

**STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II**

SHARYN MCPHERSON and
RICHARD MCPHERSON,
individually and as a marital
community,

Appellants

v.

CHARLES and LUPITA
SANDOVAL,

Respondents

NO. 34599-4-II

Thurston Co. Superior Court
Cause No. 04-2-01099-1

BRIEF OF APPELLANTS

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ASSIGNMENT OF ERROR

Entry of dismissal order with respect to Charles and Lupita Sandoval with prejudice instead of without prejudice.

STATEMENT OF THE CASE

Sharyn McPherson in 2002 and before was an employee of Capital Medical Center, as an x-ray technician. Capital, by contract with Tumwater Family Practice Clinic, installed and operated an x-ray machine manufactured by and/or acquired from General Electric Company on the Clinic's premises, with Sharyn as the primary operator. Capital contracted with General Electric Company for the maintenance, service and repair of that machine, with Charles Sandoval the GE employee assigned to perform such tasks. On December 4, 2002, while Sharyn was operating the machine, it malfunctioned and delivered to her a sudden severe electrical shock. **CP 10-13.**¹

On October 9, 2003, Sharyn and her husband Richard filed suit in Thurston County Superior Court under Cause No. 03-2-02035-1, against General Electric Company, a New York corporation registered to do business in Washington, referred to herein as General Electric Company or GEC. On October 27, the Seattle law firm of Montgomery Purdue Blankinship & Austin, through attorney Peggy Hughes, filed and served a Notice of Appearance for GEC. **CP 109-126.**

¹ The complaint in this case identifies GE Medical Systems Information Technologies ("GEMS-IT"), but, as will be seen, General Electric Company is the proper party defendant and so is referenced here instead of GEMS-IT.

GEC then removed the case to federal court in Tacoma under diversity jurisdiction, where it was assigned Case No. CV03-5628. GEC there on November 17, 2003 filed its "Answer of Defendant General Electric Company" to the complaint.

Paragraph 4 of the complaint read as follows:

On information and belief, at all relevant times defendant GE is the manufacturer and product seller of the machine, and/or was responsible under contract or other form of legal relationship with Capital Medical Center for its servicing, repair and maintenance.

CP 109-126.

In its answer, General Electric Company repeatedly denied that it had any involvement in the matter:

Answer, Paragraph 4: "Answering paragraph 4, [GEC] denies for lack of information upon which GE can form a well-founded belief."

Affirmative Defense #3: "Improper Party. GE is not a proper party to this action."

Affirmative Defense #5: "No Duty of Care. GE owed Plaintiffs no duty of care and Plaintiffs' alleged damages were not proximately caused by any acts or omissions of GE."

Affirmative Defense #6: "Intervening Cause. All or part of Plaintiffs' alleged damages were proximately caused by the intervening and superseding acts or omissions of entities and/or persons not joined herein and/or not in control of GE, and Plaintiffs are not entitled to recover damages from GE."

CP 109-126.

Upon receipt of this answer, plaintiffs' counsel Mr. Meeks spoke by telephone with Ms. Hughes, to inquire about these

pleading statements. Ms. Hughes discussed how there are many business entities in this state and nationwide who operate under the name "General Electric" or "GE" in some form, but that they are mostly separate and independent legal entities, usually in the form of separate corporations. She advised Mr. Meeks that the factual basis for the pleading allegations was that the x-ray machine in question was under the responsibility of "GE Medical Systems," not General Electric Company, and that GE Medical Systems was a legally separate company. Mr. Meeks responded that, if this is so, General Electric Company would not be a proper party defendant and that the lawsuit would have to be changed accordingly.

CP 109-126.

Ms. Hughes' statements legally placed Mr. Meeks on notice that there may not be a reasonable basis in fact or law under CR 11 to proceed against General Electric Company. Knowing that a legally separate company would have to be registered to do business in Washington, Mr. Meeks checked the Secretary of State's corporation record database, and found numerous companies using the name "General Electric" or "GE," one of which was "GE Medical Systems Information Technologies, Inc." Mr. Meeks assumed that this was the company to which Ms. Hughes had referred, and, finding no indication to the contrary by a

check of General Electric Company's website or Washington state records, concluded that it needed to be replaced with GE Medical Systems Information Technologies, Inc.

CP 109-126.

At the time of the original filing, other defendants were under consideration for inclusion, including Mr. Sandoval, Tumwater Family Practice Clinic as the lessor of the premises, and even Capital Medical Center on some possible basis outside of its Industrial Insurance Act exemption. There was enough information then to support filing under CR 11 against Mr. Sandoval and TFPC on information and belief, but Mr. Meeks decided, especially with regard to TFPC, that it would be better to start the suit against General Electric Company and then use early party and third-party discovery processes to confirm that it was the appropriate General Electric entity involved and determine if TFPC and/or Mr. Sandoval should be included as named parties.

CP 109-126.

Before this could be done, two things happened: General Electric Company removed the case to federal court, and Ms. Hughes made her pleading and oral statements regarding its improper party status. Since (1) GEC had to be replaced with GEMS-IT anyway, (2) the addition of any local defendant (either originally or by amendment) would defeat diversity jurisdiction and

thus require remand to state court anyway, and (3) there were sound bases to allege tortious conduct of Mr. Sandoval and Tumwater Family Practice Clinic at least on information and belief, Mr. Meeks concluded that there were two procedural options: move in federal court for substitution and addition of parties defendant and then remand, or simply take a nonsuit against and refile in Thurston County against GE Medical Systems Information Technologies and the new defendants. The second option was taken because it was easier, less expensive, and saved 30-60 days to get to the same inevitable result. So, on March 17, 2004, Mr. Meeks filed in federal court the voluntary dismissal motion, which stated as fact that:

“Defendant has not pleaded any counterclaim, and has pleaded as an affirmative defense that it is not a proper party to this action. Present information indicates that such defense is well-taken.” (Emphasis added.)

CP 109-126.

By letter of March 16, 2004, Mr. Meeks said to Ms. Hughes and her firm colleague Paul Miller (who had joined the case):

“Enclosed are your copies of my motion for voluntary dismissal of this action and proposed order. The motion is set on the April 2 docket, but a stipulation from you will of course render that moot. Thank you for your courtesies.”

CP 109-126.

The federal court did not wait for April 2, but acted immediately by granting the motion, by order dated March 19,

2004. At no time after reading the motion and receiving the order did Ms. Hughes or Mr. Miller ever communicate to Mr. Meeks anything to the effect that Ms. Hughes had been “incorrect” in her statements regarding General Electric Company’s involvement.

CP 109-126.

On June 2, 2004, Mr. Meeks filed this action, No. 04-2-01099-1, naming GE Medical Systems Information Technologies, Inc. (“GEMS-IT”), Mr. Sandoval, and Tumwater Family Practice Clinic² as the known defendants. **CP 10-13.** Ms. Hughes and Mr. Miller appeared for GEMS-IT, but not for Mr. Sandoval, **CP 20-21**, and, after a motion for default, filed its Answer on October 14, 2004. **CP 22-26.** Paragraph 4 of the original complaint was repeated in the new suit as Paragraph 7, as follows:

On information and belief, at all relevant times defendant GE Medical is the manufacturer and product seller of the machine, and/or was responsible under contract or other form of legal relationship with Capital Medical Center and/or TFPC for its servicing, repair and maintenance.

In GEMS-IT’s Answer, Ms. Hughes and now Mr. Miller did the same thing, simply replacing General Electric Company with GEMS-IT in identical pleading allegations without any change whatsoever to their substance:

Answer, Paragraph 7: “Answering paragraph 7, deny for lack of information upon which GEMS-IT can form a well-founded belief.”

² Tumwater Family Practice Clinic was later voluntarily dismissed after proof by its counsel that there was no basis for it having liability in the matter. **CP 34-35.**

Affirmative Defense #3: "Improper Party. GEMS-IT is not a proper party to this action."

Affirmative Defense #5: "No Duty of Care. GEMS-IT owed Plaintiffs no duty of care and Plaintiffs' alleged damages were not proximately caused by any acts or omissions of GEMS-IT."

Affirmative Defense #6: "Intervening Cause. All or part of Plaintiffs' alleged damages were proximately caused by the intervening and superseding acts or omissions of entities and/or persons not joined herein and/or not in control of GEMS-IT, and Plaintiffs are not entitled to recover damages from GEMS-IT."

Mr. Meeks decided to get the truth as to the proper GE entity with discovery requests, directed to GEMS-IT to be answered based on its knowledge and that of its lawyers whom it shared with General Electric Company. A set had been served on GEMS-IT in June 2004 along with service of original process, but these had not yet been answered. Mr. Meeks reminded Mr. Miller of the need for these answers, and in addition on October 14th sent a second set, seeking the supporting evidence for the affirmative defenses and production of identified documents. Mr. Meeks, based on his perception that evasion tactics may be in progress based on corporate names and entities, and that Ms. Hughes and Mr. Miller as record counsel for both General Electric Company and GEMS-IT surely had or could acquire knowledge of things, included a custom-made preliminary note in those requests:

"NOTE 5: The term "you" means defendant GE Medical Systems Information Technologies, Inc. and each of its employees, officers, directors, and other form of agent,

including but not limited to the law firm of Montgomery Purdue Blankinship and Austin, PLLC and each of its members and employees, specifically including but not limited to attorneys Peggy Hughes and Paul Miller, who have or may have knowledge pertinent to these requests.

The pertinent requests were:

Interrogatory No. 3: Describe the evidence³ which you contend tends to prove your third affirmative defense (improper party). *As part of the answer, identify each person of whom you have knowledge who was and/or is at any time in a contractual or other form of business relationship with Capital Medical Center with respect to medical machinery physically located on the premises of the Tumwater Family Practice Clinic, including but not limited to the machine described in the complaint in this action.*

Interrogatory No. 17: Describe the evidence which would tend to show (1) whether or not there existed or exists any form of business relationship between you and Capital Medical Center and/or (2) the nature and extent of any such relationship, at any time within the five years preceding the commencement of this action.

Request for Production of Documents: Please produce for inspection and copying...each document identified in your responses to the foregoing interrogatories.

CP 109-126.

Twelve days later, answers to the first set arrived, signed only by Mr. Miller. In his Preliminary Statement, Mr. Miller stated that the responsive information “is not based solely upon the knowledge of Defendant GE Medical Systems Information Technologies, Inc. (“Defendant”) but also is based upon the

³ The term “describe the evidence” is defined in preliminary Note 2 as including a brief summary of facts and identification of witnesses and documents.

knowledge of its legal counsel....” (Emphasis added.) Excerpts

from the responses are:

Request for Production No. 1: Each document pertaining to the machine at the premises of the Tumwater Family Practice Clinic which on December 4, 2002 delivered an electric shock to Sharyn McPherson.

Response: *** Without waiving said objections, Defendant neither designed, manufactured, nor installed the machine or any component part thereof. Defendant also did not maintain, monitor, service or repair the machine at any time prior to the incident alleged in the Complaint. As a result, it is unlikely it has any unprivileged documents related to the machine at issue. Defendant is still trying to locate any such unprivileged documents and will produce them if located.

Request for Production No. 2: Each document pertaining to Sharyn McPherson.

Response: *** Without waiving said objections, Defendant neither designed, manufactured, nor installed the machine or any component part thereof. Defendant also did not maintain, monitor, service or repair the machine at any time prior to the incident alleged in the Complaint. As a result, it is unlikely it has any unprivileged documents related to Ms. McPherson. Defendant is still trying to locate any such unprivileged documents and will produce them if located.

Interrogatory No. 1: Identify each person who as an employee, agent and/or independent contractor or GE Medical Systems Information Technologies, Inc. was responsible for, performed or otherwise participated in the installation, assembly, maintenance, service and/or repair of said machine.

Answer: None. Defendant did not participate in the installation, assembly, maintenance, service or repair of the machine at issue at any time prior to the incident alleged in the complaint.

Interrogatory No. 2: Identify each person other than an employee, agent and/or independent contractor or GE Medical Systems Information Technologies, Inc. who was

responsible for, performed or otherwise participated in the installation, assembly, maintenance, service and/or repair of said machine.

Answer: At this time, Defendant is aware that Charles Sandoval of GE Medical Systems, a separate and different legal entity from Defendant, may have performed what could be described as maintenance, service and/or repair on the machine at issue. Ron Mattoon of GE Medical Systems may have been present during one or more of Mr. Sandoval's visits. Discovery is ongoing and this answer may be supplemented.

Interrogatory No. 3: Identify each person having any knowledge of facts regarding liability, stating in summary form the nature of such facts and identifying each document pertaining to such facts.

Answer: *** Without waiving said objection, Defendant is unaware of which individual or entity may be liable for the alleged shock to Ms. McPherson. Discovery is ongoing and this answer may be supplemented.

CP 109-126.

Mr. Meeks immediately reacted to these evasive answers and other perceived deficiencies by writing to Mr. Miller and Ms. Hughes, on October 27. The last part of the letter read:

Observation re Party Standing Issue and Litigation Conduct Choices

I'm a bit disappointed in what is more and more appearing to be a "Junior Litigator" shell game regarding which "GE" entity is the one whose conduct is at issue in this case. A wonderful way to handle this question is for those people who know this information – like you – to tell me all pertinent information so that it can be verified and the party status adjusted as appropriate, which can easily be done both verbally and by simply giving me the documents that you know pertain to this action, no matter who the proper "GE" defendant is or is not. I remember asking Peggy this specifically, and remember her declining to answer, and then having to wait another 30-60 days for the late discovery responses with incomplete information, and still having to write letters like this. This apprehension also extends to the choices being made as to how my very simple and straightforward discovery requests are responded to.

On November 5, Mr. Miller e-mailed that he would discuss the matter on November 8, and a telephone conference occurred on that day. Mr. Meeks related to Mr. Miller Ms. Hughes' earlier statements regarding "GE Medical Systems" in relation to GEC, and asked about the basis for the denial and affirmative defenses in light of them. Mr. Miller responded that the "entity" with responsibility for the machine was GE Medical Systems, which was a division of GEC, and that GE Medical Systems Information Technologies, Inc. was a software operation that had nothing to do with medical machinery and was not related to "GE Medical Systems," the division of GEC. Mr. Meeks told Mr. Miller about Ms. Hughes' repeated statements that the "GE Medical Systems" she was referring to was a "separate company" from GEC (which would not be true if it were a division of GEC), and he responded to the effect: "I don't know why she would say that." Mr. Meeks asked Mr. Miller to speak with Ms. Hughes regarding this and get back to him to get it straightened out. Mr. Miller promised to provide further information.

CP 109-126.

That was done in a letter dated November 16, 2004, in which Mr. Miller stated:

(2) To clarify the relationship amongst the various GE entities, I can tell you that GE Medical Systems, a separate legal entity from GE Medical Systems Information Technologies was responsible for the manufacture of some

of the parts of the x-ray apparatus at issue in this case. GE Medical Systems Information Technologies was not responsible in any way for the sale, design, or manufacture of any parts of the apparatus. GE Medical Systems (or one of its departments/divisions) provided servicing for the x-ray apparatus at the time of the alleged incident. GE Medical Systems was a division of General Electric Company. GE Medical Systems is now GE Healthcare, but is still a division of General Electric Company.

(3) GE Medical Systems Information Technologies and General Electric Company are insured with Electric Insurance Company. In the event your client was to obtain a judgment against General Electric Company, Electric Insurance Company would be responsible for paying the judgment. The reason why GE Medical Information Technologies responded to your request in the way that it did was because it was not involved in any way with the manufacture, design, or sale of the subject apparatus, and thus no insurance coverage would have been triggered since your client would not have prevailed against it.

CP 109-126.

So, it turned out that plaintiffs were correct in naming General Electric Company as the primary defendant in the 2003 case, and that Charles Sandoval had been acting as the agent for General Electric Company, not GEMS-IT, which meant that as of that time, plaintiffs had no reasonable factual basis under Rule 11 to proceed against GEMS-IT other than to verify with sworn discovery the statuses described by Mr. Miller.

On December 17, 2004, a case schedule order was issued, ***CP 27-30***, setting trial for February 6, 2006 and various case administration deadlines before then. Plaintiffs' counsel intended to take the necessary action to replace GEMS-IT with General Electric Company into the case once counsel's representations

were verified with discovery responses, but, for personal reasons not relevant now, further action on the case was not undertaken until the motion activity now to be described.

On October 27, 2005, GEMS-IT moved to compel discovery responses and for sanctions. **CP 39-50**. On November 4, 2005, the court granted this motion, requiring responses and payment of a sanction within ten business days. **CP 88-90**.

All of this time, the only parties in the case were plaintiffs and GEMS-IT; Mr. Sandoval, though named, had never been served with process and had never appeared.

On November 14, 2005, plaintiffs filed a third lawsuit on the matter, in which they named General Electric Company and Mr. Sandoval as the defendants, which was assigned case no. 05-2-02263-6 and shortly thereafter accomplished service of process upon General Electric. On November 22, they filed and noted for hearing on December 9, 2005 motions for (1) consolidation of the new action with this one, (2) amendment of the case schedule order to strike all remaining events and issue a new one, (3) compulsion of discovery responses from GEMS-IT, including the correct location of Mr. Sandoval for purposes of serving him with process, and (4) CR 11 sanctions arising out of Ms. Hughes' false pleading in the 2003 action. **CP 109-126**.

On December 2, despite the presence of local citizen Mr. Sandoval as a named defendant therein, General Electric Company, through the same attorneys who represented it in the 2003 case and were representing GEMS-IT in the 2004 case, removed the 2005 action to federal court under claimed diversity jurisdiction, where it was assigned case no. C05-5775 RBL.⁴ **CP 109-126.** On the same day, GEMS-IT (and not Mr. Sandoval) filed and noted for hearing on December 9 its motion to dismiss the 2004 case for alleged violation of the November 4 discovery order. **CP 183-200.** On December 7, GEMS-IT (and not General Electric Company and/or Mr. Sandoval) filed its opposition to plaintiffs' motions, claiming lack of subject matter jurisdiction on the motion to consolidate due to the 2005 case now being in federal court. **CP 24-258.**

On December 9, 2005, **CP 260-264**, the court issued the following order after hearing on the motions:

[1] Plaintiffs [must] provide full, complete, and signed responses without objections to defendant's first interrogatories and requests for production to defendant's counsel by close of business on December 19, 2005.

[2] If the court deems the responses unsatisfactory at hearing on January 6, 2006, this action shall be dismissed with prejudice and the court shall consider other sanctions at that time, except as otherwise determined by the court.

⁴ The federal court later, in May 2006, remanded the case to the superior court for lack of diversity jurisdiction, where it is now pending in a different department.

[3] Plaintiffs' motion for consolidation is denied for present lack of subject matter jurisdiction due to removal to federal court of cause no. 05-2-02263-6.

[4] Plaintiffs' motion for amendment of the case schedule order in cause no. 04-2-01099-1 is granted:

A. Trial date is continued to May 1, 2006

B. Judicial Assistant to issue amended case schedule order

[5] Plaintiffs' motion for discovery orders is granted in part:

A. Charles Sandoval shall appear in person at the address given in Paul Miller's November 16, 2004 letter for purposes of receiving service of process, at an agreed time between 9:00 a.m. and 12 noon on Thursday, December 15, 2005

B. If he does not do so, defendant GEMS-IT and/or attorneys Peggy Hughes and Paul Miller shall no later than December 19 provide to Steven Meeks Mr. Sandoval's full and complete residence and business addresses and telephone numbers

[6] Plaintiffs' motion for CR 11 sanctions is denied for present lack of subject matter jurisdiction, without prejudice.

On December 13, 2005, Charles Sandoval, at the direction of GEMS-IT's attorneys, personally appeared at Mr. Meeks' office and was served with process in the 2005 action, and shortly thereafter, in the federal court, entered his appearance in that action through Ms. Hughes and Mr. Miller. He did not enter any appearance in the 2004 action. **CP 335-346.**

On December 15, the court issued an amended case schedule order, setting trial for May 1, 2006, a January 31 deadline

for plaintiffs' disclosure of fact and expert witnesses, and a discovery cutoff of March 15, 2006. **CP 265-267.**

On December 29, after plaintiffs complied with the December 9 order by serving supplemental discovery responses. GEMS-IT moved again for dismissal as a discovery sanction, claiming that the responses were deficient. **CP 272-287.** Plaintiffs responded to the effect that there had been no violation of the court's December 9 order because the responses were full and complete to the extent of presently available information and that depositions were already set in January for the various entities involved, including on the question of verifying whether or not GEMS-IT was or was not a proper party in the action. **CP 310-313.** On January 6, the court denied GEMS-IT's motion. **RP January 6, 2006, p. 43.**

Since the beginning of the 2005 action, starting with the November 22 motion for consolidation, plaintiffs' counsel had made it crystal clear to the court and counsel that his intent was to not go forward with the 2004 action once GEMS-IT's noninvolvement was confirmed by sworn discovery responses and to proceed against General Electric Company and Mr. Sandoval in the 2005 action, as reflected in this exchange at the January 6 motion hearing:

THE COURT: *** I have yet to draw any conclusions that this case can possibly be prepared within the time limits that have been established here.

MR. MEEKS: All right. It might be. It all depends. And that goes to the other point, the idea of dismissal as a sanction.***That is not a remedy that should be granted on a CR 37 motion.

THE COURT: All right.

MR. MEEKS: So, you know, this – like I said, I suspect that this is a tempest in a teapot. I have – I received information from counsel that GEC was not a proper party defendant. I had no information to the contrary. I changed. I took a nonsuit out of federal court. I then sued the party that sounded like the one they said was the right one, and that turns out that's not the right one, either. And so I needed to change the party defendants again. I have taken action to do that. As soon as I can get verification of GEMS-IT's status, I will say under Civil Rule 11 that I have no basis to proceed against them, and then you'll make whatever decision you make at that point. So, I mean, the case is really – the major case is going to be the one against GEC, which will most likely be remanded to state court as soon as I finish the motion for remand.***

THE COURT: What's the status of the individual defendant at this point?

MR. MEEKS: *** He has been served in the lawsuit against General Electric Company that was filed in December 2005 in Thurston County Superior Court and was removed to federal court.

THE COURT: I see. Now, has he been named and served in this lawsuit?

MR. MEEKS: He was named, not served.

THE COURT: Okay. So at this point the defendant that we are referring to as "GEMS-IT", GE Medical Systems Technologies, is the only defendant who has been served and remains in the lawsuit. Is that correct?

MR. MEEKS: Essentially. That's essentially correct. And Mr. Sandoval is scheduled as a third party witness in this lawsuit on January 23rd. ***

(Each emphasis added.)

RP January 6, 2006, pp. 34-37.

Earlier in the hearing, Mr. Miller confirmed that he represented only GEMS-IT in the 2004 action, and used the pendency of the 2005 action as support for his argument for dismissal, by arguing that it would only "clear up a procedural mess" and would have no effect on the right of appellants to their day in court:

THE COURT: Now, GE Medical Systems Information Technologies is the defendant that you represent here.

MR. MILLER: Correct.

THE COURT: There is no other corporate defendant left in this case.

MR. MILLER: Correct.

THE COURT: All right. Why do you refer to [General Electric Company] as a defendant?

MR. MILLER: Well, I – they are defending in another lawsuit. Right around the time of our hearing on December 9th, Mr. Meeks filed another action naming General Electric Company related to the same incident, and I don't know if you recall, but he sought to have those actions consolidated. But that case had been removed to federal court, and you were un – you were not able to do that because you lacked jurisdiction.

GE, the defendant in the current federal court action [is a separate entity from GEMS-IT].***I can represent to the court right now, that General Electric Company did manufacture some of the components that are at issue related to the x-ray machine. And so the main point I'm trying to make here is, by you dismissing this case, you're not going to be prejudicing the McPhersons [by] keeping them from having their day in court.

The proper defendant here is GE Company. There's a current, ongoing lawsuit against them in federal court. That case is in its infancy.***And the McPhersons are going to have their opportunity to have their day in court against the proper defendant in this case, GE Company. So, by you dismissing this case here...it just kind of clears up a procedural mess here in terms of two sort of competing lawsuits against different defendants related to the same incident....So I wanted to – I just wanted to make that point that it's not that you're not – it's not the death penalty you would be handing down to the McPhersons here if you decide to dismiss this case."

(Each emphasis added.)

RP January 6, 2006, pp. 7-10.

After the January 6 hearing, counsel reached a stipulation: the then-scheduled 30(b)(6) depositions of General Electric Company, GEMS-IT and Capital Medical Center would be stricken, the witness disclosure deadline would be extended to February 6, and GEMS-IT would produce its agent Christopher Osbourne on January 19 for a deposition to confirm the facts regarding its noninvolvement, and if his testimony did that the 2004 action would be dismissed, with prejudice against GEMS-IT. That deposition occurred, Mr. Osbourne testified as expected, and the

understanding between counsel was that the 2004 case would not go forward. Counsel exchanged by e-mail in the following weeks proposals as to the form of order to be entered, as evidenced in an e-mail exchange of February 16, 2006. **CP 335-346.**

On March 10, 2006, with a note of issue for March 17, attorney Miller filed another dismissal motion, **CP 324-329**, entitling it as a motion for “discovery sanction, order in limine, and for dismissal,” reciting the stipulation as confirmed in the February 16 writing and inferring that plaintiffs were responsible for the case not being dismissed yet, so that the motion was necessary so as to:

“bring this case to a close and remove it from the Court’s calendar, as well as to save further expense by the parties and the Court in dealing with other case schedule requirements.”

After receiving the motion, Mr. Meeks telephoned Mr. Miller and pointed out he had been waiting for Mr. Miller to send another draft proposal. Mr. Miller checked this, and on March 13 sent this e-mail to Mr. Meeks:

“Steve,

Here is the new draft of the dismissal for GEMS-IT. I could not locate my prior e-mail, so its possible that the newest draft never found its way to you. Please review and let me know if it is ok. If so, I will sign and send it to you. The only change was to more precisely state the representations that were made by GEMS-IT in its statements and discovery responses.”

CP 335-346.

The order as to GEMS-IT was then agreed to, and it was entered ex parte on March 15, 2006, with GEMS-IT being dismissed with prejudice based upon the veracity of its prior statements of record and discovery responses. **CP 335-346.**⁵

A new twist, however, had been introduced with the filing of this motion: the motion was brought by Mr. Miller not only on behalf of GEMS-IT, but also on behalf of Mr. Sandoval and his wife, who had never been served with process and had never before entered any form of appearance in the 2004 case. Counsel discussed this, with Mr. Miller indicating his intention to move forward with the motion on behalf of the Sandovals, so on March 16 plaintiff's counsel filed their opposition to the motion, noting its mootness as to GEMS-IT and agreeing to dismissal of the Sandovals so long as that was without prejudice. Upon receipt of the opposition, Mr. Miller struck the matter from the March 17 calendar. **CP 335-346.**

On March 22, plaintiffs then re-noted for March 31 the Sandovals' dismissal motion so as to complete the termination of the 2004 case, and joined in such motion, except to contend that there was no basis for any such dismissal being with prejudice. **CP 348-356, 357-358.**

⁵ This fact is undisputed, but it appears that this document was mistakenly omitted from appellant's designation of clerk's papers, so there is no CP reference available. This omission will be corrected appropriately.

On March 31, the court granted the motion to dismiss, with prejudice. **CP 362-363**. This timely appeal has followed, **CP 364-368**, with the only issue being that the dismissal was with prejudice instead of without.

ARGUMENT

A. Governing Law

CR 41 where pertinent reads:

(a) Voluntary Dismissal.

(1) *Mandatory*. Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:

(A) By Stipulation. When all parties who have appeared so stipulate in writing;

(4) *Effect*. Unless otherwise stated in the order of dismissal, the dismissal is without prejudice***

(b) Involuntary Dismissal; Effect. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

It is the general policy of Washington courts not to resort to dismissal lightly. When a trial court imposes dismissal or default in a proceeding as a sanction for violation of a court order, it must be apparent from the record that (1) the party's refusal to obey the order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the

trial court explicitly considered whether a lesser sanction would probably have sufficed. A party's disregard of a court order without reasonable excuse or justification is deemed willful. *Rivers v. Washington State Conference of Mason Contractors, et al.*, 145 Wn. 2d 674, 686-87, 41 P. 3d 1175 (2002), citing *Burnet v. Spokane Ambulance*, 131 Wn. 2d 484, 494, 933 P. 2d 1036 (1997), and *Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn. App. 125, 129, 896 P. 2d 66 (1995).

The abuse of discretion standard governs review of sanctions for noncompliance with court orders. 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. The trial court's reasons should, typically, be clearly stated on the record so that meaningful review can be had on appeal. *Rivers*, at 684-85; *Burnet*, at 494-95.

B. The Trial Court Abused Its Discretion In Entering the Sandoval Dismissal Order With Prejudice

Charles Sandoval⁶ had never appeared in this action until he voluntarily and unilaterally did so by joining in the March 10 motion to dismiss by GEMS-IT,⁷ after the active parties had

⁶ and his wife Lupita, named as "Jane Doe" in the complaint

⁷ A defendant "appears" in an action when he answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance. RCW 4.28.210.

reached a settlement agreement as to disposition of the 2004 case, and after Mr. Sandoval had, for three months, been named and served and had appeared as a defendant in the 2005 case along with his true employer General Electric Company. The motion was expressly made so as to “bring this case to a close and remove it from the Court’s calendar, as well as to save further expense by the parties and the Court in dealing with other case schedule requirements,” and was entirely appropriate given the termination of the case against GEMS-IT and the pendency of the 2005 action, so plaintiffs joined in the motion to dismiss for the stated purpose. Thus, Mr. Sandoval and plaintiffs stipulated in writing that the 2004 case should be dismissed by the court, and the effect of such dismissal, unless otherwise stated by the court, is that it is without prejudice.

The court, however, treated the Sandoval motion as one for dismissal for failure to comply with the December 15 case schedule order and dismissed with prejudice. It had no basis in fact or law to do so.

1. The Case Schedule Order Did Not Apply to Sandoval

In Thurston County, LCR 16 governs the issuance of case schedule orders. Upon filing, the case is assigned to particular judge and an initial status conference date set. LCR 16(c)(1). The notice of assignment/notice of status conference must be served

upon a defendant, either with the initial pleadings or within 10 days of the filing of the first pleading by a defendant. LCR 16(c)(2). The purpose of the status conference is to address all issues in the case schedule order and to enter the order. LCR 16(d). The parties or their lead counsel of record must confer with each other and appear in court to discuss case administration topics, and the court by agreement of the parties or decision enters a case schedule order, which can be later modified in the discretion of the court upon motion of a party or its own initiative. LCR 16(d)(5). If a party joins an additional party, he must serve the additional party with the current case schedule order and all other pleadings. LCR 16(d)(6).

Each superior court department in Thurston County has its own case schedule order form. The form for Department 4 includes a deadline for adding parties to case, which in this case was set initially as August 15, 2005 and never changed thereafter.

Mr. Sandoval, although named as a defendant as the agent of GEMS-IT in this the 2004 case, was never brought under the court's personal jurisdiction by plaintiffs. He was not an active party when either the original or amended case schedule order was issued, or at any time before the active parties GEMS-IT and plaintiffs reached agreement as to resolution of the matter, which

mooted the case schedule order deadlines pending entry of an agreed dismissal order.

Mr. Sandoval clearly could not be bound by the December 15 case schedule order, and plaintiffs never did anything to assert that he should be. With no mutuality of obligation, clearly the order does not apply to Mr. Sandoval.

2. Plaintiffs Did Not Violate The Case Schedule Order

The March 10 motion was entitled as being for (1) discovery sanction, (2) order in limine, and (3) dismissal, but in reality was for dismissal only based upon the agreement to discontinue the case after the Osbourne deposition. Discovery sufficiency issues had already been resolved by the December 9 and January 6 motions orders. Dismissal was sought based upon the discontinuance agreement, and the motion was made while Mr. Miller was under the mistaken impression that the "ball was in the court" of plaintiffs regarding the GEMS-IT dismissal order form. Mention was made that plaintiffs had not disclosed any witnesses by February 6, but it is indisputable that the reason for this is that the agreement was reached prior to that, shortly after the Osbourne deposition, and that the matter had been transformed from active litigation to resolved litigation with the only thing remaining being the appropriate form of dismissal order. So, the case schedule order

was mooted by the settlement between the only active parties in the litigation at that time.

So, when Mr. Sandoval chose to enter the case, there was nothing left to do other than formally terminate it by dismissal order, with all issues on the matter to be determined in the 2005 case with the correct party defendants fully named, served, and active. Accordingly, there was no violation of any court order at all, much less one that would justify the punitive sanction of a dismissal with prejudice.

3. No Willful or Deliberate Violation of Order

Assuming *arguendo* that the case schedule order was still in effect on March 10 and that it applied to the never-prosecuted claim against Mr. Sandoval, the only possible basis for a claimed violation was plaintiffs' not disclosing witnesses by February 6. A "willful or deliberate" violation is one made without reasonable excuse or justification. Here, the reason for the nondisclosure was the indisputable fact that the parties had reached agreement that the 2004 case would not be further prosecuted, which agreement was reached at a time when Mr. Sandoval had not appeared in the case and was actively defending in the 2005 matter. This is without question a "reasonable" excuse or justification for the nondisclosure.

4. No Prejudice To Mr. Sandoval's Ability to Prepare for Trial

Assuming *arguendo* that plaintiffs committed some wrongful "action" even though they never invoked the court's personal jurisdiction over Mr. Sandoval, the nondisclosure in no way prejudiced or could prejudice Mr. Sandoval's ability to prepare for trial. He unilaterally entered the case knowing of the discontinuance agreement and that trial would not be going forward, and that plaintiffs' intent was to prosecute the matter in the 2005 action in which he was already an active defendant.

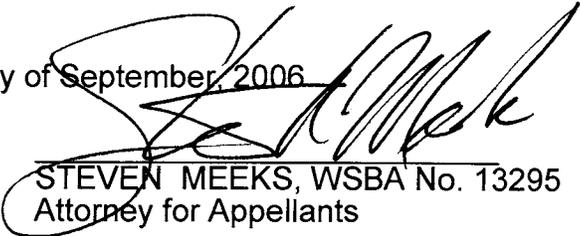
5. Sufficiency of Lesser "Sanction"

The trial court administered the harshest form of "sanction": dismissal with prejudice, when dismissal without prejudice would have fully sufficed to protect Mr. Sandoval's interests, which were in no danger whatsoever in the 2004 matter.

CONCLUSION

There was no basis in fact or law for the trial court to enter the dismissal order with prejudice. This court is requested to reverse that order and remand with directions to enter the order without prejudice.

Dated this 19th day of September, 2006



STEVEN MEEKS, WSBA No. 13295
Attorney for Appellants

PROOF OF SERVICE

As a competent adult nonparty person, on September 20, 2006 I served a complete and true copy of the original of this document to:

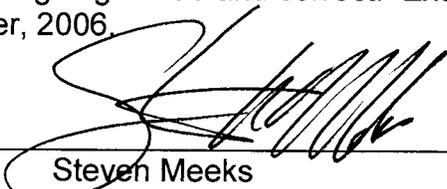
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Via:

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- Personal delivery to the office address shown via agent ABC Legal Services

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BY _____

I declare under penalty of perjury under Washington law that the foregoing is true and correct. Executed this 19th day of September, 2006.



Steven Meeks