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NO. 34630-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION TWO

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DIVISION II
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JESSE MAGANA,

Respondent,

vs.

HYUNDAI MOTOR AMERICA; HYUNDAI MOTOR COMPANY;

Appellants,

and

RICKY and ANGELA SMITH, husband and wife; et al.,

Respondents.

BRIEF OF RESPONDENT

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INTRODUCTION

Jesse Magaña has been confined to a wheelchair for nearly ten years because Hyundai negligently manufactured a dangerously defective car. A jury awarded damages commensurate with the magnitude of his loss. Due to an error at least partially caused by Hyundai's own false statement to the trial court, the liability verdict was reversed on a very narrow ground, but the damages verdict was left intact. Nearly nine years after Hyundai rendered Magaña paraplegic, Hyundai first disclosed that a significant number of other people have been injured by Hyundai's defective seats. After reviewing a great deal of evidence and hearing live testimony, the trial court defaulted Hyundai for failing to respond truthfully to relevant discovery propounded in 2000. The trial court reinstated the jury's verdict.

Based on ample evidence presented in the two-day sanctions hearing, the trial court found that Hyundai's directly false misrepresentations were willful, highly prejudicial to Magaña's ability to prepare for trial and to the administration of justice, and irremediable. The trial court properly found lesser sanctions inadequate to right Hyundai's wrongs. The trial court did not abuse its discretion. It rendered justice for Jesse Magaña – finally.

RESTATEMENT OF ISSUES

1. Under the great weight of Washington authority Hyundai ignores, should this Court review the trial court's sanctions rulings for an abuse of discretion, where our courts unvaryingly apply this standard in reviewing trial-court sanctions rulings?

2. Did the trial court abuse its discretion in finding that Hyundai willfully (*i.e.*, without reasonable excuse) violated its discovery obligations, where Hyundai (a) failed to disclose claims and lawsuits involving Hyundai seatback failures despite very specific discovery requests seeking these documents; (b) unilaterally narrowed the discovery requests; (c) withheld relevant documents without moving for a protective order; (d) failed to develop any workable discovery system, relying instead on attorneys' memories; and (e) denied substantial similarity, where seats in other Hyundai models react very much like Accent seats during a collision?

3. Did the trial court abuse its discretion in finding that Hyundai's repeated discovery violations substantially prejudiced Magaña, where (due to Hyundai's very tardy production) Magaña could not adequately prepare for trial, evidence was stale and had been lost or destroyed, and witnesses had died or were missing?

4. Did the trial court abuse its discretion in finding that lesser sanctions than default were inadequate, where (a) Magaña has waited 10 years for justice, and a continuance would have further harmed Magaña and rewarded Hyundai; (b) monetary sanctions would not have adequately punished Hyundai (a "multi-billion dollar corporation") or restored the "irretrievable" evidence; and (c) the court could not strike counterclaims or affirmative defenses previously resolved and affirmed in the first appeal?

5. Is default appropriate as to the entire case, where Hyundai's discovery violations deprived Magaña of important evidence relevant to all outstanding issues of fact?

6. If a retrial were required, would a reasonable, objective person perceive potential future trial court bias on this record? Should the trial judge have the first opportunity to decide this issue?

7. Did the trial court abuse its discretion in allowing prejudgment interest, where the first appeal was necessitated at least in part by Hyundai's misrepresentation to the trial court?

8. If a retrial were required, should the Smiths be involved, where RCW 4.22.070(1) requires a jury to allocate fault to any responsible party?

RESTATEMENT OF THE CASE

Hyundai's 40-page statement of the case barely acknowledges the testimony from the sanction hearing or the trial court's findings of fact.[1] The following restatement more completely explains the evidence and the findings of fact. The section discussing the evidentiary hearing marshals some of the evidence supporting the findings. More of the evidence is cited in the table attached to this brief as Appendix A.

A. 2/15/1997: While riding in a Hyundai Accent, Jesse Magaña's seatback collapsed in an accident, allowing Magaña to be ejected through the back window and leaving him paraplegic.

On February 15, 1997, Jesse Magaña was a passenger in a 1996 Hyundai Accent. ***Magaña v. Hyundai Motor America***, 123 Wn. App. 306, 309, 94 P.3d 987 (2004). When driver Ricky Smith lost control of the car, it left the road in a spin. *Id.* Magaña's seatback collapsed, allowing him to be ejected out the rear window and leaving him paraplegic. *Id.* at 310-11.

Magaña sued both Hyundai and driver Ricky Smith, who defaulted. *Id.* at 310. The jury found in Magaña's favor, allocating

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[1] Indeed, Hyundai's Statement of the Case is virtually bereft of citation to the findings of fact, citing only five findings in a 40-page statement, and then only in footnotes. BA 13 n.7, 34 n.19, 40 n.25.

fault 60% Hyundai, and 40% Smith, *id.* at 313, and finding Magaña's damages to be $8,064,055. FF 71, CP 5334.

This Court reversed the liability verdict for failure to tell the jury that the trial court had stricken the answers of one of Magaña's expert witnesses to five questions. 123 Wn. App. at 312, 318-19.

B. 2/10/2000: Hyundai withheld discovery of other similar incidents in response to Magaña's Request for Production 20.

Plaintiffs in automobile product liability cases like Magaña's routinely seek to discover evidence of other similar incidents, or OSIs. CP 2648. In February 2000, soon after filing suit, Magaña asked Hyundai[2] for OSIs in Request for Production (RFP) 20:

> Pursuant to Civil Rule 34 attach or produce, according to the above instructions, copies of any and all documents including but not limited to complaints, answers, police reports, photographs, depositions or other documents relating to complaints, notices, claims, lawsuits or incidents of alleged seat back failure on Hyundai products for the years 1980 to present.

FF 8, CP 5315.

When it received RFP 20, Hyundai already knew of three reported seatback failures for Accents and over 20 reported seatback failures on other Hyundai models. Ex 48, chart titled,

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[2]Defendant Hyundai Motor America (HMA) answered RFP 20 and Hyundai Motor Company (HMC) answered an identical RFP 20, CP 3910.

"Jesse Magaña prejudiced by Hyundai's willful discovery violations," attached to this brief as Appendix B; Timeline, attached as Appendix C.

Hyundai finally produced some of the records five years later, only after the trial court ordered production. CP 961-62, 2353-54.[3] Hyundai waited even longer to disclose the three pre-2000 Accent files, as discussed below.

Hyundai assigns error to FF 6 and 52, along with 50 others, but never argues either finding.[4] BA 1, 64-65. Thus, Hyundai does not dispute that the chart correctly summarizes documents that came from Hyundai's own files showing "complaints, notices, claims, lawsuits or incidents of alleged seat back failure on Hyundai products for the years 1980 to present," the very information sought by RFP 20. Nor does Hyundai dispute FF 52 that it was aware of these alleged seatback failures.

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[3] The records produced on 11/21/05 included Contini (Ex 10), Hogle (Ex 11), Mak (Ex 12), Reed (Ex 13), McElligatt (Ex 14), Gowanny (Ex 15), Harris (Ex 16), Stewart (Ex 17), Jia Zhang Ni (Ex 18), Guy (Ex 19), Vincent (Ex 20), Schiller (Ex 21), Enriquez (Ex 22), Miller (Ex 24), Chittick (Ex 26), Randall (Ex 29).

[4] The Court treats these unargued findings as verities. ***City of Burien v. Cent. Puget Sound Growth Mgmt. Hearings Bd.***, 113 Wn. App. 375, 383, 53 P.3d 1028 (2002).

C. 4/5/2000: Instead of answering RFP 20, Hyundai unilaterally narrowed the request and then answered its own narrow request falsely.

Under CR 37(d), a party may not withhold discovery "on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 26(c)." Hyundai did not seek a protective order. FF 13, CP 5316. Yet instead of providing "any and all documents . . . relating to . . . incidents of alleged seat back failure on Hyundai products for the years 1980 to present," CP 5315, Hyundai (HMA)[5] objected to RFP 20, and restated it more narrowly (FF 9, CP 5315):

> HMA objects to Request No. 20 on the grounds it is overly broad and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objections, HMA further responds that there have been no personal injury or fatality lawsuits or claims in connection with or involving the seat or seat back of the Hyundai Accent model years 1995-1999.

Even as narrowed by Hyundai, the trial court found this response false. FF 12, CP 5316. It was false because by May 2000, Hyundai had received reports of three 1995-1999 Accent seatback failures causing injury – Martinez, McQuary and Salizar. FF 14, CP 5316; Exs 30, 31, 32.

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[5] HMC answered and restated the identically worded RFP 20 even more narrowly. CP 3910.

Magaña would not learn of these three claims[6] until Hyundai finally produced them on January 5, 2006, (CP 4792-93) long after Hyundai's false answer and the first trial, and less than two weeks before the rescheduled trial date of January 17, 2006.

D. 2000-2005: Hyundai failed to supplement its false response to RFP 20 as additional claims were made to Hyundai.

Between May 2000, when Hyundai gave its false response to RFP 20, and June 2002, when the case was first tried, Hyundai received more claims regarding seatback failures in Hyundai Accents – Wagner (Ex 36); Bobbitt (Ex 37); Pockrus (Ex 38); Powell (Ex 39); and Whittiker (Ex 40) (FF 15, CP 5317):

> Each of these claims involved alleged seat back failures in the Hyundai Accent model years 1995-1999. All were reported to Hyundai prior to the trial in June 2002, with the exception of Whittiker, which was reported in July, 2002. None were provided to plaintiff when they became known to Hyundai. These other incidents and accompanying documentation should have been provided because these reports directly contradicted Hyundai's prior answer that there were no such claims.

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[6] Hyundai argues that the Salizar vehicle had a VIN number for a different model. BA 40 n.25, 62 n.38. But RFP 20 was not limited to Accents; the vehicle was identified as an Accent in Hyundai's computerized records (01/18/06 RP 135-36); and as the trial court held, Hyundai at the very least was obligated to disclose that it might be an Accent. 01/20/06 RP 4.

E. October-December 2005: Hyundai finally disclosed some – but not all – of the evidence of other seatback failures shortly before the scheduled re-trial.

After this Court reversed the jury's verdict against Hyundai, Magaña asked Hyundai to supplement its answer to RFP 20 (CP 905-06) including Accents, Elantras and other models. CP 807. Hyundai initially produced documents relating to only two matters, Dowling and Bobbitt, CP 812, claiming "[o]ther than the claim of Mr. Magana, these are the only seat-back failure claims relating to either the 1995-1995 (*sic*) Hyundai Accent or the 1992-1995 Hyundai Elantra." *Id.* This was false. FF 18, CP 5318.

In October 2005, Magaña filed a motion to compel Hyundai to answer RFP 20 with respect to other models as well as the Accent and Elantra. CP 787. At this point, Magaña still believed (incorrectly) that there would be only a handful of seatback-failure complaints and claims. CP 4795.

The trial court ordered Hyundai to produce documents relating to other incidents involving single-recliner seats. 11/07/05 RP 14-17. Hyundai tried to limit production to "complaints" and "claims" and nothing else, 11/18/05 RP 2, but the trial court ordered Hyundai to produce (CP 961-62):

> Police Reports, legal claims, Consumer Complaints and Expert Reports or Depositions and Exhibits and photographs thereto with respect to all consumer complaints and lawsuits involving allegations of seatback failure on all Hyundai vehicles with single recliner mechanisms regardless of incident date and regardless of model year.

On November 21, 2005, less than two months before the scheduled trial date, Hyundai produced the first batch of OSIs, none of which were for Accents. CP 2353-54; *see* App. B. On December 1, 2005, Hyundai produced three boxes of documents, including several previously unidentified incidents and claims involving the Accent and the Elantra.[7] CP 2354.

Production of these documents showed that Hyundai's representations (made just a month earlier) that there were only two other seatback failure claims "were simply false." FF 18, CP 5318. Not only did Hyundai produce documents on previously unidentified incidents, it produced additional documents for claims incompletely disclosed one month earlier, such as Bobbitt. CP 2427-31. Hyundai belatedly produced Bobbitt's original claim "requesting assistance with medical bills because neck injury caused by seat back breaking." Ex 37 at 102. Clearly, Bobbitt had

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[7] This production included Wagner (Ex 36), Pockrus (Ex 38), Powell (Ex 39), Whittiker (Ex 40), and Urice (Ex 34).

made a claim before filing a lawsuit – and the claim was made nearly a year before the first Magaña trial.

F. December 2005: Magaña moved for the sanction of default because it was not possible to adequately analyze Hyundai's new revelations by the trial date.

With Hyundai's new revelations, Magaña concluded, "[w]ith less than a month before trial it will be virtually impossible to effectively put together a proper case utilizing the other similar incidents material just produced by Hyundai." CP 2350. Thus, on December 23, 2005, Magaña moved for a default judgment against Hyundai. CP 2309-46.

Magaña had relied on Hyundai's response to RFP 20 and other answers before the first trial. CP 2349. If the newly disclosed seatback claims had been available before the first trial, Magaña would have investigated, provided this information to his experts, and then followed up on incidents the experts found most important. CP 2354. Magaña's expert witnesses stated that the OSIs would have been "invaluable" and "extremely useful" in the first trial (CP 2665, 2669) but that it would be difficult, "if not impossible," to prepare and use them in the scheduled retrial. CP 2666, 2668, 2670. Retired-Justice Robert Utter and attorney Thomas Greenan emphasized the importance of truthful discovery

responses and the need to sanction inadequate responses. CP 2651-54, 2655-62.

Magaña moved for an evidentiary hearing to create an adequate record. CP 3171. Hyundai opposed both the motion for sanctions and the evidentiary hearing (CP 3199, 4606) submitting declarations in opposition. *See* BA, Ex C.

On January 5, 2006, just 12 days prior to trial, Hyundai finally produced the Martinez, McQuary and Salizar claims, which showed that Hyundai's original, narrowed answer to RFP 20 was false when made. FF 14-15, CP 5316-17.

On January 13, 2006, the Friday before the scheduled trial date, the trial court heard argument and granted Magaña's motion for an evidentiary hearing, commencing on January 17, the scheduled trial date. 01/13/06 RP at 72-75.

G. January 2006: The trial court held an evidentiary hearing and entered judgment against Hyundai based on the affidavits, exhibits and live testimony.

The hearing was held January 17-20. Magaña placed OSI files into evidence. Exs 2, 5-6, 8-43. Magaña presented the testimony of Hyundai's CR 30(b)(6) witness, Steve Johnson, in deposition form. Ex 3; 01/17/05 RP 128-30. Magaña also presented live testimony from a number of witnesses.

1. Judge Johnson found Hyundai guilty of multiple discovery violations.

Judge Johnson found that "the violations alleged by plaintiff on [the chart in Ex 48, App. B] have been proven and that the roadblocks placed by defendants on the plaintiff's right to obtain discovery were real." FF 6, CP 5315.[8] Judge Johnson found that "Hyundai and its legal department knew that there had been customer complaints and claims of incidents of seat back failure" affecting the Accent, the Elantra, and other vehicles. FF 52, CP 5328. Magaña expert-witness Thomas Greenan testified at the sanction hearing that Hyundai's failure to answer RFP 20 as drafted was evasive and misleading. 01/17/06 RP 48-49.

2. Judge Johnson rejected Hyundai's lawsuit or claim defense.

Hyundai claimed at the hearing and claims on appeal that it had narrowed RFP 20 to lawsuits or claims and that the OSIs were not "claims." BA 60-62. As discussed below, Hyundai's own witnesses gave several different definitions of "claim."

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[8] Hyundai argues that the trial court declined to determine whether the discovery violations prejudiced Magaña in the first trial. BA 41 n.27. But the trial court did find that the additional information would have been developed and analyzed and that the withheld information is "highly relevant." FF 55, 59, CP 5329, 5331. The court also observed that it is "very difficult" to determine how this affected prior proceedings, and focused instead on the effect on the second trial. 01/20/06 RP 24.

Hyundai CR 30(b)(6) designee Steve Johnson defined a "claim" as a customer's response to Hyundai's request for additional information, which was then reviewed by Hyundai's attorneys (FF 38, CP 5323, quoting Ex 3 at 34-35):

> Let me define a claim. That's if the customer sends in the additional information from the document request package, that information is reviewed typically by an attorney.

Hyundai expert-witness David Swartling testified at the sanction hearing that a claim was an articulation of a problem "coupled with a demand for a particular remedy." 01/18/06 RP 48, paraphrased in FF 39, CP 5324.

The trial court found that both the Martinez and McQuary files concerned "claims" as defined by Johnson and Swartling. FF 40, 41, CP 5324-25. Martinez sent Hyundai a "complaint", Ex 31 at 246,[9] which was forwarded to the legal department, which directed how the matter would be handled. *Id.* at 144-45. As the trial court found, "[a]ccording to Mr. Steve Johnson and Mr. Swartling this was, by any sense of the term, a claim." FF 40, CP 5324.

Similarly, McQuary reported to Hyundai that his Accent seat collapsed in a collision, the matter was referred to the legal

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[9] The documents bear 8-digit production numbers; we cite the last 3 digits.

department, a preliminary investigation report was performed, and additional information requested. Ex 32 at 147. As the trial court found, "[a]gain, this was clearly a claim. A remedy was requested by Mr. McQuary and [the] Hyundai legal department was involved." FF 41, CP 5324-35.

Other incidents were also claims within Hyundai's definitions. Wagner provided additional information as Hyundai requested, then Hyundai denied the "claim" (Ex 36 at 171, emphasis added):

> Your assistance in providing this information will expedite our investigation and ensure a prompt response to your **claim**. The party that will be handling your **claim** will contact you when a decision had been made. Thank you for your cooperation.

Bobbitt requested assistance with medical bills, Ex 37 at 102, and his attorney contacted Hyundai. *Id.* at 997. Hyundai's file notes, "DO NOT RESPOND LEGAL WILL HANDLE." *Id.* at 103. Hyundai conceded in closing argument that Bobbitt filed a "claim" under Steve Johnson's and Swartling's definitions. 01/19/06 RP 84-85. Bobbitt also filed a lawsuit shortly after Magaña's case went to trial. Ex 37 at 998. Pockrus asked Hyundai to look into the defective seat after his seat flattened in a collision, but Hyundai closed the file without action. Ex 38 at 139-40. Hyundai's letter to Powell, like its letter to Wagner, referred to Powell's "claim": "Providing this

information will expedite our investigation and ensure a prompt response to your **claim**" (Ex 39 at 173, emphasis supplied) as did Hyundai's letter to Whittiker. Ex 40 at 169.

3. Judge Johnson rejected Hyundai's theory that "claims" were limited to "attorney demand letters" held in Hyundai's corporate legal department.

During the sanctions hearing, Hyundai proposed a stipulation that its answer to RFP 20 was based on limiting "claims" to attorney demand letters, although this limitation was never disclosed to Magaña. FF 21, CP 5318. Hyundai in-house counsel Vanderford testified that Hyundai searched only for attorney demand letters (01/18/06 RP 143) and only within the legal department. FF 22, CP 5319. Vanderford testified that the legal department worked closely with the Consumer Affairs Department, directing investigations, requesting more information, and directing denial of claims on a form letter devised by the legal department. FF 25, CP 5320. The legal department had no record of any of this activity.[10] FF 26, CP 5320.

Based on this evidence, the trial court found:

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[10] This despite the fact that Hyundai's legal and consumer affairs departments are within 100 feet of each other. Ex 3 at 10-11, 15, 162.

- "A search limited to the corporate legal office, which did not seek or disclose records from claims which originated with the Consumer Affairs Department, even though many of the claims involved the legal department, was not a diligent search." FF 26, CP 5320.[11]

- "The false answer to RFP 20 was without reasonable excuse or explanation." FF 27, CP 5320.

4. Judge Johnson rejected Hyundai's "discovery agreement" defense.

Hyundai argues that "an agreement had been reached between counsel in which plaintiff abandoned the request for disclosure of seatback failures prior to trial." FF 30, CP 5321. Finding of Fact 35 – "[t]he Court concludes there was no such agreement" – is supported by the following evidence.

Hyundai never asserted a 2001 agreement until four-and-a-half years after allegedly making an agreement:

> 10/06/05: When Magaña asked Hyundai to update the response to RFP 20, Hyundai did not assert a 2001 agreement. Instead, Austin agreed to produce documents relating to Elantras as well as Accents. CP 903-04.
>
> 11/02/05: Responding to Magaña's motion to compel a more complete response to RFP 20, CP 787, Hyundai still did not assert a 2001 agreement. CP 903-08.
>
> 11/07/05: Arguing the motion to compel, Hyundai still did not assert a 2001 agreement. 11/07/05 RP 7-11, 13, 14.

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[11] FF 26 is one of the 52 findings to which Hyundai assigns error. But Hyundai never argues FF 26 or most of the other 51 findings.

11/18/05: When Magaña moved to clarify the trial court's order to compel, Hyundai still did not assert a 2001 agreement. 11/18/05 RP 5-7.

12/01/05: Hyundai moved for relief from the production order, pleading computer difficulties, without asserting a 2001 agreement. CP 1018-23.

12/15/05: Arguing its motion, Hyundai still did not assert a 2001 agreement. 12/15/05 RP 35-42, 110-11.

In January 2006, Hyundai finally claimed that an agreement was reached in a 2001 exchange of letters. CP 3707-08. In April, 2001, O'Neil had demanded a more complete response to RFP 20:

> Request for Production No. 20 and 21 ask for documents relating to other incidents where people have been injured by seat back collapse or by the airbag in a Hyundai vehicle. Hyundai's response seeks to rewrite the request so that it applies only to people who were injured in a manner identical to Mr. Magana. That is not Hyundai's prerogative, and the requests should be answered as written.

FF 32, CP 5322 (quoting CP 2392). Austin and O'Neil exchanged a series of letters and phone calls concerning airbags and crash tests, not RFP 20 and seatback failures. CP 4791, 2532-41, 3707.

On July 11, 2001, Austin wrote to O'Neil regarding airbag and crash-test documents. CP 3939-40 (BA Ex F). But as the trial court held, Austin's July 11 letter says nothing about an agreement. FF 34, CP 5322. O'Neil flatly denied any agreement (CP 4791):

> The claim that the parties somehow arrived at an "agreement" not to pursue discovery of seat back incidents is simply false. No such agreement is described in any of the

> letters by Mr. Austin, nor is it stated in any letter anywhere by me.

And Magaña's expert witnesses testified that Austin's letter did not set forth any agreement limiting discovery. 01/17/06 RP 44-45 (Greenan); 01/17/06 RP 189 (Baron).

Hyundai claims that "Magaña's defective design theory shifted back and forth during the course of discovery" and that Magaña shifted focus from the seatback to a theory that "an overpowered air bag caused the" seatback to fail. BA 5, 16-19. But Magaña consistently maintained that the Accent's entire restraint system – seatback, airbag and seatbelt – was defective:

Date	Title	CP
5/5/00	Pl. Resp. to Hyundai Interrogatory 6	3772-73
8/17/00	Pl. Supp. Resp. to Hyundai Interrogatory 6	70
9/17/01	Third Supplemental Reponses	73-74, 80-81
12/20/01	Plaintiff's Response to Motion for Partial Summary Judgment	189
12/19/01	Declaration of Stephen Syson	198-201
12/14/01	Declaration of Joseph Burton	233-37
01/02	Trial court's ruling denying partial summary judgment, ***Magaña***, 123 Wn. App. at 309-10.	
5/22/02	Memorandum in Support of Motion in Limine	329
06/02	Jury Inst. 9 in first trial, ***Magaña***, 123 Wn. App. at 316.	
01/06/06	Proposed Jury Inst. 9	4252

Magaña never abandoned his theory that the entire restraint system was defective, and Hyundai cites no such concession.

5. Judge Johnson found that Hyundai's failure to produce the *Acevedo* claim "casts doubt on whether all responsive documents have been produced."

By November, 2005, Magaña had independently learned of a lawsuit against Hyundai arising from a seatback failure in a 1994 Hyundai Scoupe, ***Acevedo v. Hyundai***, No. ATL-L-2276-01 (N.J. Superior Ct. for Atlantic Cty). CP 2361, 4663. But Hyundai failed to disclose ***Acevedo*** or include any ***Acevedo*** documents in the five boxes of documents it produced under court order in early December, 2005. CP 4663.

Hyundai eventually acknowledged that its failure to produce ***Acevedo*** was a discovery violation. FF 19, CP 5318. Hyundai's counsel Vanderford claimed in his 01/05/06 declaration that he did not "recall" that ***Acevedo*** concerned a seatback failure. CP 3304-05; FF 28, CP 5321. Less than two weeks later, Vanderford testified he never knew of the seatback-failure claim, and "I . . . don't think I ever knew it, but I certainly failed to recall it." 01/18/06 RP 119, 120. Yet a collapsing seatback had directly caused devastating brain injuries to a 9-year-old child in the back seat, CP 4724-29, 4736 (she cannot walk, talk or eat, and breathes through

a machine) and the complaint alleged that the "seat system and its components, including seatbacks & latching seatback system were defective in design and workmanship." CP 2364.

The trial court found ***Acevedo*** "highly relevant to plaintiff's claim." FF 28, CP 5321. Hyundai's failure to produce ***Acevedo*** "casts doubt on whether all responsive documents have been produced," particularly where Vanderford suggested that Hyundai's production depended upon his memory. FF 29, CP 5321.

6. Judge Johnson found that Magaña was "severely prejudiced" by Hyundai's discovery violations.

Judge Johnson found that Magaña was "severely prejudiced in going into a second trial" and in settlement negotiations, expressly relying on the testimony of Baron and Swartling. FF 60-61, 63, CP 5331. Based on his experience in crashworthiness cases, Baron explained the time-consuming steps involved in developing and analyzing OSIs. 01/17/06 RP 136-40. Hyundai's own expert witness Swartling admitted that it is time-consuming to develop OSI evidence and that there was not enough time to fully prepare for trial. 01/18/06 RP 16-17. Jesse Magaña described his frustrating effort to locate some of the people involved in the OSIs including deceased or missing victims and witnesses, and lost or destroyed evidence. 01/17/06 RP 90-96.

For example, Nikki Holcomb's Hyundai seatback failed during a 1996 accident; she kept the seat until at least February 2001, eight months after Hyundai's false response to RFP 20. 01/17/06 RP 98-101, 110. But by the time Magaña learned about and contacted Holcomb, she had discarded the seat. *Id.* at 101.

Judge Johnson found that Magaña would probably have amended his complaint to add a failure-to-warn claim if Hyundai had accurately answered RFP 20. FF 55, CP 5329. Magaña did move to amend in January 2006, CP 4293, but later withdrew the motion to avoid the continuance Hyundai sought. 01/13/06 RP 62. Both parties' experts testified that OSIs are relevant to a failure-to-warn claim. 01/18/06 RP 18; 01/17/06 RP 115.

Judge Johnson also found that Hyundai's discovery violations prejudiced the administration of justice, FF 62, CP 5331, relying on retired-Justice Robert Utter's declaration (FF 54, CP 5329, citing CP 2652):

> Discovery abuse strikes at the heart of the judicial system. When a party wrongfully fails to produce documents sought in discovery, that party interferes with the judicial system's ability to engage in the truth-seeking process. Discovery abuse unfairly hampers the presentation of the other party's claim, violates the jury's role and prevents an impartial decision on the merits.

On January 20, Judge Johnson gave her oral decision, which she characterized as "one of the most difficult tasks that this Court has undertaken." 01/20/06 RP 1. Judge Johnson made the findings discussed above and found that default was the only workable sanction for Hyundai's willful, egregious and prejudicial discovery violations. *Id.* at 21, 25, 32. Judge Johnson entered findings, conclusions and a judgment, and later denied Hyundai's motion for reconsideration. CP 5901.

ARGUMENT

Hyundai asks this Court to abandon a well established principle: appellate courts review trial courts' sanctions decisions for abuse of discretion. Hyundai will not concede the point, but its appeal fails unless this Court not only adopts the *de novo* standard of review, but also holds that Hyundai may withhold material evidence without disclosing its existence or bringing a motion for a protective order. This too is contrary to the overwhelming weight of authority, founded in ***Lowry v. Moore***, 16 Wash. 476, 48 P. 238 (1897), reaching a modern plateau of stability in this Court's decision, ***Associated Mortgage Invest. v. G.P. Kent Const. Co., Inc.***, 15 Wn. App. 223, 548 P.2d 558, *rev. denied*, 87 Wn.2d 1006 (1976), and reaching new heights in ***Wash. State Physicians Ins.***

Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 858 P.2d 1054 (1993) (***Fisons***), and ***Smith v. Behr Process Corp.***, 113 Wn. App. 306, 54 P.3d 665 (2002).

This Court should apply the usual standard of review – abuse of discretion. But even if it were to dramatically alter the balance between trial and appellate courts by adopting *de novo* review for the first time, this Court would certainly agree with the trial court that Hyundai willfully and deliberately violated discovery rules and orders, to Jesse Magaña's substantial prejudice – an egregious violation mandating no lesser sanction than default. Under any standard of review, this Court should affirm.

A. The standard of review is abuse of discretion – the same standard all courts always apply when reviewing trial court discretion on sanctions – under the great weight of Washington authority ignored by Hyundai.

As this Court recently reiterated once again, a "court does not abuse its discretion in sanctioning a party unless that discretion is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" ***Casper v. Esteb Enterprises, Inc.***, 119 Wn. App. 759, 768, 82 P.3d 1223 (2004) (citing ***Associated Mortgage***, 15 Wn. App. at 229). Indeed, this Court properly gives wide deference to the trial court in this area:

> We review the use of sanctions under an abuse of discretion standard that gives the trial court wide latitude in determining appropriate sanctions, reduces trial court reluctance to impose sanctions, and recognizes that the trial court is in a better position to determine this issue.

Smith v. Behr, 113 Wn. App. at 324 (citing ***Fisons***, 122 Wn.2d at 338-39). And the Supreme Court reaffirmed this standard this year:

> A trial court exercises broad discretion in imposing discovery sanctions under CR 26(g) or 37(b), and its determination will not be disturbed absent a clear abuse of discretion.

Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (citing ***Associated Mortgage***, 15 Wn. App. at 229; ***Fisons***, 122 Wn.2d at 355-56; ***Burnet v. Spokane Ambulance***, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)). This broad discretion is warranted because trial courts are better positioned and must have latitude in fashioning sanctions (***Fisons***, 122 Wn.2d at 339):

> The abuse of discretion standard again recognizes that deference is owed to the judicial actor who is "'better positioned than another to decide the issue in question.'" ***Cooter & Gell v. Hartmarx Corp.***, 496 U.S. 384, 403, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (quoting ***Miller v. Fenton***, 474 U.S. 104, 114, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985)). Further, the sanction rules are "designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are proper in a given case and to 'reduce the reluctance of courts to impose sanctions' . . . . If a review de novo was the proper standard of review, it could thwart these purposes; it could also have a chilling effect on the trial court's willingness to impose . . . sanctions." ***Cooper v. Viking Ventures***, 53 Wn. App. 739, 742-43, 770 P.2d 659 (1989) (quoting Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. 198 (1983)).

This well established, controlling authority plainly contradicts Hyundai's standard of review arguments. BA 51-56. While Hyundai acknowledges the proper standard, it nonetheless argues for a different standard, and even suggests applying the same standard differently, apparently urging this Court to engage in "nudge, nudge, wink, wink" abuse of discretion review. Abuse of discretion is a broad standard, but Hyundai manages to go over the edge. The Court should apply the usual standard of review.

Unable to support its position with Washington law, Hyundai relies on a 20-year-old federal appeal of an injunction entered in prison litigation for the proposition that "'the abuse of discretion standard varies with the decision being reviewed.'" BA 52, (citing ***Toussaint v. McCarthy***, 801 F.2d 1080 (9th Cir. 1986)). This inapposite dictum sheds no light on Washington's consistent application of the abuse of discretion standard in discovery-sanction cases.

Hyundai also argues that heightened scrutiny is appropriate because (1) trial courts are not better situated to decide discovery sanctions; and (2) the default judgment deprived it of a jury trial. BA 54-56. The first point was resolved to the contrary in ***Fisons***, 122 Wn.2d at 339, and ***Smith v. Behr***, 113 Wn. App. at 324. The

second point is not accurate – Hyundai had a jury trial, whose verdict the trial court reinstated due to Hyundai's egregious misconduct. FF 71, CP 5334. Our courts have sewn adequate constitutional safeguards into the very fabric of the sanctions analysis. The Court should review for abuse of discretion.

Hyundai argues by metaphor, repeatedly arguing that Judge Johnson did not "taste the flavor" of the discovery dispute. BA 55, 58. A trial judge is not a ruminant, but an active participant in the trial process. Judge Johnson presided over the first trial and a full evidentiary hearing. She fully understood Hyundai's discovery violations.

B. The trial court properly considered and found that (1) Hyundai willfully (*i.e.*, without reasonable excuse) failed to make discovery; (2) this substantially prejudiced Magaña; and (3) no lesser sanctions would suffice.

Equally well established are the legal standards for imposing a default judgment under CR 37(b):

> When a trial court imposes one of the "harsher remedies" under CR 37(b), "it must be apparent from the record that the trial court explicitly considered whether" (1) a lesser sanction would probably have sufficed and (2) whether the court found that the party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial.

Casper, 119 Wn. App. at 768-69 (citations omitted). Thus, Magaña must show that (1) Hyundai willfully (without reasonable excuse) or

deliberately failed to make discovery; (2) this substantially prejudiced Magaña; and (3) no lesser sanction would suffice. *Id.*

It is well known that in ***Fisons***, our Supreme Court wrought a sea change in discovery practice in this state. The Court reversed a refusal to grant even a lesser sanction under CR 26, where (as here) the defendants withheld two "smoking gun" documents while (1) promulgating misleading responses to discovery that failed to disclose the existence of withheld documents; (2) claiming that it had produced all the documents it agreed to produce; (3) claiming that plaintiffs had limited the discovery; and (4) claiming that the discovery requests were not specific enough. ***Fisons***, 122 Wn.2d at 352-55. The Court set these frequently-cited guideposts:

> [C]ertain principles guide the trial court's consideration of sanctions. First, the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong. The wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions.
>
> The purposes of sanctions orders are to deter, to punish, to compensate and to educate.

122 Wn.2d at 355-56 (footnote citations omitted). Equally important, ***Fisons*** requires that if a defendant believes a request is

too broad, it must move for a protective order, not simply fail or refuse to answer. 122 Wn.2d at 354. Hyundai never did this.

Modern Washington law pertaining to default as a sanction for discovery violations had its genesis in this Court's 1976 ***Associated Mortgage***, an analysis followed in major sanctions cases like ***Mayer***, ***Burnet***, and ***Smith v. Behr*** (all *supra*); ***Rivers v. Wash. State Conference of Mason Contractors***, 145 Wn.2d 674, 685-87, 41 P.3d 1175 (2002); ***Rhinehart v. Seattle Times Co.***, 51 Wn. App. 561, 577, 754 P.2d 1243, *rev. denied*, 111 Wn.2d 1025 (1988); and ***Gammon v. Clark Equip. Co.***, 38 Wn. App. 274, 280, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985).

In ***Associated Mortgage***, as here, the defendants failed to comply with discovery. This Court held that a trial court may enter a default consistent with due process when, as here, a party fails to produce material evidence pursuant to court order. 15 Wn. App. at 227-28 (citing, *inter alia*, ***Hovey v. Elliott***, 167 U.S. 409, 17 S. Ct. 841, 42 L.Ed. 215 (1897); ***Hammond Packing Co. v. Arkansas***, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530 (1909); ***Lawson v. Black Diamond Coal Mining Co.***, 44 Wash. 26, 86 P. 1120 (1906)).

To ensure adequate safeguards for due process, the Court held that default should be granted when a willful or deliberate refusal to obey a discovery order substantially prejudices the opponent's ability to prepare for trial. 15 Wn. App. at 228-29 (citing ***Cameron v. Boone***, 62 Wn.2d 420, 383 P.2d 277 (1963); ***Kagele v. Fredrick***, 43 Wn.2d 410, 261 P.2d 699 (1953)). An "unexplained failure to furnish complete and meaningful answers . . . in the face of the court's order impels a conclusion that the refusal was willful." 15 Wn. App. at 229 (citation omitted); *see also* CR 37(a)(3) (". . . an evasive or incomplete answer is to be treated as a failure to answer"). And "any violation of an explicit court order without reasonable excuse or justification must be deemed a willful act." *Id.* (citing ***Lowry***, 16 Wash. at 479).

This Court also found prejudice in that the "incomplete answers prevented plaintiff from discovering essential facts and evidence . . . ." 15 Wn. App. at 230. The Court examined numerous factors also present here, including delays caused by failures to timely answer; evasiveness and incompleteness of the answers; materiality of the answers for proper trial preparation; defendant's primary knowledge and control of the material information; and the proximity of the trial date. 15 Wn. App. at 230.

As noted above, this analysis has been followed in perhaps a dozen major sanctions decisions, including this Court's oft-cited decision in ***Anderson v. Mohundro***, 24 Wn. App. 569, 575, 604 P.2d 181 (1979), *rev. denied*, 93 Wn.2d 1013 (1980), and its landmark 2002 decision in ***Smith v. Behr***, *supra,* each of which affirmed default as a discovery sanction. Notwithstanding Hyundai's failure to more than glance at this controlling law, this Court should affirm under this very well established and correct legal analysis.

1. Hyundai willfully (without reasonable excuse) and deliberately violated the discovery rules.

A "violation of the discovery rules is willful if done without a reasonable excuse." ***Smith v. Behr***, 113 Wn. App. at 327. Here, the trial court found many discovery violations, beginning in May 2000, and continuing through the sanctions hearing. FF 6, CP 5315 (citing Ex 48, App. B). The court specifies a half-dozen violations, and later focuses on five OSIs. CP 5315-28. The court concludes that all of the "violations were without reasonable excuse." FF 51, CP 5329.

The trial court found that Hyundai and its legal department knew that customers had complained about seatback failures in the

Accent and Elantra models during the relevant years. FF 52, CP 5328. As detailed above, when Hyundai answered Magaña's RFP 20, the Martinez (Exs. 5 and 31), McQuary (Exs. 6 and 32), and Salizar (Ex 30) claims were all pending at Hyundai, the first two involving Accents, and the third purportedly an Accent. FF 14, CP 5316. Hyundai then failed to supplement its responses with five more Accent claims – Wagner (Ex 36), Bobbit (Ex 37), Pockrus (Ex 38), Powell (Ex 39) and Whittiker (Ex 40). FF 15, CP 5317. Other claims existed as well. CP 5326-28. These claims contradict Hyundai's false answer to RFP 20. *Id.* Hyundai has no excuse.

The trial court found that some of these claims had even been litigated. FF 52, CP 5328. Eleven claims were litigated. *See* Exs 10, 13, 14, 15, 16, 18, 22, 26, 29, 37 and 41. No reasonable excuse could exist for withholding these lawsuits in light of RFP 20's specific request for lawsuits; Hyundai offered none.

The trial court found that Hyundai had a duty to establish an adequate system to respond to discovery requests, but failed to do so. FF 52, CP 5328. The duty is well established. *See, e.g.*, sanctions decisions involving corporations, from ***Associated Mortgage*** through ***Fisons*** to ***Smith v. Behr***. The fact that Hyundai never produced ***Acevedo***, and never produced dozens of other

relevant files in its possession until long, long after the discovery was propounded, firmly supports the trial court's finding that Hyundai's "system" is inadequate. Hyundai-counsel Vanderford's claim that Hyundai did not produce ***Acevedo*** because he "did not recall" also demonstrates inadequacy. FF 29, CP 5321.

The trial court found that Hyundai unreasonably limited the term "lawsuits" to "legal complaints" and the term "claim" to "attorney demand letters." FF 21, CP 5318-19. The court saw a similarity of non-compliance with discovery obligations between this case and ***Parks v. Hyundai Motor America, Inc.***, 258 Ga. App. 876, 575 S.E.2d 673 (2002) (finding Hyundai's discovery responses inadequate). FF 23, CP 5319, modified at CP 5902.

Ultimately, the trial court found Hyundai's response "simply false" (FF 18, CP 5318) and, "because these violations involved directly false misrepresentations, these violations were egregious." FF 53, CP 5329. In light of this, Hyundai's "excuses" are trivial – or worse. For instance, Hyundai argues that it "agreed" with Magaña's counsel, Peter O'Neil, to limit discovery. BA 57-60. As explained above, this "agreement" claim never surfaced before the sanctions hearing; it could not excuse Hyundai's false answers one year before the alleged agreement; O'Neil flatly denied making any

agreement; and the letters among counsel reflect no such agreement. *See, e.g.*, FF 30-35, CP 5321-23. The trial court correctly found that this claim was false. FF 35, CP 5322.

Similarly, Hyundai ginned up a variety of definitions of the word "claim" to evade a discovery request encompassing

> any and all documents including but not limited to complaints, answers, police reports, photographs, depositions **or other documents relating to** complaints, notices, claims, lawsuits **or incidents** of alleged seatback failure on Hyundai products for the years 1980 to present.

FF 8, CP 5315 (emphases added). BA 60-64. "Document" was broadly defined to

> include without limitation all official and personal communications, reports, memoranda, notes, minutes, diaries, transcripts, working papers, telegrams, letters, papers, charts, drawings, graphs, photographs, publications, accounting materials, statements, and all other written, printed, typed or filmed materials.

CP 3717.

While Hyundai asserts that Magaña changed what he was seeking, his original request plainly encompassed any kind of document relating to any alleged seatback failure in any Hyundai product. *Id.* Hyundai was required to bring a timely motion for protective order if it felt that this request was too broad, but it did not. ***Fisons***, 122 Wn.2d at 354. Hyundai's failure to properly answer or seek a protective order mandates sanctions. *Id.*

Hyundai focuses solely on "claims." BA 60-64. As the trial court found, however, these documents contained "claims" by any reasonable definition. CP 5323-29. On reconsideration, Hyundai asked the trial court to impose a federal regulatory definition on the word "claims" (BA 62), but Hyundai had never before shared with Magaña its post-hoc definition based on a regulation first adopted two years after this discovery was propounded. Magaña did not (and could not) agree to limit his request solely to "claims" under a definition first proposed years later for a sanctions hearing. Hyundai's belated attempts to reframe and limit Magaña's discovery requests are baseless.

Hyundai even argues that the Martinez and McQuary records are not "claims." BA 63-64. Since discovery requests are ordinarily propounded to people or entities with no legal training, our courts should rely on the ordinary, common meaning of such words found in dictionaries. As relevant here, the American Heritage Dictionary 129 (Second College Ed. 1983) defines "claim" as "1. To demand as one's due. 2. To state to be true. 3. To call for; require." Webster's Third New International Dictionary 414 (1993) adds that "claim" is synonymous with "maintain" and

"demand." Under common definitions (and those of Hyundai's experts), the Martinez and McQuary documents contained claims.

Martinez called the Hyundai hotline in February 1998, claiming that the seats in his 1995 Hyundai Accent "folded" in an accident. Ex 31. "There will be medical bills because the passenger does not have" insurance. *Id.* Martinez wrote to Hyundai in March 1998, making a "complaint." Ex 31 at 246. He "struck the steering wheel and was injured." *Id.* He demanded "to be treated fairly and with a little respect." *Id.*

Hyundai responded to Martinez's hotline claims on March 9, 1998, stating that it was "in the process of evaluating your request for assistance relating to an accident in your Hyundai Accent." Ex 31 (3/9/98 letter). Hyundai required many records, all of which are in Hyundai's Martinez file, such as the police report, damage estimate, and pictures of the damage. Ex 31. Hyundai plainly knew that Martinez was making claims.

McQuary called the hotline in March 1998, regarding a collision in his 1997 Hyundai Accent. Ex 32. He "claims that a Suburban hit him from behind, pushing him into the veh[icle] in front of him." *Id.* He "claims that when the Suburban hit him the seat collapsed . . . ." *Id.* He is "requesting that someone from HMA

contact him in regards to this concern." *Id.* Hyundai apparently sent him a request for documents, and the file contains numerous photographs of the damage to McQuary's Accent, including the collapsed seat. *Id.* Again, Hyundai knew about McQuary's claims.

Yet Hyundai produced neither of these 1998 files in response to Magaña's April 2000 discovery requests. While Hyundai "urges this Court to hold . . . that Hyundai's response to RFP No. 20 was not misleading" (BA 64), even its appellate argument on this issue is misleading. All of the records Hyundai failed to produce contained "documents relating to complaints, notices, claims, lawsuits or incidents of alleged seatback failure on Hyundai products for the years 1980 to present." FF 8, CP 5315. This Court should affirm the trial court's findings and conclusions that Hyundai's discovery violations were willful.

2. Hyundai's "other" violations were also willful.

Hyundai challenges three other violations, BA 65-69, but all are supported by substantial evidence. The court focused on only the most egregious violations in its findings, including:

- Failing to produce seatback failures in 1995-1999 Hyundai Accents in response to RFP 20. FF 6-12.
- Attempting to "reframe" and "unilaterally narrow" the discovery sought in RFP 20 and Interrogatory 12,

withholding discoverable documents, failing to clarify the request and failing to seek a protective order. FF 13.

- Denying that the Elantra seat was substantially similar until after Magaña proved otherwise. FF 13, 16.
- Failing to supplement the response to RFP 20 when Hyundai was made aware of numerous subsequent OSIs in the same model. FF 15, 17, 18.
- Failing to produce sled test results. FF 19.
- Failing to produce ***Acevedo*** despite an order compelling production. FF 19, 28.
- Failing to conduct a reasonable search for requested discovery. FF 21-29.

Each of these violations, in addition to others listed in Ex 48, contributed to the court's correct determination that the appropriate sanction is a default judgment. Each is sufficient.

a. Hyundai conceded that Elantra seats are substantially similar to Accent seats.

Judge Johnson found Hyundai's answer to RFP 20 "evasive and misleading" in light of Hyundai's answer to Interrogatory 12. FF 13, CP 5316. Hyundai challenges findings 13 and 16, claiming that "[t]he trial court simply adopted Magana's assertion that Hyundai conceded the similarity of the Elantra and Accent seats [and] made no effort to come to grips with the evidence." BA 65-66. Hyundai effectively concedes that the Elantra and Accent "use[] the same recliner mechanism," but argues that they still are not

substantially similar. BA 66. The evidence – which the court fully "came to grips with" – fully supports its findings.

Interrogatory 12 had asked Hyundai to identify all Hyundai models with "the same or substantially similar right front seat as the 1996 Hyundai Accent." FF 10, CP 5316. Hyundai answered that, "[n]o other Hyundai model automobiles used the same or substantially similar design for the right front seat as the 1996 Hyundai Accent." FF 11, CP 5316. The trial court found that the Elantra seat is "substantially similar seat to the Accent," making the response to RFP 20 misleading. FF 16, CP 5317.

The following evidence supports FF 13 and 16. In September 2005, Magaña's counsel O'Neil wrote to Hyundai's counsel Austin, "We have a recliner mechanism from another Hyundai vehicle that looks identical." CP 4032. Magaña moved to compel production of records of seatback failures on all Hyundai products. CP 787-830. Magaña's expert witness Syson stated that the seatbacks in various Hyundai models have similar strength, a similar recliner mechanism, and nearly identical parts. CP 784-86. At the hearing, Austin conceded that after O'Neil's letter, "We looked, and sure enough, 1992 to 1995 recliner on the Alantra [*sic*]

used the same recliner that's on the 1995 to 1999 Hyundai Accent." 11/07/05 RP 8.

Hyundai argues that the seats are not substantially similar (BA 66), relying on its expert witness declaration that the Accent seat is "not the same seat" as the Elantra seat, CP 3272, but the finding is of substantial similarity, not identity. Hyundai also relies on another expert declaration submitted for its post-hearing motion for reconsideration. BA 66. The focus of the post-hearing declaration is that the prior accidents identified in discovery were not substantially similar to Magaña's accident, not that the seats were not substantially similar.[12] CP 5578. The trial court rejected Hyundai's contrary evidence: that is not error, but fact-finding.

b. Asking attorneys whether they remember cases is not a "document retrieval system."

Hyundai concedes that it failed to produce ***Acevedo*** in violation of the order compelling discovery and that its failure "was the result of a misrecollection" of what ***Acevedo*** was about. BA 67. Thus, Hyundai suggests that it may comply with its discovery

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[12] Hyundai quibbles that FF 13 says, "[o]nly after plaintiff's counsel demonstrated . . . that the Elantra seat was identical did the defendants concede a similarity." BA 65 (citing FF 13, CP 5316). But FF 16 – the operative finding – says substantial similarity, not identity.

obligations by relying on counsel's memory. BA 67-68. But as the trial court correctly found, a "document retrieval system" that consists of the recollections of attorneys who did not even "handle[]" the relevant cases (01/18/06 RP 120) is no system at all. FF 28-29, CP 5321. Rather, Hyundai was required "to set up a workable discovery system." ***Smith v. Behr***, 113 Wn. App. at 328. Hyundai's "system" did not work.

Hyundai struggles to bolster Vanderford's faulty memory by pointing to the ***Acevedo*** plaintiff's trial counsel's website, which describes the case in three lines, mentioning a seat belt, but not a seatback. BA 67, citing CP 3415. Opposing counsel's website also is not an adequate document-retrieval system.

Hyundai argues that ***Acevedo*** is "a single isolated" case out of 900,000 consumer hotline computer records. BA 68. But ***Acevedo*** is not just a hotline record, it was a litigation. Hyundai had only to look through its litigation history to find ***Acevedo***.

Hyundai also accuses Magaña of a "trial theatric" during the January 2006 sanctions hearing:

> [T]he circumstances of this courtroom "revelation" proved far more indicative of a trial theatric deliberately staged by Magana's counsel, who bypassed numerous opportunities to address the matter directly with Hyundai's counsel in favor of

a (supposed) "gotcha" moment during their examination of Mr. Vanderford.

BA 68. This is a puzzling accusation: Magaña disclosed ***Acevedo*** in the sanctions motion nearly a month before Magaña's examination of Vanderford, and Vanderford had discussed ***Acevedo*** in his own January 5 declaration, two weeks before the "(supposed) gotcha moment." CP 3303-05 (cited BA 38).

c. The "similarity" between *Parks* and this case is that Hyundai again failed to produce a lawsuit "properly the subject of discovery."

Hyundai criticizes the trial court's statement that there is a "similarity . . . regarding production of OSI documents" between this case and ***Parks***, *supra*, and even claims that the only similarity is "Hyundai's production of 33 OSI's in Parks." FF 23, CP 5902; BA 69. But the cases are very similar in other ways.

The ***Parks*** court reversed and remanded a summary judgment in Hyundai's favor, where plaintiffs alleged that their son's death resulted from Hyundai's defective passenger restraint system. Plaintiffs propounded a request for production seeking OSIs. As here, Hyundai reformulated the question, narrowing its response to exclude other discoverable claims (at least one of which was the subject of a published opinion). Viewing Hyundai's conduct as "nonresponsive and evasive," the ***Parks*** court held that

Hyundai willfully failed to produce relevant documents specifically requested in plaintiff's discovery. ***Parks***, 575 S.E.2d at 676. The ***Parks*** court also questioned whether Hyundai "was drawing too fine a line in responding to . . . discovery requests." *Id.* After the ***Parks*** court remanded, and after plaintiffs brought a successful motion to compel, Hyundai finally produced 33 responsive OSIs. CP 4758-59; FF 23, CP 5902.

Parks and this case establish that evasion and nondisclosure are Hyundai's repeated *modus operandi* regarding discovery. Hyundai's response in each case was obstructionist and failed to comply with the spirit of discovery. Hyundai rewrote straightforward discovery requests into ridiculously narrow requests in order to conceal OSIs. The trial court's finding is correct.

3. Hyundai's willful discovery violations substantially prejudiced Magaña's ability to prepare for trial.

The second requirement in imposing a default sanction is substantial prejudice to Magaña's ability to prepare for trial. ***Smith v. Behr***, 113 Wn. App. at 324-27. Prejudice depends on the facts of the case, but has been established where, as here, there was "reasonable evidentiary support" for the proposition that the

undisclosed evidence was relevant; *i.e.*, it tended to strengthen the plaintiff's case, and weaken the defendant's case. *Id.* at 327-28.

The trial court entered extensive findings on the obvious prejudice both to Magaña and to the administration of justice. CP 5329-32. The trial court noted that if Hyundai had properly disclosed these OSIs at the appropriate time – when requested, and in timely supplementations – Magaña would have had substantial opportunities to develop broader and deeper analyses of (1) the product defect (*e.g.*, by examining other plaintiffs' evidence and experts); (2) Hyundai's failure to warn Magaña based on the OSIs; and (3) occupant kinematics (*e.g.*, comparative analyses of occupant injuries and positions). FF 55-58, CP 5329-30. But due to Hyundai's hiding the truth, neither Magaña's experts nor the trial court had any time to properly address this evidence prior to either trial. FF 57-63, 5330-31. In sum, the withheld evidence went to the heart of Magaña's claims, undermined Hyundai's defenses, and created enormous prejudice to Magaña and to the administration of justice. FF 64, CP 5332.

Hyundai first claims that a "default judgment is only appropriate when a discovery violation deprives a plaintiff of . . . a fair trial." BA 70 (title case omitted). Magaña agrees. Hyundai

goes on at length that a trial is a search for the truth. BA 71-72. Magaña agrees. Hyundai also asserts that the right to jury trial must not diminish over time. BA 72. Magaña agrees. But as Washington courts have determined since at least 1897, when one party hides the truth, a fair trial is impossible. *See, e.g.*, cases from ***Lowry v. Moore***, *supra*, through ***Smith v. Behr***, *supra*.

Based on the truisms it misappropriates, Hyundai "urges this Court to hold that . . . it is preferable to delay the trial than to impose a default judgment where a fair trial is possible, provided the sanctioned party compensates the moving party financially for the costs of the delay." BA 73. But this is impossible because all of the authority cited above makes plain that courts do not reward discovery violations with trial continuances.

It is also impossible because Jesse Magaña will now have been waiting ten years for justice in this case due to Hyundai's directly false misrepresentations. Jesse was entitled to a fair trial, but Hyundai has made that impossible – twice. Money cannot "neutralize" this injustice. And it is not "preferable" to impose more delay on Jesse due to Hyundai's misconduct – it is unjust.

Hyundai next argues that it is "literally impossible" to determine whether Magaña has suffered any prejudice. BA 73-74.

This is fatuous. The trial court saw and heard lengthy testimony that it would be literally impossible to develop the OSI evidence in the time left after Hyundai finally disclosed. *See, e.g.*, CP 2646 (Baron Decl.), 2667 (Burton Decl.), 2663 (Syson Decl.), 2437 (Whelan Decl.); 1/17/06 RP 136-41 (Baron). The trial court also saw and heard testimony that witnesses have died or moved away, and evidence has been lost or destroyed. 1/17/06 RP 90-96 (Magaña); 98-101, 110 (Holcomb); Ex 1. All of this substantially prejudiced Magaña's ability to prepare for trial.

Moreover, when Magaña moved to amend to add the failure-to-warn claim based on the late-disclosed OSIs, Hyundai sought a continuance. Magaña withdrew the motion rather than endure more delay. 1/13/06 RP 58-62. The loss of this additional legal claim – negligence without the necessity of proving a product defect – also substantially prejudiced Magaña.

In attacking the trial court's reasoning as "flawed in every particular," Hyundai misstates the trial court's thinking, and then attacks its own flawed logic. BA 74-75. For instance, where the trial court saw the difficulties created by years of delay in producing the OSI evidence – witnesses dead or missing, evidence lost or destroyed, memories long-since faded – Hyundai sees only a need

for further delay to "investigat[e]" whether such things have happened. *Id.* In the real world, more delay is not necessary to establish the inevitable. And the trial court heard ample evidence of this type of prejudice, as discussed above. Indeed, Hyundai does not even challenge the trial court's finding that much of the OSI evidence is now "irretrievable." FF 68, CP 5333.

"Justice is not done if hurried defaults are allowed, but neither is it done if continuing delays are permitted." ***Johnson v. Cash Store***, 116 Wn. App. 833, 841, 68 P.3d 1099, *rev. denied*, 150 Wn.2d 1020, 81 P.3d 120 (2003) (citing ***Griggs v. Averbeck Realty, Inc.***, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979)). The trial court did not hurry its default, but held a comprehensive two-day sanctions hearing, carefully balancing the parties' respective rights to timely justice. Hyundai simply ignores the value of finality.

Our laws embody a fundamental human awareness – a truly bedrock principle – that delay prejudices the search for truth. Civil Rule 1 requires that court rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Every action. Article I, § 10 of the Washington State Constitution requires that "[j]ustice in all cases shall be administered . . . without unnecessary delay." All cases.

Hyundai goes so far as to suggest that the trial court abused its discretion by not imposing on Magaña the additional burdens of expending untold resources and more time trying to track down witnesses (BA 75-77) – witnesses who are dead or impossible to find, or whose memories will inevitably have faded in the five, ten, even fifteen years since their claims arose. *See, e.g.*, Ex 1. Hyundai cites no authority permitting such injustice. None exists.

Similarly, Hyundai tries to use the prejudice to Magaña – his inability to establish OSIs due to Hyundai's willful misconduct – as a sword to strike him down – again. BA 77-81. Every witness agreed that it would be extremely difficult or impossible to develop the OSI evidence at this late date. *See, e.g.*, CP 2646-50, 2667-702, 2663-66, 3262-70; 1/17/06 RP 98-101, 110, 136-41; 1/18/06 RP 16-17. Unless one places absolutely no value on timely justice – a proposition supported nowhere in the law – it simply defies logic to suggest that the trial court abused its discretion by bringing this case to a close.

Hyundai also drags up its old claim that its seatbacks are designed to "yield." BA 80-81. That argument goes to the weight of the OSIs, not their admissibility. Even Hyundai does not argue that its seatbacks are properly designed to collapse on impact and

throw passengers through the rear window. But all of that would have been for the jury to decide, if only Hyundai had lived up to its legal duty to disclose the OSIs in a timely manner.

Finally on prejudice, Hyundai complains about the trial court's quoting attorney Bullion's closing in ***Brewster v. Hyundai***. BA 81-83. The point of the quote is that OSIs are of "critical importance" (FF 56, CP 5330) an unremarkable proposition with which every expert agreed. Nowhere did the trial court even remotely suggest that it placed "great weight" on this snippet of a closing from a different case. BA 81. It is true that ***Brewster*** was a different case, but Magaña never claimed otherwise. Hyundai-counsel Austin did not mention the lack of OSIs in his closing for the first trial because Hyundai pursued a different defense, claiming Magana was not even in the front seat. CP 5674-78, 5684-5709.[13]

In sum, the trial court saw ample evidence of substantial prejudice to Magaña's ability to prepare for trial. It properly exercised its discretion in defaulting Hyundai. The Court should affirm the just result finally achieved by this ruling.

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[13] In any event, Austin made very close to the same argument as Bullion. *Compare* CP 5711-12 ("Magaña's expert is claiming that almost all seatbacks are defective") *with* CP 5713 ("[s]eats like the one in the Hyundai Accent are doing a good job").

4. The trial court properly considered lesser sanctions, but none were appropriate due to the severity of Hyundai's discovery violations.

Hyundai's argument on lesser sanctions (BA 83-84) ignores sanctions the trial court carefully considered and rejected, and also a greater sanction the court could have imposed – a default judgment plus money damages for the discovery violations that prejudiced the first trial. By the time Magaña filed suit in February 2000, Hyundai knew of 24 OSIs. Ex 48. Although Magaña prevailed on a product theory without this valuable discovery, with the OSIs he could also have raised an alternative failure-to-warn theory. 03/02/06 RP 4-6. The court focused solely on the second trial, but it could have awarded sanctions for prejudice to the first trial. 01/20/06 RP 24. The default judgment was not the harshest available sanction.

Carefully following this Court's decision in ***Smith v. Behr***, the trial court considered and rejected these lesser sanctions:

- Continuance: As in ***Smith v. Behr***, the trial court rejected a continuance because it would have harmed Magaña and rewarded Hyundai, which previously sought a continuance. A continuance would have significantly increased costs and duplicated trial preparation, and would not have remedied staleness or made it any easier for the court to determine how to treat the OSIs. FF 69, CP 5333.
- Monetary Fine: Also like ***Smith v. Behr***, the trial court rejected monetary sanctions because they would not rectify

the wrong or adequately punish Hyundai, a "multi-billion dollar corporation." CP 2610-19. Much of the OSI evidence is "irretrievable" and a monetary sanction cannot remedy that prejudice to Magaña, or serve the court's search for the truth. FF 67, 68, CP 5332-33.

- Striking Counterclaims or Affirmative Defenses: The trial court could not sanction Hyundai by striking counterclaims or affirmative defenses because there were no counterclaims and affirmative defenses were already decided and affirmed on the first appeal. FF 70, CP 5333-34.

Although Hyundai assigns error to these findings, it does not address Findings 65-69, and does not challenge Finding 70's rejection of striking affirmative defenses or counterclaims. BA 83-84. These findings are verities.[14] ***In re Welfare of C.B.***, 134 Wn. App. 336, 349,139 P.3d 1119 (2006); RAP 10.3(a)(6).

Hyundai challenges FF 70, that Hyundai "admitted . . . taking the facts of the OSI seat back failures as established . . . would be the same as or tantamount to ordering default judgment." BA 83 (quoting FF 70, CP 5334). That is precisely what Hyundai said:

> Admitting all the OSI evidence is tantamount to a default. We might as well skip the trial.

01/19/06 RP 92; *see also*, 87-88 (admitting all OSI as "established facts . . . guarantees[s] an unfair trial"), 94 ("default in form").

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[14] See App. A, providing citations to support these findings.

While the trial court correctly found that Hyundai did not propose any "sanction" other than a continuance, it never accused Hyundai of "Volunteer[ing]" for a default judgment. *Compare* FF 69, CP 5333 *and* 01/19/06 RP 88-94 *with* BA 83. Hyundai argues that it "was suggested" that the court admit only OSIs "affected by staleness" (BA 83), but Hyundai still demanded a continuance, vehemently opposing admitting OSIs without allowing Hyundai to challenge them. 01/19/06 RP 88-94. As noted, however, Hyundai does not challenge the finding that much of the OSI evidence is "irretrievable" – the trial court could not have admitted evidence that cannot be retrieved. FF 68, CP 5333.

In light of Hyundai's appellate argument that a continuance is not a sanction, Hyundai literally proposed no alternative sanction. Undoubtedly Hyundai would prefer the reward of more delay, and a longer deprivation of Magaña's fundamental right to a just and speedy resolution of his suit. The trial court did not abuse its discretion by putting an end to this charade.

C. Hyundai's egregious discovery violations warrant default on the case because the late-produced OSIs were also relevant to all outstanding issues of fact.

Hyundai next claims that even if the Court affirms the default judgment, the Court should limit default to the seatback defect and

remand for a trial to determine "who was sitting where" (Hyundai claimed Magaña, not Angela Smith, was sitting in back). BA 84. In a footnote, Hyundai acknowledges that the trial court found a connection between the OSIs and the kinematics issues (BA 85 n.51) but claims the finding is unsupported. This too is false.

In his motion seeking an evidentiary hearing, Magaña pointed out that in his deposition, Hyundai-expert Thomas McNish, Ph.D. testified that the chances of a front-seatbelted passenger being ejected were so "vanishingly small" as to be "as close to impossible as you can get." CP 3175 (citing CP 3195). Yet the late-produced "Ni" OSI presented precisely that scenario in a suit against Hyundai filed in 1995. Ex 18. Similarly, McNish testified in deposition that it was highly unlikely or impossible to have sufficient loading to fracture the femur of a backseat passenger, as Angela Smith suffered here. CP 3196. Yet the Dowling OSI involved a rear-seat passenger's broken leg from a deformed seatback in a Hyundai Elantra. CP 3175; Ex 35. These hidden OSIs could have been used to cross-examine McNish during the first trial. CP 3175. Their suppression directly prejudiced Magaña's preparation for the first and second trials. *Id.*

At least three other OSIs involved situations in which passengers in the back seat were injured when the front seat collapsed. Ex 34 (Urice), Ex 40 (Whittiker), and CP 4724-36 (***Acevedo***). Similarities between injuries to the backseat passengers in these cases, and to Angela Smith (seated behind Magaña) would have undermined Hyundai's seating-position claims. FF 57-58, CP 5330. This too prejudiced Magaña.

D. A reasonable, objective person would not perceive any potential bias in this trial judge, and any recusal request should be made to the trial court in the first instance.

Hyundai asks the Court to disqualify Judge Johnson on remand, but does not argue that any alleged bias is a ground for reversal here. BA 3-4, 85-97. Hyundai ignores both the correct standard – actual or probable bias – and the correct test – the appearance to a reasonable, objective person – and again asks for a lowered standard – "mere suspicion." BA 86, 88. The Court should affirm without reaching this issue. If necessary, Hyundai may ask Judge Johnson to recuse, allowing her to rule in the first instance. But no substantial grounds for alleging bias exist, whether actual, probable, or even "mere suspicion." Judge Johnson based her rulings on the evidence and the law. Hyundai's suspicions are unmerited, ill considered, and insulting.

1. "Mere suspicion" of bias or prejudice is inadequate to warrant remand to a different judge.

Judges should recuse only if "their impartiality might reasonably be questioned . . . ." CJC 3(D)(1). That is, a party seeking to disqualify a judge must show "actual or potential bias," without which "an appearance of fairness claim cannot succeed and is without merit." ***State v. Post***, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). Absent such evidence, a motion to disqualify must be made to the trial court, not the appellate court. ***Santos v. Dean***, 96 Wn. App. 849, 857, 982 P.2d 632 (1999), *rev. denied*, 139 Wn.2d 1026 (2000); *see also* ***State v. DeVries***, 109 Wn. App. 322, 325 n.1, 34 P.3d 927 (2001) *reversed on other grounds*, 149 Wn.2d 842 (2003). The test is what an objective, reasonable person who knows the facts would conclude. *See* ***Sherman v. State***, 128 Wn.2d 164, 205, 905 P.2d 355 (1995), and ***Chicago, Milwaukee, St. Paul & Pac. R. R. Co. v. Wash. State Human Rights Comm***, 87 Wn.2d 802, 810, 557 P.2d 307 (1976), cited at BA 85-86, 88.

Hyundai cites ***In re Custody of R.***, 88 Wn. App. 746, 947 P.2d 745 (1997), which relies on ***Human Rights Comm'n***, *supra*, apparently finding probable bias when the trial court ignored foreign court orders because the copies were uncertified, refused a

continuance to obtain certified copies, and scolded a party for taking actions in reliance on those very orders. ***Custody of R.*** applies the correct standard, but is nothing like this case.

2. Finding reversal "painful" is not bias.

Hyundai infers bias because the trial court found the issue on which the prior trial was reversed "painful" to address. BA 89. Reversal is naturally "painful" for any trial judge, in light of the waste, expense and delay engendered by an error. But this does not and cannot establish actual or potential bias, as such would always preclude a remand to the same judge. Judge Johnson was not biased, but rather was careful to follow this Court's decision, stating that "in light of the Court of Appeals' ruling" she would not address issues similar to those upon which the case was reversed without "a very clear understanding" of the situation. 12/15/05 RP 100. Hyundai's argument is frivolous.

3. The trial court did not express "hostility" toward Hyundai or any other large corporation.

Hyundai also argues that the trial court "expressed hostility toward corporations generally" (BA 89, title case omitted), but all she said was that plaintiffs try to make very broad requests, and corporations try to narrow them. 12/30/05 RP 17. This does not imply any corporate wrongdoing. BA 90. If a corporation properly

asks the trial court for a protective order – which Hyundai did not – its attempt to narrow any request is perfectly proper. ***Fisons***, 122 Wn.2d at 354; CR 26(c). Hyundai shows not a hint of bias.

4. Judge Johnson did not "assume" Hyundai was "engaged in improper conduct" – she expected counsel to follow her instructions.

The trial court was legitimately concerned when Talmadge and Hyundai's counsel placed his convenience over the trial schedule. BA 91-92 (citing 01/17/06 RP 14-15). As for his honorific, the trial court asked counsel to call Talmadge "Mr." rather than "Justice," to avoid confusion.[15] 01/17/06 RP 13-14. Minutes later, Hyundai's counsel again intentionally used "Justice":

> THE COURT: Somehow I have a feeling ["Justice" is] not used accidentally here in this context . . . .
>
> MR. KING: And I agree . . . .

Id. at 16-17. The judge did not "ascribe improper motives" to Hyundai (BA 93) – its counsel defied the trial court's request.

Hyundai's counsel also stamped "Magana v. Hyundai" in large black bold letters diagonally across the entire face of documents. *Compare* BA 93 *with* BA Exs G & H. This "watermark"

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[15] Ironically, Talmadge himself did not refer to Robert Utter as "Justice," but as "my esteemed friend and former colleague, Robert Utter . . ." CP 3254. If Talmadge declines to refer to Utter as "Justice," Hyundai can hardly fault Judge Johnson for declining to call Talmadge "Justice."

obscured some documents so badly that a witness "absolutely could not" read them and "gave up."[16] 01/17/06 RP 144. After wasting "considerable time" trying to decipher illegible documents on the stand, the court asked counsel to provide unmarked copies. 01/18/06 RP 1. Following counsel's unsolicited lecture rationalizing this practice, the court repeated her request. *Id.* at 2-3. When counsel claimed not to know how long it would take to provide clean copies, the court questioned whether counsel was using clean copies. *Id.* at 3. No bias against Hyundai is shown.

5. Denying Hyundai's motion for reconsideration does not mean that the court failed to consider the motion with an open mind.

Hyundai argues that the denial of Hyundai's motion for reconsideration "suggest[s] an inability to consider evidence and argument presented by Hyundai with the requisite open mind." BA 94-95 (title case omitted). On the contrary, a trial court is not required to state any reason for denying a CR 59 motion. CR 59(f) (court required to give reasons for granting the motion, not for denying it). There is no good reason to accuse Judge Johnson of not having an open mind in denying Hyundai's baseless motion.

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[16] Baron did not "accuse[]" Hyundai of marking the documents to "impede the discovery process itself" (BA 94 n.53 (citing 01/17/06 RP 144)); he noted that Bates Stamps are less obtrusive. 01/17/06 RP 143-44.

6. Accepting an award for service as a judge does not make Judge Johnson biased.

As with the other claims of bias, the appropriate remedy here is to do nothing with this issue and simply allow Hyundai to take it up at the trial court in the unlikely event of a remand. It is appropriate for Judge Johnson to determine whether she can remain impartial after receiving an award for outstanding service on the bench. The award does not show the "appearance of bias" (BA 97) – it shows that Judge Johnson is widely considered a fair and impartial jurist.

E. Judge Johnson acted within her discretion in awarding prejudgment interest, where Hyundai's own misrepresentation in the first trial at least partially misled this Court to reverse the first verdict.

Prejudgment interest on the recovery of a liquidated amount is ordinarily a matter of right. ***Colonial Imports v. Carlton Northwest, Inc.***, 83 Wn. App. 229, 245, 232, 921 P.2d 575 (1996). Prejudgment interest is favored because one who retains money owed to another should be charged interest on it. ***Hadley v. Maxwell***, 120 Wn. App. 137, 142, 84 P.3d 286, *rev. denied*, 152 Wn.2d 1030 (2004). Interest is awarded to compensate the plaintiff for the loss of use of the money and to make the plaintiff whole. *See, e.g.*, ***Lakes v. von der Mehden***, 117 Wn. App. 212, 217, 70

P.3d 154 (2003), *rev. denied*, 150 Wn.2d 1036 (2004); ***Colonial Imports***, 83 Wn. App. at 242. A trial court's award of prejudgment interest is reviewed for an abuse of discretion. ***Seattle-First Nat. Bank v. Wash. Ins. Guar. Ass'n.***, 94 Wn. App. 744, 757, 972 P.2d 1282 (1999); *see also* ***Colonial Imports***, 83 Wn. App. at 245 ("We hold that prejudgment interest on liquidated claims ordinarily is a matter of right, but that Washington trial judges have discretion to disallow such interest during periods of unreasonable delay in completing litigation that is attributable to claimants").

Hyundai seeks to deny Magaña interest on equitable grounds. BA 98. It is well-established that a party cannot seek relief in equity when that party has unclean hands. ***Income Investors, Inc. v. Shelton***, 3 Wn.2d 599, 602, 101 P.2d 973 (1940); *see also* ***Portion Pack, Inc. v. Bond***, 44 Wn.2d 161, 170, 265 P.2d 1045 (1954). Hyundai has unclean hands and is not entitled to equitable relief.

Hyundai argues that equity requires the court to deny prejudgment interest to Magaña because Magaña "invited clear error at the first trial by urging the trial court not to tell the jury that a portion of Dr. Burton's testimony had been stricken." BA 98. But Hyundai has unclean hands because Hyundai lied to the trial court

and to this Court about Burton's deposition testimony. Hyundai objected to Burton's trial testimony about integrated seatbacks on the ground that the subject was never mentioned in discovery or by any witness and was "totally new." CP 1980-82. Judge Johnson believed Hyundai, striking Burton's testimony on the subject; this Court also believed Hyundai, stating in its prior opinion:

> During discovery, Magaña and Hyundai took the depositions of two experts, Dr. Joseph Burton and Stephen Syson. Burton and Syson discussed the passenger restraint system, which they described as the passenger seat back, airbag, and seat belt hardware. **They did not mention an integrated seat belt design.**

Magaña v. Hyundai at 309 (emphasis supplied).

Unfortunately, Judge Johnson and this Court were misled. Burton explained the significance of his paper on integrated seatbacks during his deposition:

> Well, this paper, the Belt Integrated Vehicular Seat Rear Impact Studies, shows that basically if you have a seat back that has an integrated seat where the shoulder belt's incorporated into the seat back and the restraint belts are incorporated into the lap belt into the seat itself, that if you let this seat back recline, say, 60 degrees and you've got a seat where the belts are not part of it, that that seat with the belts integrated . . . can do a better job of keeping you in the seat.
>
> Q. Why is that?
>
> A. Because the shoulder belt in a conventional system, like the vehicle we're talking about today, it's anchored to the B-pillar. So the shoulder belt has nothing to do with restraining an occupant in the rear-end part of a rear-end

> collision. But if the seat belt is part of the seat back, you can let the seat back go to 70 degrees, and that shoulder belt still will be over the occupant because it's moving backwards with the occupant. So it creates a more likely environment to retain an occupant in the seat if that's what you're trying to do, and most people acknowledge that it's a good thing to keep the occupant in the seat.

CP 2567-68. Hyundai examined Burton about integrated seatbacks for several pages of deposition. CP 2568-73. Magaña tried to correct Hyundai's misrepresentation at trial. CP 1981. In short, contrary to Hyundai's assertion to Judge Johnson, and contrary to this Court's prior opinion, Hyundai knew Burton might talk about integrated seatbacks.

Magaña told Judge Johnson about Hyundai's misrepresentation of Burton's deposition. CP 2323-25. Judge Johnson was also keenly aware of Hyundai's egregious discovery violations. Balancing the equities, Judge Johnson rejected Hyundai's request to deny Magaña prejudgment interest:

> The court does not find an equitable basis for denial of interest as argued by Hyundai. Error found by the Court of Appeals which resulted in reversal was made by the trial court, and was not the result of unreasonable argument by plaintiff's counsel. In addition, the request for equity would be outweighed by the court's finding of willful and egregious discovery violations by Hyundai.

2/15/06 Letter Ruling by Judge Johnson (designation pending).

The court in ***Colonial Imports***, cited by Hyundai, was concerned that the judgment rate was unrealistically high, 83 Wn. App. at 247, but the Legislature resolved that concern by amending RCW 4.56.110(3), which applies to this case after June 10, 2004.[17] Magaña is fault-free. He has been denied the use of money awarded to him by the jury since 2002. Denial of interest would be inequitable to Magaña and would reward Hyundai for its discovery violations. Judge Johnson properly exercised her discretion in awarding prejudgment interest to Magaña.

F. RCW 4.22.070 requires that the Smiths be involved in any retrial of this case, as the Smiths requested.

Hyundai asks the Court to hold that upon any remand, the Smiths should not be involved in the case. BA 99. But if this case is remanded a second time, RCW 4.22.070 requires that the jury determine the respective percentages of fault of Hyundai and Ricky Smith. The Smiths asked to be, and should be, involved in any remand. CP 5461-62.

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[17] The interest rate here is 3.198% from June 10, 2004, to February 16, 2006 (entry of judgment). CP 5344, n.2. The interest rate during this appeal is 6.42%. CP 5342.

G. Attorney fees.

Hyundai assigns error to FF 74 on attorney fees, but provides no argument in support of its assignment. This Court should affirm the award of attorney fees by Judge Johnson and award attorney fees and costs for the expense of responding to this second appeal. RAP 18.1(a) provides for an award of attorney fees on appeal if applicable law grants the right to recover fees, and CR 37(d) allows the court to award fees for moving for default for failure to make discovery. ***Eugster v. City of Spokane***, 121 Wn. App. 799, 817, 91 P.3d 117 (2004) (awarding fees on appeal for defending discovery order and fee award under CR 37(a)(4)), *rev. denied*, 153 Wn.2d 1012 (2005).

CONCLUSION

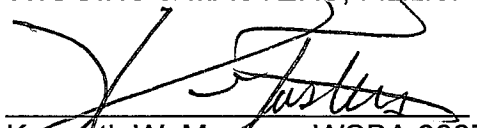
A jury trial is, and should remain, a noble search for truth. The civil justice system rests upon the good faith and fair dealing of all party litigants, who have an important responsibility: to truthfully and completely answer discovery and to provide all relevant documents to their opponents. Whenever any party ignores the truth and instead perpetuates a fiction in pre-trial discovery, the search for truth is derailed and our justice system is threatened.

By the time Magaña began to learn the truth and pressed for more accurate discovery responses, Judge Johnson was confronted with the problem of how to deal with these discovery violations and still preserve a fair trial for Jesse Magaña. Judge Johnson conducted a full scale evidentiary hearing into the issue, considered voluminous pleadings and attachments, heard live testimony from witnesses called by both sides, reviewed in detail the OSI evidence, and heard lengthy argument from counsel. Her findings, conclusions and judgment are well supported by the evidence, well within her discretion, and well-nigh inevitable.

All Jesse Magaña wanted and deserved was a level playing field. Hyundai deprived him of it. Judge Johnson restored it. This Court should affirm it.

RESPECTFULLY SUBMITTED this 20th day of December 2006.

WIGGINS & MASTERS, P.L.L.C.



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CERTIFICATE OF SERVICE

I certify that I caused to be served, a copy of the foregoing BRIEF OF RESPONDENT postage prepaid, via U.S. mail on the 20th day of December 2006, to the following counsel of record at the following addresses:

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Magaña v. Hyundai: Support for Challenged Findings

Findings of Fact	Clerks Papers	Evidentiary Hearing Exhibits	Report of Proceedings
FF 6	• **CP 2351** (Order Granting Plaintiff's Motion to Compel). • **CP 2351** (Acevedo Complaint and Mediation Memo, O'Neil Decl. Ex 2). • **CP 3304-05** (Decl. of Vanderford).	• **Ex 48** (Chart Entitled "Repeated Willful Discovery Violations Over Several Years").	• **01/18/06 RP 119-21** (Vanderford).
FF 7	• **CP 2379** (HMA's Response to RFP No.20. O'Neil Decl. Ex 3). • **CP 2384-85** (HMC's Response to RFP No. 20. O'Neil Decl. Ex 3).		
FF 12	• **See Support for FF 6, 12, 13, 14, 15, 17, 18, 20, 21, 27, 35, 47, 52.**		
FF 13	• **CR 37.** • **CP 4757-59** (Rita Williams Decl.) • ***Parks v. Hyundai*, 258 Ga. App. 876, 575 S.E.2d 673 (2002)** (cert. denied). (Vanderford engaged in same practice). • **CP 2351** (Response to Interrog. No. 12 HMA to Response to Interrog. No. 11 HMC, O'Neil Decl. Ex 3).	• **Ex 50** (Chart).	• **01/13/06 VRP 27-30** (King). • **01/17/06 VRP 23-40, 38-39, 48-51** (Greenan). • **11/07/05 VRP 8** (Austin).
FF 14		• **Ex 3** (Johnson Dep. 33-34). • **Exs 5, 6, 30, 31, 32.**	• **01/18/06 VRP 47-49** (Swartling). • **01/17/06 VRP 152-54** (Baron).
FF 15	• **CR 26(e)(2).** • **CP 2379** (HMA's Response to RFP No.20. O'Neil Decl. Ex 3). • **CP 2384-85** (HMC's Response to RFP No. 20. O'Neil Decl. Ex 3).	• **Exs 36,37,38,39,40.**	
FF 16	**See Support for FF 13.**		
FF 17 & 18	• **CP 04053** (10/25/05 Austin Letter).	• **Exs 31,32,36,37,38,39,40.**	

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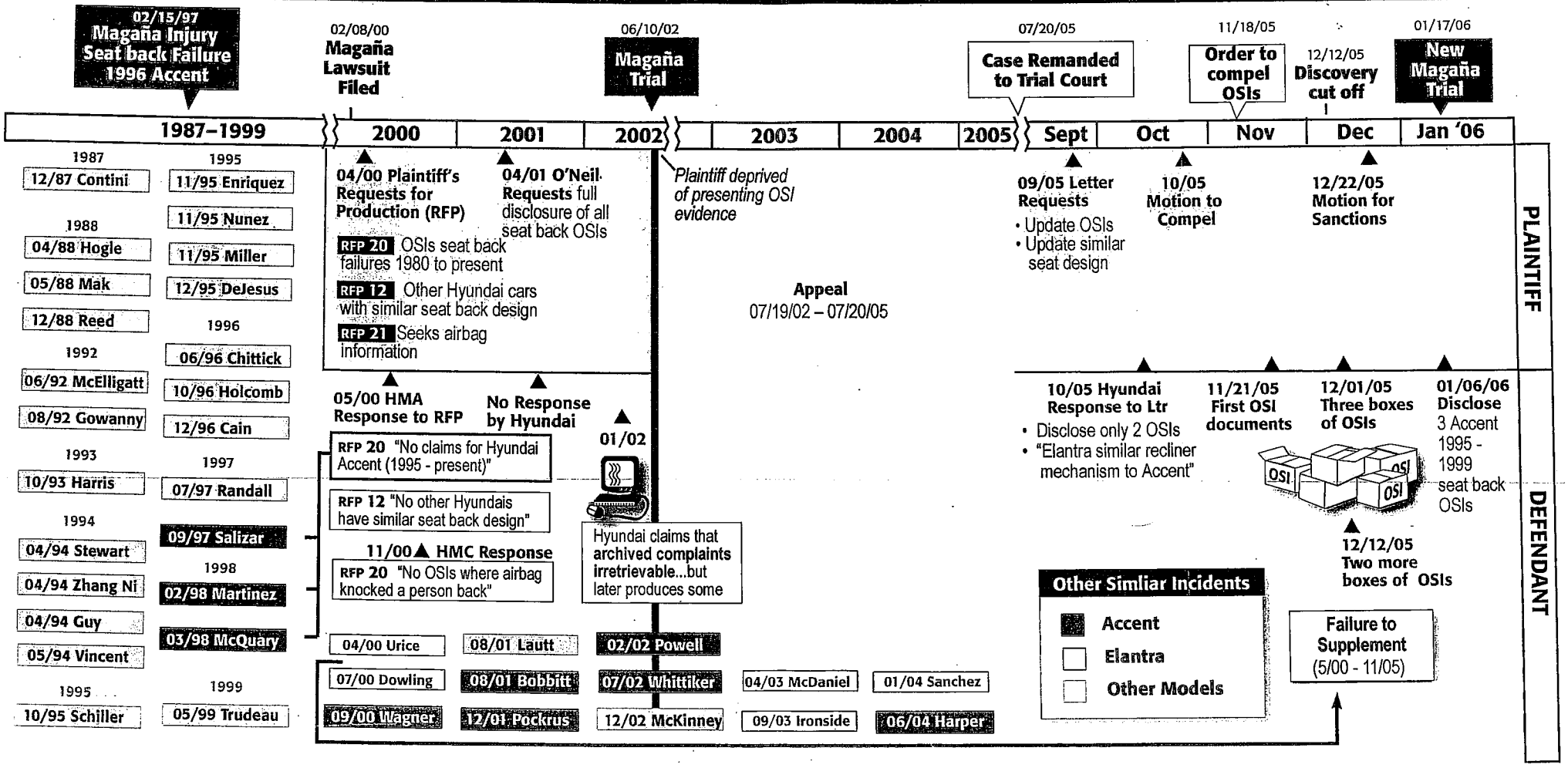
Findings of Fact	Clerks Papers	Evidentiary Hearing Exhibits	Report of Proceedings
FF 20 & 21	• **CP 4979-80** (Hyundai's Proposed Stipulation).		• **01/18/06 VRP 143-44.** (Vanderford).
FF 23	• **CP 4757-90** (Reply Decl. Rita Williams).		
FF 24 & 26		• **Ex 3** (Johnson Dep., pp.36, 37, 42-47, 63-74, 101-104).	
FF 27	• **CP 2379** (HMA's Response to RFP No.20. O'Neil Decl. Ex 3).		• **01/18/06 VRP 20-22** (Swartling). • **01/18/06 VRP 112-16** (Vanderford).
FF 28	• **CP 4724-29** (Excerpts from Dep. of Seargent Mojica, Ex F to Brodkowitz Reply Decl.). • **CP 4731-47** (Report of Dr. Ward, Ex G to Brodkowitz Reply Decl.).		
FF 29	• **CP 2576-99** (Judge Foscue's Ruling, Ex 22, Plaintiff's Motion for Sanctions).		
FF 30 & 33 & 34	• **CP 2391-92** (04/26/01 O'Neil Letter). • **CP 3930-31** (05/01/01 Austin Letter). • **CP 3933-34** (05/03/01 O'Neil Letter). • **CP 3938-39** (07/11/01 Austin Letter). • **CP 3703-08** (Austin Decl.). • **CP 4790-92** (O'Neil Decl.).		• **01/17/06 VRP 67-72** (Greenan).
FF 35	• **CP 4790-4792** (O'Neil Decl.). • **See Support for FF 30.**		• **01/17/06 VRP 43-45** (Greenan). • **01/17/06 VRP 188-194, 197-98** (Baron). • **01/17/06 VRP 67-72** (Greenan). • **11/07/05 VRP 7-12** (Austin).

Findings of Fact	Clerks Papers	Evidentiary Hearing Exhibits	Report of Proceedings
FF 36	• **CP 2646** (Baron Decl.). • **CP 2667** (Burton Decl.). • **CP 2663** (Syson Decl.). • **CP 2350** (Whelan Decl.).	• **Ex 1** (Chart Depicting Efforts to Locate OSI Information).	• **01/17/06 VRP 136-141** (Baron). • **01/17/06 VRP 90-96** (Magaña).
FF 37	• **See Support for FF 14 and FF 21.**		
FF 39			• **01/18/06 VRP 47-49** (Swartling).
FF 40 - 48		• **Exs 5, 31** (Martinez). • **Exs 6, 32** (McQuary). • **Ex 8** (Trudeau). • **Ex 9** (Harper). • **Ex 36** (Wagner). • **Ex 34** (Urice).	
FF 49	• **CP 1767-1768** (Dr. McNish Dep. Excerpts). • **CP 1776-1777** (O'Neil Decl.).		
FF 51 & 52	• **See Support for FF 14, 15, 17, 18, 20, 21, 26.**	• **Exs 10, 13, 14, 15, 16, 17, 18, 22, 26, 29, 37, 41.**	
FF 53	• **See Support for FF 6, 12, 13, 14, 15, 17,18, 20, 21, 27, 35, 47, 52.**		
FF 55	• **See Support for FF 36.** • **CP 4293-94** (Motion To Amend Complaint).		• **01/17/06 VRP 98-101, 110** (Holcomb). • **01/13/06 VRP 58-62.** (Whelan, Austin, Judge Johnson). • **01/18/06 VRP 17-19** (Swartling). • **01/17/06 VRP 114** (Baron).

Findings of Fact	Clerks Papers	Evidentiary Hearing Exhibits	Report of Proceedings
FF 56		• **Ex 49.**	
FF 58 & 59	• **CP 2667** (Burton Decl.). • **CP 1767-68** (McNish Dep. Excerpts).		• **01/17/06 VRP 142-43** (Baron). • **01/13/06 VRP 63** (Austin).
FF 60 & 61	• **See Support for FF 36 & 55.** • **CP 3262** (Swartling Decl.).	• **Ex 48.**	• **01/18/06 VRP 16-17** (Swartling).
FF 62	• **CP 2651** (Utter Decl.).		• **01/17/06 VRP 158-59** (Baron). • **12/15/06 VRP 68** (Cavanaugh).
FF 63	• **CP 2351** (O'Neil Decl.). • **CP 2646** (Baron Decl.). • **See Support for FF 36.**		• **Exs 9, 10, 11, 12 and 14.**
FF 64 & 65	• **See Support for FF 58.** • **CP 784-86** (Syson Decl.).		
FF 66		• **Ex 48** (including "What Sanctions are Effective in Curing the Discovery Abuse?").	• **01/19/06 VRP 69, 87-94** (King). • **01/19/06 VRP 94-95, 112-13** (Withey).
FF 68	• **CP 2351** (O'Neil Decl., and Exhibit 23 and 24 thereto). • **CP 2653** (Utter Decl.).		• **01/19/06 VRP 32-33** (Withey).
FF 69	• **See Support for FF 36.**		• **01/13/06 VRP 70** (Oral ruling by Judge Johnson).
FF 70	• **See Support for FF 36, 55, 60 and 66.**		
FF 73	• **See Support for FF 59, 60, 61, 62,63,65,68, 69, 70.**		
FF 74	• **Letter ruling from Judge Johnson dated February 15, 2006** (to be designated).		

Jesse Magaña prejudiced by Hyundai's willful discovery violations



Magana vs. Hyundai, et. al.

Timeline	
Before Magaña's injury – the following OSIs (eventually produced pursuant to court order), were filed with Hyundai: Contini (Ex 10), Hogle (Ex 11), Mak (Ex 12), Reed (Ex 13), McElligatt (Ex 14), Gowanny (Ex 15), Harris (Ex 16), Stewart (Ex 17), Ni (Ex 18), Guy (Ex 19), Vincent (Ex 20), Schiller (Ex 21), Enriquez (Ex 22), Nunez (Ex 23), Miller (Ex 24), DeJesus (Ex 25), Chittick (Ex 26), Holcomb (Ex 27), Cain (Ex 28), Randall (Ex 29). Ex 48 (chart).	
02/15/97	Jesse Magaña injured.
09/04/97	Salizar OSI. Exs 32, 48.
02/06/98	Martinez OSI. Exs 31, 48.
03/09/98	McQuary OSI. Exs 32, 48.
05/21/99	Hyundai denies "claim" for Trudeau Sonata seat back injury claim. Ex 33, 50053300D.
02/08/00	Magaña files suit.
05/05/00	Magaña files first set of interrogatories and requests for production. CP 56-66, 3715-32.
04/05/00	HMA (Hyundai Motor America) responds to Magaña's first set of interrogatories and requests for production. CP 3734-56.
05/02/00	Urice OSI. Exs 34, 48.
09/01/00	Wagner OSI. Exs 36, 48.
11/21/00	HMC responds to Magaña's first set of discovery requests. CP 2385.
04/21/01	Letter from Magaña (O'Neil) to Hyundai (Austin), accusing Hyundai of re-writing the RFPs. CP 2391-92.
07/11/01	Letter from Hyundai (Austin) to Magaña (O'Neil), which Hyundai claims memorializes an agreement to narrow discovery. CP 3939-40.
08/29/01	Bobbitt OSI. Exs 37, 48.
From August 2000 forward	Magaña continued arguing that his position that the defect in the Hyundia included the entire occupant restraint system – including seat back, seat belts, and airbag:
	09/17/01 – Third Supplemental Reponses. CP 73-74, CP 80-81.
	02/20/01 – Plaintiff's Response to Motion for Partial Summary Judgment. CP 187-287, CP 189.
	12/19/01 – Syson Declaration. CP 198-201.

Timeline	
	12/14/01 – Burton Declaration. CP 233-37.
	05/22/02 – Memo. re: Motion in Limine. CP 329.
12/18/02	Pockrus OSI. Exs 38, 48.
01/19/02	Powell OSI. Exs 3, 39, 48.
06/02	First trial begins.
06/28/02	Whittiker OSI. Exs 40, 48.
09/19/02	Hyundai files notice of appeal. CP 5904.
12/10/02	McKinney OSI. Exs 41, 48.
04/16/03	McDaniel OSI. Ex 48.
09/23/03	Ironside OSI. Exs 42, 48.
01/08/04	Sanchez OSI. Exs 43, 48.
06/09/04	Harper OSI. Exs 9, 48.
09/21/04	Decision reversing judgment in Magaña v. Hyundai.
05/23/05	Trial court set a new trial date for January 17, 2006. CP 758.
09/13/05	Letter from Magaña (O'Neil) to Hyundai (Austin), requesting HMA and HMC to update responses to discovery. CP 905-06.
10/0605	Letter from Magaña (O'Neil) to Hyundai (Austin) memorializing discussion re: discovery. CP 907.
10/07/05	Magaña (O'Neil) letter to Hyundai (Austin) clarifying response to Hyundai's "offer to produce information relating to alleged seat back failures in certain Accents and Elantras." CP 807.
10/11/05	Hyundai (Austin) responds, stating that Magaña's (O'Neil's) October 7 letter is a change in position and encompasses documents to which Hyundai believes Magaña is not entitled. CP 808-09.
10/25/05	First OSIs disclosed (Dowling and Bobbitt). Exs 35, 37, 48.
10/27/05	Magaña moves to compel OSIs. CP 787-830.
11/07/05	Hearing on motion to compel. 11/07/2005 RP.
11/21/05	Hyundai produces more OSIs. CP 2353-54; Ex 48.
12/01/05	Hyundai moves for relief from order compelling production of OSIs. CP 1018-25.
12/01/05	Hyundai produces three more boxes of documents, including more OSIs. Ex 48.

Timeline	
12/23/05	Magaña moves for a default judgment against Hyundai. CP 2309-46.
12/30/05	Trial court orders Hyundai to produce witnesses to respond to paragraphs 3-5 of Magaña's CR 30(b)(6) notice. CP 3167-69.
01/04/06	Magaña requests an evidentiary hearing. CP 3185-96, 3171-84.
01/05/06	(12 days before the scheduled trial date) – Hyundai produces the Martinez, McQuary, Salizar OSIs. CP 4790-4820.
01/10/06	Magaña takes CR 30(D)(6) deposition of Hyundai's Steve Johnson. Ex 3.
01/13/06	(the Friday before the scheduled trial date) – the trial court hears argument and grants Magaña's motion for an evidentiary hearing. 01/13/06 RP.
01/17/06-01/19/06	Evidentiary hearing on Hyundai's discovery violations. 01/17/06 RP-01/19/06 RP.
01/20/06	The trial court issues an oral ruling, defaulting Hyundai. 01/20/06 RP.
02/15/06	The trial court enters written findings and conclusions. CP 5311-38.
02/16/06	The trial court enters a written judgment. CP 5341-44.
02/27/06	Hyundai moves for reconsideration. CP 5466-94.
03/08/06	Magaña opposes Hyundai's motion for reconsideration. CP 5836-56.
03/28/06	The trial court denies Hyundai's motion for reconsideration. CP 5901-03.
04/03/06	Hyundai appeals. CP 5904-05.

Civil Rule 26. General provisions governing discovery.

(a) Discovery methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery scope and limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

(2) Insurance agreements. A party may obtain discovery and production of: (i) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and (ii) any documents affecting coverage (such as denying coverage, extending coverage, or reserving rights) from or on behalf of such person to the covered person or the covered person's representative. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.

(3) Structured settlements and awards. In a case where a settlement or final award provides for all or part of the recovery to be paid in the future, a party entitled to such payments may obtain disclosure of the actual cost to the defendant of making such payments. This disclosure may be obtained during settlement negotiations upon written demand by a party entitled to such payments. If disclosure of cost is demanded, the defendant may withdraw the offer of a structured settlement at any time before the offer is accepted.

(4) Trial preparation: Materials. Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party

seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this section, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(5) Trial preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. (ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.

(B) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(5)(A)(ii) and (b)(5)(B) of this rule; and (ii) with respect to discovery obtained under subsection (b)(5)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subsection (b)(5)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(6) Discovery from treating health care providers. The party seeking discovery from a treating health care provider shall pay a reasonable fee for the reasonable time spent in responding to the discovery. If no agreement for the amount of the fee is reached in advance, absent an order to the contrary under section (c), the discovery shall occur and the health care provider or any party may later seek an order setting the amount of the fee to be paid by the party who sought the discovery. This subsection shall not apply to the provision of records under RCW 70.02 or any similar statute, nor to discovery authorized under any rules for criminal matters.

(7) Treaties or conventions. If the methods of discovery provided by applicable treaty or

convention are inadequate or inequitable and additional discovery is not prohibited by the treaty or convention, a party may employ the discovery methods described in these rules to supplement the discovery method provided by such treaty or convention.

(c) Protective orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that the contents of a deposition not be disclosed or be disclosed only in a designated way; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.

(f) Discovery conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 16.

(g) Signing of discovery requests, responses, and objections Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the

violation, including a reasonable attorney fee.

(h) Use of discovery materials. A party filing discovery materials on order of the court or for use in a proceeding or trial shall file only those portions upon which the party relies and may file a copy in lieu of the original.

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

(j) Access to discovery materials under RCW 4.24.

(1) In general. For purposes of this rule, "discovery materials" means depositions, answers to interrogatories, documents or electronic data produced and physically exchanged in response to requests for production, and admissions pursuant to rules 26-37.

(2) Motion. The motion for access to discovery materials under the provisions of RCW 4.24 shall be filed in the court that heard the action in which the discovery took place. The person seeking access shall serve a copy of the motion on every party to the action, and on nonparties if ordered by the court.

(3) Decision. The provisions of RCW 4.24 shall determine whether the motion for access to discovery materials should be granted.

Civil Rule 30. Depositions upon oral examination.

(a) When depositions may be taken. After the summons and a copy of the complaint are served, or the complaint is filed, whichever shall first occur, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subsection (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of examination: general requirements; special notice; nonstenographic recording; production of documents and things; deposition of organization; videotape recording.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing of not less than 5 days (exclusive of the day of service, Saturdays, Sundays and court holidays) to every other party to the action and to the deponent, if not a party or a managing agent of a party. Notice to a deponent who is not a party or a managing agent of a party may be given by mail or by any means reasonably likely to provide actual notice. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice. A party seeking to compel the attendance of a deponent who is not a party or a managing agent of a party must serve a subpoena on that deponent in accordance with rule 45. Failure to give 5 days' notice to a deponent who is not a party or a managing agent of a party may be grounds for the imposition of sanctions in favor of the deponent, but shall not constitute grounds for quashing the subpoena.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the state and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subsection (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or the order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections under section

(c), any changes made by the witness, his signature identifying the deposition as his own or the statement of the officer that is required if the witness does not sign, as provided in section (e), and the certification of the officer required by section (f) shall be set forth in a writing to accompany a deposition recorded by nonstenographic means.

(5) The notice to a party deponent may be accompanied by a request made in compliance with rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of rule 34 shall apply to the request, including the time established by rule 34(b) for the party to respond to the request.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. In that event the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters known on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to the matters known or reasonably available to the organization. This subsection (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or by other electronic means. For the purposes of this rule and rules 28(a), 37(a)(1), 37(b)(1), and 45(d), a deposition taken by telephone or by other electronic means is taken at the place where the deponent is to answer questions propounded to him.

(8) Videotaping of depositions.

(A) Any party may videotape the deposition of any party or witness without leave of court provided that written notice is served on all parties not less than 20 days before the deposition date, and specifically states that the deposition will be recorded on videotape. Failure to so state shall preclude the use of videotape equipment at the deposition, absent agreement of the parties or court order.

(B) No party may videotape a deposition within 120 days of the later of the date of filing or service of the lawsuit, absent agreement of the parties or court order.

(C) On motion of a party made prior to the deposition, the court shall order that a videotape deposition be postponed or begun subject to being continued, on such terms as are just, if the court finds that the deposition is to be taken before the moving party has had an adequate opportunity to prepare, by discovery deposition of the deponent or other means, for cross examination of the deponent.

(D) Unless otherwise stipulated to by the parties, the expense of videotaping shall be borne by the noting party and shall not be taxed as costs. Any party, at that party's expense, may obtain a copy of the videotape.

(E) A stenographic record of the deposition shall be made simultaneously with the videotape at the expense of the noting party.

(F) The area to be used for videotaping testimony shall be suitable in size, have adequate lighting and be reasonably quiet. The physical arrangements shall be fair to all parties. The deposition shall begin by a statement on the record of: (a) the operator's name, address

and telephone number, (b) the name and address of the operator's employer, (c) the date, time and place of the deposition, (d) the caption of the case, (e) the name of the deponent, and (f) the name of the party giving notice of the deposition. The officer before whom the deposition is taken shall be identified and swear the deponent on camera. At the conclusion of the deposition, it shall be stated on the record that the deposition is concluded. When more than one tape is used, the operator shall announce on camera the end of each tape and the beginning of the next tape.

(G) Absent agreement of the parties or court order, if all or any part of the videotape will be offered at trial, the party offering it must order the stenographic record to be fully transcribed at that party's expense. A party intending to offer a videotaped recording of a deposition in evidence shall notify all parties in writing of that intent and the parts of the deposition to be offered within sufficient time for a stenographic transcript to be prepared, and for objections to be made and ruled on before the trial or hearing. Objections to all or part of the deposition shall be made in writing within sufficient time to allow for rulings on them and for editing of the tape. The court shall permit further designations of testimony and objections as fairness may require. In excluding objectionable testimony or comments or objections of counsel, the court may order that an edited copy of the videotape be made, or that the person playing the tape at trial suppress the objectionable portions of the tape. In no event, however, shall the original videotape be affected by any editing process.

(H) After the deposition has been taken, the operator of the videotape equipment shall attach to the videotape a certificate that the recording is a correct and complete record of the testimony by the deponent. Unless otherwise agreed by the parties on the record, the operator shall retain custody of the original videotape. The custodian shall store it under conditions that will protect it against loss or destruction or tampering, and shall preserve as far as practicable the quality of the tape and the technical integrity of the testimony and images it contains. The custodian of the original videotape shall retain custody of it until 6 months after final disposition of the action, unless the court, on motion of any party and for good cause shown, orders that the tape be preserved for a longer period.

(I) The use of videotaped depositions shall be subject to rule 32.

(c) Examination and cross examination; record of examination; oath; objections. Examination and cross examination of witnesses may proceed as permitted at the trial under the provisions of the Washington Rules of Evidence (ER). The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subsection (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. A judge of the superior court, or a special master if one is appointed pursuant to rule 53.3, may make telephone rulings on objections made during depositions. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to terminate or limit examination. At any time during the taking of the

deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Submission to witness; changes; signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and service by officer; exhibits; copies; notice.

(1) The officer shall certify on the deposition transcript that the witness was duly sworn and that the transcript is a true record of the testimony given by the witness. The officer shall then secure the transcript in an envelope endorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly serve it on the person who ordered the transcript, unless the court orders otherwise.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to the deposition transcript and filed with the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition transcript to any party or the deponent.

(3) The officer serving or filing the deposition transcript shall give prompt notice of such action to all parties and file such notice with the clerk of the court.

(g) Failure to attend or to serve subpoena; expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

(h) Conduct of depositions. The following shall govern deposition practice:

(1) Conduct of examining counsel. Examining counsel will refrain from asking questions he or she knows to be beyond the legitimate scope of discovery, and from undue repetition.

(2) Objections. Only objections which are not reserved for time of trial by these rules or which are based on privileges or raised to questions seeking information beyond the scope of discovery may be made during the course of the deposition. All objections shall be concise and must not suggest or coach answers from the deponent. Argumentative interruptions by counsel shall not be permitted.

(3) Instructions not to answer. Instructions to the deponent not to answer questions are improper, except when based upon privilege or pursuant to rule 30(d). When a privilege is claimed the deponent shall nevertheless answer questions related to the existence, extent, or waiver of the privilege, such as the date of communication, identity of the declarant, and in whose presence the statement was made.

(4) Responsiveness. Witnesses shall be instructed to answer all questions directly and without evasion to the extent of their testimonial knowledge, unless properly instructed by counsel not to answer.

(5) Private consultation. Except where agreed to, attorneys shall not privately confer with deponents during the deposition between a question and an answer except for the purpose of determining the existence of privilege. Conferences with attorneys during normal recesses and at adjournment are permissible unless prohibited by the court.

(6) Courtroom standard. All counsel and parties shall conduct themselves in depositions with the same courtesy and respect for the rules that are required in the courtroom during trial.

Civil Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or the court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons not parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

Civil Rule 37. Failure to make discovery: Sanctions.

(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, and upon a showing of compliance with rule 26(i), may apply to the court in the county where the deposition was taken, or in the county where the action is pending, for an order compelling discovery as follows:

(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or on matters relating to a deposition, to the court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the county where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under rules 30 or 31, or a corporation or other entity fails to make a designation under rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under rule 33, or if a party, in response to a request for inspection submitted under rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, any party may move for an order compelling an answer or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to rule 26(c).

(3) Evasive or incomplete answer. For purposes of this section an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of expenses of motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) Sanctions by court in county where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on

behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or rule 35, or if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination;

(E) Where a party has failed to comply with an order under rule 35(a) requiring him to produce another for examination such orders as are listed in sections (A), (B), and (C) of this subsection, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe the fact was not true or the document was not genuine, or (4) there was other good reason for the failure to admit.

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for production or inspection. If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his or her deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for production of documents or inspection submitted under rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including

attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 26(c). For purposes of this section, an evasive or misleading answer is to be treated as a failure to answer.

(e) Failure to participate in the framing of a discovery plan. If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

Civil Rule 59. New trial, reconsideration, and amendment of judgments.

(a) Grounds for new trial or reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

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

(8) Error in law occurring at the trial and objected to at the time by the party making the application;

(9) That substantial justice has not been done.

(b) Time for motion; contents of motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) Time for serving affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than 10 days after entry of judgment, the court on its own initiative may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and opportunity to be heard, the court may grant a timely motion for a new trial for a

reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Hearing on motion. When a motion for reconsideration or for a new trial is filed, the judge by whom it is to be heard may on the judge's own motion or on application determine:

(1) Time of hearing. Whether the motion shall be heard before the entry of judgment;

(2) Consolidation of hearings. Whether the motion shall be heard before or at the same time as the presentation of the findings and conclusions and/or judgment, and the hearing on any other pending motion; and/or

(3) Nature of hearing. Whether the motion or motions and presentation shall be heard on oral argument or submitted on briefs, and if on briefs, shall fix the time within which the briefs shall be served and filed.

(f) Statement of reasons. In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(g) Reopening judgment. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(h) Motion to alter or amend judgment. A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

(i) Alternative motions, etc. Alternative motions for judgment as a matter of law and for a new trial may be made in accordance with rule 50(c).

(j) Limit on motions. If a motion for reconsideration, or for a new trial, or for judgment as a matter of law, is made and heard before the entry of the judgment, no further motion may be made without leave of the court first obtained for good cause shown: (1) for a new trial, (2) pursuant to sections (g), (h), and (i) of this rule, or (3) under rule 52(b).

RCW 4.22.070. Percentage of fault -- Determination -- Exception -- Limitations

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3) (a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

RCW 4.56.110. Interest on judgments

Interest on judgments shall accrue as follows:

(1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment.

(2) All judgments for unpaid child support that have accrued under a superior court order or an order entered under the administrative procedure act shall bear interest at the rate of twelve percent.

(3) Judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

(4) Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered. The method for determining an interest rate prescribed by this subsection is also the method for determining the "rate applicable to civil judgments" for purposes of RCW 10.82.090.