finds that the failure was substantially justified or that other

circumstances make an award of expenses unjust. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (quoting *Snedigar v. Hodderon*, 53 Wn. App. 476, 487, 768 P.2d 1 (1989), *rev'd in part sub nom.*, *Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990)). Further, as a default judgment for discovery violations raises due process concerns, the Court must first find willfulness and substantial prejudice. *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 176, 810 P.2d 4 (1991); *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 227-28, 548 P.2d 558 (1976).

The Petitioners/Appellants did not, in fact, “fail to respond”, and they did not do so without reasonable excuse. They were simply delayed in furnishing answers to interrogatories and in their compliance with the case schedule as it pertained to discovery. As previously indicated, a review of the record fails to show proof of an express order by the Court compelling discovery.

The record indicates only that the judge ordered that a Default judgment be entered.

In the absence of any expression to the contrary, there is no evidence that the Petitioners/Appellants violated an explicit Court order, and thus, the record is insufficient to support the Court’s finding that the Petitioners/Appellants acts and/or omissions were willful, so as to justify entry of the Order of Default.

Additionally, sanctions imposed pursuant to CR 37(3)(C) are limited to “entry of an order striking out pleadings **or** parts thereof, **or** staying further proceedings until the order is obeyed, **or** dismissing the action or proceedings or any part thereof, **or** rendering a judgment by default against the disobedient party”(emphasis added)

The record in this case shows that the Honorable Judge Stolz denied the Defendants/Appellants Motion for Continuance, **and** that she

denied the Appellants Motion for Reconsideration, (CP p. 118-119) **and** that she entered an order requiring that the Defendants/Appellants pleadings be stricken, **and** that she entered an Order Granting Plaintiffs/Appellees Motion for Default, **and** that she Ordered that a Default Judgment be entered. (RP p. 13 lines 20-21) In so doing, Judge Stolz not only violated the purpose and spirit of the rule, she abused her discretion in doing so.

(d). **The trial Court failed to explicitly consider whether a lesser sanction would suffice.**

Further, Federal Courts have made sound rulings concerning imposition of CR 37(b)(2) sanctions. Generally, they have held that when the most severe sanction of default or dismissal is imposed, the trial Court should explicitly consider whether lesser sanctions would probably cure the improper behavior and advance the deterrent aspects of CR 37. *Bataon v. Neal Spelce Assocs., Inc.*, 765 F.2d 511, 514-15 (5th Cir. 1985), *AFF'D ON REMAND*, 805 F.2d 546 (1986); *In Re Macmeekin*, 722 F.2d 32, 35 (3d Cir. 1983). Because the choice of sanctions is entrusted to the trial Court's discretion, federal Courts also require that the reason for imposing a particular sanction be clearly stated on the record so that meaningful review may be had on appeal. *Macmeekin*, 722 F.2d at 34-36; *Quality Prefabrication, Inc. v. Daniel J. Keating Co.*, 675 F.2d 77, 80 (3d Cir. 1982).

While the Court did explicitly state on the record its reasons for imposing the aforementioned sanctions, specifically, that

Petitioners/Appellants did not disclose witnesses by the 9th of May (RP p. 6 lines 9-10), and that Petitioners/Appellants failed to comply with discovery cutoff of August 29th (RP p.6 lines 14-15) and while the record does show that the trial Court considered sanctions other than default and dismissal, the Court nevertheless departed from normal practice and procedure when it failed to abide by the limitations set forth Pierce County Local Rule 1(4)(K). The Court abused its discretion when it failed to limit the imposition of such sanctions, as required pursuant to CR 37, presuming such is found to be applicable. As a consequence, the Court should reverse the order of default and remand to the trial Court for consideration of these factors on the record.

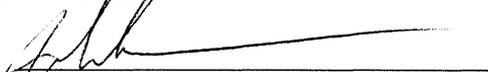
The sanctions imposed in this case were unauthorized, they were unjust, and it is obvious from the record that other less drastic alternatives to default would have been sufficient.

While the choice of sanctions for violation of a discovery order is discretionary, the particular facts and circumstances of each case will determine whether the discretion has been abused. CR 37

A discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. (Citations omitted.)

DATED this 8th day of June 2006.


Stacia Dorman


JOHN DORMAN, Appellant