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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**WASHINGTON STATE COURT OF APPEALS
DIVISION III**

No. 32615-2-III

JAMES T. MORROW and DAWN M. MORROW,

Appellants,

v.

VICKI A. TOMSHA,

Respondent

APPELLANTS' RESPONSIVE BRIEF

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A. STATEMENT OF THE CASE — CLARIFICATION

The basic facts underlying the present case are not in dispute. Additionally, the Respondents' conduct is not at issue, and any such inference heretofore manifested by Appellants' comments is expressly withdrawn.

This case was filed February 18, 2014. A Case Assignment and Notice Order was undoubtedly issued by the Clerk's office to whomever filed the documents, establishing a case status conference before Judge Price, set for May 23, 2014. CP 8.

The status conference was not calendared by Plaintiffs' counsel, although the normal and proper course in his office would have been to do so. CP 18, ¶ 12. There is no apparent reason for the matter not having been calendared, other than inadvertence.

Inasmuch as the status conference was not calendared, Plaintiffs' counsel did not appear.

Defense counsel filed a notice of appearance on May 29, 2014, having been served on May 16, 2014, one week before the status conference. Appendix, p. 1.

Because Plaintiffs' counsel did not appear at the status conference, Judge Price issued an Order to Show Cause on May 23, 2014, which stated in relevant part as follows:

IT IS HEREBY ORDERED that plaintiff and defendant, James T. Morrow and Dawn M. Morrow and Vicki A. Tomsha, appear before this court on June 6, 2014, at 8:30 a.m., and show cause why this case should not be dismissed.

If the plaintiff and defendant, or an attorney on their behalf, does not appear before this court on said date, this matter *will be* dismissed.

[Emphasis added]. CP 9. The sanction for non-compliance was clearly set forth and clearly preordained by the court: Dismissal.

On Friday, June 6, 2014, Plaintiffs' counsel had two other matters pending in Superior Court, both of which he attended, but he did not appear for the show cause hearing set by Judge Price. CP 25, ¶ 5. Plaintiffs' counsel did not advise Judge Price of scheduling conflicts, nor otherwise contact the court before the hearing. He called Judge Price's judicial assistant after he returned to his office later that morning and left a recorded message regarding his absence from the show cause hearing. CP 19, ¶¶ 16-17.

Sometime in the morning or afternoon of June 6, Judge Price entered an order sanctioning Appellants, expressly finding that (1) the Plaintiffs did not appear for the show cause hearing, (2) the case is inactive, and (3) good cause exists for dismissal. The order concluded with "This case is dismissed." CP 14.

On Monday June 9, Plaintiffs' counsel went to Judge Price's court and learned from his Judicial Assistant, Ms. Collins, that the case had been dismissed on June 6. CP 19, ¶ 17.

On June 13, 2014, Plaintiffs filed a Motion for Reconsideration, supported by counsel's declaration, requesting that the court vacate its dismissal order and reinstate the case as active. CP 16.

On June 17, Judge Price entered findings of fact reciting the procedural facts set forth above, noting that "counsel does not explain how a regularly scheduled case scheduling order that is provided in virtually every civil case filed in Spokane County Superior Court providing a status conference date and time was completely overlooked." CP 25, ¶ 9.

The court further noted that "counsel offers no viable excuse or basis to explain or otherwise make clear why counsel could not have notified this department in advance...." and "counsel simply failed to appear at both hearings and then asks the Court to set aside a valid order of dismissal necessitated only by counsel's failure to properly note or seriously consider the importance of appearing at regularly scheduled Court hearings." CP 27, ¶ 7.

The trial court did not enter a finding that the failure to appear was deliberate or willful but, rather, that Appellants' trial counsel provided no

explanation or “viable excuse” for his absence. E.g., CP 25, ¶ 9; CP 27, ¶ 7.

Appellants’ trial counsel submits that his failure to appear at the status conference and the show cause hearing was the result of inadvertence: That is, proper calendaring of the status conference was not done, and the show cause hearing was overlooked in the press of having three matters pending for the morning of Friday, June 6. Certainly, there is no inference to be made from the surrounding facts that his absences were the product of a tactic or plan to gain advantage. Rather, it was the product of inattention.

As the trial court and Respondents correctly point out, it would have been physically possible and highly preferable for Appellants’ trial counsel to contact Judge Price’s staff in the morning *before* scheduled proceedings began and apprise them of his schedule conflicts

The contention advanced by Appellants from the foregoing facts is not that failure to appear at the scheduled proceedings should simply be excused by the trial court. Rather, the contention is that the sanction of dismissal was excessive and, therefore, an abuse of discretion. The less harsh but effective sanction of a monetary penalty was available to the court.

B. ISSUE

The Respondents have correctly stated the core issue: “The question presented on review was [sic] whether, under the facts and circumstances of the case, there was an abuse of discretion in the underlying Court’s dismissal of Appellants’ case.” Resp. Br., p.4.

The issue might be more precisely stated as: Where, due to inadvertence and oversight, counsel has missed a status conference set by the initial scheduling order, and missed the resulting show cause hearing, did the trial court abuse its discretion by imposing the sanction of dismissal of Plaintiffs’ cause of action?

C. ARGUMENT

1. Introduction

The four substantive sections of Respondents’ brief assert three basic arguments in support of dismissal.

First, Respondents say dismissal was proper because Appellants’ failure to appear was willful. Resp. Br. p. 5.

Second, they say the trial court has authority to dismiss Plaintiffs’ cause of action, based on noncompliance with its Order to Show Cause. Resp. Br. p. 7.

Third, and in support of both prior points, Respondents contend that failure of Appellants' trial counsel to advise the court of scheduling conflicts *in advance* of the show cause hearing on June 6 provides evidence of willfulness. Resp. Br. p. 10. While the foregoing suggestion by Respondents is undoubtedly correct and preferable, the conclusion that failure to do so demonstrates "willful" conduct is not supported by the facts.

As to Respondents' first point, Appellants contend the failure to appear at either proceeding was inadvertent and inattentive, not willful.

As to the second of Respondents' points, Appellants do not question that a trial court has authority and consequent broad discretion to sanction noncompliance with its rules and orders. However, based on interpretations of applicable court rules by our appellate courts regarding the imposition of sanctions, such discretion is not limitless, and is circumscribed by standards. Appellants respectfully submit those standards were not followed by the trial court and, therefore, dismissal constituted an abuse of discretion.

As to the third point, and as noted above, it certainly would have been preferable had Appellants' trial counsel gone to Judge Price's courtroom in advance to advise them of his schedule conflicts. Such action would probably have avoided the possibility of overlooking

the matter later in the morning. But he did not do so and, unfortunately, did not remember the show cause hearing until he returned to his office.

It is against the foregoing factual backdrop that Judge Price's dismissal of Plaintiffs' cause of action must be measured regarding abuse of discretion.

2. Actions Of Counsel Not "Willful"

In *In re Disciplinary Proceeding against Lopez*, 153 Wn.2d 570, 611,106 P.3d 221 (2005), meaning of the term "willful" was discussed by Justice Owens in her dissent, in which she argued that conduct of the subject attorney was not willful:

The adjective "willful" is defined as "done deliberately: not accidental or without purpose: *intentional*, self-determined." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2617 (2002) (emphasis added); *see also* BLACK'S LAW DICTIONARY 1630 (8th ed.2004) (defining "willful" as "[v]oluntary and *intentional* " (emphasis added)).

In *In re Disciplinary Proceeding Against Vanderveen*, 166 Wn.2d 594, 211 P.3d 1008 (2009), attorney Vanderveen argued that his failure to file a currency report with the IRS was not intentional, even though he pleaded guilty to a "willful" violation of the relevant federal statute. Rejecting Vanderveen's argument, the Court stated, at 607, fn. 19:

Additionally, the plain language meaning of the word "willful" is synonymous with "intentional." The adjective "willful" is defined as "done deliberately: ... intentional." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2617 (2002); *see also* BLACK'S LAW DICTIONARY 1630 (8th ed.2004) (defining "willful" as "[v]oluntary and intentional, but not necessarily malicious").

In *Ryan v. Harrison*, 40 Wn. App. 395, 397, 699 P.2d 230 (1985), a crop-dusting pilot mistakenly fumigated the wrong field. His insurance policy excluded coverage regarding "deliberate" conduct by an insured that caused damage. In construing the term "deliberate," the court determined the meaning as follows:

Deliberately is ordinarily defined as willful, intentional; purposely, well thought out; careful consideration of the consequences of a step. Black's Law Dictionary 513 (4th rev. ed. 1968); 3 Oxford English Dictionary 159 (1969); Webster's Third New International Dictionary 596 (1969). The facts must be considered in light of these definitions.

The court held that application of the herbicide was preceded by careful preparation and planning and the material was intentionally spread on the fields. The fact that the wrong fields were fumigated did not render the conduct accidental.

As stated by the Court in *Lopez and Vanderveen, supra*, the "plain language meaning" of willful is synonymous with intentional and

deliberate. There is no evidence in the record that counsel's failure to attend either proceeding was intentional.

Citing *Anderson v. Mohundro*, 24 Wn. App. 569, at 574, 604 P.2d 181 (1979), Respondents assert, as did Division 1 in that case, that “*Any violation of an explicit court order without reasonable excuse or justification must be considered a willful act.*” [Emphasis added.] Resp. Br. p. 11. Application of the general principle, however, must involve consideration of (1) actual meaning of the word willful, and (2) the nature of surrounding circumstances, which circumstances may or may not merit an inference of willful conduct.¹

First, and as noted by the Court in *Lopez* and *Vanderveen*, the actual meaning of “willful” does not include inadvertent, accidental, or negligent conduct.

Second, circumstances in which the term “willful” has been applied to a failure to comply with court orders or rules have involved repeated instances of noncompliance that burden an opposing party and the court, and certainly do not typically compare with the regrettable but low-impact facts underlying this case. See for example: *Woodhead v.*

¹ “What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.” *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979): (proper to vacate default, where petitioner was not provided notice of trial by ex-husband).

Discount Waterbeds, Inc., 78 Wn. App. 125, 896 P.2d 66 (1995): (dismissal upheld where Woodhead diverted rent from landlord, employed delaying tactic by failure to serve complaint on defendants, deliberately attempted to mislead court, and prejudiced the defendants' position); *Allied Financial Services, Inc. v. Mangum*, 72 Wn. App. 164, 864 P.2d 1 (1993): (exclusion of witnesses affirmed where party failed to provide witness list); *Apostolis v. City of Seattle*, 101 Wn. App. 300, 3 P.3d 198 (2000): (dismissal upheld where plaintiff's counsel failed to provide scheduling order to opponent after repeated requests, and failed to comply with mediation requirements); *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 584-585, 220 P.3d 191 (2009): (dismissal of defense affirmed where Hyundai's responses to discovery repeatedly false, misleading, and evasive, coupled with intentional failure to supplement and correct misleading responses); *Johnson v. Horizon Fisheries, LLC*, 148 Wn. App. 628, 201 P.3d 346 (2009): (dismissal affirmed where Plaintiff voluntarily dismissed suit, re-filed, then failed to pay Defendant of \$2,762.57 pursuant to CR 41(d), and failed to comply with witness disclosure requirement); *Associated Mtg. Invest. v. G.P. Kent Const. Co., Inc.*, 15 Wn. App. 223, 548 P.2d 558 (1976): (despite extensions, party failed to pay \$300.00 terms and provide full discovery responses, right up to one week before

trial); *Jewell v. City of Kirkland*, 50 Wn. App. 813, 750 P.2d 1307 (1988): (failure to pay deposit for preparation of administrative record, despite reminders and extensions from opposing counsel and the trial court).

On the other hand, in many cases where a party has failed, to one degree or another, to comply with court rules and/or court orders, trial court sanctions have been reversed based on excessiveness and/or the absence of evidence demonstrating truly “willful” and/or prejudicial conduct. See, for example, *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, at 494, 933 P.2d 1036 (1997): (trial court’s exclusion of plaintiffs’ experts and related discovery reversed where trial court did make record (1) willful, deliberate noncompliance, (2) prejudice regarding opponent’s ability to prepare for trial, and (3) whether a lesser sanction would probably have sufficed;² *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002): (dismissal of discrimination action as sanction reversed where trial court failed to comply with *Burnet* considerations); *Marina Condominium Homeowner’s Ass’n v. Stratford at Marina, LLC*, 161 Wn. App. 249, 254 P.3d 827 (2011): (discovery sanction of default reversed, where defendant failed to

² The Court noted, in addition, at 497-498: “Furthermore, even if the trial court had considered other options before imposing the sanction that it did, we would be forced to conclude that the sanction imposed in this case was too severe in light of the length of time to trial, the undisputedly severe injury to Tristen, and the absence of a finding that the Burnets willfully disregarded an order of the trial court.” [Citations omitted.]

comply with discovery requests, but trial court failed to substantiate *Burnet* considerations; *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 128-129, 89 P.3d 242 (2004): (trial court's dismissal of action for willful failure to comply with CR 5 reversed, court of appeals holding that dismissal not supported by *Burnet* criteria regarding willful, deliberate conduct or prejudice to opponent).

A common thread running through cases such as those cited above, whether involving affirmance or reversal of sanctions, is a calculation by each reviewing court as to whether there is a degree of culpability that really evidences "willful" conduct or creates prejudice sufficient to merit an inference of willfulness by an offending party. See, e.g., *State v. Shifferl*, 51 Wn. App. 268, at 273, 753 P.2d 549 (1988): (criminal complaint dismissed by trial court based on prosecutor's negligence, reversed where court found degree of negligence insufficient to merit dismissal: "...there are degrees of negligence, degrees of culpability, as well as degrees of prejudice, and only if the balance weighs so that the result offends fundamental conceptions of justice is dismissal justified.")

The foregoing comment by the court in *Shifferl* would seem to parallel the principles underlying, for example, *Burnet*, *Rivers*, *Will*, and *Marina Condominium*. That is, dismissal is a harsh sanction, and should

not be imposed in the absence of carefully weighing (1) the nature of the purported offensive conduct, and whether that conduct, even though deficient, was undertaken willfully and deliberately, (2) whether that conduct actually prejudiced an opponent's ability to prepare for trial and, finally, (3) whether no lesser sanction would probably have sufficed.

In the present case, the trial court was understandably irritated by the failure of Appellants' trial counsel to appear for the show cause hearing on June 6. Nonetheless, dismissal of Appellants' lawsuit must be reversed, because circumstances surrounding the dismissal do not comport with current standards applicable to such sanctions.

First, the trial court's Show Cause Order established something of a "hell-or-high water" red line mandating dismissal, regardless of surrounding facts, and regardless of criteria established by our Supreme Court in *Burnet* and *Rivers*. Wording of the Show Cause Order left no room for consideration of the *Burnet* factors. Additionally, consideration of those factors would have required that the trial court disavow the mandatory words in its Order To Show Cause — which may very likely have been eschewed as antithetical to firm and effective docket management.

Second, the trial court's Order On Reconsideration unjustifiably invoked a fiction to substantiate the dismissal, at least in part. Certainly,

there was no evidence that the case had become “inactive,” inasmuch as a declaration of service and Defendants’ notice of appearance had been filed within the prior three weeks. CP 13; Appendix, p. 1.

Third, the trial court’s findings in the Order On Reconsideration did not state that the failure to appear at either the status conference or the show cause hearing was willful, as that term has been interpreted by our Supreme Court, e.g., *Lopez* and *Vanderveen*, *supra*. The trial court found that Mr. Bardelli’s affidavit did not “explain why he did not contact this department until after the show cause hearing,” and “counsel does not explain how a regularly scheduled case scheduling order that is provided in virtually every civil case filed in Spokane County Superior Court providing a status conference date and time was completely overlooked.” CP 25, ¶ 9.

The trial court’s queries are, of course, perfectly reasonable. The only reasonable answer that can be inferred from the facts is that the status conference notice was indeed “overlooked” and not properly calendared in keeping with counsel’s normal practice. And, the show cause hearing was overlooked in the press of events on the morning of June 6. It is not here suggested that counsel’s omissions must or should be overlooked: The failure to appear at the proceedings constituted mistakes, and there is no

other explanation. Rather, the point is simply that the mistakes occurred, but the sanction imposed was excessive.

Fourth, the underlying facts do not support the inference that the failure to appear at the show cause hearing was willful, in that there was no history of repeated instances of noncompliance with court rules or court orders, such as occurred in, for example, *Woodhead v. Discount Waterbeds, Inc.*, *Allied Financial Services, Inc. v. Mangum*, *Apostolis v. City of Seattle*, *Magana v. Hyundai Motor America*, *Johnson v. Horizon Fisheries*, *Jewell v. City of Kirkland*, *Associated Mortgage v. G.P. Kent*. In that regard, this case had been filed in February, the Defendants had just recently entered a notice of appearance, no answer had been filed by the Defendants, and no discovery had been undertaken by either party.

Fifth, because the case was in its infancy, the opposing side was not prejudiced by the failure of Plaintiffs' counsel to appear at either the status conference or the show cause hearing. The preceding sentence is not meant to infer in the least that the trial court was not rightly upset, nor that it should not have considered and/or imposed some type of meaningful sanction. Rather, the point is, again, that because trial counsel's absence was not willful and deliberate, and opposing counsel was not prejudiced, the sanction of dismissal was excessive.

Sixth, the trial court made no record of whether it considered a lesser sanction, which point is discussed below.

3. Discretion Not Unlimited

As discussed previously, Appellants do not question the trial court's authority to impose a sanction in the present case.

The Respondents cite *Associated Mtg. Invest. v. G.P. Kent Const. Co., Inc.*, 15 Wn. App. 223, 548 P.2d 558 (1976) and *Jewell v. City of Kirkland*, 50 Wn. App. 813, 750 P.2d 1307 (1988) for the frequently repeated propositions that trial courts have broad discretion as to choice of sanctions, and that their discretionary determinations 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. In that regard, those principles were recited as part of the Court's rulings in both *Burnet*, 131 Wn.2d 484, at 494, and *Rivers*, 145 Wn.2d 674, at 684-685. The Court made clear in both cases that those principles are, however, qualified by requirements that call upon trial courts to weigh the surrounding circumstances carefully before dismissing a cause of action or an entire lawsuit.

In *Burnet* the trial court limited plaintiffs' discovery and prohibited expert testimony regarding negligent credentialing of two physicians by

Sacred Heart Hospital, in essence stripping that claim from the lawsuit. In reversing the trial court's rulings, the Supreme Court stated:

Such 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." [Citation omitted] Those reasons should, typically, be clearly stated on the record so that meaningful review can be had on appeal. When the trial court "chooses one of the harsher remedies allowable under CR 37(b), ... it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed," and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial.

Id., at 494. Finding that the trial court made no record regarding actual consideration of lesser sanctions, the case was remanded for trial on the issue of negligent credentialing. As mentioned above (p. 11, fn. 2), the Court stated that even if the trial court had made a record of its considerations of a lesser sanction, it would have reversed because the sanction was simply excessive.

In *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002), the trial court dismissed with prejudice plaintiff's gender discrimination complaint against Fairweather Masonry Company because she did not comply with a court order directing her to follow a discovery order and case event schedule

deadlines, failed to meet several discovery extensions, and failed to file a case status report. On review, the Court reversed the dismissal and remanded for the trial court to make a record regarding the *Burnet* factors, stating in part:

The court in *Burnet* held that sanctions imposed by a trial court is a matter of judicial discretion to be exercised in light of the particular circumstances, but that the sanction imposed should be *proportional* to the nature of the discovery violation and the surrounding circumstances. That decision establishes a *gauge* for determining disproportionate sanctions. The court stated that even if the trial court had considered other options, the sanctions were still too severe considering the length of time (eighteen months) before trial was scheduled to begin, the severe injury to plaintiff, and the absence of a finding that the plaintiffs willfully disregarded a trial court order.

Id., at 695, emphasis added. The Court noted that although the trial court stated that it considered lesser sanctions, that statement was conclusory and, in fact, there was no trial court record as to what lesser sanctions were considered and why they would not be sufficient.

Thus, a trial court has authority to sanction conduct that violates court rules and court orders. However, as stated by Justice Chambers in his concurring opinion in *Rivers*, “Dismissal of a complaint or answer is an extreme sanction not available merely to encourage compliance with a case schedule. Such a sanction is reserved for discovery violations which

are willful or deliberate, when the violation substantially prejudices the opponent, and a lesser sanction would not suffice.” *Rivers, supra*, at 701.

4. Lawsuits Should Be Decided On The Merits: Proportionality Of Sanction

As stated in the Appellants’ Opening Brief, our courts have long stated that lawsuits should be decided on their merits. *Lane v. Brown & Haley*, 81 Wn.App. 102, 912 P.2d 1040 (1996); *Sacotte Constr., Inc. v. Nat’l Fire & Marine Ins., Co.*, 143 Wn. App. 410, 414, 177 P.3d 1147 (2008).

As the Court noted in *Rivers*, at 695, a sanction should be proportional to the wrong upon which it is based. The requirements established in *Burnet* provide three relatively simple questions for the trial court to answer, on the record, by which the proportionality of a sanction may be contemplated and gauged and, within a reasonable expenditure of time and effort, excessive sanctions avoided: Was the sanctioned conduct (1) willful, and (2) significantly prejudicial to an opposing party, and (3) susceptible of a lesser sanction that would effectuate the purposes of sanctions, i.e., “...to deter, to punish, to compensate and to educate.” *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, at 356, 858 P.2d 1054 (1993).

As a final point regarding disposition of lawsuits on the merits and the proportionality of sanctions, it is worth remembering that involuntary dismissal of claim or defense will usually deprive the sanctioned party of a valuable property interest. Parenthetically, it is not suggested that in this case the formalities of due process were omitted: The Show Cause Order provided notice of the potential sanction. As in other situations where dismissal of a cause of action is imposed as a sanction, due process is usually not the focal issue.

Rather, the overarching issue most often is whether justice has really been done when the sanction of dismissal aborts a valid claim or defense and, more particularly, whether loss of the lawsuit is significantly disproportionate to the wrong giving rise to the sanction. In the present case, Plaintiffs alleged the occurrence of a motor vehicle collision, causing serious physical injury and financial loss.

Because the case was in its infancy, there is no evidence reflecting the extent of Plaintiffs' loss: It may be great, it may be minor. In any event, the sanction has unnecessarily deprived them of the opportunity to prove their claim and recover damages. Potentially, indeed, probably, that is a significant loss, inasmuch as attorneys typically — as a serious financial consideration — do not undertake cases that lack merit.

In the present case, the failure of Appellants' trial counsel to appear was irritating and created inconvenience for the trial court. The failure to appear was, by all indicia in the record, the result of inadvertence and oversight, not willful, deliberate disregard for the courts' rules and orders. And, of no little importance is the fact that the opposing party was not prejudiced in its trial preparation by either the failure to appear at the status conference or the show cause hearing.

D. CONCLUSION

It is respectfully submitted that the trial court's dismissal of the present action unnecessarily deprived Plaintiffs of the opportunity to prove their claim and recover such damages as may have been caused by the other party's negligence. It is not contended that the trial court should not have imposed some type of sanction. Rather, it is contended that application of the *Burnet* factors would have led to the inescapable conclusion that the sanction of dismissal was excessive.

The trial court abused its discretion by dismissing the Appellants' lawsuit. The dismissal should be reversed and the case remanded for trial.

DATED this 1st day of July, 2015.

Respectfully submitted,


DENNIS W. CLAYTON, WSBA #7464

DECLARATION OF SERVICE

Dennis W. Clayton declares as follows, under penalty of perjury of the State of Washington:

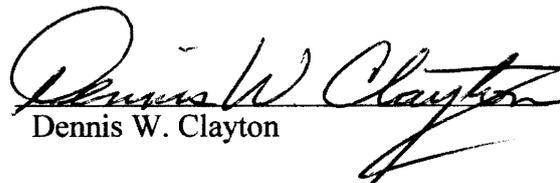
1. I am over the age of 18 years, competent to testify herein, and do so based upon personal knowledge of the matters stated.

2. On July 1, 2015, I personally served a copy of the Appellants' Responsive Brief by mailing a copy to counsel, postage prepaid, at the following addresses:

Raymond Schutts
Attorney at Law
24001 E. Mission
Suite 101
Liberty Lake, WA 99019

Alina Polyak
Attorney at Law
1191 Second Avenue, Suite 500
Seattle, WA 98101

DATED this 1st day of July, 2015.


Dennis W. Clayton

APPENDIX

COPY
ORIGINAL FILED
MAY 22 2014

SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

JAMES T MORROW AND DAWN M MORROW
husband and wife,

Plaintiff(s),

No. 14-2-00526-6

vs.

DECLARATION OF SERVICE

JOHN DOE TOMSHA AND VICKI A TOMSHA
husband and wife,

Defendant(s),

ss.

The undersigned, being first duly sworn on oath deposes and says: That he/she is now and at all times herein mentioned was a citizen of the United States, over the age of eighteen years, not a party to or interested in the above entitled action and competent to be a witness therein.

That on the 16th day of May, 2014 @ 08:10 PM, at the address of 2124 EAST ROWAN, SPOKANE, within SPOKANE County, WA, the undersigned duly served TWO copy(ies) of the following document(s): **SUMMONS, COMPLAINT FOR DAMAGES RESULTING FROM PERSONAL INJURIES SUSTAINED IN NEGLIGENT OPERATION OF A MOTOR VEHICLE**, in the above entitled action upon **JOHN DOE TOMSHA AND VICKI A TOMSHA** husband and wife, by then and there, at the residence and usual place of abode of said person(s), personally delivering TWO true and correct copy(ies) of the above documents into the hands of and leaving same with **VICKI A TOMSHA, RESIDENT**, being a person of suitable age and discretion, then resident therein.
Desc: Sex: Female - Age: 60 - Skin: White - Hair: Gray - Height: 5'7 - Weight: 150.
Left TWO copy(ies) on behalf of the marital community at the usual place of abode of said defendants.

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

Date: 5/22/14
Service Fee: \$ 33.00
Return Fee: \$ 7.00
Mileage Fee: \$ 25.00
Misc. Fee: \$
Total Fee: \$ 65.00

R CRAVER
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