

80922-4

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

No. 80922-4

2008 MAR 14 P 3:29

SUPREME COURT  
OF THE STATE OF WASHINGTON

RONALD R. CARPENTER

CLERK

FILED  
MAR 14 2008

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

JESSE MAGANA,

Plaintiff/Petitioner

v.

HYUNDAI MOTOR AMERICA; HYUNDAI  
MOTOR COMPANY,

Defendants/Respondents

and

RICKY and ANGELA SMITH, husband and wife,

Defendants

ON PETITION FOR REVIEW FROM  
COURT OF APPEALS, DIVISION II

ANSWER TO PETITION FOR REVIEW

Michael B. King  
WSBA No. 14405  
TALMADGE/FITZPATRICK  
Attorneys for Respondents  
Hyundai Motor America and  
Hyundai Motor Company

Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, Washington 98188-4630  
Telephone: (206) 574-6661  
Facsimile: (206) 575-1397

Heather K. Cavanaugh, Esq.  
WSBA No. 33234  
MILLER NASH LLP  
Attorneys for Respondents Hyundai  
Motor America and Hyundai Motor  
Company

Miller Nash LLP  
111 S.W. Fifth Avenue  
Suite 3400  
Portland, Oregon 97204  
Telephone: (503) 224-5858  
Facsimile: (503) 224-0155

TABLE OF CONTENTS

	<u>Page</u>
A. <u>Identity of Answering Parties</u> .....	1
B. <u>Summary of Grounds for Denying Review</u> .....	1
C. <u>Restatement of the Issues Presented for Review</u> .....	3
1. <u>Standard for Imposing a Default as a Sanction for         Discovery Violations</u> .....	3
2. <u>Relevance of Trial Tactics In Determining the         Appropriate Scope of a Sanction for         Discovery Violations</u> .....	3
D. <u>Restatement of the Case and the Decision Below</u> .....	3
E. <u>Grounds for Denying Petition</u> .....	14
1. <u>The Court of Appeals' Decision Is Fully Consistent         with this Court's Decisions Establishing the Rules For         Determining When A Trial Court May Impose The         Sanction of Default for Discovery Violations, as well as         with the Decisions of the Court of Appeals         Applying Those Rules</u> .....	14
2. <u>The Court of Appeals Gave Proper Weight to the         Impact of the Timing of Plaintiff's Decision to         Pursue Production of the Discovery At Issue</u> .....	19
F. <u>Conclusion</u> .....	20

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Anderson v. Mohundro</i> , 24 Wn. App. 569, 604 P.2d 181 (1979), <i>review denied</i> , 93 Wn.2d 1013 (1980).....	17
<i>Associated Mortgage Investors v. G.P. Kent Constr. Co.</i> , 15 Wn. App. 223, 548 P.2d 558, <i>review denied</i> , 87 Wn.2d 1006 (1976).....	17
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997).....	2, 14, 16
<i>Gammon v. Clark Equipment Co.</i> , 38 Wn. App. 274, 686 P.2d 1102 (1984), <i>aff'd</i> , 104 Wn.2d 613, 707 P.2d 685 (1985).....	18
<i>Griggs v. Averbek Realty, Inc.</i> , 92 Wn.2d 576, 599 P.2d 1289 (1979).....	15
<i>Magana v. Hyundai Motor America</i> , 123 Wn. App. 306, 94 P.3d 987 (2004).....	4, 7, 8
<i>Magana v. Hyundai Motor America</i> , 141 Wn. App. 495, 170 P.3d 1165 (2007).....	5, 6, 14, 18
<i>Mayer v. Sto Industries, Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006).....	15
<i>Rhinehart v. Seattle Times Co.</i> , 51 Wn. App. 561, 754 P.2d 1243, <i>review denied</i> , 111 Wn.2d 1025 (1988).....	17
<i>Rivers v. Washington State Conference of Mason Contractors</i> , 145 Wn.2d 674, 41 P.3d 1175 (2002).....	14
<i>Seals v. Seals</i> , 22 Wn. App. 652, 590 P.2d 1301 (1979) .....	16
<i>Smith v. Behr Process Corp.</i> , 113 Wn. App. 306, 54 P.3d 655 (2002).....	17
<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711, <i>as amended</i> , 780 P.2d 270 (1989).....	15
<i>Thompson v. King Feed &amp; Nutrition Service, Inc.</i> , 153 Wn.2d 447, 105 P.3d 378 (2005).....	16
<i>Washington State Physicians Insurance Exchange &amp; Association v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	16

Other Cases

*Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131,  
47 Tex. Sup. Ct. J. 955 (2004) .....16

Rules and Regulations

CR 26(e).....16  
CR 26(i) .....6  
RAP 13.4(b) .....2

A. Identity of Answering Parties

Defendants Hyundai Motor America and Hyundai Motor Company (collectively "Hyundai") hereby answer the Petition for Review of Plaintiff Jesse Magana ("Magana").

B. Summary of Grounds for Denying Review

Jesse Magana was severely injured in an automobile accident of singular violence. Magana asserts his injuries were caused by the unreasonably dangerous design of the seatback of the front passenger seat of a 1996 Hyundai "Accent," in which he was a passenger at the time of the accident. Magana alleges the seatback was too weak to resist the forces of the accident and collapsed backwards, and he was ejected out the back of the Accent. Hyundai contends a seatback strong enough to withstand the extraordinarily violent forces of Magana's accident would significantly increase the risk of serious injuries in far more common rear impact collisions. Hyundai also contends Magana was ejected from the vehicle because he was seated, unbelted, in the rear passenger seat at the time of the accident.

A jury found in favor of Magana, and Hyundai appealed. The Court of Appeals ruled that prejudicial error compelled a retrial on liability. On the eve of that retrial, the trial court struck Hyundai's answer and entered a default judgment as a sanction for discovery violations --

specifically, the late disclosure of the existence of so-called "other similar incidents" (or "OSIs") involving the seatbacks of all Hyundai vehicle models. The Court of Appeals reversed again, holding there was no basis for concluding that the late disclosure had deprived Magana of the chance for a fair trial on his defective design claim, and remanding for the retrial it had ordered four years before.

Magana asserts that the decision of the Court of Appeals<sup>1</sup> conflicts with this Court's discovery sanctions jurisprudence. In a series of decisions beginning with *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), this Court has made clear that a sanction that denies a party the chance of having a claim or defense determined on the merits may not be imposed, unless the complaining party has been deprived of the chance for a fair trial on that claim or defense. The Court of Appeals correctly applied these principles in concluding that the trial court had abused its discretion by imposing the sanction of a default, and this conclusion is fully supported by the record.

Magana also quarrels with what he sees as an inappropriate chastisement of his trial court tactics. In addressing the loss of the January 2006 retrial date, the Court of Appeals observed that Magana's counsel

---

<sup>1</sup> Magana's petition repeatedly disparages the decision as the "2-1 majority decision," even though the fact of a dissent has been eliminated as a grounds for review under RAP 13.4(b).

contributed to that loss, by waiting as long as they did after remand before seeking to reopen discovery of seatback OSIs. This conclusion also was fully supported by the record, and in accord with this Court's decisions.

C. Restatement of the Issues Presented for Review

Magana's petition actually presents just two issues for review:

1. Standard for Imposing a Default as a Sanction for Discovery Violations

Should a trial court strike a defendant's answer and enter a default judgment against a defendant in a civil damages action, as a sanction for discovery violations, when: (1) the complaining plaintiff fails to establish that the defendant's misconduct has deprived the plaintiff of a chance for a fair trial on his or her claims; and (2) the default deprives the defendant of its constitutional right to a jury trial?

2. Relevance of Trial Tactics In Determining the Appropriate Scope of a Sanction for Discovery Violations

When a trial date must be continued in order to give a complaining plaintiff the opportunity to evaluate discovery materials belatedly produced by the defendant, should a trial court consider the extent to which the trial tactics of the complaining party contributed to the need for that continuance, in determining the appropriate sanction?

D. Restatement of the Case and the Decision Below

Jesse Magana was a passenger in a 1996 Hyundai "Accent" driven by Ricky Smith. *Magana v. Hyundai Motor America*, 123 Wn. App. 306, 309, 94 P.3d 987 (2004) ("*Magana I*"). Cresting a hill, Smith saw an oncoming truck that appeared to be in his lane. *Id.* Smith jerked the wheel, causing the car to yaw and leave the road. *Id.* The Accent hit at least two trees, and went into a violent spin. *Id.* The resulting centrifugal forces threw Magana out the car's rear window, and he sustained injuries leaving him a paraplegic. *Id.*<sup>2</sup>

Three years later, and one week before the running of the statute of limitations, Magana filed suit. *Id.* At the outset of the case, Magana asserted that his injuries were due to a defect in the Accent's "seating system." *See* (CP 3772-73) (Magana's responses to first discovery requests at 4-5). In response to a request for clarification, Magana attributed his injuries to an overpowered passenger-side airbag, which he asserted caused the front passenger seatback to fail, resulting in his ejection from the vehicle. *See* (CP 3833) (Magana's supplemental discovery responses at 4); *see also* (CP 3927) (Letter from Magana's

---

<sup>2</sup> The Court of Appeals in *Magana I* was careful to identify the question of where Magana was seated as "[a] major factual issue" and the court did not in any way suggest that the issue should be treated as having been conclusively resolved in Magana's favor. *See* 123 Wn. App. at 310.

counsel at 1) (asserting "the passenger airbag...was responsible for Jesse Magana's injuries").

Prior to this clarification, Magana had served discovery requests seeking production of so-called "other similar incidents" (or "OSIs").<sup>3</sup> Hyundai objected to the scope of the requested production (which sought documents for any seatback-related "lawsuit," "claim," "complaint," "notice," or "incident," for every Hyundai model dating back to 1980), and then stated there had been no seatback-related personal injury lawsuits or claims involving Hyundai Accents for the model years 1995-1999. *See* (CP 3750) (HMA's initial response to Magana's Request for Production No. 20).<sup>4</sup> After Magana clarified his theory of the case to focus on the alleged overpowered airbag, he propounded airbag OSI discovery

---

<sup>3</sup> The short-hand term "other similar incidents" can be highly misleading, as it seems to imply that the matters sought to be discovered *in fact* involve accidents substantially similar to the plaintiff's accident. In fact, as both Magana's and Hyundai's OSI experts agreed, production of raw OSI discovery material is just the beginning of a process required to determine whether any of the so-called "similar incidents" actually involves a substantially similar accident and therefore possibly admissible into evidence at trial. *Compare* (CP 2648-49) (Decl. of Lawrence Baron at 3-4, ¶¶ 6-10) (Magana's OSI expert) *with* (CP 3267) (Decl. of David Swartling at 6, ¶ 13) (Hyundai's OSI expert).

<sup>4</sup> The trial court found that this response was willfully misleading because Hyundai employed what the trial court believed was a misleading definition of the term "claim," and the Court of Appeals affirmed this finding as within the trial court's discretion. *See Magana v. Hyundai Motor America*, 141 Wn. App. 495, 170 P.3d 1165 (2007) ("*Magana II*"), ¶¶ 35-37. While Hyundai continues to believe that the trial court's determination is incorrect and rested on a flawed procedure that deprived Hyundai of a fair chance to address this issue, *see* Opening Brief to the Court of Appeals at 60-64, Hyundai does not seek review of this determination. Hyundai seeks to return this case to the trial court as soon as practicable, for the retrial of liability originally ordered by the Court of Appeals in July of 2004.

requests, to which Hyundai responded as it had to the seatback OSI requests. *See* (CP 3850) (Magana's Request for Production No. 21 to HMC); (CP 3910-11) (HMC's responses to RFP Nos. 20 & 21).

Following Hyundai's initial document production,<sup>5</sup> Magana's counsel then raised several issues concerning the scope of Hyundai's discovery responses, including to the OSI discovery requests. *See* (CP 3928) (letter from counsel at 2). Discussions ensued in accordance with the meet-and-confer requirement of CR 26(i), following which Hyundai's counsel wrote a letter listing four areas "that you requested we respond to[.]" *See* (CP 3707) (Austin Decl. at 5, ¶ 5); (CP 3939) (letter from counsel at 1). One area was airbag OSIs, and counsel's letter stated that Hyundai would produce "claims relating to aggressive or violent deployment of the passenger side airbag in the 1995-1997 Hyundai Accent." (CP 3939) (letter at 1).<sup>6</sup>

---

<sup>5</sup> The production involved some 11,000 pages of documents responsive to a multitude of discovery requests, and was praised as a "good initial production" by Magana's counsel. *See* (CP 3924-25) (letter from Hyundai's counsel) (describing scope of initial production); (CP 3927) (letter from Magana's counsel at 1) (commenting on Hyundai's initial production).

<sup>6</sup> Hyundai's counsel said nothing about Hyundai producing anything relating to seatback OSIs. Hyundai's counsel testified that this correspondence was intended to "memorialize...the understandings" that he and Magana's counsel had reached. *See* (CP 3708) (Austin Decl. at 6, continuation of ¶ 20). Magana's counsel testified that the parties never "arrived at an 'agreement' not to pursue discovery of seatback incidents." *See* (CP 4791) (O'Neil Reply Decl. at 2, ¶ 5). The trial court found that the parties had not entered into such an agreement, and the Court of Appeals affirmed this determination as involving a matter of credibility and therefore within the trial court's discretion to resolve. *Magana II*, ¶ 34. While Hyundai does not agree with this determination,

Hyundai produced the promised airbag OSIs. *See* (CP 3708) (Austin Decl. at 6, ¶ 21); (CP 3946) (copy of transmittal letter dated August 20, 2001); (CP 3942-44) (chart itemizing airbag OSI production). Soon thereafter, Magana's "occupant kinematics" expert, Dr. Joseph L. Burton, testified at his deposition that the airbag had played no substantial role in the failure of the front passenger seatback. *See* (CP 113-16) (Hyundai memorandum quoting from Burton's deposition). The focal point of the case for trial then became the design of the seatback itself. *See Magana I* at 318 ("Magana's primary trial theory was that, if the seatback had been more rigid, it would not have given way...").

The case went to trial in the Summer of 2002. During the trial, Magana's counsel, over Hyundai's objection, was permitted to elicit testimony from Dr. Burton about an alternative seat *belt* design, which Burton opined could have prevented Magana's ejection. *Magana I* at 311-12. After Hyundai demonstrated that Burton's testimony exceeded the scope of his expert opinion disclosed during the course of discovery (among other things, Dr. Burton admitted he was not a design expert and was not planning to offer any opinions about design issues), the trial court

---

Hyundai does not seek review of it by this Court. Hyundai also notes that, while Magana's counsel denied the existence of an "agreement," counsel did not deny that he never objected to the absence of any supplemental seatback OSI production when Hyundai made its supplemental airbag OSI production.

reconsidered its ruling and determined it would strike Burton's testimony about the alternative seatbelt design. *See id.* at 312.<sup>7</sup> But over Hyundai's objection, the trial court agreed with Magana's counsel that the jury would not be told that the evidence had been stricken. *Id.* at 313; *see* (CP 3453-55) (Summer 2002 Trial VRP [XV] 2275:2277:17) (statement by Magana counsel opposing instructing the jury that the Burton evidence had been stricken, because doing so would "kind of highlight it").

By 10-2 votes on the issues of defective design and who-sat-where (proximate cause), the jury returned a verdict in favor of Magana, awarding him \$8,064,052 in damages. *Magana I* at 313; (CP 694-96) (Special Verdict Form). Hyundai appealed and the Court of Appeals reversed, holding that the trial court had erred in failing to instruct the jury that the Burton evidence had been stricken, and that this error had denied Hyundai a fair trial. *See Magana I* at 315-19 (concluding after a

---

<sup>7</sup> During principal briefing to the Court of Appeals, Magana made no argument that the reconsideration decision to strike the testimony was incorrect. *See Magana I* at 315 n.6 ("Magana does not argue that the ruling striking Burton's testimony was incorrect"). Magana belatedly asserted on reconsideration that the trial court and the Court of Appeals had been misled by Hyundai about the scope of Burton's disclosures, but did not seek review after the Court of Appeals denied reconsideration. During the sanctions proceedings before the trial court, Magana again asserted that Hyundai had misrepresented the scope of Burton's disclosures; Hyundai responded by submitting the full record of the matter from the first trial, and Magana appeared to have dropped the point, only to raise it yet again in his answering brief to the Court of Appeals. *See* Brief of Respondent at 1 & 59-61. Hyundai rebutted the charge based on the record submitted to the trial court. *See* Appellants' Reply Brief at 4-5. The Court of Appeals did not address the issue. In a footnote to his Petition, Magana claims that "[n]either the trial court nor the appellate court in this second appeal resolved this dispute" (*see* Petition at 4 n.1) but does not seek review on this ground.

"comprehensive examination of the record" that there was "at least a substantial possibility that the error affected the verdict"). On reconsideration the court amended its decision to clarify that the retrial would be limited to liability issues. *See id.* at 319 n.9.

Magana did not petition for review, and the matter returned to the trial court. On May 23, 2005, the trial court set a retrial commencement date of January 17, 2006. (CP 4024) (retrial setting notice). Some four months later (on September 13, 2005), Magana's counsel made their first request to Hyundai to "update" Hyundai's responses to several discovery requests, including those related to seatback OSIs (but not those related to airbag OSIs). *See* (CP 4032-33) (letter from counsel at 1-2). Counsel specifically requested that Hyundai include seatback OSIs involving the "Elantra," a different model of Hyundai vehicle, asserting that the Elantra recliner mechanism was similar to the Accent mechanism and this was enough to justify discovery. (CP 4032) (letter at 1).

Although Hyundai disagreed that the similarity of recliner mechanism rendered the seatbacks themselves substantially similar, Hyundai nonetheless updated its responses to include seatback-related personal injury lawsuits or claims for both the Accent and Elantra. *See* (CP 4050) (letter from counsel at 1). On October 25, 2005, Hyundai produced documents relating to a lawsuit filed in July 2002 and alleging a

seatback failure in a 1999 Accent (the *Bobbitt* lawsuit), and correspondence from an attorney dating from September 2000 and alleging a seatback failure in a 1995 Elantra for which no lawsuit was ever filed (the *Dowling* claim). *See* (CP 4053) (letter from counsel); (CP 4054-60) (documents). Hyundai also renewed its objection to the full scope of Magana's seatback OSI request. *See* (CP 4050-51) (letter from counsel).

Magana moved to compel, demanding production of *all* documents relating to *any* seatback OSI (whether lawsuit, claim, complaint, notice, or incident) for *every* Hyundai model dating back to 1980. *See* (CP 787-830) (motion and supporting papers). On November 7 the trial court granted the motion, *see* VRP (Nov. 7, 2005) 17:12-16 (colloquy between court and counsel), and on November 18 the court clarified its intention that Magana was to search its consumer 1-800 hotline computer record database as well as its lawsuits records, and produce documents relating to consumer complaints as well as legal claims. *See* (CP 961-62) (court's order compelling production). On November 21, Hyundai produced documents concerning some 15 seatback-related lawsuits and claims (attorney demand letters) involving models other than the Accent and Elantra. *See* (CP 1027) (Cavanaugh Decl. at 2); (CP 2353-54) (O'Neil Decl. at 3-4); *see also* Exs. 11-22, 24, 26 & 29 (extracts from the lawsuits and claims produced on November 21). On December 1, Hyundai supplemented this

production with several boxes containing police reports, expert reports, deposition transcripts, and photographs, and also produced the first set of records generated from the search of its consumer hotline database. *See* (CP 1027) (Cavanaugh Decl. at 2).<sup>8</sup>

Had Magana's counsel sought the update of seatback OSI discovery shortly after the setting of the January 2006 retrial date in May 2005, a process of discussion and motions practice similar to what actually ensued would have put the OSI discovery materials in counsel's hands by Labor Day 2005 -- which, as Magana tacitly admits in his Petition for Review, would have left sufficient time to review and evaluate the materials before the scheduled retrial start date of January 2006. *See* Petition at 18 (citing testimony of Mr. David Swartling). Instead, Magana's counsel waited until after Labor Day 2005 to seek an update of seatback OSI discovery, and then insisted Hyundai produce documents well beyond the scope of what Hyundai had previously produced. The result was a substantial production of raw OSI discovery material just weeks before trial, and Magana's experts admitted they could not

---

<sup>8</sup> Hyundai's information systems staff reconstructed software in order to restore access to older complaint records that had been stored on backup disks after a computer conversion. *See* (CP 1028-30) (Dowd Decl. at 1-3, ¶¶ 2-8); (CP 1721-22) (Supp. Dowd Decl.). All responsive hotline records were produced by January 5, 2006. *See* (CP 3303) (Vanderford Decl. at 6, ¶ 2); Ex. 44 (letter from Hyundai counsel Heather Cavanaugh, dated January 5, 2006, at 2).

determine the material's actual value to Magana's case in time for the scheduled January 2006 retrial. *See* (CP 2665-66) (Decl. of Magana's design defect expert Stephen Syson at 3-4, ¶¶ 11-12 & 14); (CP 2669-2770) (Decl. of Dr. Burton at 3-4, ¶¶ 10-11 & 14).

Magana could have sought a continuance to allow sufficient time to evaluate the OSI materials. Instead, Magana moved for the striking of Hyundai's answer and the entry of a default judgment in the amount of the original verdict. Magana claimed he was prejudiced in his preparation for the retrial because he lacked the time required to determine whether any of the recently produced OSIs could be admitted into evidence. *See* (CP 2331-35) (memorandum in support of motion for default at 23-27). When Hyundai responded that the inability to determine admissibility in time for a January 2006 trial meant that the putative value of the OSIs to Magana's case *also* could not be determined without further investigation, *see, e.g.*, (CP 3267) (Swartling Decl. at 6, ¶ 13), Magana replied by raising the issue of "staleness," asserting that the delay in disclosing the existence of the OSIs had cost him the chance to establish the substantial similarity required for admissibility.

To support his staleness claim, Magana testified about the results of calls he had made using telephone numbers listed on some of the OSI documents produced by Hyundai. *See* VRP (Jan. 17, 2006) 90:2-94:14

(Magana's testimony); Ex. 1 (list of phone calls made by Magana). Magana also called Ms. Nikki Holcomb, a local area resident, to testify about her loss of a seatback she had saved for several years after a 1996 accident. *See* VRP (Jan. 17, 2006) 98:3-111:16 (examination by counsel for Magana and Hyundai). Magana's testimony, however, completely failed to establish the loss of any evidence actually essential to determine the substantial similarity of any accident, and Hyundai showed that Magana's limited investigative efforts were insufficient to establish whether key evidence had actually been lost due to the passage of time. *See* (CP 5495-96) (Bennet Decl.); (CP 5761-62) (Runyan Decl.). And Ms. Holcomb's answers to questions about the facts of her accident were sufficient to establish that it was not substantially similar to Magana's, thereby discrediting Magana's assertion that the loss of the seatback itself had prejudiced Magana in any way. *See* (CP 5576-77) (Blaisdell Decl. at 5-6, ¶¶ 12-16).

The trial court struck Hyundai's answer and entered a default judgment in the amount of the original verdict. *See* (CP 5341-44) (judgment).<sup>9</sup> Hyundai appealed, and the Court of Appeals held that the trial court's finding of substantial prejudice was unfounded and the trial

---

<sup>9</sup> The court also ordered that Hyundai would be liable for prejudgment interest from the date of the first verdict, and awarded to Magana the attorney's fees and expenses incurred in bringing the motion for sanctions and for the related evidentiary hearing.

court's choice of the sanction of default therefore an abuse of discretion, citing this Court's decision in *Burnet*. See *Magana II*, ¶¶ 41, 43, 45-51. The court reversed the default judgment and remanded for the retrial originally ordered by the court in 2004. *Id.*, ¶ 51.<sup>10</sup>

E. Grounds for Denying Petition

1. The Court of Appeals' Decision Is Fully Consistent with this Court's Decisions Establishing the Rules For Determining When A Trial Court May Impose The Sanction of Default for Discovery Violations, as well as with the Decisions of the Court of Appeals Applying Those Rules

Magana asserts that the decision of the Court of Appeals to vacate the trial court's default judgment conflicts with several decisions of this Court and the Court of Appeals. See Petition at 13-16. Yet Magana does not so much as *mention* the *three* decisions of this Court which have laid down the basic principles governing when a default judgment may be imposed as a sanction for a discovery violation. Starting with *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), continuing with *Rivers v. Washington State Conference of Mason Contractors*, 145

---

<sup>10</sup> Contrary to Magana's assertion in his Petition, see Petition at 11, the Court of Appeals did *not* affirm the trial court's discovery violation findings pertaining to either the *Acevedo* case or a supposed "pattern of lack of compliance with discovery obligations" ostensibly demonstrated by Hyundai's conduct in the *Parks* case from Georgia. Magana cites ¶ 31 of the decision in support of this assertion, but the court says nothing in that paragraph about either *Acevedo* or *Parks*. Instead, the court's discussion of these matters is found in ¶ 40, and there the court did not affirm the findings pertaining to these matters but held only that "any error related to th[o]se findings is harmless" because the findings "do not affect the validity of the trial court's legal conclusions." See *Magana II*, ¶ 40 (citation omitted).

Wn.2d 674, 41 P.3d 1175 (2002), and culminating with *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.3d 115 (2006), this Court has made clear that a trial court may not impose sanctions that go beyond a monetary penalty unless the complaining party establishes that nothing less than the proposed sanction will cure the prejudice caused by the discovery violation in question.<sup>11</sup>

The Court of Appeals concluded that the default must be reversed because Magana had not established that he had been deprived of a chance of a fair trial on his claims because of any late production of seatback OSI discovery. Magana's Petition implies that the value of so-called "other similar incidents" discovery is self-evident, when in fact the production of such material is only the first step in a process that may -- but often does not -- lead to the admission of such matters at trial. As the Texas Supreme Court recently cautioned:

. . . product defects must be proved; they cannot simply be inferred from a large number of complaints. If the rule were otherwise, product claims would become a self-fulfilling prophecy -- the more that are made, the more likely all must be true.

---

<sup>11</sup> This conclusion reflects our state's long-standing preference to see cases resolved on their merits, and the constitutional mandate to keep the right to jury trial inviolate. See, e.g., *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979) (merits); *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, as amended, 780 P.2d 270 (1989) (jury trial).

*Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 142, 47 Tex. Sup. Ct. J. 955 (2004) (reversing and remanding for a new trial). Here, Magana's own experts testified they *could not determine* the value of the raw OSI discovery material to Magana's case in the time remaining between the production of that material and the January 2006 retrial date.

The Court of Appeals' decision is entirely consistent with this Court's sanctions jurisprudence, as laid down in *Burnet* and its progeny. Magana asserts a conflict with this Court's decision in *Washington State Physicians Insurance Exchange & Association v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993) *See* Petition at 13. Yet the question of when a trial court might go beyond imposing a monetary sanction for discovery violations was not addressed in *Fisons*.<sup>12</sup> Magana also asserts a conflict with several Court of Appeals decisions affirming the imposition of defaults. *See* Petition at 15. Yet all but one of these cases involved a

---

<sup>12</sup> Magana also asserts a conflict with this Court's decision in *Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wn.2d 447, 105 P.3d 378 (2005), based on what Magana describes as *Thompson's* explication of the duty to seasonably supplement discovery requests under CR 26(e). *See* Petition at 16. Magana has confused Justice Ireland's discussion of that point of law with the actual decision of the Court on the sanctions issue presented in that case. Justice Charles Johnson joined Justice Sanders' opinion on the sanctions issue, making Justice Sanders' opinion the decision for a majority of the Court on that issue. *See* 153 Wn.2d at 464 (op. per C. Johnson, J.). In that opinion the majority *reversed* the imposition of sanctions, and nothing in that opinion is in any way in conflict with the Court of Appeals' decision in this case. Magana also asserts a conflict with the Court of Appeals decision in *Seals v. Seals*, 22 Wn. App. 652, 590 P.2d 1301 (1979). *See* Petition at 16. Yet the Court of Appeals in *Seals* actually *reversed* the imposition of sanctions (involving an ostensible violation involving responses to requests for admissions), and nothing in *that* decision is in any way in conflict with the Court of Appeals decision in this case.

failure not only to answer discovery requests material to the opposing party's case but *also* a failure to comply with subsequent trial court orders compelling that discovery.<sup>13</sup> And in the one case where a default was imposed without a violation of a court order compelling compliance with discovery obligations, the discovery at issue both indisputably supported the plaintiff's case *and* had been at least partially "lost" under circumstances suggesting a deliberate attempt to deny the plaintiff access to it.<sup>14</sup> Here, Hyundai complied with the trial court's order to produce. Moreover, Magana failed to establish that any delay in that production had rendered any of the OSIs "stale," *or* that *only* a default could effectively address any "staleness" problem.

In the face of his failure to prove that he had been deprived of the chance of a fair trial on his claims, Magana essentially asks this Court to grant review and rule that beyond a certain point the search for the truth of a dispute must yield to the passage of time. *See* Petition at 19. Tellingly, Magana does not even try to claim that this Court has ever held that the

---

<sup>13</sup> *See Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 573-78, 754 P.2d 1243, *review denied*, 111 Wn.2d 1025 (1988); *Anderson v. Mohundro*, 24 Wn. App. 569, 573-75, 604 P.2d 181 (1979), *review denied*, 93 Wn.2d 1013 (1980); *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).

<sup>14</sup> *See Smith v. Behr Process Corp.*, 113 Wn. App. 306, 314-16, 54 P.3d 655 (2002); (CP 2586, 2590-91 & 2593-94) (trial court's oral ruling in *Smith*, submitted by Magana in support of his motion for default).

mandates of due process should be set aside merely because of sheer delay in getting a dispute resolved on its merits.<sup>15</sup> Moreover, Magana's argument based on delay paints a decidedly one-sided picture of the causes for why this case is still pending in the Washington court system, eleven years after the accident in which he was injured. Magana's counsel waited until one week before the three year statute of limitations had run before filing suit. The case then proceeded with reasonable dispatch and a trial was held in the Summer of 2002. And the result of that trial would have seen the end of this case, had Magana's counsel either not wrongfully interjected an alternate theory of design in violation of expert witness disclosures, *or* not objected to the trial court telling the jury that the evidence supporting that alternate theory had been stricken. For without either error, and assuming Magana had still prevailed before the jury, the Court of Appeals would have affirmed the resulting judgment on the jury's verdict in Magana's favor, and this case would have ended at the latest with the denial of a Hyundai petition for review some time in 2005.

---

<sup>15</sup> The only authority Magana does cite is Judge Bridgewater's *dissent* in this case, which in turn cited to the Court of Appeals decision in *Gammon v. Clark Equipment Co.*, 38 Wn. App. 274, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985). See Petition at 19, citing *Magana II*, ¶ 83 n.39. But in *Gammon* the Court of Appeals *vacated the default and remanded for a new trial* because the materiality of the wrongfully withheld discovery could not be determined given the record before the court. See *Gammon*, 38 Wn. App. at 282 ("It is precisely because we cannot know what impact full compliance would have had, that we must grant a new trial").

Instead, the judgment on the jury's verdict had to be vacated and the case remanded for a retrial on liability.

And when Magana then chose to reopen the issue of seatback OSI discovery, and compelled Hyundai to produce records of every kind pertaining to every Hyundai vehicle model since 1980, had Magana sought a continuance to determine the true import of this raw discovery material instead of demanding then and there that Hyundai be defaulted, the parties might very well have been able to sort through that material and a retrial held well before the end of 2006. Instead, Magana demanded -- and got -- a default, Hyundai was again compelled to appeal, and the Court of Appeals was for the second time compelled by prejudicial error to set aside the trial court's judgment and remand for the retrial on liability that the court had originally ordered in the Summer of 2004. And instead of accepting this determination and returning promptly to the trial court for that retrial, Magana has petitioned this Court for review. Given *this* record, Magana has no claim whatsoever to have this Court so much as entertain the notion that Hyundai's due process and jury trial rights should be set aside because *Magana* has waited too long for justice.

2. The Court of Appeals Gave Proper Weight to the Impact of the Timing of Plaintiff's Decision to Pursue Production of the Discovery At Issue

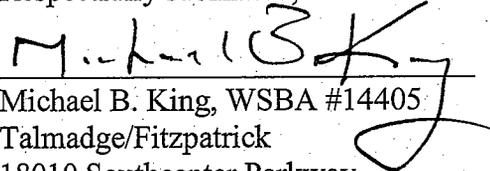
Magana also takes issue with the Court of Appeals giving weight to the timing of his decision to reopen seatback OSI discovery. Yet all the Court of Appeals did was apply the principle recognized by this Court in *Fisons* that a party complaining of discovery violations still has the duty to mitigate, and that a failure to mitigate may be considered in fashioning sanctions. *See* 122 Wn.2d at 356. Moreover, the evidence established that Magana would have been able to evaluate the seatback OSI discovery in time for the January 2006 trial date, if he had not delayed re-opening the issue for several months after the case had been remanded and the retrial date had been set.

F. Conclusion

Magana's Petition should be denied, and the case returned to the trial court for the retrial of liability originally ordered by the Court of Appeals in July of 2004.

DATED this 13<sup>th</sup> day of March, 2008.

Respectfully submitted,



Michael B. King, WSBA #14405

Talmadge/Fitzpatrick

18010 Southcenter Parkway

Tukwila, WA 98188-4630

(206) 574-6661

Attorneys for Respondents Hyundai Motor  
America and Hyundai Motor Company

RECEIVED  
SUPREME COURT  
DECLARATION OF SERVICE OF WASHINGTON

On said day below I deposited in the U. S. mail a true and accurate copy of the following document: Answer to Petition for Review in Cause No. 80922-4, to the following:

2008 MAR 11 P 3:30  
BY RONALD R. DAVIS

CLERK

Jeffrey D. Austin  
Heather K. Cavanaugh  
Miller Nash LLP  
3400 US Bancorp Tower  
111 SW 5<sup>th</sup> Avenue  
Portland, OR 97204-3699

Paul Whelan  
Peter O'Neil  
Alisa K. Brodkowitz  
Stritmatter Kessler Whelan Withey & Coluccio  
200 2<sup>nd</sup> Avenue W  
Seattle, WA 98119-4204

Charles K. Wiggins  
Kenneth W. Masters  
Wiggins & Masters, PLLC  
241 Madison Avenue N.  
Bainbridge Island, WA 98110

Douglas F. Foley  
Foley & Buxman, PLLC  
Park Tower V  
13115 NE 4<sup>th</sup> Street, Suite 260  
Vancouver, WA 98684

Derek J. Vanderwood  
English, Lane, Marshall, Stahnke & Vanderwood  
12204 SE Mill Plain Blvd, Suite 200  
Vancouver, WA 98684

Original sent by ABC Legal Messenger to:  
Supreme Court  
Clerk's Office  
415 12<sup>th</sup> Street W  
Olympia, WA 98504-0929

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

DATED: March 13, 2008, at Tukwila, Washington.

A handwritten signature in cursive script, appearing to read "Paula Chapler", written over a horizontal line.

Paula Chapler  
Legal Assistant  
Talmadge/Fitzpatrick