

No. 80922-4
(COA No. 34630-3-II)
SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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JESSE MAGANA,

Petitioner,

vs.

HYUNDAI MOTOR AMERICA; HYUNDAI MOTOR COMPANY,

Respondents,

and

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

Defendants.

**RESPONDENTS' SECOND STATEMENT OF ADDITIONAL
AUTHORITIES**

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ORIGINAL

Under RAP 10.8, Respondents Hyundai Motor America and Hyundai Motor Company (collectively “Hyundai”) submit the following additional authorities.

1. Scope of Washington Right to Jury Trial. Concerning whether federal jury trial right jurisprudence provides useful guidance in determining the scope of Washington’s right to jury trial (*see* Petitioner Magana’s Answer to Brief of Amicus Curiae Association of Washington Business at 6, citing decisions of various United States Circuit Courts of Appeals and the majority opinion of the Wisconsin Supreme Court in *Rao v. WMA Securities, Inc.*, 310 Wis.2d 623, 752 N.W. 2d 220 (2008), Hyundai submits the following authority:

Compare Rao, 752 N.W.2d at 647, n.42, ¶ 47 (majority opinion per Abrahamson, C.J.) (“The right to jury trial in civil cases that is guaranteed by Article I, § 5 of the Wisconsin Constitution is substantially similar to that right guaranteed by the Seventh Amendment to the United States Constitution” (citing and quoting *Markweise v. Peck Foods Corp.*, 205 Wis.2d 208, 556 N.W.2d 326 (Ct. App. 1996)) & 650, n. 49, ¶ 49 (citing same federal circuit court decisions for primary holding cited by Magana as separate authorities) *with State v. Hicks*, 163 Wn.2d 477, 492, ¶ 35, 181 P.3d 831 (2008) (agreeing with the American Civil Liberties Union that “the Washington Constitution provides greater protection for jury trials than is provided in the federal constitution” (citations omitted) (previously cited by Amicus Association of Washington Business in its brief at 9, n.15).

2. “Waiver” of the Right to Jury Trial When a Party is Subjected to the Sanction of Default. Concerning whether the imposition by a trial court of the sanction of default for discovery violations should be deemed an implied “waiver” by the defendant of the right to trial by jury (*see* Petitioner Magana’s Answer to Brief of Amicus Curiae Association of Washington Business at 2-4), Hyundai submits the following authorities:

- On the general requirement for establishing waiver, express or implied:

Jones v. Best, 134 Wn.2d 232, 241-42, 950 P.2d 1 (1998) (holding that waiver was not established) (“A waiver is the intentional and voluntary relinquishment of a known right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. [citation omitted]. To constitute implied waiver, *there must be unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous facts.* [citations omitted]. The intention to relinquish the right to advantage must be proved, and the burden is on the party claiming waiver. [citation omitted]” (emphasis added)).

- On the specific requirement for establishing waiver of a constitutional right, including the right to trial by jury:

Wilson v. Horsley, 137 Wn.2d 500, 509, 974 P.2d 316 (1999) (reversing trial court and Court of Appeals in relevant part, and holding that waiver of right to jury trial not established) (“[A]ny waiver of a right guaranteed by a state’s constitution *should be narrowly construed in favor*

of preserving the right” (citation omitted)(emphasis added)).

- On the legal relevance of “waiver” to the interplay between the imposition by a trial court of a default sanction for discovery violations and the right to trial by jury:

Rao, 752 N.W.2d at 678, ¶ 109 (dissenting opinion per Prosser, J, joined by Roggensack, J.) (“The majority relies on Wis. Stat. § 804.12(2)(a)(3), which permits circuit courts to render judgment by default as a discovery sanction against a disobedient party. Majority op., ¶¶ 5, 81. *This authority must be grounded in some principle other than waiver or forfeiture* or the absence of disputed facts, for these principles are inapplicable. A circuit court’s decision to impose a sanction that deprives a party of a constitutional right ought to require standards that are susceptible to meaningful review. *The proposition that a party deprived of a constitutional right by sanction has intentionally relinquished that right is intellectually bankrupt because it eliminates the need for standards governing the judicially imposed deprivation* (emphasis added)).

3. Justice and Delay. Concerning whether justice delayed is by definition justice denied in an action for civil damage actions (*see* Petitioner Magana’s Answer to Brief of Amicus Curiae Association of Washington Business at 2), Hyundai submits the following additional authority:

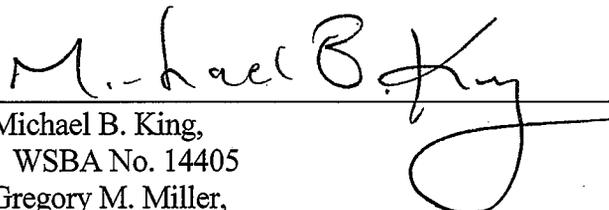
“We must come to see with the distinguished jurist of yesterday that ‘justice *too long delayed* is justice denied.’” Martin Luther King, Jr,

“Letter from Birmingham City Jail,” reprinted in The Essential Writings and Speeches of Martin Luther King, Jr. at 292 (J. Washington, ed. 1986) (emphasis added).

Copies of the authorities are attached for the convenience of the Court.

RESPECTFULLY SUBMITTED this 20th day of January, 2009.

CARNEY BADLEY SPELLMAN, P.S.

By: 
Michael B. King,
WSBA No. 14405
Gregory M. Miller,
WSBA No. 14459
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Supreme Court of Wisconsin.
 Ramachandra RAO, M.D., Plaintiff-Respondent-Cross-Appellant,
 v.
 WMA SECURITIES, INC., Defendant-Appellant-Cross-Respondent-Petitioner,
 World Group Securities, Inc., IDEX Investor Services, Inc., State Street Bank & Trust Company and David Novak, Defendants.
 No. 2006AP813.

Argued March 4, 2008.
 Decided June 27, 2008.

Background: Investor filed action against investment firm, seeking compensatory and punitive damages on claims including conversion, intentional misrepresentation, and breach of contract in connection with alleged theft by firm employee of assets from investor's account. After striking firm's answer as a discovery sanction and holding evidentiary hearing on issue of damages, the Circuit Court, Rock County, James Welker, J., entered a default judgment against firm. Both sides appealed. The Court of Appeals, 2007 WL 944293, Dykman, J., affirmed in part and reversed and remanded in part.

Holdings: Granting review, the Supreme Court, Shirley S. Abrahamson, Chief Justice, held that: (1) a civil defendant's failure to comply with discovery orders resulting in default judgment constitutes a waiver of state constitutional right to jury trial on issue of damages; (2) a circuit court ruling on claim for punitive damages in a judgment by default must give complaining party an opportunity to prove facts in support of that claim beyond those alleged in complaint; and (3) record supported investor's claim that circuit court considered only allegations in complaint in denying request for punitive damages.

Affirmed and cause remanded.

Annette Kingsland Ziegler, J., filed a concurring opinion.

David T. Prosser, J., filed a dissenting opinion in which Patience Drake Roggensack, J., joined.

West Headnotes

[1] Appeal and Error 30 ↪842(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k842 Review Dependent on Whether Questions Are of Law or of Fact

30k842(1) k. In General. Most Cited Cases

Appeal and Error 30 ↪1083(1)

30 Appeal and Error

30XVI Review

30XVI(L) Decisions of Intermediate Courts

30k1081 Questions Considered

30k1083 Review Dependent on Whether Questions Are of Law or of Fact

30k1083(1) k. In General. Most Cited Cases

Interpretation of State Constitution presents a question of law that Supreme Court determines independently of the circuit court and court of appeals but benefiting from their analyses.

[2] Jury 230 ↪12(3)

230 Jury

230II Right to Trial by Jury

230k12 Nature of Cause of Action or Issue in General

230k12(3) k. Issues of Law or Fact in

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General. Most Cited Cases
 State constitutional right of trial by jury extends to
 the issue of damages. W.S.A. Const. Art. 1, § 5.

[3] Jury 230 ↪25(6)

230 Jury
 230II Right to Trial by Jury
 230k25 Demand for Jury
 230k25(6) k. Time for Making Demand.
 Most Cited Cases

Jury 230 ↪26

230 Jury
 230II Right to Trial by Jury
 230k26 k. Payment or Deposit of Jury Fees.
 Most Cited Cases

Jury 230 ↪28(5)

230 Jury
 230II Right to Trial by Jury
 230k27 Waiver of Right
 230k28 In Civil Cases
 230k28(5) k. Form and Sufficiency of
 Waiver. Most Cited Cases
 A party's waiver of state constitutional right of trial
 by jury need not be a waiver in the strictest sense of
 that word, that is, an intentional relinquishment of a
 known right; instead, a party may waive the right of
 trial by jury by failing to assert the right timely, as
 when a party fails to demand a jury trial timely, or
 by violating a law setting conditions on the party's
 exercise of the jury trial right, as when a party fails
 to pay the jury fee timely. W.S.A. Const. Art. 1, §
 5; W.S.A. 805.01, 814.61.

[4] Appeal and Error 30 ↪842(1)

30 Appeal and Error
 30XVI Review
 30XVI(A) Scope, Standards, and Extent, in
 General
 30k838 Questions Considered
 30k842 Review Dependent on Whether
 Questions Are of Law or of Fact

30k842(1) k. In General. Most
 Cited Cases

Appeal and Error 30 ↪1083(1)

30 Appeal and Error
 30XVI Review
 30XVI(L) Decisions of Intermediate Courts
 30k1081 Questions Considered
 30k1083 Review Dependent on
 Whether Questions Are of Law or of Fact
 30k1083(1) k. In General. Most
 Cited Cases
 Interpretation of rules governing discovery sanc-
 tions and default judgments is a question of law
 that Supreme Court determines independently of
 the circuit court and court of appeals but benefiting
 from their analyses. W.S.A. 804.12, 806.02.

[5] Courts 106 ↪82

106 Courts
 106II Establishment, Organization, and Proced-
 ure
 106II(F) Rules of Court and Conduct of
 Business
 106k82 k. Modification, Amendment,
 Suspension, or Disregard of Rules. Most Cited Cases

Courts 106 ↪85(1)

106 Courts
 106II Establishment, Organization, and Proced-
 ure
 106II(F) Rules of Court and Conduct of
 Business
 106k85 Operation and Effect of Rules
 106k85(1) k. In General. Most Cited
 Cases
 A rule adopted by Supreme Court in accordance
 with statute requiring it to promulgate rules of
 pleading and practice may be amended by both the
 Supreme Court and the legislature and has the force
 of law. W.S.A. 751.12.

[6] Pretrial Procedure 307A ↪46

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307A Pretrial Procedure

307AII Depositions and Discovery

307AII(A) Discovery in General

307Ak44 Failure to Disclose; Sanctions

307Ak46 k. Dismissal or Default Judgment. Most Cited Cases

Trial court could render default judgment against defendant in civil action after striking defendant's pleadings for failure to comply with discovery orders, as no issue of law or fact had been joined. W.S.A. 804.12(2)(a), 806.02.

[7] Jury 230 ↪28(15)

230 Jury

230II Right to Trial by Jury

230k27 Waiver of Right

230k28 In Civil Cases

230k28(15) k. Evidence of Waiver.

Most Cited Cases

A civil defendant's failure to comply with the circuit court's discovery orders, resulting in default judgment against the defendant, constitutes a waiver of the defendant's state constitutional right to a jury trial on the issue of damages. W.S.A. Const. Art. 1, § 5; W.S.A. 804.12, 806.02.

[8] Jury 230 ↪10

230 Jury

230II Right to Trial by Jury

230k10 k. Constitutional and Statutory Provisions. Most Cited Cases

In construing state constitutional right to jury trial in civil cases, court may look for guidance to federal decisions interpreting the Seventh Amendment to Federal Constitution. U.S.C.A. Const.Amend. 7; W.S.A. Const. Art. 1, § 5.

[9] Courts 106 ↪97(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling

or as Precedents

106k97 Decisions of United States Courts as Authority in State Courts

106k97(1) k. In General. Most Cited Cases

Supreme Court looks to federal cases in interpreting state rule governing default judgments because state rule is similar in language and effect to federal rule. Fed.Rules Civ.Proc.Rule 55, 28 U.S.C.A.; W.S.A. 806.02.

[10] Appeal and Error 30 ↪842(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k842 Review Dependent on Whether Questions Are of Law or of Fact

30k842(1) k. In General. Most Cited Cases

Appeal and Error 30 ↪1083(1)

30 Appeal and Error

30XVI Review

30XVI(L) Decisions of Intermediate Courts

30k1081 Questions Considered

30k1083 Review Dependent on Whether Questions Are of Law or of Fact

30k1083(1) k. In General. Most Cited Cases

Whether a circuit court is limited to the allegations in the complaint in determining whether to award punitive damages in a judgment by default presents a question of law that Supreme Court determines independently of the circuit court and court of appeals but benefiting from these courts' analyses.

[11] Damages 115 ↪91.5(1)

115 Damages

115V Exemplary Damages

115k91.5 Grounds for Exemplary Damages

115k91.5(1) k. In General. Most Cited

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Cases

To meet requirements of statute setting forth conduct that may give rise to punitive damages, the plaintiff's evidence must show that the defendant acted with a purpose to disregard the plaintiff's rights, or was aware that his or her acts were substantially certain to result in the plaintiff's rights being disregarded; such a showing requires that the defendant's act or course of conduct was deliberate, that the act or conduct actually disregarded the rights of the plaintiff, and that the act or conduct was sufficiently aggravated to warrant punishment by punitive damages. W.S.A. 895.043(3).

[12] Damages 115 194

115 Damages

115X Proceedings for Assessment

115k193 Inquest on Default or Interlocutory Judgment

115k194 k. Nature and Form of Proceeding. Most Cited Cases

A circuit court ruling on claim for punitive damages in a judgment by default must give the complaining party an opportunity to prove facts in support of the punitive damages claim beyond those alleged in the complaint. W.S.A. 806.02, 895.043.

[13] Brokers 65 38(7)

65 Brokers

65IV Duties and Liability to Principal

65k38 Actions for Negligence or Wrongful Acts of Broker

65k38(7) k. Damages. Most Cited Cases

Record supported investor's claim that trial court, which rendered default judgment against investment firm on tort and contract claims arising from alleged theft of investor's assets by firm employee, considered only allegations in investor's complaint when it denied request for punitive damages at close of evidentiary hearing on damages; trial court made numerous comments that it was limiting investor to arguing punitive damages claim based on facts alleged in complaint, and in denying that claim it made no reference to investor's offer of

proof, to affidavits of investor's counsel and of another accountholder, or to counsel's request to present that person's testimony.

**222 For the defendant-appellant-cross-respondent-petitioner there were briefs by Sean Lanphier and Mallery & Zimmerman, S.C., Milwaukee, and oral argument by Sean Lanphier.

For the plaintiff-respondent-cross-appellant there was a brief by Sara L. Gehrig and Nowlan & Mouat L.L.P., Janesville, and oral argument by Sara L. Gehrig.

¶ 1 SHIRLEY S. ABRAHAMSON, Chief Justice.

*626 The defendant, WMA Securities, Inc., seeks review of an unpublished court of appeals decision affirming in part and reversing in part a judgment and an order of the Circuit Court for Rock County, James Welker, Judge.^{FN1} After the defendant continuously failed to comply with the circuit court's discovery orders, the circuit court issued an order striking the defendant's pleadings and awarding judgment by default to the plaintiff, Ramachandra Rao, M.D., against the defendant.

FN1. *Rao v. WMA Securities, Inc.*, No.2006AP813, unpublished slip op. (Wis.Ct.App. Mar. 29, 2007).

*627 ¶ 2 The circuit court ordered a hearing on damages, denying the defendant's request for a jury trial on this issue. The court of appeals affirmed the circuit court's ruling denying a jury trial.^{FN2}

FN2. The court of appeals stated: "Because [the defendant] has not cited supporting authority for its proposition that a party is entitled to a jury trial following a default judgment, we decline to consider its argument further." *Rao v. WMA Securities, Inc.*, No.2006AP813, unpublished slip op., ¶ 23 (Wis.Ct.App. Mar. 29, 2007).

¶ 3 The circuit court denied the plaintiff's request for punitive damages under Wis. Stat. § 895.043 (2005-06).^{FN3} The court of appeals reversed the

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circuit court's denial of punitive damages, remanding the issue to the circuit court to exercise its discretion in determining the nature of the hearing on punitive damages and to determine whether punitive damages are warranted.^{FN4}

FN3. All subsequent references to the Wisconsin Statutes are to the 2005-06 version unless otherwise indicated.

At the time this action was brought the punitive damages statute was numbered Wis. Stat. § 895.85 (2003-04).

FN4. *Rao v. WMA Securities, Inc.*, No.2006AP813, unpublished slip op., ¶ 42 (Wis.Ct.App. Mar. 29, 2007). The court of appeals further explained its remand at ¶ 42 as follows:

For example, the court may hold an evidentiary hearing, consider Rao's offer of proof to determine if an evidentiary hearing is warranted, or allow Rao an opportunity to submit additional proof to support his case for punitive damages before determining whether to hold a full evidentiary hearing.

¶ 4 Two issues are presented on review of the decision of the court of appeals:^{FN5}

FN5. The court of appeals was presented with both an appeal by the defendant and a cross-appeal by the plaintiff and decided a number of issues that neither party has briefed or has sought to have reviewed here. Accordingly, the court does not address these issues and limits its review to the two issues the parties present.

The court of appeals affirmed the circuit court's order striking the defendant's pleading and awarding default judgment to the plaintiff; the circuit court's determination of the amount of the plaintiff's damages; and the circuit

court's ruling denying the plaintiff's request for multiple damages under Wis. Stat. § 895.80. The court of appeals reversed the circuit court's ruling denying the defendant's request to present evidence of the plaintiff's failure to mitigate damages and reversed the circuit court's ruling not to offset the damages award by the amount the plaintiff recovered from settling defendants.

**223 *628 I. Did the circuit court violate the defendant's right of trial by jury under Article I, Section 5 of the Wisconsin Constitution when it denied the defendant's motion for a jury trial on the issue of damages after it ordered a judgment by default against the defendant?

II. Did the circuit court err in denying the plaintiff's punitive damages claim?

¶ 5 We conclude that the circuit court did not violate the defendant's right of trial by jury under Article I, Section 5 of the Wisconsin Constitution when it denied the defendant's motion for a jury trial on the issue of damages. The defendant waived its right of trial by jury in the manner set forth in Wis. Stat. §§ (Rule) 804.12(2) and 806.02. We further conclude that the circuit court erred in denying the plaintiff's claim for punitive damages solely on the basis of allegations in the complaint and in denying the plaintiff an opportunity to prove additional facts in support of the punitive damages claim.

¶ 6 Accordingly, we affirm the decision of the court of appeals. We affirm, as did the court of appeals, the circuit court's denial of the defendant's request for *629 a jury trial on the issue of damages. We reverse, as did the court of appeals, the circuit court's ruling denying punitive damages, and remand the issue of punitive damages to the circuit court to exercise its discretion in determining the nature of the hearing on punitive damages and to determine whether punitive damages are warranted. We affirm the decision of the court of appeals re-

manding the cause to the circuit court.

¶ 7 We briefly summarize the facts giving rise to the instant case and present additional facts relating to each issue when we address that issue. The facts are more fully stated in the decision of the court of appeals.

¶ 8 The plaintiff brought an action against the defendant, an employee of the defendant, and three additional co-defendants alleging that the employee unlawfully converted hundreds of thousands of dollars from an investment account that the plaintiff maintained with the defendant. The plaintiff asserted that the defendant terminated the employee's employment but took no action to inform the plaintiff that the employment had been terminated or that the termination was for forgery and theft. The circuit court entered judgment by default against the employee. Each of the remaining co-defendants was eventually dismissed from the action.

¶ 9 The plaintiff alleged that the defendant is liable to the plaintiff for (1) vicarious liability for the employee's unlawful acts of conversion, (2) intentional misrepresentation, (3) strict responsibility misrepresentation, (4) negligent misrepresentation, (5) breach of fiduciary duty, (6) negligence, (7) breach of the implied duty of good faith in performance of a contract, and (8) breach of contract. The plaintiff demanded damages from the defendant, including compensatory damages and punitive damages.

*630 ¶ 10 After hearing the parties on the question whether the defendant had disobeyed discovery orders, the circuit court agreed with the plaintiff's characterization of the defendant's conduct during discovery, and, as a sanction for the defendant's violating discovery orders, the circuit court ordered the defendant's pleadings struck and granted the plaintiff's motion for judgment by default pursuant to Wis. Stat. § (Rule) 804.12(2)(a) authorizing a circuit court to sanction a party for failure to comply with discovery orders.

¶ 11 No judgment by default was rendered or entered because damages had not **224 been determined. Thus the circuit court's order also provided that the defendant would be entitled to participate in an evidentiary hearing to determine the amount of damages. Approximately two weeks after holding the evidentiary hearing, the circuit court rendered a default judgment against the defendant for the plaintiff's damages as determined by the circuit court.^{FN6} The judgment was then entered three days after it was rendered.^{FN7}

FN6. "A judgment is rendered by the court when it is signed by the judge or by the clerk at the judge's written discretion." 3A Jay E. Grenig, *Wisconsin Practice Series: Civil Procedure* § 602.4, at 172 (3d ed.2003).

FN7. "A judgment is entered when it is filed in the office of the clerk of court." 3A Grenig, *supra* note 6, § 602.4, at 172.

I

¶ 12 We examine first the defendant's argument that the circuit court violated the defendant's right of trial by jury under Article I, Section 5 of the Wisconsin Constitution when it denied the defendant's motion for a jury trial on the issue of damages.

¶ 13 The defendant's motion for a jury trial on the issue of damages came after the circuit court *631 granted the plaintiff's motion for judgment by default against the defendant as a sanction, pursuant to Wis. Stat. § (Rule) 804.12(2)(a), for failing to comply with discovery orders and ordered an evidentiary hearing on damages. The defendant had neither demanded a jury trial in the circuit court nor paid the jury fee in a timely fashion before the pleadings were struck. A co-defendant, however, did demand a jury trial and did pay the jury fee timely.^{FN8} The co-defendant was later dismissed from the case. Because neither party in the instant case raised or briefed the issue, the question wheth-

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er a co-defendant's timely demand for a jury trial and timely payment of the jury fee suffices to enable the defendant to claim a constitutional right of trial by jury is not before the court. We assume (without deciding) that for purposes of the instant review the co-defendant's demand for trial by jury and payment of the jury fee can be attributed to the defendant.

FN8. The circuit court ordered that “[o]n or before April 10, 2005, the party demanding a trial by jury shall pay to the office of the clerk ... the jury fee required by statute” and that “[i]n the event such fee is not paid by that date, the right of trial by jury will be deemed waived.”

¶ 14 Article I, Section 5 of the Wisconsin Constitution provides in full as follows:

The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law. Provided, however, that the legislature may, from time to time, by statute provide that a valid verdict, in civil cases, may be based on the votes of a specified number of the jury, not less than five-sixths thereof.

[1] *632 ¶ 15 Interpretation of the Wisconsin Constitution presents a question of law that this court determines independently of the circuit court and court of appeals but benefiting from their analyses.^{FN9}

FN9. *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, ¶ 58, 284 Wis.2d 573, 701 N.W.2d 440.

¶ 16 The defendant argues that if its constitutional right of trial by jury is to remain inviolate, it cannot be denied a jury trial on the issue of damages in the present case.

[2] ¶ 17 We agree with the defendant that the Article I, Section 5 right of trial by jury extends to the

issue of damages. **225 In *Jennings v. Safeguard Ins. Co.*, 13 Wis.2d 427, 109 N.W.2d 90 (1961), this court held that the right of trial by jury under Article I, Section 5 extends to “all issues of fact, including that of damages.”^{FN10} Nevertheless, a party may waive a trial by jury on the issue of damages “in the manner prescribed by law.”

FN10. *Jennings v. Safeguard Ins. Co.*, 13 Wis.2d 427, 431, 109 N.W.2d 90 (1961) (citing *Borowicz v. Hamann*, 193 Wis. 324, 214 N.W. 431 (1927)).

¶ 18 The question presented is whether the defendant waived its right of trial by jury in the manner prescribed by law. The court has addressed waiver in previous cases. The court has declared that a defendant “has no vested right under art. I, sec. 5 [of the Wisconsin Constitution], to the manner or time in which [the right of trial by jury] may be exercised or waived, since these are merely procedural matters to be determined by law.”^{FN11}

FN11. *Phelps v. Physicians Ins. Co. of Wis., Inc.*, 2005 WI 85, ¶ 32, 282 Wis.2d 69, 698 N.W.2d 643 (quoting *State ex rel. Prentice v. County Court*, 70 Wis.2d 230, 240, 234 N.W.2d 283 (1975)) (quotation marks omitted).

*633 ¶ 19 The manner in which the Article I, Section 5 right of trial by jury may be waived is governed principally by Wis. Stat. § (Rule) 805.01(3).^{FN12} Section (Rule) 805.01(3) sets forth two ways in which the right of trial by jury may be waived. First, a party's failure to demand a jury trial timely in accordance with § (Rule) 805.01(2) constitutes a waiver of the jury trial right. Second, the parties or their attorneys of record may waive the right by written stipulation filed with the court or by oral stipulation made in open court and entered in the record.

FN12. Wisconsin Stat. § (Rule) § 805.01 provides in full as follows:

(1) **Right preserved.** The right of trial by jury as declared in article I, section 5, of the constitution or as given by a statute and the right of trial by the court shall be preserved to the parties invol-

(2) **Demand.** Any party entitled to a trial by jury or by the court may demand a trial in the mode to which entitled at or before the scheduling conference or pre-trial conference, whichever is held first. The demand may be made either in writing or orally on the record.

(3) **Waiver.** The failure of a party to demand in accordance with sub. (2) a trial in the mode to which entitled constitutes a waiver of trial in such mode. The right to trial by jury is also waived if the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

¶ 20 Wisconsin Stat. § (Rule) 805.01(3) is not the exclusive provision governing the manner in which the state constitutional right of trial by jury may be waived. Under § 814.61(4), for example, a party may waive the jury trial right by failing to pay the jury fee timely. *634 Section 814.61(4) states that if the jury fee is not paid timely, “no jury may be called in the action, and the action may be tried to the court without a jury.” FN13

FN13. Wisconsin Stat. § 814.61(4) provides in full as follows:

Jury Fee. For a jury in all civil actions, except a garnishment action under ch. 812, a nonrefundable fee of \$6 per juror demanded to hear the case to be paid by

the party demanding a jury within the time permitted to demand a jury trial. If the jury fee is not paid, no jury may be called in the action, and the action may be tried to the court without a jury.

¶ 21 Moreover, “Wisconsin Stat. §§ 805.01(3) and 814.61 are ‘but two examples of how waiver [of the Article I, Section 5 right of trial by jury] may be effectuated.’ **226” FN14

FN14. *Phelps*, 282 Wis.2d 69, ¶ 28, 698 N.W.2d 643.

[3] ¶ 22 As both Wis. Stat. § (Rule) 805.01(3) and Wis. Stat. § 814.61 make clear, a party’s “waiver” of the Article I, Section 5 right of trial by jury need not be a “waiver” in the strictest sense of that word, that is, an “intentional relinquishment of a known right.” FN15 Instead, a party may “waive” the Article I, Section 5 right of trial by jury by failing to assert the right timely (as when a party fails to demand a jury trial timely in accordance with § (Rule) 805.01) or by violating a law setting conditions on the party’s exercise of the jury trial right (as when a party fails to pay the jury fee timely in accordance with Wis. Stat. § 814.61).

FN15. *State v. Kelty*, 2006 WI 101, ¶ 18 n. 11, 294 Wis.2d 62, 716 N.W.2d 886.

¶ 23 Two examples from the case law are instructive: *State ex rel. Prentice v. County Court*, 70 Wis.2d 230, 240, 234 N.W.2d 283 (1975), and *Phelps v. Physicians Insurance Co. of Wisconsin, Inc.*, 2005 WI 85, 282 Wis.2d 69, 698 N.W.2d 643.

*635 ¶ 24 In the *Prentice* case, Prentice waived her right to a jury trial by failing to assert the right timely. This form of “waiver” is more akin to “forfeiture” than to “waiver” in its strictest sense as an intentional relinquishment of a known right. See *State v. Kelty*, 2006 WI 101, ¶ 18 n. 11, 294 Wis.2d 62, 716 N.W.2d 886 (defining “forfeiture” as “the failure to make the timely assertion of a right” and as occurring “by operation of law

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without regard to the defendant's state of mind").

¶ 25 Prentice was one day late in demanding a jury trial and paying her jury fee. The applicable statute required Prentice to demand a jury trial and to pay the jury fee within 20 days of joining issue.^{FN16} Prentice took 21 days. The circuit court consequently denied Prentice's demand for a trial by jury.

FN16. The applicable statute, Wis. Stat. § 299.21(3) (1971), provided as follows:

Trial by jury. (a) Any party may, upon payment of the fees specified in par. (b), file a written demand for trial by jury. If no party demands a trial by jury, the right to trial by jury is waived forever. In eviction actions, such demand shall be filed at or before the time of joinder of issue; in all other actions within 20 days thereafter.

(b) The fee for a jury is \$24, plus an additional amount as suit tax which will result in a suit tax payment of the amount which would have been payable had the action been commenced in circuit court and additional clerk's fees of \$6.

Prentice, 70 Wis.2d at 239, 234 N.W.2d 283.

¶ 26 This court rejected Prentice's argument that the applicable statute operated in violation of her rights under Article I, Section 5. The court held that Prentice had waived her right of trial by jury because the applicable statute "is a law which reasonably prescribes that failure of a party to act within twenty days constitutes a waiver of jury trial in cases to which [the statute] applies."^{FN17}

FN17. *Id.*

*636 ¶ 27 Furthermore, we recognized in *Prentice* that the defendant's waiver of the jury trial right

puts the defendant's demand for a jury trial at the discretion of the circuit court. We stated that once a defendant fails to meet the requirements of the statute limiting the time in which to demand a jury trial and to pay the jury fee, the defendant "loses her right and the matter of a jury trial becomes discretionary with the trial court."^{FN18} *Prentice* shows that this court has sustained as constitutional a circuit court's discretionary**227 decision to deny a defendant's right of jury trial based on the defendant's waiver of the right.

FN18. *Id.* at 240, 234 N.W.2d 283.

¶ 28 In *Phelps*, the Physicians Insurance Company of Wisconsin (PIC) asserted the right of trial by jury timely but then waived the right by failing to comply with a law setting conditions on PIC's exercise of the right that it had timely asserted. PIC timely asserted its right to a jury trial but then failed to pay the jury fee timely in accordance with the circuit court's scheduling order and local rules.^{FN19} Relying upon Wis. Stat. § 814.61, the court concluded that PIC's failure to pay the jury fee timely constituted a waiver of the jury trial right that PIC had timely asserted.^{FN20}

FN19. *Phelps*, 282 Wis.2d 69, ¶ 15, 698 N.W.2d 643.

FN20. *Id.*, ¶¶ 30-32.

¶ 29 Prentice's and PIC's actions plainly did not evince the intent to relinquish a right known to them. Prentice "waived" her right to a jury trial by failing to assert the right timely. PIC asserted the jury trial right timely but then waived the right by failing to comply with a statute setting conditions on PIC's exercise of the right.

*637 ¶ 30 Thus the question presented in the instant case is whether by failing to comply with the circuit court's discovery orders and by incurring a judgment by default as a sanction, the defendant has waived its state constitutional right of trial by jury in the manner prescribed by law. More specifically,

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the question presented is whether Wis. Stat. § (Rule) 804.12(2), governing sanctions for discovery violations, and Wis. Stat. § (Rule) 806.02, governing default judgments, are laws prescribing the manner in which a party's right of trial by jury is waived.

¶ 31 Section (Rule) 804.12(2)(a) authorizes a circuit court to strike out pleadings or parts thereof and render a judgment by default against a disobedient party who has failed to comply with a circuit court's discovery orders.^{FN21} It provides in relevant part as follows:

FN21. *See also* Wis. Stat. § (Rule) 805.03, providing in relevant part as follows:

For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a)....

(2) Failure to comply with order.

(a) If a party ... fails to obey an order to provide or permit discovery ... 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:

....

3. *An order striking out pleadings* or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, **638 or rendering a judgment by default* against the disobedient party ... (emphasis added).

¶ 32 Wisconsin Stat. § (Rule) 806.02 governs default judgments. Wisconsin Stat. § (Rule) 806.02 provides in relevant part as follows:

Default Judgment (1) A default judgment may be rendered as provided in subs. (1) to (4) if no issue of law or fact has been joined and if the time for joining issue has expired. Any defendant appearing in an action shall be entitled to notice of motion for judgment.

(2) ... the plaintiff may move for judgment according to the demand of the complaint... If proof of any fact is ****228** necessary for the court to give judgment, the court shall receive the proof.

....

(5) A default judgment may be rendered against any defendant who has appeared in the action but who fails to appear at trial. If proof of any fact is necessary for the court to render judgment, the court shall receive the proof.

[4] ¶ 33 The interpretation of Wis. Stat. §§ (Rules) 804.12(2) and 806.02 is a question of law that we determine independently of the circuit court and court of appeals but benefiting from their analyses.^{FN22}

FN22. *Waters ex rel. Skow v. Pertzborn*, 2001 WI 62, ¶ 16, 243 Wis.2d 703, 627 N.W.2d 497.

¶ 34 Wisconsin Stat. §§ (Rules) 804.12(2)(a) and 806.02 are rules of pleading, practice, and procedure that were adopted by this court pursuant to Wis. Stat. § 751.12. Wisconsin Stat. § 751.12 provides in relevant part as follows:

***639 Rules of pleading and practice.** (1) The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the same and of promoting the speedy determination of litigation upon its merits. The rules shall not abridge, enlarge, or modify the substantive rights of any litigant....

(2) All statutes relating to pleading, practice, and procedure may be modified or suspended by rules promulgated under this section....

....

(4) This section shall not abridge the right of the legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure.

(5) The judicial council shall act in an advisory capacity to assist the court in performing its duties under this section.

[5] ¶ 35 A rule adopted by this court in accordance with Wis. Stat. § 751.12 is numbered as a statute, is printed in the Wisconsin Statutes, may be amended by both the court and the legislature,^{FN23} has been described by this court as “a statute promulgated under this court’s rule-making authority,” and has the force of law.^{FN24} Thus if the defendant relinquished its right of trial by jury in the manner prescribed by Wis. Stat. §§ (Rules) 804.12(2)(a) and 806.02, rules of practice and *640 procedure, then the defendant has waived its state constitutional right to a jury trial on the issue of damages.^{FN25}

FN23. Both Wis. Stat. §§ (Rules) 804.12 and 806.06 have been amended by statute.

FN24. *Trinity Petroleum, Inc. v. Scott Oil Co., Inc.*, 2007 WI 88, ¶¶ 32, 39, 302 Wis.2d 299, 735 N.W.2d 1; *Waters*, 243 Wis.2d 703, ¶ 16, 627 N.W.2d 497.

FN25. This court has previously recognized that a court-promulgated rule of pleading, practice, or procedure may prescribe the manner in which the state constitutional right to trial by jury is waived. See *Phelps*, 282 Wis.2d 69, ¶ 28, 698 N.W.2d 643 (stating that Wis. Stat. § (Rule) 805.03 provides an example of how waiver of the jury trial right may be effectuated).

¶ 36 Wisconsin Stat. § (Rule) 804.12(2), governing

sanctions for violation of discovery orders, allows a circuit court to render a judgment by default against a disobedient defendant. It is well established that “judgment by default” (the term used in Wis. Stat. § 804.12(2)(a)3.) is identical to “default judgment” (the term used in Wis. Stat. § 806.02). For example, in *Split Rock Hardwoods v. Lumber Liquidators, Inc.*, 2002 WI 66, ¶ 42 n. 15, 253 Wis.2d 238, 646 N.W.2d 19, Justice Prosser explained on behalf of the court that “[a] court may enter *default judgment* under **229 Wis. Stat. § 804.12(2)(a) against a party for failure to comply with a discovery order” (emphasis added) (citing *Midwest Developers v. Goma Corp.*, 121 Wis.2d 632, 650, 360 N.W.2d 554 (Ct.App.1984)). The circuit court ordered a default judgment to be rendered against the defendant in the present case for failure to comply with a discovery order, and we look to the law governing default judgments to determine whether the defendant has a right of trial by jury on the issue of damages.^{FN26}

FN26. The Wisconsin courts consistently apply Wis. Stat. § (Rule) 806.02 in cases where a default judgment is rendered under Wis. Stat. § 804.12(2)(a). See our discussion, ¶¶ 41-42, *infra*, of *Brandon Apparel Group, Inc. v. Pearson Props., Ltd.*, 2001 WI App 205, 247 Wis.2d 521, 634 N.W.2d 544; *Smith v. Golde*, 224 Wis.2d 518, 528, 530, 592 N.W.2d 287 (Wis.Ct.App.1999); *Kerans v. Manion Outdoors Co.*, 167 Wis.2d 122, 130-31, 482 N.W.2d 110 (Ct.App.1992); and *Midwest Developers v. Goma Corp.*, 121 Wis.2d 632, 651, 360 N.W.2d 554 (Ct.App.1984).

641 ¶ 37 The defendant on review accepts that the default judgment was properly rendered in the present case. According to Wis. Stat. § (Rule) 806.02, a default judgment may be rendered if no issue of law or fact has been joined. In the present case no issue of law or fact has been joined because the circuit court struck the defendant’s pleadings;

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the circuit court thus rendered a judgment by default that satisfies Wis. Stat. § (Rule) 806.02 governing default judgment.^{FN27}

FN27. The case law makes clear that Wis. Stat. § (Rule) 806.02 governs cases in which the defendant answers but the circuit court strikes the defendant's answer. For example, we stated in *Split Rock Hardwoods v. Lumber Liquidators, Inc.*, 2002 WI 66, 253 Wis.2d 238, 646 N.W.2d 19, that a party is subject to default judgment under Wis. Stat. § (Rule) 806.02 once the circuit court has struck the party's answer. Writing for the *Split Rock* majority, Justice Prosser explained that “[a] successful motion to strike an answer will normally lead to a default judgment.” *Split Rock*, 253 Wis.2d 238, ¶ 38, 646 N.W.2d 19.

The Wisconsin courts routinely apply Wis. Stat. § (Rule) 806.02 in cases in which the defendant answers but the circuit court strikes the defendant's answer. See, e.g., *Leonard v. Cattahach*, 214 Wis.2d 236, 571 N.W.2d 444 (Ct.App.1997) (affirming the circuit court's decision striking the defendant's untimely answer and entering default judgment against the defendant); *Gerth v. American Star Insurance Co.*, 166 Wis.2d 1000, 480 N.W.2d 836 (Ct.App.1992) (same); *Martin v. Griffin*, 117 Wis.2d 438, 344 N.W.2d 206 (Ct.App.1984) (same).

¶ 38 According to Wis. Stat. § (Rule) 806.02, if proof of any fact, including damages, is necessary for the circuit court to render judgment by default, the circuit court shall receive the proof. A party who *642 defaults admits liability but not the amount of damages.^{FN28} Wisconsin Stat. § (Rule) 806.02(2) and (5) do not bind the court to a single procedure for deciding factual issues when a default judgment is entered but instead provide only that “[i]f proof of any fact is necessary for the court to

give judgment, the court shall receive the proof.”

^{FN29} The Judicial Council Committee's**230 Note to the 1978 Supreme Court order amending Wis. Stat. § (Rule) 806.02(5) to state in conformity with subsection (2) that the circuit court “shall receive the proof,” in place of “shall hear the proof,” explains that a circuit court *643 receiving proof of any fact in a default judgment matter has “the option of in-chamber consideration of affidavits presented by attorneys” as well as “the option of hearing proof in open court.” ^{FN30}

FN28. See 3A Grenig, *supra* note 6, § 602.3, at 171 (“If the court determines the defendant is in default, the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true.”) (citing Charles Alan Wright et al., *Federal Practice and Procedure: Civil 2d* § 2688 (pertaining to Rule 55 of the Federal Rules of Civil Procedure)).

“We look to federal cases [applying Federal Rule 55] because Wis. Stat. § 806.02 is similar in language and effect to Fed.R.Civ.P. 55 governing default judgments.” *Apex Electronics Corp. v. Gee*, 217 Wis.2d 378, 389 n. 11, 577 N.W.2d 23 (1998) (citation omitted).

“[T]he failure of an averment to state a valid claim for relief is fatal to a motion for default judgment.” *Tridle ex rel. Shannon v. Horn*, 2002 WI App 215, ¶ 11, 257 Wis.2d 529, 652 N.W.2d 418.

FN29. Wisconsin Stat. § (Rule) 806.02(2) provides:

After filing the complaint and proof of service of the summons on one or more of the defendants and an affidavit that the defendant is in default for failure to join issue, the plaintiff may move for judgment according to the demand of the

complaint. If the amount of money sought was excluded from the demand for judgment, as required under s. 802.02(1m), the court shall require the plaintiff to specify the amount of money claimed and provide that information to the court and to the other parties prior to the court rendering judgment. If proof of any fact is necessary for the court to give judgment, the court shall receive the proof.

FN30. Order, *In re the Rules of Civil Procedure*, 82 Wis.2d ix, xvi (1978).

¶ 39 Although Wis. Stat. § (Rule) 806.02, governing default judgments, does not explicitly address the question whether a defendant's default constitutes a waiver of the right of trial by jury on the issue of damages, the clear implication of the rule and the case law applying the rule is that by engaging in conduct that results in a default judgment the defendant has waived its right of trial by jury in the manner prescribed by Wis. Stat. § (Rule) 806.02, a rule of pleading, practice, and procedure. A right of trial by jury on the issue of damages is inconsistent with the proposition that a circuit court has discretion to determine the nature of the hearing for deciding issues of fact and has discretion to determine the nature of the procedure for establishing damages, including the discretion to decide factual issues on the basis of affidavits presented by the attorneys.

¶ 40 In *Apex Electronics Corp. v. Gee*, 217 Wis.2d 378, 387, 577 N.W.2d 23 (1998), for example, a case in which the circuit court rendered default judgment on a punitive damages claim, this court held that if proof of any fact is necessary for the circuit court to give default judgment under Wis. Stat. § (Rule) 806.02, “[t]he procedure for obtaining the additional proof ... is within the discretion of the circuit court.” In *Hedtcke v. Sentry Ins. Co.*, 109 Wis.2d 461, 478 n. 5, 326 N.W.2d 727 (1982), the court similarly stated that “[u]pon entry of a *644 default judgment, the circuit court may hold a

hearing or inquiry to determine damages” (citations omitted).

¶ 41 The case law further demonstrates that when default judgment is rendered pursuant to Wis. Stat. § (Rule) 804.12(2)(a), governing sanctions for a violation of a circuit court's discovery order, the procedure for deciding the issue of damages lies within the discretion of the circuit court. The court of appeals has consistently looked to Wis. Stat. § (Rule) 806.02 when determining the proper procedure for determining damages under Wis. Stat. § (Rule) 804.12(2)(a) when a default judgment was rendered.^{FN31}

FN31. See, e.g., *Smith v. Golde*, 224 Wis.2d 518, 528, 530, 592 N.W.2d 287 (Wis.Ct.App.1999) (holding that the circuit court did not erroneously exercise its discretion in ordering default judgment under Wis. Stat. § (Rule) 804.12(2)(a); applying Wis. Stat. § (Rule) 806.02(2) to determine whether the court was required to receive additional evidence to assess damages); *Kerans*, 167 Wis.2d at 130-31, 482 N.W.2d 110 (holding that the circuit court did not erroneously exercise its discretion in ordering default judgment under Wis. Stat. § (Rule) 804.12(2)(a); applying Wis. Stat. § (Rule) 806.02(5) to determine whether the circuit court erred by not requiring proof of damages before entering the judgment); *Midwest Developers v. Goma Corp.*, 121 Wis.2d 632, 651, 360 N.W.2d 554 (Ct.App.1984) (holding that the circuit court did not erroneously exercise its discretion in ordering default judgment under Wis. Stat. § (Rule) 804.12(2); applying Wis. Stat. § (Rule) 806.02(2) to determine whether the court erred in assessing damages without an evidentiary hearing).

**231 ¶ 42 For example, in *Brandon Apparel Group, Inc. v. Pearson Props., Ltd.*, 2001 WI App 205, 247 Wis.2d 521, 634 N.W.2d 544, the circuit

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court ordered judgment by default against a third-party defendant as a sanction for the third-party defendant's failure to appear for a deposition as ordered.^{FN32} After determining that the circuit court had not erroneously exercised its *645 discretion in ordering default judgment under Wis. Stat. § (Rule) 804.12(2)(a),^{FN33} the court of appeals applied Wis. Stat. § (Rule) 806.02(2) (governing default judgment) to determine whether the circuit court was required to receive additional evidence to assess damages.^{FN34} THE *BR*Andon *apparel* court of appeals further ruled that when receiving proof of any fact prior to rendering judgment by default, the circuit court may receive proof "through an evidentiary hearing or by means of affidavits."^{FN35}

FN32. *Brandon Apparel*, 247 Wis.2d 521, ¶ 9, 634 N.W.2d 544.

FN33. *Id.*, ¶¶ 11, 19.

FN34. *Id.*, ¶ 20.

FN35. *Id.* (citation omitted).

¶ 43 This court has similarly recognized, in a case in which it rendered judgment against a disobedient party as a sanction for misconduct, that the procedure for determining damages lies within the circuit court's discretion. In *Chevron Chemical Co. v. Deloitte & Touche*, 176 Wis.2d 935, 501 N.W.2d 15 (1993) (*Chevron I*), which was not a default judgment case, this court imposed judgment, "on the authority provided by secs. 805.03 and 804.12, Stats., and the inherent authority courts have to enter judgment as a sanction,"^{FN36} against Deloitte, a disobedient defendant, as a sanction for repeated, flagrant, and intentional misconduct. The *Chevron I* court remanded the cause to the circuit court to determine the amount of damages to be awarded against Deloitte and instructed the circuit court that on remand "the matter of the amount of damages is to be treated as it is in typical default judgment cases."^{FN37}

FN36. *Chevron Chemical Co. v. Deloitte & Touche*, 176 Wis.2d 935, 947, 501 N.W.2d 15 (1993) (*Chevron I*). See also *Chevron Chem. Co. v. Deloitte & Touche LLP*, 207 Wis.2d 43, 48, 557 N.W.2d 775 (1997) (*Chevron II*).

FN37. *Chevron I*, 176 Wis.2d at 950, 501 N.W.2d 15.

*646 ¶ 44 On remand the circuit court determined damages on the basis of the circuit court record, without an evidentiary hearing, even though Deloitte wanted an evidentiary hearing with all the characteristics of a bifurcated trial on damages.^{FN38} In *Chevron Chemical Co. v. Deloitte & Touche LLP*, 207 Wis.2d 43, 557 N.W.2d 775 (1997) (*Chevron II*), this court explained that in *Chevron I* it had intended to leave "the nature of the hearing on damages to the circuit court's discretion," just as in typical default judgment situations.^{FN39} The *Chevron II* court further held **232 that the circuit court had not erroneously exercised its discretion when it declined to hold an evidentiary hearing and instead determined damages on the basis of the trial record, with additional briefing and oral argument.^{FN40}

FN38. *Chevron II*, 207 Wis.2d at 46, 557 N.W.2d 775.

Based on Deloitte's request, the circuit court concluded that Deloitte wanted a jury trial on damages. Plaintiff-Respondent-Cross Appellant-Petitioner's Brief Upon Review at 8-9 & n. 6, in *Chevron Chem. Co. v. Deloitte & Touche LLP*, 207 Wis.2d 43, 557 N.W.2d 775 (1997).

FN39. *Chevron II*, 207 Wis.2d at 50, 557 N.W.2d 775.

Chevron II made clear that Wis. Stat. § (Rule) 806.02, the law governing default judgment, did not govern that case.

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Chevron II, 207 Wis.2d at 48, 557 N.W.2d 775. The *Chevron II* court explained that “issues of fact and law were joined [in that case] and the defendant appeared at trial.” *Id.* Judgment against the defendant in *Chevron I* had been entered by the *Chevron I* supreme court on appellate review as a sanction. *Id.*

FN40. *Chevron II*, 207 Wis.2d at 44, 557 N.W.2d 775.

[7] ¶ 45 Wisconsin Stat. §§ (Rules) 804.12(2)(a) and 806.02 and case law interpreting and applying these rules establish the manner by which a party waives its Article I, Section 5 right of trial by jury on the issue of *647 damages. Under these court rules, a defendant's failure to comply with the circuit court's discovery orders, resulting in default judgment against the defendant, constitutes a waiver of the defendant's state constitutional right to a jury trial on the issue of damages. Accordingly, we conclude that the circuit court did not violate the defendant's right of trial by jury under Article I, Section 5 of the Wisconsin Constitution when, adhering to Wis. Stat. §§ (Rules) 804.12(2) and 806.02, it denied the defendant's motion for a jury trial on the issue of damages.

¶ 46 Our decision in the present case is buttressed by federal cases addressing the question whether the Seventh Amendment^{FN41} right of trial by jury in civil cases survives a default judgment or sanctions for a party violating a discovery order.

FN41. The Seventh Amendment to the United States Constitution provides as follows: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

[8][9] ¶ 47 This court, in construing Article I, Sec-

tion 5 of the Wisconsin Constitution, may look for guidance to federal decisions interpreting the Seventh Amendment.^{FN42} Because the Wisconsin rules governing default *648 judgments and sanctions for violations of discovery orders mirror the federal rules, federal law is also instructive in interpreting the Wisconsin rules. Rule 55 of the Federal Rules of Civil Procedure is similar to Wis. Stat. § (Rule) 806.02 governing default judgments and may guide our interpretation of the Wisconsin statute.^{FN43} Rule 37(b)(2) of the Federal Rules of Civil Procedure is essentially identical to Wis. Stat. § (Rule) 804.12(2)(a) governing sanctions for violation of discovery **233 orders.^{FN44}

FN42. *Markweise v. Peck Foods Corp.*, 205 Wis.2d 208, 225, 556 N.W.2d 326 (Ct.App.1996) (“The right to a jury trial in civil cases that is guaranteed by Article I, § 5 of the Wisconsin Constitution is substantially similar to that right guaranteed by the Seventh Amendment to the United States Constitution.... The Seventh Amendment jury-trial right does not apply to the states. Nevertheless, we may be guided by the federal cases interpreting that provision.”) (citation omitted).

FN43. “We look to federal cases because Wis. Stat. § 806.02 is similar in language and effect to Fed.R.Civ.P. 55 governing default judgments.” *Apex Electronics Corp. v. Gee*, 217 Wis.2d 378, 389 n. 11, 577 N.W.2d 23 (1998) (citation omitted).

See also *Midwest Developers v. Goma Corp.*, 121 Wis.2d 632, 651-52, 360 N.W.2d 554 (Ct.App.1984) (“When there are no Wisconsin cases on point, an appellate court can look to federal decisions for aid in determining the intent of a Wisconsin statute if a federal statute exists that is similar in language and operation. Federal Rule of Civil Procedure 55 is similar in language and effect to sec. 806.02, Stats.”) (footnote and in-

ternal citations omitted).

FN44. *Compare* Fed.R.Civ.P. 37(b)(2)(A) (“If a party ... fails to obey an order to provide or permit discovery ... the court where the action is pending may issue further just orders. They may include the following: ... (vi) rendering a default judgment against the disobedient party....”) with Wis. Stat. § 804.12(2)(a) (“If a party ... fails to obey an order to provide or permit discovery ... 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: ... 3. An order striking out pleadings or parts thereof ... or rendering a judgment by default against the disobedient party....”).

¶ 48 The federal courts agree that a defendant's default extinguishes the Seventh Amendment right to a jury trial on the question of damages.^{FN45} As one federal *649 court of appeals explained: “It is ... clear that in a default case neither the plaintiff nor the defendant has a constitutional right to a jury trial on the issue of damages. Assuming that [the party] had the right to a jury trial he waived that right when he purposefully chose not to answer the suit and timely request such a trial.”^{FN46} For a recitation of the history (from the first volume of Blackstone's Commentaries in 1765 until 1877) of the assessment of damages without a jury upon a default judgment rendered under court rules, see *Raymond v. Danbury & Norwalk Railroad Co.*, 43 Conn. 596, 20 F.Cas. 332 (C.C.D.Conn.1877) (No. 11,593).^{FN47} Federal law, like Wisconsin law, places the procedure for determining damages in a default judgment case within the discretion of the trial court.^{FN48}

FN45. See 10 James Wm. Moore et al., *Moore's Federal Practice* § 55.32 [2] [e], at 55-50 (3d ed. 2007) (“[T]he defaulting party is entitled to contest damages and participate in a hearing on damages, if one is held, but has no right to a jury trial,

either under the federal rules or under the Constitution. The defaulting party waives normal rights to a jury trial by its default.”) (footnote omitted); 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2688 at 69 (3d ed.1998) (although “the court may order a jury trial as to damages in a default situation if it seems to be the best means of assessing damages ... neither side has a right to demand a jury trial on damages.”) (footnotes omitted).

FN46. *In re Dierschke*, 975 F.2d 181, 185 (5th Cir.1992) (quotation marks and footnote omitted).

FN47. See also *Henry v. Sneyders*, 490 F.2d 315, 318 (9th Cir.1974) and cases cited therein; *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21, 23 S.Ct. 120, 47 L.Ed. 194 (1902); *Dyson v. Rhode Island Co.*, 25 R.I. 600, 57 A. 771 (1904) (tracing the history of assessing damages in default cases in the courts of England).

FN48. 10 Moore et al., *supra* note 45, § 55.32[2][c], at 55-48 (“When the amount of damages is not certain and cannot be determined from the record, the court must make further inquiry. However, the court need not hold an evidentiary hearing with oral testimony”); § 55.32[2][d], at 55-49 (“[T]he court has the discretion to hold a hearing or inquest into the amount of damages”) (footnote omitted); § 55.32[2][e], at 55-50 (“The court may, in its discretion, hold a jury trial on a request for a default judgment.”) (footnote omitted).

See 10A Wright et al., *supra* note 45, § 2688, at 57-58, 64 (the court determines the nature of the hearing on damages).

*650 ¶ 49 The federal courts have also held that no Seventh Amendment right to a jury trial on dam-

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ages exists in cases in which default judgment was ordered as a sanction for discovery violations.^{FN49}

FN49. See *Olcott v. Del. Flood Co.*, 327 F.3d 1115, 1124 (10th Cir.2003) (holding, in a case in which the district court entered default judgment pursuant to Fed.R.Civ.P. 37(b)(2) for defendants' willful discovery violations, that "[d]efendants do not have a constitutional right to a jury trial following entry of default") (citations omitted); *Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc.*, 982 F.2d 686, 692 n. 15 (1st Cir.1993) ("[A]fter a default judgment has been entered under Fed.R.Civ.P. 37(b)(2), a party has no right to jury trial under either Fed.R.Civ.P. 55(b)(2)... or the Seventh Amendment.") (citations and quotation marks omitted); *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1414 (9th Cir.1990), cert. denied sub nom. *Lewis & Co. v. Thoeren*, 498 U.S. 1109, 111 S.Ct. 1019, 112 L.Ed.2d 1100 (1991) (same) (citation omitted).

See 10A Wright et al., *supra* note 45, § 2688, at 69 (in a default situation neither party has a right to demand a jury trial on damages).

**234 ¶ 50 The federal cases support our conclusion in the present case that by violating a circuit court's discovery orders and by incurring a judgment by default, a party waives the constitutional right of trial by jury on the issue of damages.

¶ 51 We acknowledge that at least one state supreme court has reached a conclusion that conflicts with our holding in the present case. In *651 *Curbelo v. Ullman*, 571 So.2d 443 (Fla.1990), the Florida Supreme Court held that "[w]hen a jury trial has been requested by the plaintiff, the defendant is still entitled to a jury trial on the issue of damages even though a default has been entered against the defendant for failure to answer or otherwise plead." ^{FN50}

FN50. *Curbelo v. Ullman*, 571 So.2d 443, 444 (Fla.1990) (citation omitted).

¶ 52 *Wood v. Detroit Automobile Inter-Insurance Exchange*, 413 Mich. 573, 321 N.W.2d 653 (1982), is consistent with our holding in the present case. In *Wood*, the defendant answered but then violated the court's discovery order. The court granted the plaintiff's motion for a default judgment. On appeal, the Supreme Court of Michigan rejected the rule that a defendant's default constitutes a waiver of Michigan's state constitutional right of trial by jury when the trial court has an evidentiary hearing on damages.^{FN51} However, the *Wood* decision rests largely on the application of procedural rules that, unlike Wisconsin's Rules of Civil Procedure, made clear that a defendant's default could not serve as a waiver of Michigan's state constitutional right of trial by jury in civil cases. The difference between *Wood* and the present case lies in Michigan's procedural rules governing the manner in which the right to trial by jury may be waived.

FN51. *Wood v. Detroit Auto. Inter-Ins. Exch.*, 413 Mich. 573, 321 N.W.2d 653, 658-59 (1982).

At the time of the *Wood* case, Article I, Section 14 of the Michigan Constitution provided in relevant part that "[t]he right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law." See *Wood*, 321 N.W.2d at 657 (quoting Mich. Const. art. I, § 14 (1963)).

*652 ¶ 53 The *Wood* court relied upon Michigan's default judgment rule, Rule 520 of the Michigan General Court Rules of 1963.^{FN52} In cases in which a trial court determined that further proceedings were necessary to determine damages in default judgment situations, Rule 520 expressly mandated "a right of trial by jury to the parties when and as required by the constitution." ^{FN53} The *Wood* court therefore held that "a defaulting party

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who has properly invoked his right to jury trial retains that right if a hearing is held to determine the amount of recovery.” FN54

FN52. *Wood*, 321 N.W.2d at 659-60.

Rule 520 of the Michigan General Court Rules of 1963 corresponds to Rule 2.603 of the Michigan Court Rules of 1985 (2008).

FN53. *Wood*, 321 N.W.2d at 659 (quoting Rule 520.2(2) of the Michigan General Court Rules of 1963) (emphasis omitted).

FN54. *Wood*, 321 N.W.2d at 659.

See also id. at 660 (“[T]he trial court in the case at bar, having determined that a hearing was necessary on the question of damages, was obliged to accord defendant its properly preserved right to jury trial.”) (footnote omitted).

¶ 54 Unlike the Michigan General Court Rules of 1963, Wisconsin’s Rules of Civil Procedure do not require the circuit court **235 to recognize a defaulting defendant’s state constitutional right of trial by jury when the court determines that an evidentiary hearing will be held to determine the amount of damages to be awarded. Instead, the law in Wisconsin is clear that it lies within the circuit court’s discretion to determine the appropriate procedure for deciding factual issues in default judgment cases and that the defaulting party therefore has no right of trial by jury. This distinction between Michigan and Wisconsin law, pertaining not to the scope of the state constitutional right to jury trials *653 in civil cases but rather to matters of procedural law governing waiver of that right, explains the different holding in *Wood* and in the instant case.

¶ 55 For the reasons set forth, we conclude that the circuit court did not violate the defendant’s right of trial by jury under Article I, Section 5 of the Wisconsin Constitution when it denied the defendant’s motion for a jury trial on the issue of damages. The

defendant waived its right of trial by jury in the manner set forth in Wis. Stat. §§ (Rule) 804.12 and 806.02 by violating the circuit court’s discovery order and by incurring a judgment by default.

II

¶ 56 We next address the question whether the circuit court erred in denying the plaintiff’s claim for punitive damages under Wis. Stat. § 895.043(3).

¶ 57 The parties disagree about the basis for the circuit court’s denial of the plaintiff’s claim for punitive damages. They disagree about whether the circuit court denied the plaintiff’s punitive damages claim after considering only the allegations of the complaint or whether the circuit court based its denial on evidence the plaintiff presented at the evidentiary hearing on damages.

¶ 58 The plaintiff argues that the circuit court’s denial of punitive damages was based on a procedural error, namely that the circuit court erroneously limited its determination of the plaintiff’s punitive damages claim to the allegations in the complaint. The plaintiff asks this court to reverse the circuit court’s denial of punitive damages and remand the issue of punitive damages to the circuit court. According to the plaintiff, this court should hold that the circuit court erred in *654 limiting its determination of punitive damages to the allegations in the complaint.

¶ 59 The defendant argues that the circuit court considered all the evidence presented and did not limit itself to considering the allegations in the complaint when addressing the plaintiff’s claim for punitive damages. According to the defendant, after examining the record the circuit court concluded as a matter of law that the plaintiff was not entitled to punitive damages. The defendant asks this court to affirm the circuit court and hold that because the defendant was merely silent or failed to warn the plaintiff about the employee who converted the plaintiff’s funds, the defendant is as a matter of law

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not subject to punitive damages.

¶ 60 The court of appeals concluded that the circuit court erred in excluding the plaintiff's evidence supporting the award of punitive damages and remanded the issue of punitive damages to the circuit court.

¶ 61 We turn first (A) to deciding whether a circuit court is limited to the allegations in the complaint in determining whether to award punitive damages in a judgment by default. We then (B) examine the record to determine whether the circuit court limited its consideration of the issue of punitive damages to the allegations of the complaint. After resolving these two questions, this court (C) determines whether the circuit court erred in **236 denying the plaintiff's claim for punitive damages.

A

[10] ¶ 62 Whether a circuit court is limited to the allegations in the complaint in determining whether to award punitive damages in a judgment by default *655 presents a question of law that this court determines independently of the circuit court and court of appeals but benefiting from these courts' analyses.^{FN55}

FN55. See *Apex Electronics Corp. v. Gee*, 217 Wis.2d 378, 384, 577 N.W.2d 23 (1998) (whether the circuit court erred by awarding the plaintiff punitive damages solely on the basis of the complaint presents a question of law involving statutory interpretation).

[11] ¶ 63 We agree with the court of appeals in the present case that the circuit court was required to determine whether proof of any fact was needed to determine whether the defendant acted "maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff,"^{FN56} justifying an award of punitive damages. The case law is clear that a circuit court is not limited to considering only the allegations of the complaint. As a general pro-

position, some form of inquiry beyond the complaint is required to determine the merits of a punitive damages claim.

FN56. Wis. Stat. § 895.043(3).

Section 895.043(3) sets forth the conduct that may give rise to punitive damages, providing in full that "[t]he plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."

In order to meet the requirements of Wis. Stat. § 895.043(3), the plaintiff's evidence must show that the defendant acted "with a purpose to disregard the plaintiff's rights, or [was] aware that his or her acts [were] substantially certain to result in the plaintiff's rights being disregarded." *Strenke v. Hogner*, 2005 WI 25, ¶ 38, 279 Wis.2d 52, 694 N.W.2d 296. Such a showing requires that the defendant's "act or course of conduct [was] deliberate," that "the act or conduct ... actually disregard [ed] the rights of the plaintiff," and that "the act or conduct [was] sufficiently aggravated to warrant punishment by punitive damages." *Strenke*, 279 Wis.2d 52, ¶ 38, 694 N.W.2d 296.

*656 ¶ 64 *Apex Electronics Corp. v. Gee*, 217 Wis.2d 378, 577 N.W.2d 23 (1998), upon which the court of appeals relied, governs the instant case. In *Apex Electronics*, the circuit court awarded judgment by default under Wis. Stat. § (Rule) 806.02 on a punitive damages claim solely on the basis of the complaint. Applying both Wis. Stat. § (Rule) 806.02 (governing default judgments) and § 895.043 (governing punitive damages), the supreme court concluded "that a circuit court entering a default judgment on a punitive damages claim must make inquiry beyond the complaint to determine

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the merits of the punitive damages claim and the amount of punitive damages, if any, to be awarded.”^{FN57} The supreme court explained that “[w]ithout conducting an inquiry beyond the complaint, a circuit court cannot determine whether a defendant’s conduct justifies a punitive damages award and, if an award is justified, what amount would accomplish the purposes of punitive damages while satisfying the requirements of due process.”^{FN58} The *Apex Electronics* court concluded that the circuit court had erred when it relied solely on the plaintiff’s demand in the complaint for a certain sum in punitive damages and “when it failed to receive proof of facts necessary to determine the merits of the punitive damages claim and the amount of punitive damages, **237 if any, to be awarded.”^{FN59}

FN57. *Apex Electronics*, 217 Wis.2d at 390, 577 N.W.2d 23.

FN58. *Id.*

FN59. *Id.* at 391, 577 N.W.2d 23.

[12] ¶ 65 *Apex Electronics* controls the present case. Whether the circuit court awards or refuses to award punitive damages in a judgment by default, the circuit court must ordinarily make inquiry beyond the complaint*657 to determine the merits of the punitive damages claim and the amount of punitive damages, if any, to be awarded. We thus conclude, as the court did in *Apex Electronics*, that a circuit court in ruling on a claim for punitive damages errs in basing its decision solely on the allegations in the plaintiff’s complaint. The circuit court must give the complaining party an opportunity to prove facts in support of the punitive damages claim beyond those alleged in the complaint.^{FN60}

FN60. As we explained previously, the circuit court determines the method for receiving proof in determining damages in a default judgment.

B

[13] ¶ 66 We now turn to the record to determine whether the circuit court in the present case limited its consideration of the issue of punitive damages to the allegations of the complaint. We acknowledge at the outset that the record, which consists in relevant part of lengthy transcripts of two separate hearings conducted by the circuit court, is somewhat difficult to interpret. However, after examining the record as a whole, we conclude, as did the court of appeals, that the circuit court considered only the allegations of the complaint.

¶ 67 At the hearing on the defendant’s motion for a jury trial on the issue of damages, the plaintiff requested an opportunity to present witnesses to testify about facts that were not alleged in the plaintiff’s complaint but that supported the plaintiff’s punitive damages claim. The plaintiff stated to the court that he wanted “the opportunity to come in with witnesses” not only to “establish the amount of money that was stolen *658 from [the plaintiff]” but also to establish “the circumstances of those thefts.” The plaintiff explained that his purpose in presenting witness testimony about the circumstances of the thefts was to “show the egregious ... manner in which [the defendant] conducted itself so that [the plaintiff could] legitimately prepare a record ... that will justify punitive damages against [the defendant].” The plaintiff acknowledged that it would be difficult for him to make the case for punitive damages based solely on the “bare bones” allegations in his complaint.

¶ 68 The circuit court ruled that the plaintiff could introduce witness testimony regarding the amount that was stolen from the plaintiff but that the plaintiff could not introduce witness testimony about the defendant’s conduct in relation to the plaintiff’s request for punitive damages. The circuit court held that although the plaintiff had a right to argue for punitive damages at the evidentiary hearing, the plaintiff would have to make such argument “from the admitted facts in the complaint.” In discussing the plaintiff’s right to argue for punitive damages, the circuit court stated at various points

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that the plaintiff was “limited to the facts in the complaint”; that the plaintiff had “the right to argue based on what it is that [he had] pled”; that the circuit court need not “get into the business of hearing testimony at all concerning all of these other matters”; that the circuit court did not “intend to get into the question of all of the activity that went on here”; and that the circuit court would consider “based on the admitted facts, now **238 admitted facts in the complaint, whether [the plaintiff was] entitled to punitive damages or not.”

¶ 69 The circuit court limited the plaintiff to the allegations of the complaint as follows:

**659 I'm only going to allow the plaintiff to prove the number of dollars involved and, of course, you can argue from the admitted facts in the complaint. The complaint is deemed admitted in all of its aspects. It is deemed admitted. And you can argue for punitive damages based on that, of course. But I'm not going to get into a trial on the merits here. I believe the allegations of the complaint are deemed admitted for purposes of this proceeding. And that's what you're going to be stuck with.*^{FN61}

FN61. Emphasis added.

¶ 70 An exchange between the circuit court and counsel for defendant also makes clear the circuit court's intention to decide the issue of punitive damages solely on the facts alleged in the plaintiff's complaint. After the circuit court informed the defendant's counsel that it would decide the punitive damages issue on “[t]he facts that are in [the plaintiff's] complaint,” the following exchange then ensued:

[DEFENDANT'S COUNSEL]: All of them?

THE COURT: All of them.

[DEFENDANT'S COUNSEL]: Nothing else?

THE COURT: Nothing else. Well, the theory on

defaults is that you are limited to what's in your complaint because in a typical default situation where someone doesn't answer, the theory is that if they knew you were going to ask for something else, they might have answered.... They are limited to the facts in the complaint....

¶ 71 After the hearing on the defendant's motion for a jury trial on damages, the plaintiff attempted to submit documentary evidence in support of the plaintiff's punitive damages claim. The documentary *660 evidence was attached to an affidavit, signed by the plaintiff's counsel, describing the evidence. A supplemental brief also accompanied the evidence and the affidavit. In the supplemental brief, the plaintiff acknowledged that the circuit court had ruled at the motion hearing that the plaintiff “may not present witnesses to testify regarding the facts which Plaintiff believes support an award of punitive damages.” The plaintiff described the documentary evidence accompanying the brief as evidence pertaining to facts already known to the circuit court through the depositions.

¶ 72 At the evidentiary hearing on damages, the plaintiff argued for punitive damages, relying upon the documentary evidence that the plaintiff had submitted to the circuit court in response to the circuit court's ruling that the plaintiff could not introduce witnesses to testify about facts supporting his punitive damages claim. The circuit court excluded this documentary evidence on hearsay grounds.

¶ 73 Immediately after the circuit court ruled that the plaintiff's documentary evidence would be excluded, the plaintiff again requested to present a witness, Ted Frydrych, to testify in support of the plaintiff's punitive damages claim. Mr. Frydrych is another of the defendant's accountholders whose assets allegedly were stolen by the same employee who allegedly stole from the plaintiff. Counsel for the plaintiff stated that it was her “offer of proof that we can establish all the facts set forth in my affidavit as well as the affidavit of Frydrych through his live **239 testimony.”^{FN62} *661 In response, the circuit court stated, “All right, that affidavit will

stand as your offer of proof.”

FN62. Mr. Frydrych's affidavit was among the documentary evidence that the plaintiff submitted to the court after the hearing on the defendant's motion for a jury trial on the issue of damages and that the court ultimately excluded as evidence.

¶ 74 The circuit court did not state whether it accepted counsel's offer of proof or whether it would consider the offer of proof when deciding the issue of punitive damages. When it decided punitive damages at the close of the evidentiary hearing, the circuit court made no reference to the offer of proof, to counsel's affidavit, to the affidavit of Mr. Frydrych, or to counsel's request to present Mr. Frydrych's live testimony. Mr. Frydrych never testified at the evidentiary hearing on damages. The circuit court decided punitive damages without making any clear reference to facts or evidence beyond the plaintiff's complaint.

¶ 75 At the close of the evidentiary hearing on damages, the circuit court held that judgment by default would be rendered against the defendant in the amount of \$514,010 plus costs and interest, for a total judgment of \$525,901.41. The circuit court also denied the plaintiff's request for punitive damages. The circuit court reasoned that “none of the money ... that was taken from the plaintiff went into the pocket of [the defendant] other than its employee.” The circuit court stated: “I do not believe that if the district attorney were to prosecute [the defendant] for theft, that such a prosecution would be successful because I don't think they can prove intent.” The circuit court stated in conclusion that the defendant “behaved very badly” but that the court did “not believe that punitive damages against [the defendant] in this case would be appropriate.”

¶ 76 The defendant contends that the circuit court considered the merits of the plaintiff's claim for punitive damages. It points to the circuit court's observations during the hearing on the defendant's motion *662 for a jury trial on the issue of damages

that some of the facts and evidence discussed by the plaintiff “sounds like negligent practice” and that the plaintiff seemed to have “a pretty high burden” of showing that the defendant was not “just sloppy” but instead acted in intentional disregard of the plaintiff's rights. According to the defendant, these statements of the circuit court show that the circuit court considered facts beyond those alleged in the complaint and concluded that the plaintiff was unable to prove his claim for punitive damages.

¶ 77 We disagree with the defendant. The circuit court's passing observations about the plaintiff's claim for punitive damages do not detract from the clarity of the circuit court's numerous comments that the circuit court was limiting the plaintiff to arguing from the facts alleged in his complaint. In any event, the circuit court's comments do not demonstrate a careful consideration of the record and an analysis of the law of punitive damages to which the parties were entitled.

¶ 78 Taken as a whole, the record supports the plaintiff's assertions that the circuit court decided the issue of punitive damages solely on the basis of allegations in the plaintiff's complaint.

C

¶ 79 Finally, we determine whether the circuit court erred in denying the plaintiff's claim for punitive damages. The circuit court erred in limiting its decision to the allegations of the complaint, in failing to review the entire record, and in failing **240 to give the plaintiff an opportunity to present evidence to support his claim for punitive damages. Under these circumstances, the merits of the plaintiff's claim for punitive damages are not *663 before this court, and we do not address them. We remand the matter to the circuit court to allow the circuit court an opportunity to exercise its discretion in determining the nature of the hearing and to determine whether punitive damages are warranted.

¶ 80 For the reasons set forth, we conclude that the

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circuit court erred in deciding the plaintiff's punitive damages claim solely on the basis of allegations in the complaint and in denying the plaintiff an opportunity to prove additional facts in support of the punitive damages claim.

* * * *

¶ 81 In sum, we affirm the decision of the court of appeals. We affirm, as did the court of appeals, the circuit court's denial of the defendant's request for a jury trial on the issue of damages. The circuit court did not violate the defendant's right of trial by jury under Article I, Section 5 of the Wisconsin Constitution when it denied the defendant's motion for a jury trial on the issue of damages. The defendant waived its right of trial by jury in the manner set forth in Wis. Stat. §§ (Rule) 804.12(2) and 806.02. We reverse, as did the court of appeals, the circuit court's ruling denying punitive damages. We conclude that the circuit court erred in deciding the plaintiff's punitive damages claim solely on the basis of facts alleged in the complaint and in denying the plaintiff an opportunity to prove additional facts in support of the punitive damages claim. We remand the issue of punitive damages to the circuit court to exercise its discretion in determining the nature of the hearing on punitive damages and to determine whether punitive damages are warranted.

*664 ¶ 82 Accordingly, we affirm the decision of the court of appeals affirming in part and reversing in part the judgment and order of the circuit court.

The decision of the court of appeals is affirmed, and the cause is remanded to the circuit court for further proceedings consistent with this opinion. ^{FN63}

FN63. The court of appeals remanded the cause for consideration of other issues not involved in this review.

¶ 83ANNETTE KINGSLAND ZIEGLER, J. (*concurring*).
 I concur, but write separately on the issue of punit-

ive damages because I do not conclude that the circuit court decided the plaintiff's punitive damages claim solely on the basis of the facts alleged in the complaint. In this case, what the circuit court judge relies upon in making his ruling is not clear. It is not clear from the record whether the judge considered the offer of proof and determined as a matter of law that the plaintiff could not meet the level of conduct necessary for punitive damages to be awarded or whether the circuit court decided the issue based upon the evidence presented, i.e., the pleadings and WMAS's conduct.

¶ 84 On one hand, the record is not absolutely clear that the judge precluded the plaintiff from introducing testimony at trial on punitive damages because parts of the record indicate that the plaintiff was to introduce evidence at the two-day hearing, other than facts established by the complaint, on all damages including punitive damages.

¶ 85 On February 20, 2006, the circuit court conducted a motion hearing. At that **241 hearing, the transcript reflects the following:

THE COURT: ... It seems to me what we are here to do is to have the plaintiff prove what the damages *665 are. That seems to me that's all we are looking at. And, obviously, you have the right to argue based on what it is that you've pled. You have the right to argue that those damages should include punitive damages. But I think we are only here for a hearing on the question of dollars. How many dollars. So I don't intend to get into the question of all of the activity that went on here.

I'm going to assume that the facts that are alleged in the complaint are true. I'm going to assume that, and therefore, plaintiff is entitled to judgment. The only question is what amount. How many dollars? And I'm going to give the plaintiff a chance to prove that.

[PLAINTIFF'S COUNSEL:] Your honor, just for my clarification, we did plead in the amended complaint, we did ask for punitive damages.

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THE COURT: All right. I'm going to hear you on that.

[PLAINTIFF'S COUNSEL:] Okay.

¶ 86 The circuit court then discussed the fact that the plaintiff would not need to introduce evidence regarding the facts that are already admitted by default and that the defendant would be precluded from arguing that the damages should be mitigated. When the answer was stricken, so was the defense of mitigation of damages. While the circuit court precluded the parties from retrying the merits of the complaint for liability purposes, the circuit court did allow the parties to introduce evidence regarding damages. The February 20 record further reflects the following:

THE COURT: ... The only issue is how many dollars flow from those facts, how many dollars of *666 damages? And based on the admitted facts, now admitted facts in the complaint, whether they are entitled to punitive damages or not.

....

[PLAINTIFF'S COUNSEL:] But my understanding of the law is whether or not someone is entitled to punitives depends on the circumstances on which the tort was committed. So although the Court is establishing as given that the tort was committed, we, if I understand you correctly, will be entitled to present evidence on the circumstances on which the tort was committed to allow us to prove our punitive damages claim.

After further discussion the circuit court stated:

THE COURT: ... This is a hearing on damages in a default situation. I'm only going to allow the plaintiff to prove the number of dollars involved and, of course, you can argue from the admitted facts in the complaint. The complaint is deemed admitted in all of its aspects. It is deemed admitted. And you can argue for punitive damages based on that, of course....

¶ 87 Accordingly, from this part of the record it appears that the plaintiff would have his day in court to prove punitive damages, but the plaintiff was instructed to not be duplicitous regarding facts already proven because of the default.

¶ 88 On the other hand, at the two-day trial, it is apparent that plaintiff's counsel believed that the plaintiff was precluded, by court order, from introducing witnesses regarding punitive damages, and the record reflects that the circuit court judge did not allow such testimony. At that trial, the plaintiff called two witnesses: George Kiskunas testified on accounting matters*667 , **242 and Dr. Rao testified on his own behalf. Plaintiff's counsel attempted to introduce an offer of proof and also asked to present live testimony. When discussing evidence being introduced, in the form of documents rather than live witnesses, the following transpired:

[PLAINTIFF'S COUNSEL:] ... It was intended to be responsive to the Court's ruling that certain forms of evidence would not be presented at the hearing. And if I understand the Court's ruling correctly, it was not so much that punitive damages were an impossibility here. I mean, we looked at the language in the complaint, and I think the Court's review of that revealed that, yeah, we're talking about some intentional torts here. But what the Court did not want to do is have us do a hearing on those allegations. I completely respect that, and I want to be able to provide the information that I feel is essential to support a punitive for exemplary damages ruling but obviously do not want to violate the Court's order.

....

And, Your Honor, in the attachments here, I've got a couple of affidavits. The affidavit I signed takes, again, documents that we obtained from WMA[S] in discovery that I believe support our request for punitive damages. And I did not take stuff that simply establishes the allegations in the pleadings, but stuff that aggravates the conduct

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that is conclusively established in the pleadings to a point where I think it will show that punitive or exemplary damages are appropriate. Stuff that we took out, segments of deposition where Mr. Novak talks about the environment at WMA[S] where fraud is tolerated. We took stuff from Mr. Ted Frydrych that shows that his affidavits of forgery that show an identical course of conduct with the \$10,000 thefts for the year preceding the thefts from David Novak. And we took e-mails sent by Mr. Frydrych and Jacque Black to WMA[S] asking about the status of the *668 investigation into the thefts for Mr. Frydrych's account, and we submitted responses by WMA[S] which is essentially, you know, talk to this person, talk to that person, talk to this person. With increasing desperation Mr. Frydrych inquired into the status of the funds and meeting a brick wall.

Finally, we submitted notes from Matt Lucky, the compliance manager, his journal entry saying that, after a conversation with the SCC, the SCC's primary concern regarding Mr. Frydrych and the situation with WMAS was that WMAS take care of Mr. Frydrych.

Mr. Frydrych's affidavit is further attached indicating that he never received any money to compensate him for the loses he suffered as a result of Mr. Novak's thefts while he was affiliated with WMAS. Those are all facts. We had Mr. Frydrych prepared to come and testify about that stuff. It's my understanding the Court didn't want to hear it. We prepared it in affidavit form. I'd ask the Court to accept the affidavits as evidence that would establish our right to punitive and/or exemplary damages.

¶ 89 In response, the circuit court, at the February 27 hearing, stated:

THE COURT: Well, I think you've made a record. It's obvious that I'm not sure at what point WMA[S] decided to batten down the hatches, but it's pretty obvious that they haven't treated Mr. Rao very well. Whether that gives rise to punitive

damages or not is something I'll hear your argument about at the conclusion. But it's perfectly obvious here that, just from my experience with this case, that poor Mr. Lanphier here was repeatedly having to come back to **243 court and hold his hat in his hand because WMAS [] didn't do what they were supposed to do, and that happened repeatedly.

*669 And when there was an investigation or when counsel for Dr. Rao made an inquiry, they immediately turned everything over to lawyers and started screaming attorney/client privilege, and they absolutely refused to do anything until this Court had to grab them by the scruff of the neck and forced them to do that. I think all of that goes to the question of whether there are punitive damages, but whether they are entitled to punitive damages is something I will hear your argument at the end of the case. There certainly is some evidence in the record, that's for sure.

Counsel for the defense then sought to clarify what evidence was in the record and stated:

[DEFENDANT'S COUNSEL:] ... I previously moved to strike everything except the deposition testimony attached to their supplement to hearing brief, and I believe all of those documents fall in the same category as we just did Exhibit 10. They are all hearsay. There's no foundation for any of these documents. I don't have a right to cross-examine Mr. Frydrych, Mr. Novak, the other people who generated these documents attached to the hearing brief. If they are making an offer of proof, I understand that, but if I think she's asking for these documents to be admitted into evidence, and they should not be.

THE COURT: I think she is and I'm not going to.

[DEFENDANT'S COUNSEL:] Thank you.

[PLAINTIFF'S COUNSEL:] Your Honor, just to clarify. These are documents. We've got the binders here. I can show you that these are docu-

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ments that were produced in discovery by WMAS. These are WMAS's records. We're not surprising them. We're just trying to use the information that-and Lord knows we've worked hard enough to get it. We're just trying to use the limited tools that we've gathered in this investigation*670 -it feels like an investigation to me-in this litigation against them, because otherwise what do we have? We can bring in Dr. Rao and he can say they were horrible to me, but in punitive damages, it talks about the need to punish and deter. We can talk about how horrible they've been for many other people. We've fought tooth and nail for that stuff, and this Court-it is relevant because it is relevant to show a pattern of conduct, to show intent, right now most crucially to us to show the need for punitive damages.

THE COURT: I think I can make some conclusions about intent just based on how WMAS has conducted itself during this litigation. I really don't think it's something I need, and I do think Counsel is right. You should have the right to cross-examine.

[PLAINTIFF'S COUNSEL:] Your Honor, can we bring Mr. Frydrych in? Mr. Frydrych is more than willing to testify. He hasn't had his day in court yet, and he won't until the criminal proceedings. Your Honor, [co-counsel] is encouraging me to do the technical thing and make an offer of proof, but obviously, I signed this under oath and it's my offer of proof that we can establish all the facts set forth in my affidavit as well as the affidavit of Frydrych through his live testimony.

The circuit court responded, "All right. Well, that affidavit will stand as your offer of proof." The defense then proceeded with calling its own witnesses.

**244 ¶ 90 At the close of trial, when ultimately deciding the issue of punitive damages, the circuit court stated:

THE COURT: I find further-well, addressing myself to the question of punitive damages. I believe that Mr. Fitzpatrick is correct that Section 895.80 has to be construed strictly. I don't-it's apparent that none of the money that went from the-that was *671 taken from the plaintiff went into the pocket of WMAS other than its employee, David Novak. I do not believe that if the district attorney were to prosecute WMAS for theft, that such a prosecution would be successful because I don't think they can prove intent. And I do not believe that punitive damages against WMAS in this case would be appropriate.

Now, I realize that WMAS has acted in a manner which was very clearly designed to obstruct and to impede any recovery by the plaintiff and to do virtually anything it could to cover up the wrongs that had been committed. And certainly in the course of this litigation, they have behaved very badly. But I don't think that I can from that conclude that the plaintiff is entitled to punitive damages.

¶ 91 The majority concludes that the circuit court precluded the plaintiff from introducing witnesses to support his punitive damages claim and specifically limited the plaintiff to the facts alleged in the complaint. Majority op., ¶¶ 69-70, 73. The majority characterizes the circuit court's action as if the circuit court decided that it could not-as a matter of law-look outside the complaint. See majority op., ¶¶ 66-67. I concur because the record is unclear that the circuit court relied solely on the facts of the complaint. It is unclear as to whether the circuit court judge relied on the testimony presented, the admitted allegations of the complaint, and WMAS's conduct during trial or whether, given the offer of proof, the circuit court determined that the conduct did not rise to the level of punitive damages as a matter of law.

¶ 92 Clearly, a circuit court is not required to conduct a trial on punitive damages just because punitive damages are pled. The statute calls for specific *672 egregious behavior. Wis. Stat. §

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Circuit courts are vested with authority to determine whether a punitive damages claim survives to trial. That determination can occur in a variety of ways. Here, we are not sure what the circuit court did in reaching its conclusion that punitive damages are not warranted.

FN1. Wisconsin Stat. § 895.043(3), "Standard Of Conduct," provides that "[t]he plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."

¶ 93 The majority states that a circuit court should exercise its discretion in determining the nature of the hearing on punitive damages and in determining whether punitive damages are warranted. Majority op., ¶ 79. I agree. The circuit court should evaluate the claim for punitive damages and determine whether a trial is warranted. Clearly, not all claims for punitive damages warrant a trial. Here, we affirm the court of appeals' determination, "the court may hold an evidentiary hearing, consider Rao's offer of proof to determine if an evidentiary hearing is warranted, or allow Rao an opportunity to submit additional proof to support his case for punitive damages before determining whether to hold a full evidentiary hearing." *Rao v. WMA Securities, Inc.*, No. 2006AP813, 2007 WL 944293, unpublished slip op., ¶ 42 (Wis.Ct.App. Mar. 29, 2007). The circuit court may ultimately determine that a trial is appropriate, but it may also determine that the matter can be **245 disposed of short of trial. The circuit court has full discretion to make that determination on remand.

¶ 94 On one hand, the record indicates that the circuit court gave the plaintiff the opportunity to introduce evidence at trial and through an offer of proof, but the circuit court concluded that based on the evidence, *673 the plaintiff was not entitled to punitive damages. On the other hand, the record indicates that the plaintiff was precluded from offering testimony from witnesses who were relevant to the

issue of punitive damages and that the circuit court reached its decision without hearing the relevant testimony. Because the circuit court's decision does not assist us in determining what the circuit court considered in reaching its conclusion not to award punitive damages, this case must be remanded.

¶ 95 However, the majority concludes that the circuit court "erred in deciding the plaintiff's punitive damages claim solely on the basis of allegations in the complaint and in denying the plaintiff an opportunity to prove additional facts in support of the punitive damages claim." Majority op., ¶ 80. The record is not so clear, and thus, I write separately. Whether the circuit court relied solely on the complaint in making its ruling is subject to question.

¶ 96 As a result, I concur with the majority that a record must be made regarding whether, and to what extent, punitive damages should be awarded. I would afford the circuit court judge the flexibility of properly considering that issue as a matter of law or after a hearing. I would afford the circuit court judge the full opportunity to decide how best to proceed.

¶ 97 For the foregoing reasons I concur.

¶ 98 DAVID T. PROSSER, J. (*dissenting*).

The majority holds that defendant WMA Securities, Inc. (WMAS) waived the right to jury trial on the issue of damages because of discovery violations leading to a court-imposed judgment by default. Majority op., ¶¶ 5, 81. It asserts that judgment by default under Wis. Stat. § 804.12(2)(a)3. triggers the application of *674 Wis. Stat. § 806.02, and that all procedures for determining damages under the latter statute are within the discretion of the circuit court, subject only to review for an erroneous exercise of discretion. *See* majority op., ¶¶ 30, 38, 39-45. Because the majority's decision diminishes the constitutional right of jury trial in civil cases and is grounded in a mistaken theory of waiver, I respectfully dissent.

I. INTRODUCTION

¶ 99 The issue presented is whether WMAS has the right to a jury trial on the issue of damages after the circuit court entered a judgment by default as a sanction for WMAS's discovery violations. WMAS has not challenged the judgment against it on the issue of liability, but it contends that the court may not deprive it of a jury determination as to damages. This court granted WMAS's petition for review because it raised an important question of constitutional law.

¶ 100 In Wisconsin, the right of jury trial in civil cases is provided by both the Wisconsin Constitution and the Wisconsin Statutes. The Wisconsin Constitution, Article I, Section 5, declares that:

The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law. Provided, however, that the legislature may, from time to time, by statute provide that a valid verdict, in civil cases, may be based **246 on the votes of a specified number of the jury, not less than five-sixths thereof.

Wisconsin Stat. § 805.01 reaffirms the right to jury trial, but requires that it be claimed:

(1) Right preserved. The right of trial by jury as *675 declared in article I, section 5, of the constitution or as given by a statute and the right of trial by the court shall be preserved to the parties inviolate.

(2) Demand. Any party entitled to a trial by jury or by the court may demand a trial in the mode to which entitled at or before the scheduling conference or pretrial conference, whichever is held first. The demand may be made either in writing or orally on the record.

¶ 101 The right of jury trial in a civil case can be waived. Wisconsin Stat. § 805.01(3) implements the waiver language in the constitution by setting

out "in the manner prescribed by law" the circumstances constituting waiver. Wis. Const. art. I, § 5. Wisconsin Stat. § 805.01(3) states:

(3) Waiver. The failure of a party to demand in accordance with sub. (2) a trial in the mode to which entitled constitutes a waiver of trial in such mode. The right to trial by jury is also waived if the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

¶ 102 Subsection (3) uses the term "waiver" in two different senses. First, technically, "waiver" is the intentional relinquishment or abandonment of a known right. See *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). A written stipulation filed with the court or an oral stipulation made in open court, consenting to trial by the court, constitute waivers in the traditional and technical sense of the term. By contrast, a party's *676 failure to demand a jury trial is, strictly speaking, a "forfeiture,"—that is, a failure to timely assert a right. *Olano*, 507 U.S. at 733, 113 S.Ct. 1770; see also *Freytag v. Comm'r*, 501 U.S. 868, 894-95 n. 2, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991) (Scalia, J., concurring) (distinguishing between waiver and forfeiture); *State v. Kelty*, 2006 WI 101, ¶¶ 62-63, 294 Wis.2d 62, 716 N.W.2d 886 (Abrahamson, C.J., concurring) (cautioning against using "waiver" and "forfeiture" interchangeably).

¶ 103 A slight variation on the kind of "waiver" described in Wis. Stat. § 805.01(3) is found in Wis. Stat. § 814.61(4), which provides that if a party fails to pay the jury fee within the time permitted to demand a jury trial, "no jury may be called in the action, and the action may be tried to the court without a jury." See *State ex rel. Prentice v. County Ct. of Milwaukee County*, 70 Wis.2d 230,

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239, 234 N.W.2d 283 (1975). This subsection creates a uniform rule supplementing the requirements for any party to demand a jury trial. It provides, in essence, that a demand for trial by jury in a civil case is not perfected or not complete if the jury fee is not paid.

¶ 104 These forms of “waiver” are not the only ways that a party can surrender the constitutional right of jury trial. Looking to the default judgment statute, a civil defendant gives up the right to a trial of *any* sort “if no issue of law or fact has been joined and if the time for joining issue has expired,” Wis. Stat. § 806.02(1), or if “a defendant fails to appear in an action,” Wis. Stat. § 806.02(3), or if a defendant**247 who has appeared in an action “fails to appear at trial.” Wis. Stat. § 806.02(5). These defaulting actions by a party may be characterized as either forfeiture or waiver, depending upon the party's state of mind.

*677 ¶ 105 In short, a party can surrender the right of civil jury trial by intentionally relinquishing the right or by failing to assert the right, both coming under the generic heading of “waiver.”

¶ 106 When a circuit court *takes* away a party's right of jury trial, however, the court's action must be explained and defended on other grounds.

¶ 107 For instance, this court has determined that a circuit court may enter summary judgment against a party, notwithstanding the party's persistent demand for a jury trial, “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Wis. Stat. § 802.08(2); *see Eden v. La Crosse Lutheran Hosp.*, 53 Wis.2d 186, 192, 191 N.W.2d 715 (1971).

¶ 108 A summary judgment that deprives a party of a jury trial is clearly not grounded in principles of waiver or forfeiture. Summary judgment is grounded on the unrelated principle that a jury is unne-

cessary-in certain cases-if there are no genuine issues of material fact and only *legal* issues will decide the outcome. In these circumstances, this court's rules of civil procedure authorize circuit judges to deny a party the right of jury trial.^{FN1}

FN1. My reservations about the use of summary judgment to deprive a party of trial by jury may be found in: *Trinity Evangelical Lutheran Church and School-Freistadt v. Tower Ins. Co.*, 2003 WI 46, ¶¶ 71-86, 261 Wis.2d 333, 661 N.W.2d 789 (Prosser, J., dissenting); *Steven V. v. Kelley H.*, 2004 WI 47, ¶¶ 63-100, 271 Wis.2d 1, 678 N.W.2d 856 (Prosser, J., dissenting); and *Walworth County DHHS v. Andrea L.O.*, 2008 WI 46, ¶ ¶ 59-68, --- Wis.2d ---, 749 N.W.2d 168 (Prosser, J., concurring).

¶ 109 The majority's holding in the present case provides additional authority for circuit judges to take *678 away a party's right of jury trial. The majority relies on Wis. Stat. § 804.12(2)(a)3., which permits circuit courts to render judgment by default as a discovery sanction against a disobedient party. Majority op., ¶¶ 5, 81. This authority must be grounded in some principle other than waiver or forfeiture or the absence of disputed facts, for these principles are inapplicable. A circuit court's decision to impose a sanction that deprives a party of a constitutional right ought to require standards that are susceptible to meaningful review. The proposition that a party deprived of a constitutional right by sanction has intentionally relinquished that right is intellectually bankrupt because it eliminates the need for standards governing the judicially imposed deprivation. If a circuit court were to use Wis. Stat. § 804.12(2)(a) to impose significant costs on a defendant (for instance, all the plaintiff's attorney fees) instead of rendering a judgment by default, I hope this court would not try to explain the sanction in terms of “waiver.”

¶ 110 When this court endorses a rule permitting judges to take away a party's constitutional right of

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jury trial, it must enunciate a clear and compelling rationale for that rule, plus standards for its application, so that the rule is not easily employed or terribly abused. This the majority opinion fails to do.

¶ 111 The majority opinion obfuscates Wis. Stat. § 805.01(3), the jury trial waiver statute. The reason for this obfuscation is obvious. Any traditional view of either waiver or forfeiture is inconsistent with **248 the facts of this case. Section 805.01(3) does not provide for *679 waiver here because WMAS has *not* (1) failed to timely demand a jury trial; or (2) stipulated to trial without a jury.

II. THE MAJORITY OPINION

¶ 112 Because the future of an important constitutional right is at stake, the majority opinion must be carefully scrutinized. The majority asserts that WMAS “waived its right of trial by jury in the manner set forth in Wis. Stat. §§ (Rule) 804.12(2) and 806.02.” Majority op., ¶¶ 5, 81.

¶ 113 The majority explains that a party may waive a trial by jury on the issue of damages “in the manner prescribed by law.” Majority op., ¶ 17. Thus, the question, in the majority’s view, is whether the defendant waived its right of trial by jury in the manner prescribed by law, that is, “whether by failing to comply with the circuit court’s discovery orders and by incurring a judgment by default as a sanction, the defendant has waived its state constitutional right of trial by jury in the manner prescribed by law.” *Id.*, ¶ 30.

¶ 114 There is no dispute that Wis. Stat. § 805.03 reads in part:

For failure of any ... party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court ... may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a).

Wisconsin Stat. § 804.12(2)(a) reads in part:

(2) Failure to comply with order. (a) If a party ... fails to obey an order to provide or permit discovery ... 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:

....

*680 3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

¶ 115 The majority cites cases in which circuit courts have rendered a judgment by default against a disobedient party as a discovery sanction under Wis. Stat. § 804.12(2)(a). Majority op., ¶ 41 n. 31; *see Midwest Developers v. Goma Corp.*, 121 Wis.2d 632, 634, 642-43, 649, 360 N.W.2d 554 (Ct.App.1984); *Kerans v. Manion Outdoors Co., Inc.*, 167 Wis.2d 122, 130, 482 N.W.2d 110 (Ct.App.1992); *Smith v. Golde*, 224 Wis.2d 518, 525, 528, 592 N.W.2d 287 (Ct.App.1999); *see also Hudson Diesel, Inc. v. Kenall*, 194 Wis.2d 531, 535 N.W.2d 65 (Ct.App.1995).

¶ 116 In several of these cases, the court of appeals moved immediately, without analysis, to apply Wis. Stat. § 806.02—the default judgment statute—as though it were axiomatic that “judgment by default” under Wis. Stat. § 804.12(2)(a)3. is the same as “default judgment” under Wis. Stat. § 806.02. The majority eagerly repeats this procedure. The majority simply states: “Wisconsin Stat. § (Rule) 806.02 governs default judgments.” Majority op., ¶ 32.

¶ 117 The majority ultimately concludes: “[T]he clear implication of the rule and the case law applying the rule is that by engaging in conduct that results in a default judgment *the defendant has waived its right of trial by jury in the manner prescribed by Wis. Stat. § (Rule) 806.02.*” Majority op., ¶ 39 (emphasis added).

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¶ 118 There are several problems with the majority's analysis.

*681 **249 A

¶ 119 The first problem with the majority's analysis is that it fails to acknowledge that the seminal case applying Wis. Stat. § 804.12(2)(a) to effect judgment by default does not utilize the doctrine of waiver. The *Midwest Developers* case relies on a completely different principle. It looked to *Hauer v. Christon*, 43 Wis.2d 147, 168 N.W.2d 81 (1969), which explained that a trial court's inherent power to strike a defendant's pleading is grounded "upon the necessity of the court to maintain the orderly administration of justice and the dispatch of its business." *Midwest Developers*, 121 Wis.2d at 643, 360 N.W.2d 554 (quoting *Hauer*, 43 Wis.2d at 150-51, 168 N.W.2d 81).

¶ 120 The *Midwest Developers* court went on to explain that the circuit court's decision to render judgment by default was "discretionary" and that a court abuses its discretion if it misapplies or misinterprets the law. *Midwest Developers*, 121 Wis.2d at 650, 360 N.W.2d 554.

¶ 121 In the *Kerans* case, the court stated:

The decision is discretionary with the trial court. We review for abuse of that discretion. A court properly exercises its discretion if it examines relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach.

Kerans, 167 Wis.2d at 130, 482 N.W.2d 110 (citations omitted).

¶ 122 In *Smith v. Golde* the court restated the standard of review: "We review a trial court's decision to enter a default judgment under the erroneous exercise of discretion standard." 224 Wis.2d at 525, 592 N.W.2d 287 (citation omitted). Then, it reasoned that to enter a judgment by default as a

sanction, "the trial court must determine that the 'noncomplying party's conduct is egregious or *682 in bad faith and without a clear and justifiable excuse.'" *Smith*, 224 Wis.2d at 526, 592 N.W.2d 287 (quoting *Hudson Diesel*, 194 Wis.2d at 542, 535 N.W.2d 65).

¶ 123 These statements about judicial discretion to maintain the orderly administration of justice embody a starkly different rationale from the majority's theory of defendant "waiver." A court's discretionary decision to deny the right of jury trial as a sanction is substantially different from a defendant's intentional relinquishment of that right or failure to assert that right. The first situation focuses on decision-making *by the court* while the second situation focuses on decision-making *by the defendant*.

¶ 124 The majority's theory of waiver departs from black letter Wisconsin law. For instance, in *Milas v. Labor Association of Wisconsin, Inc.*, 214 Wis.2d 1, 571 N.W.2d 656 (1997), the court stated:

This court has defined waiver as the "voluntary and intentional relinquishment of a known right" and has stated that "intent to relinquish [the right] is an essential element of waiver." *Von Uhl [v. Trempealeau County Mut. Ins. Co.]* 33 Wis.2d [32,] 37, 146 N.W.2d 516 [1966]. *The waiver doctrine focuses on the intent of the party against whom waiver is asserted.* It is not necessary, however, to prove that the party had an actual intent to waive. See *Attoe v. State Farm Mut. Auto. Ins. Co.*, 36 Wis.2d 539, 545, 153 N.W.2d 575 (1967). "[T]he intent to waive may be inferred as a matter of law from the conduct of the parties." *Nelson v. Caddo-Texas Oil Lands Co.*, 176 Wis. 327, 329, 186 N.W. 155 (1922).

Milas, 214 Wis.2d at 9-10, 571 N.W.2d 656 (emphasis added) (footnote omitted) (brackets in original).

**250 ¶ 125 The *Milas* court's definition and discussion are consistent with this court's prior explan-

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ations of the *683 doctrine of waiver.^{FN2} THE *MilaS* court's definition is also consistent with the common understanding of what the term "waiver" means, based on definitions found in legal dictionaries.^{FN3}

FN2. See, e.g., *Gonzalez v. City of Franklin*, 137 Wis.2d 109, 128-129, 403 N.W.2d 747 (1987) (defining waiver as a "voluntary and intentional relinquishment of a known right" and noting that "[i]ntent to waive is regarded as an essential element of waiver" (citations omitted)); *Bank of Sun Prairie v. Opstein*, 86 Wis.2d 669, 681, 273 N.W.2d 279 (1979) ("Waiver is defined as a voluntary and intentional relinquishment of a known right. Intent to waive is an essential element of waiver." (citations omitted)); *Employers Ins. of Wausau v. Sheedy*, 42 Wis.2d 161, 166, 166 N.W.2d 220 (1969) ("A waiver is the intentional relinquishment of a known right." (citation omitted)); *Davies v. J.D. Wilson Co.*, 1 Wis.2d 443, 466, 85 N.W.2d 459 (1957) ("Waiver is defined as voluntary and intentional relinquishment of a known right."); *Swedish Am. Nat'l Bank of Minneapolis v. Koebnick*, 136 Wis. 473, 479, 117 N.W. 1020 (1908) ("A waiver is the intentional relinquishment of a known right." (citation omitted)); *Monroe Water Works Co. v. City of Monroe*, 110 Wis. 11, 22, 85 N.W. 685 (1901) ("A waiver is the intentional relinquishment of a known right." (citation omitted)).

FN3. *Black's Law Dictionary* defines "waiver" as "[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage." *Black's Law Dictionary* 1574 (7th ed.1999).

Another legal dictionary defines "waiver" as "[t]he intentional relinquishment of a known right, claim, or privilege." *Ballentine's Law Dictionary*

1356 (3d ed.1969) (citing *Phillips v. Lagaly*, 214 F.2d 527 (10th Cir.1954); *Smith v. Smith*, 235 Minn. 412, 51 N.W.2d 276 (1952)). Yet another legal dictionary defines "waiver" as "[t]he intentional relinquishment of a known right." 3 *Bouvier's Law Dictionary and Concise Encyclopedia* 3417 (8th ed.1914) (citing *Lehigh Valley R. Co. v. Providence-Wash. Ins. Co.*, 172 F. 364 (C.C.A.2.1909)).

¶ 126 In *Chevron Chemical Co. v. Deloitte & Touche*, 176 Wis.2d 935, 501 N.W.2d 15 (1993) (*Chevron I*), the circuit court entered judgment for the plaintiff, *684 notwithstanding a jury verdict for the defendant. *Id.* at 944-45, 501 N.W.2d 15. The court did so as a sanction for attorney misconduct. *Id.* at 944, 501 N.W.2d 15. The court explained:

Sanctions for attorney misconduct both penalize the offender and deter future misconduct. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976); *Johnson [v. Allis Chalmers Corp.]*, 162 Wis.2d [261,] 282-83[, 470 N.W.2d 859 (1991)]. The authority to impose sanctions is essential if circuit courts are to enforce their orders and ensure prompt disposition of lawsuits.

Chevron I, 176 Wis.2d at 946, 501 N.W.2d 15.

¶ 127 Although the *Chevron I* case involved a sanction imposed after a jury trial, not a sanction for discovery violations, the court did not try to rationalize its sanction as some sort of "waiver" by the defendant.

¶ 128 Here the majority adopts a waiver theory at odds with precedent so that judicial deprivation of the constitutional right of jury trial appears to mesh with the waiver language of the state constitution. Wis. Const. art. I, § 5. This theory neatly avoids the constitutional question, shifts the focus from the

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court's decision-making to the defendant's decision-making, and significantly alters review of circuit court action. It is not correct.

B

¶ 129 The second problem with the majority's analysis is that there is no formal or logical linkage between the phrase in ****251** Wis. Stat. § 804.12(2)(a)3., authorizing "judgment by default" against a disobedient party, and Wis. Stat. § 806.02, the default judgment statute. In *Chevron Chemical Co. v. Deloitte & Touche*, 207 Wis.2d 43, 557 N.W.2d 775 (1997) (*Chevron II*), this ***685** court recognized that default as a sanction is "not a typical default judgment case." *Id.* at 48, 557 N.W.2d 775. The *Chevron II* court noted that "issues of fact and law were joined and the defendant appeared at trial." *Id.* Thus, the *Chevron II* court determined that the default sanction was "not governed by § 806.02." *Id.* (emphasis added).

¶ 130 The present case, involving another judicial sanction, also is not a typical default judgment case. The defendant did not forgo the right of trial by jury by failing to answer the complaint or failing to appear in court. The circuit court took away the right and entered judgment as a sanction. It would appear self-evident that the entry of judgment by default *on these facts* should be treated and reviewed differently from a default judgment entered on the basis of a defendant's failure to answer the complaint.

C

¶ 131 The third problem with the majority's analysis comes from a close examination of Wis. Stat. § 806.02. Careful examination reveals why the statute does not govern judgments by default in sanction cases.

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¶ 132 Subsection (1) reads: "A default judgment may be rendered as provided [in sub. (1)] if no issue of law or fact has been joined and if the time for joining issue has expired." Wis. Stat. § 806.02(1). In a sanction case, a sanctioned defendant is very likely to have joined issue by filing an answer to the complaint. The circuit court's decision to strike an answer is materially different from a defendant's failure to file an answer. To utilize subsection (1), the court must disregard the historical fact that the defendant answered the complaint.

*686 2

¶ 133 Subsection (2) provides: "After filing the complaint and proof of service of the summons on one or more of the defendants *and an affidavit that the defendant is in default for failure to join issue*, the plaintiff may move for judgment according to the demand of the complaint." Wis. Stat. § 806.02(2) (emphasis added). In this case, the plaintiff did not move for judgment with an affidavit averring that WMAS was in default *for failure to join issue*. On April 22, 2005, the plaintiff moved to strike WMAS's pleadings as a discovery sanction. This was not a § 806.02 motion. It was a Wis. Stat. § 804.12(2)(a)3. motion.

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¶ 134 Subsection (2) also provides that: "If the amount of money sought was excluded from the demand for judgment, as required under s. 802.02(1m), the court *shall* require the plaintiff to specify the amount of money claimed and provide that information to the court and to the other parties *prior to the court rendering judgment.*" Wis. Stat. § 806.02(2) (emphasis added). That did not happen here. On November 4, 2005, the circuit court issued a memorandum and order striking the pleadings and granting default judgment against WMAS pursuant to § 806.02. On November 28, 2005, the court signed a formal order that said in part: "Default

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judgment is entered against WMAS in favor of Plaintiff." A hearing on damages was not held until February 27-28, 2006, nearly four months later.

¶ 135 Subsection (3), like subsection (2), appears to require proof "before entering a **252 judgment against such defendant." Wis. Stat. § 806.02(3) (emphasis added).

*687 ¶ 136 In short, the circuit court may have acted correctly in entering judgment by default under Wis. Stat. § 804.12(2)(a)3., but it did not follow the provisions of Wis. Stat. § 806.02. If the majority insists upon the applicability of § 806.02, it cannot conclude that the circuit court correctly followed that statute.^{FN4}

FN4. For discussion of Wis. Stat. § 806.02(2), see *Stein v. Illinois State Assistance Commission*, 194 Wis.2d 775, 782, 535 N.W.2d 101 (Ct.App.1995).

4

¶ 137 Subsection (2) further provides: "If proof of any fact is necessary for the court to give judgment, the court shall receive the proof." Wis. Stat. § 806.02(2) (emphasis added). Subsection (5) provides in part: "If proof of any fact is necessary for the court to render judgment, the court shall receive the proof." Wis. Stat. § 806.02(5) (emphasis added).

¶ 138 The Judicial Council Committee's Note to Wis. Stat. § 806.02 from 1977 reads in part:

Sub. (5) has been modified to allow a judge in a default judgment matter to receive rather than mandatorily hear the proof of any fact necessary for a court to render judgment. This change allows a judge the option of *in-chamber consideration of affidavits* presented by attorneys. Under the present language the time of the judge may be taken up in open court hearing proof presented by the attorney orally whereas proof submitted by the attorney in the form of affidavits may be just

as competent and trustworthy.

Judicial Council Committee's Note, 1977, § 806.02, Stats. (emphasis added).

*688 ¶ 139 The Judicial Council Note from 1981 indicates that the identical change had been made to subsection (2). Judicial Council Note, 1981, § 806.02, Stats.

¶ 140 These proof by affidavit provisions are much easier to justify when a party has, in fact, defaulted, that is, when a party has consciously *given up the right to a trial* either by a jury or by the court. These provisions are very difficult to justify if the right of trial by jury has been taken away as a sanction, because the court's decision to impose a sanction would arguably give the court the right to skip a time-consuming hearing on damages altogether.

¶ 141 Taking points B and C together, there is no linkage between "judgment by default" under Wis. Stat. § 804.12(2)(a)3. and "default judgment" under Wis. Stat. § 806.02. A close examination of § 806.02 makes it clear that this statute does not govern "judgment by default" imposed as a sanction. Consequently, the majority's reliance upon Wisconsin precedent under § 806.02 and federal cases under Federal Rule of Civil Procedure 55 is not on point.^{FN5}

FN5. The majority opinion quotes a decision from the Fifth Circuit: "Assuming that [the party] had the right to a jury trial he waived that right when he purposefully chose not to answer the suit and timely request such a trial." Majority op., ¶ 48 (quoting *Dierschke v. O'Cheskey*, 975 F.2d 181, 185 (5th Cir.1992)) (emphasis added).

This authority is not applicable; WMAS answered Rao's amended complaint on June 2, 2005.

D

¶ 142 The fourth problem with the majority's ana-

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lysis is that it overlooks critical precedent circumscribing a court's right to strike pleadings as a sanction. *689 This court has held that the trial court has "an inherent power to dismiss a complaint and also to strike an answer and grant a default **253 judgment, but...the exercise of the power is limited by the requirement of due process of the fourteenth amendment of the United States Constitution." *Hauer*, 43 Wis.2d at 154, 168 N.W.2d 81 (emphasis added). Denial of a party's demand for trial by jury at the same time judgment by default is granted underscores the need for sound discretion that satisfies the requirements of due process.

¶ 143 In *Gipson Lumber Co. v. Schickling*, 56 Wis.2d 164, 201 N.W.2d 500 (1972), the court applied this due process principle to a discovery case:

While sec. 885.11(5), Stats.,^[FN6] does not specifically refer to a refusal to produce documents under subpoena duces tecum, which seems to be the main ground upon which the trial court struck the answer, ... we consider the section to be broad enough to embrace the failure to obey such a subpoena used with a discovery examination....

FN6. Wisconsin Stat. § 885.11(5) currently reads: "Striking out pleading. If any party to an action or proceeding shall unlawfully refuse or neglect to appear or testify or depose therein, either within or without the state, the court may, also, strike out the party's pleading, and give judgment against the party as upon default or failure of proof." The current subsection is virtually identical to the subsection when *Gipson Lumber Co. v. Schickling*, 56 Wis.2d 164, 201 N.W.2d 500 (1972), was decided.

The constitutionality of statutes similar to sec. 885.11(5), Stats., has been considered and upheld providing the court exercising the power remains within the bounds of due process of law. Three major cases have laid down guidelines. ^[FN7]

These cases were reviewed*690 in *Hauer v. Christon*, 43 Wis.2d 147, 168 N.W.2d 81 [1969], and the teaching is that a judge may strike an answer for noncompliance within the bounds of due process when the evidence withheld relates to an essential element of the defense so as to warrant a presumption of lack of merit and the disobedience is not the result of an inability on the part of the defendant to perform.

FN7. The court cited *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958), *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909), and *Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897).

Id. at 168-69, 201 N.W.2d 500 (emphasis added) (footnote omitted).

¶ 144 Both *Hauer* and *Gipson* predate this court's adoption of the Wisconsin Rules of Civil Procedure. However, the procedure rules include Wis. Stat. § 805.01(1), which reads: "Right preserved. The right of trial by jury as declared in Article I, Section 5, of the constitution or as given by a statute and the right of trial by the court shall be preserved to the parties inviolate." Wis. Stat. § 805.01(1) (emphasis added). This language is stronger than the language in Article I, Section 5. Moreover, the rules of civil procedure were adopted under Wis. Stat. § 751.12, which admonishes the court that its rules "shall not abridge ... or modify the substantive rights of any litigant." Thus, the rules of civil procedure cannot be held to diminish a party's rights to due process or trial by jury from what they were before the adoption of the civil procedure rules.

III. WISCONSIN PRECEDENT

¶ 145 Before attempting to articulate standards for circuit courts that impose sanctions that deprive a

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party of trial by jury, it may be useful to examine additional Wisconsin precedent.

¶ 146 The relevant portions of Article I, Section 5 have been part of the Wisconsin **254 Constitution since *691 1848. Our constitution has always provided that, "The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law." Wis. Const. art. I, § 5. From the beginning, judges and legislators have wrestled with the question of how to waive the right of jury trial.

¶ 147 In *Leonard v. Rogan*, 20 Wis. 540 (1866), this court reviewed a dispute over a conveyance of real estate. One question was whether the defendant, Mrs. Rogan, was entitled to a trial by jury. *Id.* at 568-71. The court stated that "[i]n an action at law, the defendant is entitled to a trial by jury ... unless she has waived it." *Id.* at 571. The court concluded that Mrs. Rogan had waived her right of jury trial because the record revealed that the action proceeded to trial before the judge alone, without objection. *Id.* "[I]n other words ... the parties *consented* to that mode of trial." *Id.* (emphasis added). "If the defendant had demanded a trial by jury, as she might have done, ... the question would have been very different." *Id.*

¶ 148 In another case, *Home Insurance Co. v. Security Insurance Co.*, 23 Wis. 171 (1868), the court determined that it was too late for the defendant to object to a non-jury trial when it voluntarily waived the right to trial before a court and jury by stipulating in writing to trial before a referee. *Id.* at 175. The court noted that while the "legislature has not attempted to *compel* the parties to submit to a trial by referees in actions of this nature," *id.* at 174, the statute at issue provided that "all or any of the issues in this action, whether of fact or of law, or both, *may* be referred, *upon the written consent of the parties.*" *Id.* at 174. The court explained that the parties "may waive their right under *692 the constitution to have the [dispute] heard and deter-

ined by the courts and juries of the country." *Id.* The court held that it was not "incompetent" for the legislature to pass such laws, because the "validity of the transaction" depended "entirely on the will of the parties." *Id.*

¶ 149 In *Wooster v. Weyh*, 194 Wis. 85, 216 N.W. 134 (1927), the defendant claimed he was deprived of his right to trial by jury. *Id.* at 89, 216 N.W. 134. The court's response: "The right he had to such trial by jury was one that may be waived. It was clearly waived in this case by appellant proceeding to trial without in any manner calling the matter to the attention of the court or suggesting that a trial by jury on this issue was desired or demanded." *Id.* at 91-92, 216 N.W. 134 (citations omitted).

¶ 150 These cases supplement Wisconsin statutes of long standing that have explained how to waive a jury trial. For instance, Section 2862 of the Revised Statutes of 1878 stated:

Trial by jury may be waived by the several parties to an issue of fact in actions on contract, and with the assent of the court in other actions, *in the following manner:*

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent in open court, entered in the minutes.

Wis. Stat. ch. 128, § 2862 (1878) (emphasis added). This text remained intact until January 1, 1936.

¶ 151 In 1935 the court revised then-existing Wis. Stat. § 270.32 (1935) to read: "Jury trial, how waived. Trial by jury may be waived by the several *693 parties to an issue of fact by failing to appear at the trial; or by written consent filed with the clerk; or by consent in open court, entered **255 in the minutes." S.Ct. Order, 217 Wis. v. ix (eff. Jan. 1, 1936). Apart from short-lived revisions in the mid-

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1940s, see *Petition of Doar*, 248 Wis. 113, 21 N.W.2d 1 (1945), this language stated the law until the court revised the rules of civil procedure in 1975, effective in 1976.

¶ 152 These statutes and cases demonstrate that waiver of the constitutional right of jury trial in civil cases has historically tracked traditional principles of waiver or forfeiture: affirmative or consensual action by one or more of the parties to surrender the right, or obvious failure by any party to assert the right. The steadfast maintenance of true waiver and forfeiture principles underlies the importance of the right being waived.

¶ 153 Wisconsin precedent honors the right of jury trial. In *Schmidt v. Riess*, 186 Wis. 574, 203 N.W. 362 (1925), this court observed:

Jurors are obtained from the various walks of life, with various degrees of knowledge and experience and with various interests, and, it must be assumed and admitted, with certain prejudices.... Unconscious prejudices exist with some in favor of the plaintiff, and with others in favor of the defendant. But after conceding all of these various elements that enter into the make-up of the personnel of the jurors and of the jury, it is largely designed that the average judgment of twelve men and women chosen from the citizenship of the community in which the parties reside will meet the requirements of justice, and that a verdict of the jury will be a true and just one.

Id. at 579-80, 203 N.W. 362.

*694 ¶ 154 *Schmidt* was a case in which the amount of damages was at issue. The court noted that “[t]he assessment of damages in a personal injury case presents a matter ... which is peculiarly within the field of a jury to determine.” *Id.* at 579, 203 N.W. 362. In *Dekeyser v. Milwaukee Automobile Insurance Co.*, 236 Wis. 419, 431, 295 N.W. 755 (1941), this court made a stronger statement that “assessment of damages is solely a jury function.” Again in *Schultz v. Miller*, 259 Wis. 316, 327, 48

N.W.2d 477 (1951), the court said “[t]he award of damages is within the province of the jury.” Many additional cases could be cited.

¶ 155 In sum, “[t]he parties to an action are entitled to a jury trial on all issues of fact, including that of damages.” *Jennings v. Safeguard Ins. Co.*, 13 Wis.2d 427, 431, 109 N.W.2d 90 (1961) (citing Wis. Const., art. I, § 5).

IV. STANDARDS

¶ 156 The challenge in this case is to reconcile the judicial holdings that eloquently articulate the importance of trial by jury for deciding issues of fact, including the issue of damages, with the clear precedent that courts have authority to strike out pleadings or parts thereof and render a judgment by default when a defendant fails to comply with a court order.

¶ 157 In *Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 470 N.W.2d 859 (1991), this court discussed judicial authority, both statutory and inherent, to sanction parties “for failure to prosecute, failure to comply with procedural statutes or rules, and for failure to obey court orders.” *Id.* at 273-74, 470 N.W.2d 859. Appropriate sanctions under Wis. Stat. § 804.12, the court said, include orders that designated facts be taken as established as well as *695 orders that refuse the delinquent party the right to support or oppose designated claims or defenses, or that strike out pleadings or parts of pleadings, or that render judgment by default. *Id.* at 274, 470 N.W.2d 859.

**256 ¶ 158 The court, speaking through Justice William Bablitch, made these telling observations:

The latitude circuit courts in Wisconsin have to dismiss actions as a sanction is demonstrated by sec. 805.03, Stats., which permits dismissal whenever a party fails “to obey any order of the court.” Although this language could be viewed as permitting dismissal for noncompliance with even trivial procedural orders, closer examination

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of the statute reveals that the court may only impose such orders "as are just." Furthermore, the Judicial Council Committee's Note ... emphasizes that "[b]ecause of the harshness of the sanction, a dismissal under this section should be considered appropriate only in cases of egregious conduct by a claimant." Our case law establishes that dismissal is improper, i.e. not "just," unless bad faith or egregious conduct can be shown on the part of the noncomplying party.

Johnson, 162 Wis.2d at 274-75, 470 N.W.2d 859 (citations omitted) (brackets in original). The court added that dismissal is a sanction that should rarely be granted and is appropriate only in cases of egregious conduct. *Id.* at 275, 470 N.W.2d 859 (citing *Trispel v. Haefler*, 89 Wis.2d 725, 732, 279 N.W.2d 242 (1979)).

¶ 159 Striking a *defendant's* pleadings is roughly equivalent to dismissing a *plaintiff's* case and should be subject to similar standards. The following standards may be useful.

¶ 160 First, to strike a party's pleadings as a sanction, a circuit court must show that the noncomplying party's conduct was "egregious or in bad faith *696 and without a clear and justifiable excuse."

Smith, 224 Wis.2d at 526, 592 N.W.2d 287 (internal quotation marks and citation omitted); *see also Schultz v. Sykes*, 2001 WI App 255, ¶ 9, 248 Wis.2d 746, 638 N.W.2d 604 (citing cases).

¶ 161 Second, the decision to enter default judgment as a sanction "ought to be the last resort." *Adolph Coors Co. v. Movement Against Racism and the Klan*, 777 F.2d 1538, 1542 (11th Cir.1985). Some federal courts consider it an "abuse of discretion" to impose judgment by default "if less draconian but equally effective sanctions" are available. *Id.* at 1543 (citing cases).

¶ 162 Third, the entry of judgment by default as a sanction must comply with due process. This consideration was discussed in *Dubman v. North Shore Bank*, 75 Wis.2d 597, 249 N.W.2d 797 (1977):

This court has held that there is an inherent power to strike pleadings in a proper case....

Defendant claims that the order ... imposes sanctions for contempt of court. If so, it is appealable. However, both *Hauer v. Christon* and *Gipson Lumber Co. v. Schickling*... hold that the sanction of striking a pleading may not be exercised as a contempt penalty. *The power can be exercised when evidence is withheld which relates to an essential element of the defense so as to warrant a presumption of fact that the defense has no merit. If imposed solely for failure to obey court orders, without evidence warranting a finding of no merit or bad faith, the sanction of striking a pleading ... denies due process of law.*

Dubman, 75 Wis.2d at 600-01, 249 N.W.2d 797 (emphasis added) (citations omitted).^{FN8}

FN8. "[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale*, 357 U.S. at 209, 78 S.Ct. 1087.

**257 *697 ¶ 163 Fourth, a circuit court must have discretion to narrow the focus of a damages hearing if the narrowing is "just" to the plaintiff. Striking a defendant's answer will *normally* settle the issue of the defendant's liability. In this case, however, when the circuit court struck the defendant's answer it made the defendant liable for: (1) vicarious liability for WMAS's employee's unlawful acts of conversion; (2) intentional misrepresentation; (3) strict responsibility misrepresentation; (4) negligent misrepresentation; (5) breach of fiduciary duty; (6) negligence; (7) breach of the implied duty of good faith in performance of a contract; and (8) breach of contract. *See majority op.*, ¶ 9. Imposing liability on eight different causes of action complicated the task of determining damages. The claims appear to be inconsistent. A court should have the ability to narrow the issues for a damages hearing.

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¶ 164 Fifth, striking a defendant's answer does not settle the amount of compensatory damages.^{FN9} The amount of compensatory damages remains an open question that requires proof of additional facts. The burden of proving the amount of damages remains with the party entitled to judgment.

FN9. See *U.S. for the Use of M-CO Constr., Inc. v. Shipco Gen., Inc.*, 814 F.2d 1011, 1014 (5th Cir.1987) (interpreting Federal Rule of Civil Procedure 37(b)).

¶ 165 In *Apex Electronics Corp. v. Gee*, 217 Wis.2d 378, 380, 577 N.W.2d 23 (1998), this court stated that a circuit court entering a default judgment on a punitive damages claim must make inquiry beyond the complaint to determine the merits of the punitive damages claim and the amount of punitive damages, if *698 any, to be awarded. The court's analysis is equally applicable to a plaintiff who seeks unliquidated compensatory damages. *Id.* at 387-88, 577 N.W.2d 23; see also *Gaertner v. 880 Corp.*, 131 Wis.2d 492, 505-06, 389 N.W.2d 59 (Ct.App.1986).

¶ 166 Because judgment by default pursuant to Wis. Stat. § 804.12(2)(a)3. is not governed by Wis. Stat. § 806.02, *Chevron II*, 207 Wis.2d at 48, 557 N.W.2d 775, this court cannot rely on pronouncements in § 806.02 cases that the court has the prerogative either to hold a hearing or inquiry on damages or to receive proof by affidavit. This court must decide how to determine damages when judgment by default is the result of judicial sanction, rather than waiver. It should not automatically conclude that a circuit court may disregard a defendant's demand for a jury trial to decide the issue of damages when that factual issue remains in dispute. Pointing to § 806.02 for judicial authority to deny trial by jury locks the court into judicial discretion to use only affidavits in determining damages.

¶ 167 The case law under Federal Rule of Civil Procedure 37(b) holds that a default may not be claimed as to damages "without a hearing unless the amount claimed is a liquidated sum or one cap-

able of mathematical calculation." *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir.1979) (citing *Flaks v. Koegel*, 504 F.2d 702, 707 (2d Cir.1974); *Eisler v. Stritzler*, 535 F.2d 148, 153-54 (1st Cir.1976)). If there is no dispute as to the amount of damages either because of the amount lawfully pled in the complaint^{FN10} or because the amount is easily and objectively ascertainable, there *699 should be no need for the **258 defendant to continue to demand a jury and no need for a court to honor that demand.

FN10. Generally, with respect to a tort claim seeking recovery of money, the demand for judgment may not specify the amount of money the pleader seeks. Wis. Stat. § 802.02(1m)(a). However, this general rule does not control the complaint in all other cases.

¶ 168 However, if an evidentiary hearing is required to determine the amount of damages, a defendant's demand for a jury trial must be considered, just as a plaintiff's demand would have to be considered.

¶ 169 There are numerous reasons why the right of jury trial should be maintained in this situation:

a. The statutes nowhere authorize a circuit court to deny trial by jury per se. If they did, courts could sanction parties by denying the right of jury trial as a separate sanction, even when they did not strike out pleadings or enter judgment by default.

b. When a circuit court strikes a defendant's pleadings under Wis. Stat. § 804.12(2)(a)3., it imposes a drastic sanction. When the court thereafter denies a jury trial to determine the amount of damages, it is imposing an additional sanction on the defendant that requires additional justification if it is to comport with due process.^{FN11} The second sanction does not follow automatically from the first sanction.

FN11. The circuit court's explanation of its

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additional sanction here was: "The motion for a jury trial is denied. I don't think that a person in default is entitled to a jury trial on an issue of damages, although they are permitted to participate in that hearing on damages."

c. The circuit court may not deny a jury trial *to the plaintiff* on the issue of damages if the plaintiff wants a jury. A plaintiff does not automatically relinquish the right of jury trial by filing a motion to strike the defendant's pleadings as a sanction for discovery violations*700. See *Morrison v. Rankin*, 2007 WI App 186, ¶ 14, 305 Wis.2d 240, 738 N.W.2d 588. There is something quite unfair, however, in honoring the request for a jury trial for one side but not the other.

d. The circuit court could not exclude the defendant from a jury trial if other defendants still had the right to claim a jury trial. See Wis. Stat. § 805.01(3). A sanctioned defendant may not be able to escape liability, but a sanctioned defendant ought to be able to establish the extent of its liability in relation to other defendants.

e. If punitive damages come into play, a defendant ought to be able to ask a jury to consider compensatory and punitive damage claims at the same time. See *Trinity Evangelical Lutheran Church and School-Freistadt v. Tower Ins. Co.*, 2003 WI 46, 261 Wis.2d 333, 661 N.W.2d 789.

¶ 170 The above conclusions are in accord with the law of Michigan and Florida. These states preserve a defendant's right of trial by jury on the issue of damages when a sanction of default is entered against that defendant.

¶ 171 In *Wood v. Detroit Automobile Inter-Insurance Exchange*, 413 Mich. 573, 321 N.W.2d 653 (1982), the trial court entered default judgment against the defendant for failure to timely respond to interrogatories following two court orders requiring a response. *Id.* at 655-56. But on appeal, the Michigan Supreme Court rejected the notion that a

defendant's default "cancels" a prior jury trial demand or constitutes the functional equivalent of waiver. *Id.* at 658-59.

¶ 172 The *Wood* court determined that Rule 520 of the Michigan General Court Rules of 1963 controlled entry of default judgment. *Id.* at 659. Specifically, the *Wood* court cited Rule 520, which preserved "a right of trial by jury to the parties when and as required by the *701 constitution" in cases where (as here) the trial **259 court must initiate further proceedings to determine damages on default. *Id.* at 659 n. 12, 660 (quoting Rule 520.2(2) of the Michigan General Court Rules of 1963). The *Wood* court noted that the Michigan Constitution stated that "[t]he right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law." *Wood*, 321 N.W.2d at 660 (quoting Mich. Const., art. 1, § 14 (1963)).^{FN12} Since the defendant in *Wood* had not waived its right to jury trial, the court concluded that "the trial court ... was obliged to accord defendant its properly preserved right to jury trial." *Wood*, 321 N.W.2d at 660 (footnote omitted).

FN12. This language is similar to that of Wis. Const. art. 1, § 5.

¶ 173 The Michigan Supreme Court reaffirmed its *Wood* holding in *Zaiter v. Riverfront Complex, Ltd.*, 463 Mich. 544, 620 N.W.2d 646, 651-53 (2001). *Zaiter* involved a default entered against a defendant for failure to participate in discovery. *Id.* at 647. The *Zaiter* defendant requested a jury trial by relying on the plaintiff's demand for jury trial. *Id.*

¶ 174 The *Zaiter* court construed Michigan Court Rule 2.603(B)(3)(b) (1985), which replaced Michigan General Court Rule 520. *Id.* at 651-52. The Michigan court noted that the new rule included the phrase "to the extent required by the constitution," instead of "when and as required by the constitution," and determined that "[n]o substantive change was intended by that rephrasing." *Id.* at 652, n. 11. Thus, the *Zaiter* court held that

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the defendant had the right to a jury trial on damages when default was entered against it as a sanction. *Id.* at 652.

*702 ¶ 175 *Wood* and *Zaiter* are not distinguishable from WMAS's case in any meaningful way. All three cases involve default entered by the trial court as a sanction against a defendant who requested a jury trial. In each case, after judgment was entered the trial court held a hearing to determine the amount of damages. In each case, the civil procedure rules and constitutional provisions at issue provided that the right to a jury trial was preserved unless waived. Thus, default, even as a sanction, does not constitute a waiver of the jury trial right. See *Zaiter*, 620 N.W.2d at 652 (citing *Wood*, 321 N.W.2d at 653).

¶ 176 Since the defendants in *Wood* and *Zaiter* invoked their right to a jury trial, and did not waive the right, they were entitled to a jury trial on the issue of damages. The same result should follow in the instant case. The majority's extraordinary response is that the court has given judges the right, in their discretion, to consider jury rights "waived." See majority op., ¶ 54.

¶ 177 The Florida Supreme Court addressed the issue of waiver of the right to a jury trial in the default judgment context in *Curbelo v. Ullman*, 571 So.2d 443 (Fla.1990). In *Curbelo*, a default judgment was entered against defendant Curbelo for failure to answer. *Id.* at 444. The trial court found damages against Curbelo in a non-jury trial, despite the plaintiff's earlier request for a jury. *Id.*

¶ 178 The Florida Supreme Court determined that "[w]hen a jury trial has been requested by the plaintiff, the defendant is still entitled to a jury trial on the issue of damages even though a default has been entered against the defendant for failure to answer or otherwise plead." *Id.* (citation omitted). The court cited a Florida rule of civil procedure for the proposition that "a demand for trial by jury may not be withdrawn. *703 'without the consent of the parties.'" *Id.* (quoting **260 Fla. R. Civ. P.

1.430(d)).^{FN13} The Florida Supreme Court held that "consent to waiver must be manifested by affirmative action such as a specific waiver in writing or by announcement in open court." *Id.* (internal quotation marks and citation omitted). Since there was no "affirmative manifestation," the *Curbelo* court found that Curbelo did not waive his right to a jury trial. *Id.*

FN13. The quoted language from Florida Rule of Civil Procedure 1.430(d) is virtually identical to that found in the Wisconsin Statutes. Wis. Stat. § 805.01(3) ("A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.").

¶ 179 Florida courts applying the Florida Rules of Civil Procedure have consistently adopted the logical position that waiver of the right to a jury trial requires some affirmative action or consent by the parties. See, e.g., *Barth v. Fla. State Constructors Serv., Inc.*, 327 So.2d 13, 15 (Fla.1976); *Baron Auctioneer, Inc. v. Ball*, 674 So.2d 212, 213-14 (Fla. Dist. Ct. App. 1996); *Jayre, Inc. v. Wachovia Bank & Trust Co., N.A.*, 420 So.2d 937, 938 (Fla. Dist. Ct. App. 1982). In Florida the right to trial by jury is preserved absent waiver, even when the opposing party, not the proponent of the right, has made the demand for trial by jury. *Curbelo*, 571 So.2d at 444.

¶ 180 In sum, these decisions from Michigan and Florida indicate that the right to trial by jury, when properly demanded, is preserved despite the fact that default judgment was entered against one party as a sanction.

¶ 181 In Wisconsin, a "default judgment" entered under Wis. Stat. § 806.02 may be distinguished from a "judgment by default" entered as a sanction under Wis. Stat. § 804.12(2)(a)3, and courts acting under Wis. Stat. § 806.02 have broad discretion on how to proceed. *704 In a *real* default, a defendant cedes that authority to the circuit court by its failure to assert its right to a trial. To apply the same sort

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of "waiver" principles to a judge's sanction, however, is to create a fiction that diminishes the valued constitutional right of jury trial.

¶ 182 For the reasons stated, I respectfully dissent.

¶ 183 I am authorized to state that Justice PATIENCE DRAKE ROGGENSACK joins this dissent.

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H

Supreme Court of Washington, En Banc.
 STATE of Washington, Respondent,
 v.

Phillip Victor HICKS, Petitioner.
 State of Washington, Respondent,
 v.

Rashad Demetrius Babbs, Petitioner.
 No. 79143-1.

April 24, 2008.

Background: Defendants were convicted in the Superior Court, Pierce County, Thomas J. Felnagle, J., of murder, and, on retrial after mistrial, of attempted murder. Defendants appealed. The Court of Appeals affirmed, and defendants appealed.

Holdings: The Supreme Court, J.M. Johnson, J., held that:

- (1) defense counsel's action in informing jury during voir dire that case was noncapital amounted to deficient performance;
- (2) deficiency did not rise to level of ineffective assistance;
- (3) trial court acted within its discretion in determining that defendants made out prima facie case of racial discrimination in jury selection; and
- (4) trial court did not clearly err in denying such claim.

Affirmed.

Chambers, J., concurred with opinion.

Sanders, J., dissented with opinion in which Alexander, C.J., and Madsen, J., joined.

West Headnotes

[1] Criminal Law 110 ↪1881

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)1 In General

110k1879 Standard of Effective Assistance in General

110k1881 k. Deficient Representation and Prejudice in General. Most Cited Cases
 (Formerly 110k641.13(1))

Two-part Strickland test applies in determining whether a defendant had constitutionally sufficient representation: first, the defendant must show that counsel's performance was deficient, requiring a demonstration that the representation fell below an objective standard of reasonableness under professional norms; second, the defendant must show that the deficient performance prejudiced the defense, requiring the defendant to prove that, but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. U.S.C.A. Const.Amend. 6.

[2] Criminal Law 110 ↪1901

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues

110k1901 k. Jury Selection and Composition. Most Cited Cases
 (Formerly 110k641.13(2.1))

Defense counsel's actions in informing jury during voir dire in murder prosecution that case was noncapital, and in failing to object to similar references by trial court and prosecution, amounted to deficient performance, for purposes of defendant's claim of ineffective assistance of counsel, as jury had no sentencing function in a noncapital case. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 ↪1901

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues

110k1901 k. Jury Selection and Composition. Most Cited Cases
 (Formerly 110k641.13(2.1))

Deficiency in performance of defense counsel in prosecution for murder and attempted murder, arising

out of counsel's informing jury during voir dire that case was noncapital and failing to object to similar references by trial court and prosecution, did not prejudice defendants and did not amount to ineffective assistance, where fact that juror impasse required declaration of mistrial on attempted murder charge indicated that jurors took their responsibility seriously even knowing that case was noncapital, different jury convicted defendants of attempted murder without any mention of death penalty, and defendants were acquitted of most serious charges in first trial. U.S.C.A. Const.Amend. 6.

[4] Constitutional Law 92 ↪3309

92 Constitutional Law

92XXVI Equal Protection

92XXVI(B) Particular Classes

92XXVI(B)8 Race, National Origin, or Ethnicity

92k3305 Juries

92k3309 k. Peremptory Challenges.

Most Cited Cases

Jury 230 ↪33(5.15)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(5) Challenges and Objections

230k33(5.15) k. Peremptory Chal-

lenges. Most Cited Cases

Three-part process applies in determining whether a prosecutor has excluded a juror based on race, in violation of equal protection: first, the defendant must make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose; second, the burden shifts to the state to come forward with a neutral explanation for challenging the juror; and third, the trial court then has the duty to determine if the defendant has established purposeful discrimination. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 ↪3309

92 Constitutional Law

92XXVI Equal Protection

92XXVI(B) Particular Classes

92XXVI(B)8 Race, National Origin, or Ethnicity

92k3305 Juries

92k3309 k. Peremptory Challenges.

Most Cited Cases

Jury 230 ↪33(5.15)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(5) Challenges and Objections

230k33(5.15) k. Peremptory Chal-

lenges. Most Cited Cases

To establish a prima facie case of racial discrimination in jury selection, in violation of equal protection, a defendant must show: (1) that he is a member of a cognizable racial group, and (2) that facts and any other relevant circumstances raise an inference that the prosecutor used a peremptory challenge to exclude a potential juror from the jury on account of the juror's race. U.S.C.A. Const.Amend. 14.

[6] Constitutional Law 92 ↪3309

92 Constitutional Law

92XXVI Equal Protection

92XXVI(B) Particular Classes

92XXVI(B)8 Race, National Origin, or Ethnicity

92k3305 Juries

92k3309 k. Peremptory Challenges.

Most Cited Cases

Jury 230 ↪33(5.15)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(5) Challenges and Objections

230k33(5.15) k. Peremptory Chal-

lenges. Most Cited Cases

Trial court acted within its discretion, under equal protection clause of federal Constitution and jury trial provision of state constitution, in determining that murder defendants made out prima facie case of racial discrimination in jury selection, where federal equal protection analysis allowed state courts leeway in

determining criteria for establishment of a prima facie case, state constitutional protection of jury trials was more extensive than that found in federal Constitution, and facts of case were sufficient for trial court to find inference of discrimination. U.S.C.A. Const.Amend. 14; West's RCWA Const. Art. 1, § 21.

[7] Jury 230 ↪10

230 Jury

230II Right to Trial by Jury

230k10 k. Constitutional and Statutory Provisions. Most Cited Cases

Washington constitution provides greater protection for jury trials than is provided in the federal Constitution. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, § 21.

[8] Criminal Law 110 ↪1158.17

110 Criminal Law

110XXIV Review

110XXIV(O) Questions of Fact and Findings

110k1158.17 k. Jury Selection. Most Cited

Cases

(Formerly 110k1158(3))

Reviewing courts afford a high level of deference to a trial court's determination of discrimination in jury selection. U.S.C.A. Const.Amend. 14.

[9] Constitutional Law 92 ↪3309

92 Constitutional Law

92XXVI Equal Protection

92XXVI(B) Particular Classes

92XXVI(B)8 Race, National Origin, or Ethnicity

92k3305 Juries

92k3309 k. Peremptory Challenges.

Most Cited Cases

Jury 230 ↪33(5.15)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(5) Challenges and Objections

230k33(5.15) k. Peremptory Challenges. Most Cited Cases

Trial court did not clearly err in denying murder defendants' claim of racial discrimination in jury selection, in violation of equal protection, where court conducted adequate analysis of such claim and provided sufficient explanation of its denial thereof; record of proceedings indicated that trial court found defense counsel's prima facie case weak and prosecutor's explanation for dismissal of veniremember at issue credible and in accordance with common jury selection considerations, and although prosecutor did not closely question veniremember at issue on facts on which proffered race-neutral explanation rested, dismissal was based on facts revealed in juror questionnaire. U.S.C.A. Const.Amend. 14.

**833 David Bruce Koch, Nielsen Broman & Koch PLLC, Rita Joan Griffith, Seattle, WA, for Petitioners. Pierce County Prosecutor's Office, Kathleen Proctor, Tacoma, WA, for Respondent.

Kathryn C. Loring, Skinner & Saar PS, Friday Harbor, WA, Nicholas Peter Gellert, Julia Parsons Clarke, Perkins Coie LLP, Sarah A. Dunne, Nancy Lynn Talner, ACLU, Seattle, WA, for Amicus Curiae on behalf of American Civil Liberties Union.

J.M. JOHNSON, J.

*481 ¶ 1 Phillip Hicks and Rashad Babbs were convicted at two separate trials for the murder of Chica Webber (first trial) and the attempted murder of Jonathan Webber (second trial). We must determine whether their defense counsel was ineffective in informing potential jurors that the case was noncapital and in not objecting to the trial court and prosecution doing the same. We must also decide whether the trial court erred in denying the defendants' Batson^{FN1} challenge to the exclusion of the only remaining African-American juror on the venire.

FN1. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

¶ 2 We hold that under our current precedent, informing the jury that the case is noncapital and failing to object to the trial court and prosecution doing the same, is deficient performance of counsel. In this case, the error was nonprejudicial. We additionally hold that the trial court's denial of the Batson challenge was not clearly erroneous. For reasons stated, we affirm the convictions.

FACTS AND PROCEDURAL HISTORY

¶ 3 On the night of March 21, 2001, two men approached Jonathan Webber and his wife Chica as they were walking from a friend's house and asked the couple if they had drugs. The Webbers told the men that they did not and kept walking. The two men followed the Webbers, demanding several times that they empty their pockets. The Webbers continued walking, and the two men started shooting at them. Jonathan ^{FN2} sustained wounds to his leg, wrist, and the left side of his back, but survived. Chica died. The autopsy of Chica's body revealed that she had been shot three times in the head—twice by a .22 revolver and once by *482 a 9 mm handgun. Jonathan and another witness, Wayne Washington, also testified that the shots came from two firearms. Jonathan identified Hicks in a photomontage as one of **834 his assailants but was unable to identify Babbs as the second assailant.

FN2. First names of the victims are used for the sake of clarity.

¶ 4 After the attack, the shooters ran off through an alley. A search of the area recovered a .22 revolver, a brown glove, a black leather jacket, a knit stocking cap, and a sweatshirt. The sweatshirt had DNA (deoxyribonucleic acid) that later testing found to be consistent with Babbs's DNA. The jacket also contained items linked to Babbs's sister and cousin.

¶ 5 On the night of the shooting, a man not wearing a jacket pounded on the window of Dana Duncan. Duncan did not know the man, but he convinced her he knew her brother. She gave the man a ride to another part of town. Shortly after Duncan arrived home, she received a thank you call from a cell phone linked to Babbs. Duncan first had difficulty identifying Babbs but eventually testified that Babbs was the man who had come to her window.

¶ 6 On April 24, 2001, the police arrested Hicks for unrelated drug dealing charges. Hicks made statements implicating himself in the Webber shootings both before and after he was read his Miranda ^{FN3} warnings.

FN3. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

¶ 7 For Chica's death, the State charged Hicks and

Babbs with aggravated first degree murder and in the alternative, first degree intentional murder and first degree felony murder, with first or second degree robbery as the underlying felony. The State also charged Hicks and Babbs with attempted murder of Jonathan and unlawful firearm possession. Babbs pleaded guilty to the firearm charge before trial.

¶ 8 At the first trial during voir dire, juror nine expressed concern that her religious beliefs might interfere with her ability to decide the case. When the trial judge asked her to think of an area where her church's teachings might conflict *483 with her jury service, she mentioned capital punishment. After a sidebar with the attorneys, the trial court informed the jury that “[t]his is not a death penalty case. So that issue is one that I suppose could come in conflict with your religious beliefs, but it is not one that is at issue in this case. So that may remove some of your problem.” Verbatim Report of Proceedings (VRP) (Apr. 22, 2003) at 74-75. There was no objection on the record from counsel. Juror nine then stated she could follow the law as given to her.

¶ 9 Later during voir dire, the prosecutor asked juror nine whether she would feel uncomfortable having to make a decision about the guilt or innocence of another human being. The juror responded, “No. I feel I try not to make a mistake, because ... some people were executed, then they found out they were innocent afterwards.” *Id.* at 155. The prosecutor then confirmed that because capital punishment was not an issue, juror nine was eligible to serve.

¶ 10 Both the defense and the prosecution referenced the nonapplicability of the death penalty on a few more occasions during voir dire. When counsel for Hicks reminded jurors that the case did not involve the death penalty, the prosecutor objected, and the trial court instructed the venire members that they should not consider punishment except to make them careful. Later, juror 33 said, “I recall it was a law professor that said to me in a conversation we had, he says, ‘I’d rather see 10 guilty people on the street than one innocent person in the electric chair.’” VRP (Apr. 23, 2003) at 63-64. Counsel for Babbs responded, “Okay. All right. Again, we are not heading toward the death penalty in this case, but I understand.” *Id.* The juror responded, “Right. Of course.” *Id.* The State dismissed juror 33, but the remaining jurors had all been present for this exchange on the death penalty. Additionally, during

closing argument, the trial deputy also alluded to the case being noncapital. Contrasting Hicks's situation with decedent Chica's, she told jurors, "at least he has a life. At least he can choose whether or not he's going to grow old to a ripe old age. He can choose whether he wants to see his friends or his family." VRP (May 12, 2003) at 31.

*484 ¶ 11 The jury convicted Hicks and Babbs of first degree felony murder of Chica. The jury also convicted Hicks of the firearm charge. The jury could not reach a verdict **835 on the attempted murder charges. Consequently, after a two day impasse, the trial court declared a mistrial on those charges.

¶ 12 A second trial was held on the attempted murder charges. During the jury voir dire, counsel for Hicks and Babbs both objected when the State used a peremptory challenge to remove juror nine, the only remaining African-American juror from the venire. (Juror 17, another African-American juror was challenged for cause because he knew many of the witnesses and thought this knowledge would impact his assessment of their credibility, and juror 54, also African-American, fell ill and did not return.) Defense counsel argued that, because the prosecutor had not asked this juror any questions,^{FN4} race must have been the reason for removing her. After a discussion with counsel regarding the *Batson* three-part test, the trial court determined, "[O]ut of an abundance of caution, I find a prima facie case [of discrimination]." 5 VRP (Jan. 30, 2004) at 496. The prosecutor then offered his reasons for exercising the challenge:

FN4. The prosecution and defense actually did ask juror nine some questions, although the questioning was not extensive.

[The juror] has a master's in education. Whether it's science or not, people who are educators tend to be non-state type jurors that tend to be more forgiving, nurturing types, that necessarily aren't going to look for reasons to excuse behavior. She also happens to be a social worker, which is another red flag for a prosecutor.

....

Further, [the juror] also indicated that somebody in her family, either a friend or relative, has been arrested and served time.

Id. at 496-97.

*485 ¶ 13 In response, the trial court remarked, "[h]e must have read the same version of the jury selection book that's been on my shelf for years." *Id.* at 497. The defense counsel reminded the court that the final step of *Batson* required the trial court's determination. After the prosecution's reiteration of his reasons for the strike, the court said "Okay. The *Batson* challenge is denied." *Id.* at 497-98. The jury at the second trial convicted Hicks and Babbs of attempted murder of Jonathan.

¶ 14 Hicks and Babbs appealed their convictions for first degree felony murder, attempted murder, and unlawful possession of a firearm. They contended that they received ineffective assistance of counsel in their first trial because their attorneys informed the jury that the case was noncapital and failed to object to the trial court and prosecution doing the same, and that this information was prejudicial.

¶ 15 Additionally, Hicks and Babbs claimed that the trial judge in their second trial erred in denying their *Batson* challenge. They contended that the judge failed to perform the third step of *Batson's* three-part analysis. They argued that even though the prosecutor's reasons for excusing the only remaining African-American juror were race-neutral, they were clearly pretextual.

¶ 16 On appeal, the Court of Appeals affirmed all convictions. Although the court found that the defense counsel's performance was deficient insofar as they did not object to the trial court informing the jury that the case was noncapital, the court held that the error was nonprejudicial because Hicks and Babbs failed to show that the trial outcome would likely have differed.

¶ 17 The Court of Appeals also upheld the trial court's denial of the *Batson* challenge. The court did not address whether the trial court properly performed *Batson's* third step or whether the prosecutor's offered reasons were pretextual. Instead, the court addressed the trial court's finding of a prima facie case. The Court of Appeals held that because defense counsel never established a prima facie *486 case, the trial court did not err in denying the *Batson* challenge.

STANDARD OF REVIEW

¶ 18 The appellate test for ineffective assistance of counsel is “whether, after examining the whole record, the court can conclude that appellant received effective representation and a fair trial.” State v. Ciskie, 110 Wash.2d 263, 284, 751 P.2d 1165 (1988).

**836 ¶ 19 In reviewing a trial court's ruling on a Batson challenge, “[t]he determination of the trial judge is ‘accorded great deference on appeal,’ and will be upheld unless clearly erroneous.” State v. Luvene, 127 Wash.2d 690, 699, 903 P.2d 960 (1995) (quoting Hernandez v. New York, 500 U.S. 352, 364, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)).

ANALYSIS

A. Defendants Received Effective Assistance of Counsel

[1] ¶ 20 We have adopted the two-part Strickland^{FN5} test to determine whether a defendant had constitutionally sufficient representation. State v. Cienfuegos, 144 Wash.2d 222, 226, 25 P.3d 1011 (2001). First, the “ ‘defendant must show that counsel's performance was deficient.’ ” Id. (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To establish deficient performance, a defendant must “demonstrate that the representation fell below an objective standard of reasonableness under professional norms....” State v. Townsend, 142 Wash.2d 838, 843-44, 15 P.3d 145 (2001). Second, the “ ‘defendant must show that the deficient performance prejudiced the defense.’ ” Cienfuegos, 144 Wash.2d at 227, 25 P.3d 1011 (quoting Strickland, 466 U.S. at 687, 104 S.Ct. 2052). This requires the defendant to prove that, but for counsel's deficient performance, there is a “reasonable probability” that the outcome would have been different. Id.

FN5. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

*487 1. Precedent in this Court Supports Finding That Counsel's Performance Was Deficient

¶ 21 In Townsend, 142 Wash.2d at 840, 15 P.3d 145, this court held that it is error to inform the jury during

the voir dire in a noncapital case that the death penalty is not involved. In Townsend, the trial court at the prosecutor's request, instructed the jury “ ‘[t]his is not a case in which the death penalty is involved and will not be a consideration for the jury.’ ” Id. at 842, 15 P.3d 145 (quoting Suppl. Partial Report of Proceedings at 2). We reasoned that where the jury has no sentencing function, it should not be informed on matters that relate only to sentencing. Id. at 846, 15 P.3d 145. We found “[t]his strict prohibition against informing the jury of sentencing considerations ensures impartial juries and prevents unfair influence on a jury's deliberations.” Id.

¶ 22 In Townsend, we also rejected the argument that revealing this information was part of a legitimate tactic, reasoning that “[t]here was no possible advantage to be gained by defense counsel's failures to object to the comments regarding the death penalty. On the contrary, such instructions, if anything, would only increase the likelihood of a juror convicting the petitioner.” Id. at 847, 15 P.3d 145. We further noted “if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility.” Id.

¶ 23 Recently, in State v. Mason, 160 Wash.2d 910, 929, 162 P.3d 396 (2007), we also declined to recognize a distinction between a court or counsel-initiated and a juror-initiated discussion of the inapplicability of the death penalty. Thus, under our precedent, in response to any mention of capital punishment, the trial judge should state generally that the jury is not to consider sentencing.^{FN6}

FN6. In Mason, we did note that “[i]f this court was incorrect in Townsend then, upon a proper record, our decision should be challenged in a truly adversarial proceeding. If our reasoning was flawed in Townsend, and there are legitimate strategic and tactical reasons why informing a jury about issues of punishment would advance the interest of justice and provide a more fair trial, then counsel should zealously advance the arguments.” Mason, 160 Wash.2d at 930, 162 P.3d 396.

[2] *488 ¶ 24 Applying both Townsend and Mason,

we hold that the defense counsel's performance was deficient insofar as counsel informed the jury that the case was noncapital and failed to object when the trial court and prosecution made similar reference.

2. Counsel's Deficient Performance Was Not Prejudicial

¶ 25 Proving that counsel's deficient performance prejudiced the defense "requires **837 showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

[3] ¶ 26 In the instant case, there is no showing that the defendants were deprived of a fair trial or that the trial outcome likely would have differed. There is no indication that the jurors failed to take their duty seriously. In declaring a mistrial on the attempted murder charges, the trial court particularly noted the active deliberation of the jury.^{FN7} There is also abundant evidence in the record to support the conviction of both Hicks and Babbs. A guilty verdict was likely even if the jury had not been informed that the case was noncapital. Most notably, a different jury in the second trial on the attempted murder charge, with no mention of the death penalty, found the evidence convincing enough to identify and convict both Hicks and Babbs as the shooters.

^{FN7}. In declaring a mistrial on the attempted murder charges, the trial court said:

[The jurors] have deliberated pretty steadily through two days. They worked pretty much through lunch both times. They did break for lunch, but a shortened lunch, and the presiding juror was pretty clear and pretty adamant, I thought both by what he said and the way he said it, that they were not going to benefit from further deliberation, and we have to remember that they had sent out a question earlier that seemed to indicate that they were already at impasse, and they've had a good bit of time since then to try to break that impasse with no apparent movement whatsoever.

VRP (May 14, 2003) at 21.

¶ 27 Moreover, since Hicks and Babbs were not convicted by the first jury of the most serious charges (aggravated *489 murder concerning Chica and attempted murder concerning Jonathan), the harm feared in *Townsend* that a jury might be more likely to convict was not manifest. We find defense counsel's deficient performance in this case nonprejudicial.

B. The Trial Court's Denial of the Batson Challenge Was Not Clearly Erroneous

1. Federal law governing *Batson*

[4] ¶ 28 In *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court declared that "[t]he Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race." *Batson* outlines a three-part process to determine whether a prosecutor has excluded a juror based on race. First, the challenger must "make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id.* at 93-94, 106 S.Ct. 1712. Second, "the burden shifts to the State to come forward with a neutral explanation for challenging" the juror. *Id.* at 97, 106 S.Ct. 1712. And third, "[t]he trial court then [has] the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98, 106 S.Ct. 1712.

[5] ¶ 29 The *Batson* Court further outlined the requirements of a prima facie case. To establish a prima facie case, the challenger "first must show that he is a member of a cognizable racial group." *Id.* at 96, 106 S.Ct. 1712. Second, the defendant "must show that these facts and any other relevant circumstances raise an inference" that the prosecutor used a peremptory challenge to exclude a potential juror from the jury on account of the juror's race. *Id.*

¶ 30 Although the Supreme Court has provided some elucidation on this three-part process since *Batson*, the Court has also recognized that the states have flexibility in the procedure for applying the *Batson* test. *Johnson v. California*, 545 U.S. 162, 168, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005); *Batson*, 476 U.S. at 99, 106 S.Ct. 1712 ("We decline ... to *490 formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.").

Lower courts have been entrusted with the task of determining the type and amount of proof necessary for a defendant to establish a prima facie case of discrimination.

2. Washington's Application of *Batson*

a. A Trial Court May in its Discretion Find a Prima Facie Case Based on Removal of the Sole Remaining Venire Person from a Constitutionally Cognizable Group

¶ 31 The parties and the Court of Appeals focus on three cases that have addressed **838 whether excusing the only remaining African-American in the jury venire is sufficient to make out a prima facie case of discrimination. Although the Court of Appeals relied on *State v. Evans*, 100 Wash.App. 757, 998 P.2d 373 (2000),^{FN8} and *State v. Wright*, 78 Wash.App. 93, 896 P.2d 713 (1995) in its ruling, and specifically rejected *State v. Rhodes*, 82 Wash.App. 192, 917 P.2d 149 (1996),^{FN9} a closer look at these three cases shows that they actually articulate the same standard: trial courts are not required to find a prima facie case based on the dismissal of the only venire person from a constitutionally cognizable group, but they may, in their discretion, recognize a prima facie case in such instances.

^{FN8.} *Evans* did not involve the sole member of the minority class on the venire. *Evans*, 100 Wash.App. at 761, 998 P.2d 373 (the venire included five persons of color).

^{FN9.} Both *Rhodes* and *Wright*, however, involved the sole remaining African-American on the venire. *Rhodes*, 82 Wash.App. at 201, 917 P.2d 149; *Wright*, 78 Wash.App. at 97, 896 P.2d 713.

¶ 32 Hicks and Babbs cite decisions from other jurisdictions that have similarly found that striking the sole remaining African-American, Hispanic, or Native American juror may be sufficient for a prima facie case under *Batson*.^{FN10} This seems consistent with the Supreme Court's *491 concern in *Batson*. The *Batson* Court noted that " 'a consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause' " and that " '[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such dis-

crimination in the making of other comparable decisions.' " 476 U.S. at 95, 106 S.Ct. 1712 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 n. 14, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)). The Court further declared that "[f]or evidentiary requirements to dictate that 'several must suffer discrimination' before one could object would be inconsistent with the promise of equal protection to all." *Id.* at 95-96, 106 S.Ct. 1712 (citation omitted).

^{FN10.} See, e.g., *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir.1987) (finding that "the additional fact that the Government used its peremptory challenges to strike the last remaining juror of defendant's race is sufficient to 'raise an inference' that the juror was excluded 'on account of [his] race.' " (alteration in original) (quoting *Batson*, 476 U.S. at 96, 106 S.Ct. 1712)).

¶ 33 The *Batson* Court also declared that "[w]e have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Id.* at 97, 106 S.Ct. 1712.

[6] ¶ 34 Here, the trial judge was well within his discretion when he determined, "[O]ut of an abundance of caution, I find a prima facie case [of discrimination]." 5 VRP (Jan. 30, 2004) at 496. Not only was juror nine the only remaining African-American venire member, but both Hicks and Babbs are African-American, and the prosecution failed to orally question juror nine about all reasons for which he dismissed her. Lack of questioning prior to dismissing a juror can be evidence that the removal is race-based. See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 246, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) ("[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." (*492 *Ex parte Travis*, 776 So.2d 874, 881 (Ala.2000))). The facts were sufficient for the trial court to find an inference of discrimination.

[7] ¶ 35 In a brief in support of the defendants, amicus American Civil Liberties Union emphasizes that this court has found that the Washington Constitution provides greater protection for jury trials than is pro-

vided in the federal constitution. See, e.g., City of Pasco v. Mace, 98 Wash.2d 87, 99, 653 P.2d 618 (1982). Article I, section 21 states, "The right of trial by jury shall remain inviolate...." In interpreting "inviolable," this court has relied on Webster's definition: " 'free from change or blemish: PURE, UNBROKEN ... free from assault or trespass: UNTOUCHED, INTACT.' " State v. Smith, 150 Wash.2d 135, 150, 75 P.3d 934 (2003)**839 (quoting Webster's Third New International Dictionary 1190 (1993)).

¶ 36 The increased protection of jury trials under the Washington Constitution further supports allowing the trial judge, in his discretion, to find a prima facie case of discrimination when the State removes the sole remaining venire person from a constitutionally cognizable group.

b. Whether Defendants Established a Prima Facie Case Is Not Necessary To Decide on Review

¶ 37 In Hernandez, the Court declared that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." 500 U.S. at 359, 111 S.Ct. 1859. We have similarly held that "if ... the prosecutor has offered a race-neutral explanation and the trial court has ruled on the question of racial motivation, the preliminary prima facie case is unnecessary." Luvone, 127 Wash.2d at 699, 903 P.2d 960 (citing Hernandez, 500 U.S. at 359, 111 S.Ct. 1859).

¶ 38 In the instant case, where the trial court found a prima facie case "out of an abundance of caution," the prosecutor offered a race-neutral explanation, and the trial court properly ruled, whether a prima facie case was *493 established does not need to be determined. 5 VRP (Jan. 30, 2004) at 496. A reviewing court should focus its deferential review on the trial court's ultimate ruling on the Batson challenge. The discussion of a prima facie case, supra, is included only to clear up confusion among the lower courts.

c. The Trial Court's Denial of the Batson Challenge Was Not Clearly Erroneous

[8] ¶ 39 Courts afford a high level of deference to the trial court's determination of discrimination. In Her-

nandez, the Supreme Court noted that "[d]eference to trial court findings on the issue of discriminatory intent makes particular sense in this context because ... the finding 'largely will turn on evaluation of credibility.' 476 U.S. at 98 n. 21, 106 S.Ct. 1712.... As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' Wainwright v. Witt, 469 U.S. 412, 428, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)." 500 U.S. at 365, 111 S.Ct. 1859. And in Miller-El v. Cockrell, 537 U.S. 322, 339, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), the Court declared, "[d]eference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations."

[9] ¶ 40 Although defendants contend that the trial judge's prompt ruling of "Okay. The ... challenge is denied" illustrates a failure to perform the third step of the Batson process, the record does not support this contention. 5 VRP (Jan. 30, 2004) at 498. The Supreme Court stated in Hernandez, "[t]he analysis set forth in Batson permits prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." 500 U.S. at 358, 111 S.Ct. 1859. Although more articulation of a trial judge's findings is always helpful on appellate review, the court here carefully followed the Batson analysis as outlined in Evans and provided sufficient explanation for his denial of the Batson challenge. The record indicates that the trial judge found defense counsel's prima facie case *494 weak and the prosecutor's explanation for juror nine's dismissal credible and in accordance with common jury selection considerations. Many lawyers maintain strong viewpoints that individuals in certain professions or occupations tend to be unfavorable jurors. The trial judge recognized the prevalence of such beliefs with his response to the prosecutor's explanation for juror nine's removal: "[h]e must have read the same version of the jury selection book that's been on my shelf for years." 5 VRP (Jan. 30, 2004) at 497. While dismissing teachers or social workers from jury service may be based upon generalizations about the type of persons engaged in those professions, such challenges are not race- or gender-based and thus constitutionally permissible. Here, although the prosecutor did not pointedly question juror nine, **840 the dismissal was based on the facts revealed in the extensive juror questionnaire. The trial court's denial of the Batson challenge was not clearly erroneous.^{FN11}

FN11. After oral arguments but before our decision in this case, the United States Supreme Court issued its decision in Snyder v. Louisiana, --- U.S. ---, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008). This opinion changes neither the analysis nor the outcome of this case.

CONCLUSION

¶ 41 Under our current precedent, informing the jury that the case is noncapital and failing to object to the trial court and prosecution doing the same is deficient performance of counsel. If the death penalty is mentioned, a trial judge should state generally that the jury is not to consider sentencing. The error here, however, was nonprejudicial. Additionally, the trial court's denial of the Batson challenge to one juror was not clearly erroneous. We affirm all convictions.

C. JOHNSON, FAIRHURST, OWENS, JJ., and BRIDGE, J.P.T., concur. CHAMBERS, J. (concurring).

*495 ¶ 42 I agree with the majority that it was improper to inform potential jurors that Phillip Hicks and Rashad Babbs did not face the death penalty. However, I do not agree that defense counsel's performance was deficient or fell below professional standards merely because he failed to object when the prosecutor and trial judge did so. See majority at 836.

¶ 43 We held in State v. Townsend, 142 Wash.2d 838, 846-47, 15 P.3d 145 (2001), that jurors should not be informed during voir dire that a case involved the death penalty. Given our clear statement of the law, it was error for the trial judge to permit the issue of punishment to be addressed in jury selection, and it was, at least technically, an error for trial counsel not to object. Id. at 847, 15 P.3d 145. But cf. State v. Mason, 160 Wash.2d 910, 931, 162 P.3d 396 (2007) (Townsend error can be harmless).

¶ 44 I write separately solely on the issue of whether this technical error on defense counsel's part amounts to deficient performance thus meeting the first element of ineffective assistance of counsel. See State v. Davis, 119 Wash.2d 657, 664-65, 835 P.2d 1039 (1992) (“[f]irst, the defendant must show that counsel's performance was deficient ... requir[ing] showing that counsel made errors so serious that counsel was

not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment” (alterations in original) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984))). It is an old adage among trial lawyers that when the law is on your side you argue the law, when it is not you argue the facts, and when you have neither you pound the table. While lawyers may not mislead the court, it is not always in the client's best interest to energetically argue every technicality of the law. The real skill in advocacy is not in high flying oratory or in raising every possible objection, but in making the hard decisions as to if, when, and how to argue the facts and the law.

¶ 45 While we have instructed in Townsend that it is improper to raise the issue of punishment during jury selection, the truth is that for the trial lawyer, jury selection *496 is a mix of science, art, and gut feeling. What is a trial lawyer to do when she has three potential jurors whom she would love to sit on her client's case? The jurors share similar backgrounds, occupations, and experiences with her client, which causes her to believe they will relate to her client. They have made statements during jury selection which lead her to believe they will be sympathetic to the arguments she intends to advance on behalf of her client. But all three have made statements to suggest they are morally opposed to the death penalty. Trial counsel could be reasonably concerned that, if in doubt as to whether or not the case involves capital punishment, the jurors will simply declare that they cannot be fair and impartial. Trial counsel knows the law and knows her duty but could well make a calculated decision that her client has a significantly better chance of acquittal if these jurors are informed that the case is not capital and that they may, in good moral conscience, become a juror. While counsel may not mislead the court as to the law, in such a case **841 counsel should not be faulted for not objecting to the jury being informed that the case does not involve the death penalty.

¶ 46 While I can follow precedent and enforce the law, I cannot impugn the competence, integrity, or effectiveness of trial counsel in such circumstances. There was no deficient performance of counsel in this case, and thus no need to reach whether any failure should undermine our confidence in the jury's verdict. I concur in result.

SANDERS, J. (dissenting).

¶ 47 We are here challenged in two different settings to ensure the impartiality of a criminal jury. In the first trial, the jury was told by the lawyers and judge the death penalty was not sought, heightening the risk of conviction by a jury which might have been more cautious were the death penalty a prospect. In the second trial, the State removed the only African-American from the jury, creating a jury which entirely excluded anyone of the same race as the defendants.

*497 I. *Hicks and Babbs were prejudiced by ineffective counsel*

¶ 48 The majority correctly holds Phillip Hicks's and Rashad Babbs's counsel "was deficient insofar as counsel informed the jury that the case was noncapital and failed to object when the trial court and prosecution made such reference";^{FN1} however, it finesses the error by asserting it was not prejudicial. Notwithstanding, the record demonstrates the defendants were indeed prejudiced by their attorneys' error, the proper remedy being reversal and remand for new trial.

FN1. Majority at 836.

¶ 49 The majority asserts the defendants did not establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Cienfuegos*, 144 Wash.2d 222, 229, 25 P.3d 1011 (2001); see majority at 836. However, that is not the test. Rather, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Cienfuegos*, 144 Wash.2d at 229, 25 P.3d 1011 (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

¶ 50 One cannot be confident the outcome of the trial would have been the same had the jury not been told the death penalty was not an option. As we held in *Townsend*, advising the jury the death penalty is off the table "increase[s] the likelihood of a juror convicting the petitioner." *State v. Townsend*, 142 Wash.2d 838, 847, 15 P.3d 145 (2001). The majority recognizes this danger, as well as the danger jurors may be less attentive, less deliberative, and less inclined to hold out during deliberations,^{FN2} but does not provide a remedy.

FN2. Majority at 836 (citing *Townsend*, 142 Wash.2d at 847, 15 P.3d 145).

¶ 51 Rather the majority speculates defendants were not prejudiced by counsel's mistake because the jury was active in its deliberation, there was an abundance of evidence to *498 support the conviction, and the defendants were not convicted of the most serious charges. Majority at 836-37. But none of this demonstrates the jury was not less attentive or less inclined to hold out during deliberations than they would have been if they were not informed of the noncapital nature of the case. Assuming arguendo the jury was active in its deliberation, it does not prove the deliberation might not have been more active absent counsel's error. That the defendants were convicted only of a less serious charge likewise does not demonstrate the jury might not have acquitted the defendants of all charges but for counsel's error.

¶ 52 In addition, the majority impermissibly invades the province of the jury when it rests on the alleged abundance of evidence against the defendants.^{FN3} The majority asserts, "[a] guilty verdict was likely even if the jury had not been informed that the case was noncapital";^{FN4} yet elsewhere we have recognized, "it is impossible for courts to contemplate**842 the probabilities any evidence may have upon the minds of the jurors." *State v. Robinson*, 24 Wash.2d 909, 917, 167 P.2d 986 (1946). Thus judicial confidence in the verdict is undermined.

FN3. Although the majority claims there was overwhelming evidence against the defendants, the record presents a somewhat mixed story. Jonathan Webber was unable to identify Babbs as a shooter, and no one placed Babbs at the scene of the crime.

FN4. Majority at 837.

II. The State improperly removed the only African-American juror from the jury

¶ 53 In addition to refusing to supply a remedy for the defendants' ineffective assistance of counsel, the majority errs when it upholds the trial court's denial of the defendants' *Batson*^{FN5} challenge. The reasons argued by the prosecution for exercising its peremptory challenge must be examined carefully to determine if they are real or pretextual.

FN5. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

*499 ¶ 54 *Batson* holds equal protection is denied when the State excludes members of the defendant's race from the venire on the basis of their race. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). There the Court developed a three-part test to determine whether the exclusion of a juror is impermissible. First, the defendant must make a prima facie case of purposeful discrimination by the State. *Id.* at 93-94, 106 S.Ct. 1712. Once that showing is made, the burden shifts to the State to provide valid, nondiscriminatory reasons for challenging the juror. *Id.* at 97, 106 S.Ct. 1712. The majority properly holds the first two parts of the *Batson* test were satisfied.

¶ 55 The final step *Batson* requires is the trial court weigh the evidence of discrimination against the reasons presented for dismissing the juror to "determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez v. New York*, 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). " 'An invidious discriminatory purpose may often be inferred from the totality of the relevant facts....' " *Id.* (quoting *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)). "A prosecutor's motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge." *McClain v. Prunty*, 217 F.3d 1209, 1220 (9th Cir.2000). See also *Snyder v. Louisiana*, 552 U.S. ---, 128 S.Ct. 1203, 1211, 170 L.Ed.2d 175 (2008) ("The implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'."). Where a proffered reason is shown to be pretextual, it "gives rise to an inference of discriminatory intent." *Id.* at 1212.

¶ 56 Here the prosecution provided two separate rationales for exercising a peremptory challenge to remove juror nine. First, the State asserted the juror was an educator and a social worker, which the State believed made her a *500 "nonstate type juror." ^{FN6} However, juror two worked for a public assistance agency and in child care licensing. The State did

not peremptorily challenge that juror, even though as a social worker, she was equally a "nonstate type juror" as juror nine. Since the explanation was equally applicable to both jurors, and only the African-American juror was excluded, this reason is pretextual. If a pretext, the court may not consider the claimed racially neutral reason as a legitimate reason to exclude her. See *McClain*, 217 F.3d at 1222.

FN6. I find it difficult to accept the logic that one who works for the government is less likely to favor it, a novel theory.

¶ 57 The State's second proffered reason is juror nine's relationship with someone who had served time, which apparently made her a "nonstate type juror" as well.^{FN7} In addition to juror nine, jurors 14, 22, 55, and 37 all had relationships with others who had been incarcerated. However, unlike juror nine, the State did not challenge those jurors. The reason given by the State applied equally to all five jurors, but only the African-American juror was excused. This "gives rise to an inference of discriminatory intent" in exercising**843 a peremptory challenge to remove juror nine. *Snyder*, 128 S.Ct. at 1205.

FN7. Amicus American Civil Liberties Union argues this reason, even if not pretextual, is not race-neutral based on the disparity of incarceration and arrest rates by race. My analysis does not require significant exploration of this argument.

III. Conclusion

¶ 58 I would reverse the defendants' convictions in the first trial because the defendants' counsel was ineffective, and confidence in the verdict but for the ineffectiveness is undermined. In the second trial, the State failed to present any nonpretextual reason for dismissing juror nine and *501 hence violated *Batson*. As such, I would reverse all convictions and remand for a new trial.

¶ 59 I dissent.

ALEXANDER, C.J., and MADSEN, J., concur.
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H

Supreme Court of Washington,
 En Banc.

John Paul JONES, d/b/a J.P. Jones Realty, Petitioner,
 v.

Cecelia M. BEST, Personal Representative of the
 Estate of Peter C. Best,
 Respondent.
 No. 65157-4.

Argued Oct. 28, 1997.
 Decided Jan. 29, 1998.
 As Amended Feb. 20, 1998.

Real estate agent brought action to recover his full commission under a listing agreement. The Superior Court, Yakima County, Robert N. Hackett, Jr., J., entered judgment for the agent. Vendor appealed. The Court of Appeals reversed in an unpublished opinion. Agent petitioned for review. The Supreme Court, Dolliver, J., held that: (1) the evidence did not support the vendor's proposed finding that he accepted the purchase price only if the agent reduced his commission; (2) the evidence supported the determination that there was no promise that could lead to promissory estoppel against the agent; (3) the agent did not waive his full commission; (4) there was no modification of the written agreement; and (5) the vendor's conditional tender of a check did not prevent an award of prejudgment interest.

Decision of Court of Appeals affirmed in part and reversed in part.

West Headnotes

[1] Brokers ↪71

65k71 Most Cited Cases

Conversation between real estate agent and vendor was not agreement to reduce agent's commission under written listing agreement.

[2] Brokers ↪73

65k73 Most Cited Cases

Although vendor's real estate agent and purchaser's agent may have had practice of sharing commissions, vendor did not owe commission to purchaser's agent; only vendor's agent was entitled to commission under listing agreement and any claim by purchaser's agent would be against vendor's agent, not against vendor.

[3] Brokers ↪86(8)

65k86(8) Most Cited Cases

Evidence did not support vendor's proposed finding that he agreed to accept purchase price only if his real estate agent accepted substantially reduced commission and, thus, did not support determination that agent was estopped from collecting full amount of commission under listing agreement; trial court expressly declined to adopt proposed finding that vendor was willing to sell at specified price only if commission was substantially reduced, and instead found that vendor "hoped the real estate commission would be substantially reduced."

[4] Estoppel ↪85

156k85 Most Cited Cases

"Promissory estoppel" requires promise which promisor should reasonably expect to cause promisee to change his position and which does cause promisee to change his position, justifiably relying on promise in such a manner that injustice can be avoided only by enforcement of promise.

[5] Estoppel ↪118

156k118 Most Cited Cases

Evidence supported trial court's finding that real estate agent made no promise to accept reduced commission from vendor and, thus, there was no basis for finding that promissory estoppel limited agent's recovery to less than amount specified in written listing agreement.

[6] Estoppel ↪85

156k85 Most Cited Cases

Vendor's hope that his real estate agent's commis-

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sion would be reduced was not the sort of detrimental reliance needed to justify application of promissory estoppel to prevent agent from claiming full commission under written listing agreement; trial court had rejected vendor's proposed finding that vendor would not have agreed to sell at actual price if he had not believed that his agent would cut commission in half.

[7] Brokers ↪71

65k71 Most Cited Cases

Proposed modification of commission provision of real estate agent's listing agreement was merely attempted, but was not completed; although broker suggested that he would take slightly less than half his commission if vendor would "take care of [purchaser's agent]," with whom vendor's agent had practice of sharing commissions, there was no evidence or finding of vendor's response.

[8] Contracts ↪236

95k236 Most Cited Cases

Silence is not acceptance of proposed contract modification.

[9] Contracts ↪236

95k236 Most Cited Cases

Mutual modification of contract by subsequent agreement arises out of intentions of parties and requires meeting of the minds.

[10] Contracts ↪236

95k236 Most Cited Cases

Mutual assent is required for contract modification and one party may not unilaterally modify contract.

[11] Estoppel ↪52.10(2)

156k52.10(2) Most Cited Cases

"Waiver" is intentional and voluntary relinquishment of known right.

[12] Estoppel ↪52.10(2)

156k52.10(2) Most Cited Cases

[12] Estoppel ↪52.10(3)

156k52.10(3) Most Cited Cases

Waiver may result from express agreement or may

be inferred from circumstances indicating intent to waive.

[13] Estoppel ↪52.10(3)

156k52.10(3) Most Cited Cases

Unequivocal acts or conduct evidencing intent to waive must exist for there to be "implied waiver"; waiver will not be inferred from doubtful or ambiguous factors.

[14] Estoppel ↪116

156k116 Most Cited Cases

Intention to relinquish right or advantage must be proved, and burden is on party claiming waiver.

[15] Brokers ↪71

65k71 Most Cited Cases

Real estate agent did not expressly or impliedly waive his right to his full commission under exclusive listing agreement, even if he indicated that he might have accepted half of specified commission if vendor would "take care of [purchaser's agent]"; at most, circumstances indicated agent was to have portion of his commission paid to someone else.

[16] Interest ↪50

219k50 Most Cited Cases

Vendor's tender of check to real estate agent was conditional and, thus, agent's refusal to cash check did not preclude award of prejudgment interest when agent recovered his full commission under exclusive listing agreement; vendor tendered only part of established commission, demanded that agent get release from purchaser's agent of any claim against vendor, and stated that tendered funds were final and complete disposition and settlement of commission dispute.

**2 *234 Walters, Whitaker, Finney & Falk, Michael D. Finney, Yakima, for petitioner.

Talbott, Simpson, Gibson & Davis, P.S., Blaine G. Gibson, Yakima, for respondent.

DOLLIVER, Justice.

The Plaintiff in this case is John Paul Jones, a Realtor, who sued for his full \$37,000 commission

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following the \$740,000 sale of real property in Yakima County. The Defendant is the estate of Peter C. Best, who owned and sold the orchard Mr. Jones listed. Following a bench trial, the Honorable Robert N. Hackett Jr. found for the Plaintiff, awarding him his full commission, less \$500, which he found the Plaintiff had agreed to deduct. The trial court also awarded Plaintiff prejudgment interest and attorney fees. The Court of Appeals reversed, finding Mr. Jones was estopped from claiming his full commission, and instead awarded him \$18,000 and prejudgment interest. The Court of Appeals awarded attorney fees to the Defendant. The Plaintiff's petition for review was granted.

John Paul Jones, the Plaintiff, is a licensed real estate agent in the State of Washington. Peter Best, the Defendant, was the owner of a 96-acre orchard in Zillah, Washington. In January 1989, Mr. Best approached Mr. Jones about selling the orchard. Mr. Best had sold and repossessed the orchard several times, so Mr. Jones was familiar with the property and had an acquaintance of several years with Mr. Best. On January 26, 1989, **3 the two men entered into a *235 one-year exclusive listing agreement: The orchard was listed for \$800,000, and Mr. Jones had the right to sell it for that price or any other to which Mr. Best agreed. Mr. Jones would receive five percent of the sale price as his commission, whether he or someone else sold the property.

Two or three months after the agreement was made, Mr. Jones learned that Pacific Fruit Growers & Packers, Inc. was a potential purchaser of the orchard. Earl Nordberg, a Realtor with whom Mr. Jones had worked in the past, was working for Pacific Fruit. Mr. Best informed Mr. Jones at that time that he was considering Pacific Fruit's offer of \$735,000 or \$740,000. At their next meeting, Mr. Best told Mr. Jones he had made a deal on the orchard. Figuring that five percent of the purchase price of \$740,000 was \$37,000, Mr. Jones told Mr. Best, "Pete, I'll take \$18,000, and you take care of Nordberg." Verbatim Report of Proceedings at 16. Al-

though he knew he was entitled to the full \$37,000, Mr. Jones intended to take a little less than half of the commission owing and have the remainder paid to Mr. Nordberg who, though not the listing agent, had procured the buyer. In similar transactions involving Mr. Nordberg, Mr. Jones stated they each took half of the commission--"50 percent for the seller and 50 percent for the lister"--and that was what he had expected would occur, through Mr. Best, in this sale. Verbatim Report of Proceedings at 21. Mr. Jones testified Mr. Best shook hands and "was evidently well pleased." Verbatim Report of Proceedings at 20.

In mid-June 1989, Mr. Jones heard the sale of the orchard had closed. He called Mr. Best to ask for the \$18,000 commission. Mr. Best was hostile and stated, "[Y]ou don't have any commission coming.... [Y]ou didn't sell the orchard." Verbatim Report of Proceedings at 17. Mr. Jones did not respond; he knew, however, that he had an exclusive listing agreement to receive five percent of any selling price. Ten minutes later, Mr. Best called back and asked Mr. Jones to show the listing agreement to E. Frederick Velikanje, Mr. Best's lawyer. He did. Around that same time, Mr. Nordberg *236 informed Mr. Jones that he had never received a commission.

Soon, Mr. Jones received a phone call from Mr. Velikanje, who wanted to know whether he had agreed, with Mr. Best, to take \$18,000 for his commission. Mr. Jones replied that he had, "as long as [Mr. Best] took care of Nordberg." Verbatim Report of Proceedings at 18. On June 21, 1989, Mr. Jones and Mr. Nordberg each received a letter from Mr. Velikanje. It stated that he would send a check for \$18,000 upon receipt of a release, signed by both Mr. Jones and Mr. Nordberg, showing that the \$18,000 was a complete settlement.

Mr. Jones wrote back on June 29, 1989, stating that, as the exclusive listing agent, he was entitled to the full five percent of the purchase price, or \$37,000. He indicated he would accept \$18,500, plus interest and costs, as a full release of his claims under the

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agreement, but would need the full \$37,000 to get a release from Mr. Nordberg. He stated the interest was \$6 per day, dating from May 31, 1989, and that legal consultation had cost him \$150.

Mr. Jones received a final letter from Mr. Velikanje, along with a check for \$18,000. The letter stated the check was forwarded as a means of settlement and compromise, upon Mr. Jones's representation that he had an exclusive listing, despite the fact he did not sell the property. The letter reiterated the check was meant "as a final and complete disposition and settlement of this matter." Ex. 10. Mr. Jones then sued for the full \$37,000.

Mr. Best died during the pendency of this case. Mr. Velikanje testified he had been Mr. Best's attorney for several years. In April 1989, he learned Mr. Best was interested in Pacific Fruit's offer of \$740,000. Mr. Velikanje also testified Mr. Best "would not go ahead with this unless he could work something out with John Paul Jones as to the commission." Verbatim Report of Proceedings at 29. In fact, Mr. Best was going to offer \$15,000 "as a settlement." Verbatim Report of Proceedings at 29. (The trial court admitted this testimony, which was hearsay, only to show *237 Mr. Best's state of mind--willingness to negotiate a deal--not **4 for the truth of the matter asserted.) Mr. Best later told Mr. Velikanje they had met and agreed to \$18,000. Mr. Velikanje testified he then called Mr. Jones, who said he had agreed to take \$18,000. Mr. Jones never cashed the \$18,000 check, but returned it before suing Mr. Best.

In oral findings following argument, Yakima Superior Court Judge Robert N. Hackett Jr. stated the problem in this case arose because Mr. Jones and Mr. Best "weren't communicating," and the conversation between the two men was "never an agreement." Verbatim Report of Proceedings at 70. The trial court went on, however, to find that "what the agreement meant was that the share owed to Mr. Jones would be \$18,000.00[,]" a figure premised on Mr. Jones's belief that Mr. Nordberg would be entitled to some payment for his efforts. Verbatim Re-

port of Proceedings at 71.

In his written findings and conclusions, Judge Hackett found Mr. Best "hoped the real estate commission would be substantially reduced" were he to accept a \$740,000 offer. The court also appeared to have accepted Mr. Jones's version of the facts, finding, "Mr. Jones told Mr. Best that Jones would accept a commission of \$18,000 and that Best would have to 'take care of Nordberg.'" Clerk's Papers at 16. The trial court further found "[t]here was never a complete agreement between Jones and Best regarding the entire commission being reduced to \$18,000." Clerk's Papers at 17. He concluded Mr. Jones had not waived a commission greater than \$18,000, but had agreed to reduce his commission by \$500 (when he offered to accept \$18,000, instead of \$18,500, which would have been one half of \$37,000). The trial judge awarded Mr. Jones \$36,500, prejudgment interest, and attorney fees.

The Court of Appeals, Division Three, reversed in an unpublished opinion, holding that Mr. Jones should be estopped from claiming more than the \$18,000 commission and that he was not entitled to attorney fees because he was no longer the prevailing party, but did award Mr. Jones prejudgment interest.

[1] *238 While this case appears to be fact-specific and easily resolved by application of well-settled contract principles, the trial court and Court of Appeals confused several theories in their attempts to resolve the issues. The evidence showed Mr. Jones and Mr. Best had a valid written contract--the exclusive listing agreement--which would give Mr. Jones five percent of the sale price of Mr. Best's orchard. Nobody has claimed the listing agreement was incomplete or in any way invalid. The confusion arose over the intended effect of Mr. Jones's "conversation" with Mr. Best, in which Mr. Jones told Mr. Best, "Pete, I'll take \$18,000, and you take care of Nordberg." Verbatim Report of Proceedings at 16. The trial court did not find that Mr. Best replied, although Mr. Jones testified the two men shook hands and Mr. Best was pleased.

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The trial court correctly found this conversation did not constitute an agreement. Inexplicably, however, the trial court then went on to conclude Mr. Jones agreed to reduce his commission by \$500. The problem with the trial court's analysis is that the only time an "agreement" could have come about was during the ambiguous conversation related above. If there was no agreement as to a reduction of Mr. Jones's commission to \$18,000, then it necessarily follows there was no agreement to a \$500 reduction.

[2] The Court of Appeals first held, correctly and as a matter of law, that Mr. Best could not owe Mr. Nordberg a commission because only Mr. Jones was entitled to a commission under the listing agreement. Although Mr. Jones and Mr. Nordberg may have had a practice of sharing commissions, such practice would only give rise to a claim by Mr. Nordberg against Mr. Jones, not Mr. Best. *Jones v. Best*, No. 14634-1-III, slip op. at 5-6 (Wn.App. Dec. 3, 1996).

The court then went on to hold, however, that Mr. Jones should be estopped from claiming more than \$18,000. After discussing whether promissory or equitable estoppel should apply, the court concluded promissory estoppel was the proper doctrine. It reasoned that, since Mr. Nordberg had *239 no right to charge Mr. Best a commission, Mr. Jones's statement that he would accept \$18,000 as his share was actually a *promise* to **5 accept \$18,000 as the entire commission. The court then stated Mr. Jones knew this promise would induce Mr. Best to change his position because "the [trial] court did find that Mr. Best was willing to sell for \$740,000.00 only if the commission was substantially reduced." *Jones*, slip op. at 8.

[3] This language is troubling for two reasons. First, the court's characterization of the trial court's findings is wrong. The trial court expressly declined to adopt the proposed finding that Mr. Best was willing to sell for \$740,000 only if the commission was substantially reduced. Instead, the trial court found Mr. Best "hoped the real estate com-

mission would be substantially reduced." Clerk's Papers at 16. This discrepancy is puzzling because Mr. Best assigned error to the trial court's failure to adopt the proposed finding that he was only willing to sell if the commission was substantially reduced.

[4][5] Second, the Court of Appeals engaged in an analysis under the theory of promissory estoppel, which does not apply in this case. Promissory estoppel requires a promise which the promisor should reasonably expect to cause the promisee to change his position and which does cause the promisee to change his position, justifiably relying on the promise in such a manner that injustice can be avoided only by enforcement of the promise. *Corbit v. J.I. Case Co.*, 70 Wash.2d 522, 539, 424 P.2d 290 (1967). The Court of Appeals substituted its judgment for the trial court's, which previously found there was no agreement or promise, and found Mr. Jones "promised" to accept a reduced commission. Where, as here, the trial court has weighed the evidence, the scope of review on appeal is limited to ascertaining whether the findings of fact are supported by substantial evidence and, if so, whether the findings support the conclusions of law and judgment. *Doe v. Boeing Co.*, 121 Wash.2d 8, 18-19, 846 P.2d 531 (1993); *240 *Enterprise Timber, Inc. v. Washington Title Ins. Co.*, 76 Wash.2d 479, 482, 457 P.2d 600 (1969). The trial court heard the evidence, judged the credibility of the witnesses, and found Mr. Jones made no promise to accept \$18,000 as the entire commission. The sine qua non of promissory estoppel is the existence of a promise; there was no promise here.

[6] Moreover, there was no justifiable, detrimental "change in position" by Mr. Best which would implicate promissory estoppel. As pointed out above, the Court of Appeals mistakenly relied on Mr. Best's unadopted proposed finding in holding that Mr. Best would not have agreed to sell for \$740,000 if he had not believed Mr. Jones would cut his commission in half. While Mr. Velikanje testified Mr. Best would only go ahead if the commission were reduced, that evidence was offered

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and admitted only to show Mr. Best's state of mind—not for the truth of the matter asserted. The trial court merely found Mr. Best hoped the commission would be reduced, and, most importantly, found the conversation between Mr. Jones and Mr. Best occurred as Mr. Jones related it.

[7][8][9][10] Neither the litigants nor the courts have addressed this case as one of attempted, but unsuccessful, modification of a valid contract. Nevertheless, that is the appropriate analysis. Following the successful formation of a contract (the written listing agreement between Mr. Jones and Mr. Best, which set Mr. Jones's commission at five percent), there was an unsuccessful attempt at modification when Mr. Jones suggested he would take slightly less than half his commission owing if Mr. Best would "take care of Nordberg." Verbatim Report of Proceedings at 16. The modification was merely attempted because there is no evidence or finding of Mr. Best's response. Silence is not acceptance. Mutual modification of a contract by subsequent agreement arises out of the intentions of the parties and requires a meeting of the minds. *Wagner v. Wagner*, 95 Wash.2d 94, 103, 621 P.2d 1279 (1980); *Hanson v. Puget Sound Navigation Co.*, 52 Wash.2d 124, 127, 323 P.2d 655 (1958). Mutual assent is required and one party may not unilaterally modify a contract. *In re Relationship of Eggers*, 30 Wash.App. 867, 638 P.2d 1267 (1982).

*241 In this case, there was no meeting of the minds as to the proposed modification. The written contract to pay Mr. Jones five percent was not effectively modified because Mr. Best never agreed to the terms of the **6 modification. Mr. Jones was therefore entitled to his five percent commission under the original contract terms. See *Ebling v. Gove's Cove, Inc.*, 34 Wash.App. 495, 499, 663 P.2d 132 (1983).

Having decided there was no modification of the original, written contract, we need not determine the outcome of this case, under the Statute of Frauds. We note only that contracts for the sale of

land are required to be in writing, as are agreements authorizing agents to sell or purchase real estate for a commission. RCW 19.36.010; RCW 64.04.010-.020. It is well settled that subsequent oral agreements to modify such contracts can run afoul of the Statute of Frauds if not performed. See *Consolidated Elec. Distribs., Inc. v. Gier*, 24 Wash.App. 671, 678, 602 P.2d 1206 (1979) (citing *Gerard-Filio Co. v. McNair*, 68 Wash. 321, 327, 123 P. 462 (1912)); cf. RCW 62A.2-209. We do not reach this issue because there was no agreement, oral or otherwise, to modify the valid written contract.

The Defendant also argues Mr. Jones waived his right to any more than \$18,000 as a commission. The Court of Appeals did not reach this issue, having ruled in favor of the Defendant on the promissory estoppel theory. While we have found there was no meeting of the minds with respect to modification of the existing contract, we must still address the waiver issue.

[11][12][13][14] A waiver is the intentional and voluntary relinquishment of a known right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. *Bowman v. Webster*, 44 Wash.2d 667, 669, 269 P.2d 960 (1954). To constitute implied waiver, there must exist unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous factors. *Central Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wash.2d 346, 354, 779 P.2d 697 (1989); *Wagner*, 95 Wash.2d at 102, 621 P.2d 1279. The intention to relinquish the right or *242 advantage must be proved, and the burden is on the party claiming waiver. *Rhodes v. Gould*, 19 Wash.App. 437, 441, 576 P.2d 914, review denied, 90 Wash.2d 1026 (1978).

[15] In this case, Mr. Jones did not waive his rights by express agreement, as there was no agreement. Moreover, circumstances do not indicate an intent to waive over half the commission; at most, they point to a desire to have that portion paid to someone else. Mr. Jones was not waiving his right

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to the full five percent commission, but suggesting that it be divided between him and Mr. Nordberg. This was no waiver, vis-à-vis Mr. Best; rather, it was a request that a portion be paid elsewhere. Mr. Best has not proved Mr. Jones waived his right to the \$37,000 commission.

[16] Prejudgment interest is granted to compensate a party for the loss of use of money to which he was entitled. *Richter v. Trimberger*, 50 Wash.App. 780, 785, 750 P.2d 1279 (1988). Mr. Best contends Mr. Jones is not entitled to prejudgment interest because he tendered a check in the amount of \$18,000, which Mr. Jones refused to accept. Mr. Best relies on *Richter v. Trimberger*. In that case, Trimberger agreed to pay Richter \$50,000 for preparing a crab boat and fishing the season. Richter stopped work and did not fish. Both parties agreed his work had been worth \$12,000, so Trimberger sent him a check for that amount. Richter refused the check and sued for the full \$50,000. Trimberger tendered \$12,000 to the court registry, but Richter refused the funds and proceeded to trial. The trial court awarded judgment to Richter for \$12,000, without interest. The Court of Appeals affirmed, holding Richter was not entitled to prejudgment interest because he had access to the funds all along. *Richter*, 50 Wash.App. at 785, 750 P.2d 1279. Mr. Best contends Mr. Jones is likewise not entitled to prejudgment interest because he had the \$18,000 check in his possession, yet refused to cash it.

The Court of Appeals correctly held Mr. Jones was entitled to prejudgment interest because the tender of the check was conditional, i.e., Mr. Best first required Mr. Jones to get a release from Mr. Nordberg, then he sent a *243 letter with the check stating the funds were a final and complete disposition and settlement of the matter. Order Granting Clarification, Amending Op., and Denying Recons. at 2. We have held that tender of the **7 amount due must be unconditional in order to stop interest from running. Tender of less than the full amount due under the contract constitutes a conditional tender.

Schmerer v. Darcy, 80 Wash.App. 499, 504, 910 P.2d 498 (1996). In *Grant v. Auvil*, 39 Wash.2d 722, 728, 238 P.2d 393 (1951), Auvil tendered a check with the notation "[a]ccount paid in full," and Grant chose not to cash it because he believed doing so would constitute an accord and satisfaction. Similarly here, Mr. Jones did not cash the check because the accompanying letter provided it was tendered in full settlement of the matter. We affirm the award of prejudgment interest to Mr. Jones. As the prevailing party, Mr. Jones is entitled to attorney fees under the listing agreement.

DURHAM, C.J., and SMITH, JOHNSON, MADSEN, ALEXANDER, TALMADGE and SANDERS, JJ., concur.

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Supreme Court of Washington, En Banc.
 Diana WILSON, Respondent,
 v.
 Gary C. HORSLEY, Petitioner.
 No. 66037-9.

Argued June 9, 1998.
 Decided March 11, 1999.

After mandatory arbitration held in action for assault resulted in judgment in plaintiff's favor, and trial de novo was set, defendant sought leave to amend answer to include several additional defenses, and to assert counterclaim. After motions were denied, and defendant acquiesced to plaintiff's withdrawal of demand for jury trial, mistrial was declared, and defendant made request for jury trial. After request was denied, and defendant stipulated to liability for assault, the Superior Court of Cowlitz County, Randolph Furman, J., awarded damages. Defendant appealed, and the Court of Appeals affirmed, 87 Wash.App. 563, 942 P.2d 1046. After granting review, the Supreme Court, Durham, J., held that: (1) leave to amend was properly denied; but (2) declaration of mistrial revived defendant's State constitutional right to jury trial.

Affirmed in part, and reversed in part.

Sanders, J., concurred in part and dissented in part and filed opinion in which Johnson and Madsen, JJ., concurred.

West Headnotes

[1] Pleading 302 ↪229

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k229 k. Right to Amend Pleadings in General. Most Cited Cases

Rules governing amendments to pleadings serve to

facilitate proper decisions on the merits, to provide parties with adequate notice of the basis for claims and defenses asserted against them, and to allow amendment except where prejudice to the opposing party would result. CR 15(a).

[2] Pleading 302 ↪236(1)

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k233 Leave of Court to Amend

302k236 Discretion of Court

302k236(1) k. In General. Most Cited

Cases

Decision to grant leave to amend pleadings is within the discretion of the trial court. CR 15(a).

[3] Appeal and Error 30 ↪959(1)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k959 Amended and Supplemental Pleadings

30k959(1) k. In General. Most Cited

Cases

In reviewing trial court's decision to grant or deny leave to amend pleadings, appellate court applies a manifest abuse of discretion test. CR 15(a).

[4] Appeal and Error 30 ↪959(1)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k959 Amended and Supplemental Pleadings

30k959(1) k. In General. Most Cited

Cases

Trial court's decision to grant or deny leave to amend pleadings will not be disturbed on review except on a clear showing of abuse of discretion, arising from discretion which is manifestly unreasonable, or exercised on untenable grounds, or for

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untenable reasons. CR 15(a).

[5] Pleading 302 ↪229

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k229 k. Right to Amend Pleadings in General. Most Cited Cases
 Touchstone for denial of a motion to amend pleading is the prejudice such an amendment would cause to the nonmoving party. CR 15(a).

[6] Pleading 302 ↪229

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k229 k. Right to Amend Pleadings in General. Most Cited Cases
 Factors which may be considered in determining whether permitting amendment would cause prejudice to nonmoving party include undue delay, unfair surprise, and jury confusion. CR 15(a).

[7] Pleading 302 ↪229

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k229 k. Right to Amend Pleadings in General. Most Cited Cases
 Nothing in Mandatory Arbitration Rules precludes a trial court from considering motion to amend pleadings in light of a completed mandatory arbitration. MAR 7.2(b)(1); CR 15(a).

[8] Alternative Dispute Resolution 25T ↪374(4)

25T Alternative Dispute Resolution

25TII Arbitration

25TII(H) Review, Conclusiveness, and Enforcement of Award

25Tk366 Appeal or Other Proceedings for Review

25Tk374 Scope and Standards of Re-

view

25Tk374(4) k. Evidence and Trial De Novo. Most Cited Cases

(Formerly 33k73.7(4) Arbitration)

Mandatory Arbitration Rules (MAR) do not address trial court's consideration of procedural matters before commencing trial de novo following entry of arbitration award; rather, question of what issues may be added to trial de novo is governed by the Civil Rules, and thus remains in the discretion of the trial court. MAR 7.2(b).

[9] Pleading 302 ↪245(1)

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k242 Amendment of Declaration, Complaint, Petition, or Statement

302k245 Condition of Cause and Time for Amendment

302k245(1) k. In General. Most Cited Cases

Pleading 302 ↪258(1)

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k255 Amendment of Plea or Answer

302k258 Condition of Cause and Time for Amendment

302k258(1) k. In General. Most Cited Cases

Fact that motion to amend pleading is made after a completed arbitration may be relevant to the question of whether allowing amendment would prejudice the opposing party, and thus is not permissible. CR 15(a).

[10] Pleading 302 ↪236(7)

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k233 Leave of Court to Amend

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302k236 Discretion of Court

302k236(7) k. New or Different Cause of Action or Defense. Most Cited Cases
 While litigant is not automatically precluded from amending his answer to add counterclaims or defenses in trial de novo held following entry of arbitration award, existence of prior arbitration is relevant factor that may be considered at trial court's discretion when deciding whether to grant leave to amend. CR 15(a).

[11] Pleading 302 ⇨ 236(7)

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k233 Leave of Court to Amend

302k236 Discretion of Court

302k236(7) k. New or Different Cause of Action or Defense. Most Cited Cases
 Trial court did not abuse its discretion in denying motion by defendant, against whom award had been entered during mandatory arbitration in action for assault, to amend answer in connection with trial de novo to add numerous affirmative defenses, and also to include counterclaim for assault, where amendments, which were raised on eve of trial, would have substantially changed case and deprived plaintiff of opportunity to have those issues resolved in arbitration, thus causing substantial prejudice, and counterclaim was compulsory counterclaim which should have been resolved at arbitration. MAR 7.2(b)(1); CR 15(a).

[12] Pleading 302 ⇨ 229

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k229 k. Right to Amend Pleadings in General. Most Cited Cases

Unfair surprise is factor which may be considered in determining whether permitting amendment to pleading would cause prejudice, and thus may not be allowed. CR 15(a).

[13] Alternative Dispute Resolution 25T ⇨ 371

25T Alternative Dispute Resolution

25TII Arbitration

25TII(H) Review, Conclusiveness, and Enforcement of Award

25Tk366 Appeal or Other Proceedings for Review

25Tk371 k. Presentation and Reservation of Grounds of Review. Most Cited Cases
 (Formerly 33k73.4 Arbitration)

Claim by defendant that his right to jury trial during trial de novo following arbitration award, which he had initially waived, was revived by declaration of mistrial, was raised before trial court, and thus was preserved for review, where defendant's counsel argued, both in papers submitted to court and during oral argument, that defendant's various rights, including right to jury trial, had come back to him following mistrial. RAP 2.5(a)(3).

[14] Constitutional Law 92 ⇨ 1050

92 Constitutional Law

92VII Constitutional Rights in General

92VII(A) In General

92k1050 k. In General. Most Cited Cases

(Formerly 92k82(1))

Right which is made inviolate by State Constitution must not diminish over time, and must be protected from all assaults to its essential guarantees.

[15] Constitutional Law 92 ⇨ 947

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(B) Estoppel, Waiver, or Forfeiture

92k947 k. Waiver in General. Most Cited Cases

(Formerly 92k43(1))

Any waiver of a right guaranteed by State Constitution should be narrowly construed in favor of preserving the right.

[16] Jury 230 ⇨ 28(17)

230 Jury

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230II Right to Trial by Jury
 230k27 Waiver of Right
 230k28 In Civil Cases
 230k28(17) k. Operation and Effect of
 Waiver. Most Cited Cases
 Right to jury trial under State Constitution is re-
 vived, notwithstanding initial waiver, upon declara-
 tion of a mistrial. West's RCWA Const. Art. 1, § 21.

[17] Jury 230 ↪28(17)

230 Jury
 230II Right to Trial by Jury
 230k27 Waiver of Right
 230k28 In Civil Cases
 230k28(17) k. Operation and Effect of
 Waiver. Most Cited Cases
 Defendant's constitutional right to jury trial in trial
 de novo held following entry of arbitration judg-
 ment, which had initially been waived by defend-
 ant, was revived upon declaration of mistrial.
 West's RCWA Const. Art. 1, § 21.

[18] Jury 230 ↪9

230 Jury
 230II Right to Trial by Jury
 230k9 k. Nature and Scope in General. Most
 Cited Cases

Jury 230 ↪28(1)

230 Jury
 230II Right to Trial by Jury
 230k27 Waiver of Right
 230k28 In Civil Cases
 230k28(1) k. In General. Most Cited
 Cases
 Right to a jury trial is a valuable right under State
 Constitution, and its waiver must be strictly con-
 strued. West's RCWA Const. Art. 1, § 21.

**317 *501 Kurt A. Anagnostou, Daggel Legal
 Services, Longview, Petitioner.
 Craig W. Weston, Longview, Respondent.

*502 DURHAM, J.

Petitioner Gary C. Horsley seeks review of the
 Court of Appeals' decision affirming the Cowlitz
 County Superior Court's denial of his motions for
 leave to amend his answer and for a jury trial. We
 hold that the trial court properly denied Horsley's
 motion to amend his answer to the complaint in this
 case. On the issue of the jury trial, however, we
 hold that Horsley's motion for a jury trial should
 have been granted. Therefore, we affirm in part and
 reverse in part.

FACTS

Petitioner Horsley assaulted Respondent Diana
 Wilson in 1992, causing Wilson to suffer emotional
 damage and a permanent injury to her right hand. In
 1993, Wilson filed a complaint for personal injuries
 against Horsley in Cowlitz County Superior Court.
 Horsley's pro se response to the complaint stated:

**318 In answer to the plaintiffs summons I am not
 really sure what she is talking about. The only in-
 stance I can think of is when on one of her drunks,
 she smacked me in the back of the head and hurt
 her finger, but what ever she is trying this time I
 deny any wrong doing.

Clerk's Papers at 5.

The case proceeded to mandatory arbitration in
 early 1994, and resulted in a judgment for Wilson
 in the amount of \$5,500. Horsley then requested a
 trial de novo. The trial was initially set as a jury tri-
 al scheduled for May 2, 1994, but was continued to
 June 6 upon Horsley's motion. On April 18, Hors-
 ley filed a motion for leave to amend his answer to
 add contributory negligence, self defense, laches,
 failure to mitigate, comparative negligence, and in-
 toxication as affirmative defenses. Horsley also
 sought to make a counterclaim against Wilson for
 assault.^{FN1}

*503 The trial court denied Horsley's motion to
 amend after oral arguments. The court reasoned
 that allowing Horsley to amend would be "grossly

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unfair” and “prejudic[ial]to the interests of the plaintiff.” Report of Proceedings (5/6/94) at 8-9. Pointing out that all of the issues raised by Horsley had been known by him since the beginning of the litigation almost a year before, the court further noted that Horsley made his motion “on the eve of trial,” after the matter had been through arbitration. *Id.* at 9. The case was, therefore, allowed to proceed within the scope of the original pleadings.

FN1. Horsley claims that all of the issues raised by the proposed amendment to his answer were addressed at the arbitration, and that amending the answer served only to clarify the issues. Because there is no transcript of the arbitration proceedings, there is no record to verify this claim. As the Court of Appeals pointed out, however, Horsley could have remedied this problem by submitting affidavits. *Wilson v. Horsley*, 87 Wash.App. 563, 571, 942 p.2d 1046 (1997). Without such affidavits, there is no evidence to substantiate Horsley's assertion that the issues were raised at the arbitra- tion.

After the court once again continued the trial, this time scheduling it for August 29, Horsley renewed his motion to amend. Horsley raised no new grounds for granting his motion and the motion was denied. Enumerating the reasons for the denial, the court emphasized that Horsley was aware of the factual basis for his proposed defenses prior to the arbitration. Granting Horsley leave to amend his answer would change the case to make it significantly different from that brought before the arbitrator. This difference would make the assessment of attorney fees under Superior Court Mandatory Arbitration Rule (MAR) 7.3 “almost impossible.” Clerk's Papers at 30. Further, the court concluded that Horsley's proposed counterclaim was a compulsory counterclaim that should have been pleaded before arbitration. Had Horsley properly included the counterclaim before arbitration. Wilson would

have had the option of having the counterclaim arbitrated. Therefore, the court concluded that allowing the amendment after arbitration would be contrary to the litigation reduction purposes of the Mandatory Arbitration Rules.

The trial finally progressed after a third continuance pushed the trial date back to February 1995. In preparation for trial, counsel met in the chambers of the Honorable *504 Judge James E.F.X. Warne, the assigned trial judge. Although there is no record of this conference, it is undisputed that in conference Wilson withdrew her jury trial demand, and that Horsley acquiesced, agreeing to have the matter resolved by a bench trial. However, on the day of trial Horsley asked the court for a continuance and requested a jury trial. These requests were denied, and the trial proceeded.

Unfortunately, this trial resulted in a mistrial after Judge Warne informed the parties that he had inadvertently seen the arbitration award. Immediately after the court granted his motion for a mistrial, Horsley requested that the trial be reset as a jury trial. The trial court denied the motion and reset the case as a nonjury trial scheduled to begin in April 1995. Judge Warne then recused himself.

In early March 1995, shortly after Judge Warne declared a mistrial, Horsley submitted a written request for a jury trial. In his request, Horsley argued that he had consented to trial without a jury only because he was informed by Wilson's attorney that he would have to pay the jury fee if he wanted a jury trial.^{FN2} Since his acquiescence to Wilson's withdrawal of a jury request was based upon “misinformation,” Horsley asked that the April trial be reset with a six-person jury. Clerk's Papers at 34. The trial court denied this motion, concluding that Judge Warne did not abuse his discretion in denying Horsley's initial oral request for a jury trial. The case proceeded to a bench trial on the issue of damages before the Cowlitz County Superior Court and resulted in a judgment for Wilson in the amount of \$25,454.50 plus costs and attorney fees. Horsley appealed the denial of his motions to amend and for

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a jury trial.

FN2. Wilson's attorney denied making any such misrepresentation to Horsley.

The Court of Appeals affirmed the trial court. *Wilson v. Horsley*, 87 Wash.App. 563, 942 P.2d 1046 (1997). The Court of Appeals concluded that there was no "manifest abuse of discretion" in the trial court's denial of Horsley's motion to amend. *Wilson*, 87 Wash.App. at 568, 942 P.2d 1046 (quoting *505 *Herron v. Tribune Publ'g Co.*, 108 Wash.2d 162, 165, 736 P.2d 249 (1987)). In addition, the Court of Appeals declined to reach the issue of Horsley's request for a jury, asserting that he failed to present his arguments on the jury trial issue to the trial court. *Wilson*, 87 Wash.App. at 573-74, 942 P.2d 1046.

ANALYSIS

Horsley's Motion to Amend

[1] We turn first to the issue of Horsley's motion to amend his answer. Since, under CR 15(a), Horsley's right to amend as a matter of course had expired, Horsley could amend his answer "only by leave of court or by written consent of the adverse party." CR 15(a). Rule 15(a) specifically provides that leave to amend "shall be freely given when justice so requires." CR 15(a). These rules serve to facilitate proper decisions on the merits, to provide parties with adequate notice of the basis for claims and defenses asserted against them, and to allow amendment of the pleadings except where amendment would result in prejudice to the opposing party. *Caruso v. Local Union No. 690*, 100 Wash.2d 343, 349, 670 P.2d 240 (1983); *Herron*, 108 Wash.2d at 165, 736 P.2d 249.

[2][3][4] The decision to grant leave to amend the pleadings is within the discretion of the trial court. *Sprague v. Sumitomo Forestry Co.*, 104 Wash.2d 751, 763, 709 P.2d 1200 (1985); *Lincoln v. Transamerica Inv. Corp.*, 89 Wash.2d 571, 577,

573 P.2d 1316 (1978). Therefore, when reviewing the court's decision to grant or deny leave to amend, we apply a manifest abuse of discretion test. *Caruso*, 100 Wash.2d at 351, 670 P.2d 240. The trial court's decision "will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

[5][6] The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party. *Caruso*, 100 Wash.2d at 350, 670 P.2d 240. Factors which may be considered in determining whether permitting *506 amendment would cause prejudice include undue delay, unfair surprise, and jury confusion. *Herron*, 108 Wash.2d at 165-66, 736 P.2d 249.

[7][8] Horsley argues that we should liberally construe CR 15(a) in the context of the Mandatory Arbitration Rules to favor permitting amendment without regard to the completed mandatory arbitration. He claims that the trial court should not have considered the completed arbitration in deciding whether to allow him to amend his answer, and cites MAR 7.2(b)(1) as support for this proposition. MAR 7.2(b)(1) provides that "[t]he trial de novo shall be conducted as though no arbitration proceeding had occurred." Contrary to Horsley's assertion, however, nothing in the Mandatory Arbitration Rules precludes a trial court from considering a motion to amend the pleadings in light of a completed mandatory arbitration. MAR 7.2(b) only prohibits reference to the arbitration when considering the merits of the underlying action in a trial de novo. The language in MAR 7.2(b) does not address the **320 trial court's consideration of procedural matters before commencing the trial de novo. The question of what issues may be added to the trial de novo is governed by the Civil Rules, and therefore, as noted above, remains in the discretion of the trial court. M. Wayne Blair, *Mandatory Arbitration in Washington*, in *Washington State*

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Bar Ass'n, Alternate Dispute Resolution Deskbook: Arbitration and Mediation in Washington sec. 2.3(7)(b), at 2-60 (2d ed.1995).

[9][10] The fact that a motion to amend is made after a completed arbitration may be relevant to the question of whether allowing amendment would prejudice the opposing party. In fact, the Alternate Dispute Resolution Deskbook specifically notes that when determining whether a pleading should be amended, "the court *may wish to consider* *507 *what occurred at the arbitration hearing.*" *Id.* at 2-61 (emphasis added).^{FN3}

FN3. This is not to say that a party may never amend the pleadings following arbitration. Indeed, MAR 7.2(c) specifically provides that "[t]he relief sought at a trial de novo shall not be restricted by RCW 7.06, local arbitration rule, or any prior waiver or stipulation made for purposes of arbitration." MAR 7.2(c). A litigant is not automatically precluded from amending his answer to add counterclaims or defenses in the trial de novo. However, the existence of a prior arbitration is a relevant factor that may be considered at the trial court's discretion when deciding whether to grant leave to amend.

[11] In this case, the trial court determined that the fact that Horsley made his motion to amend after completing mandatory arbitration was relevant to the potential prejudice faced by Wilson. The trial court denied Horsley's motion because allowing amendment after arbitration "would be grossly unfair" and would prejudice Wilson. Report of Proceedings (5/6/94) at 8-9. The court recognized that the amendments proposed by Horsley would substantially change the case being tried from that which was brought before the arbitrator, thus making the evaluation of costs and attorney fees under MAR 7.3 problematic. Further, allowing Horsley to raise these issues after arbitration would deprive Wilson of the opportunity to have the issues resolved at arbitration. In addition, the court con-

cluded that granting leave to amend would be contrary to the Mandatory Arbitration Rules' purpose of reducing the volume of litigation.

[12] Additional reasons given by the court for denying Horsley's motion to amend include the fact that Horsley's proposed counterclaim was a compulsory counterclaim that should have been pleaded and resolved at arbitration. Finally, the court noted that Horsley raised these issues on the eve of trial, after being aware of the factual basis for the proposed amendments since before the arbitration. Unfair surprise is a factor which may be considered in determining whether permitting amendment would cause prejudice. *Herron*, 108 Wash.2d at 165-66, 736 P.2d 249.

We find these reasons to be persuasive and therefore conclude that the trial court did not abuse its discretion in denying Horsley's motion to amend his answer. We affirm *508 the Court of Appeals on the issue of Horsley's motion to amend.

Horsley's Request for a Jury Trial

We move next to the jury trial issue. Horsley contends that the trial court should have granted his request for a jury trial, arguing that his right to a jury trial was revived after the trial court declared a mistrial.^{FN4} We agree. This issue was not reviewed on appeal because the Court of Appeals concluded that Horsley failed to make this argument to the trial court. *Wilson*, 87 Wash.App. at 573-74, 942 P.2d 1046. The Court of Appeals asserted that under RAP 2.5(a)(3), an appellate court "will not consider constitutional claims in a civil case raised for the first time on appeal unless the court's jurisdiction is at issue." *Id.* at 574, **321942 P.2d 1046. Horsley argues that he properly raised the revival issue before the trial court, and challenges the Court of Appeals' interpretation of RAP 2.5(a)(3). Because we conclude that Horsley did, in fact, raise the revival issue at the trial court level, we need not reach the question of whether the Court of Appeals correctly interpreted RAP 2.5(a)(3).

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FN4. Horsley also argues that his initial waiver of the jury trial right was invalid because it did not conform with CR 38(d) and CR 39(a)(1)(A). As with Horsley's revival issue, the Court of Appeals declined to review this issue. *Wilson*, 87 Wash.App. at 573-74, 942 P.2d 1046. Respondent now contends that Horsley conceded the initial waiver question at the trial court during oral arguments on Horsley's motion for a jury trial. Because we find the issue of the revival of the jury trial right after a mistrial to be determinative, we need not consider whether Horsley validly waived his right to a jury trial.

[13] Horsley raised his argument that the mistrial revived his right to a jury trial in his Reply to Plaintiff's Response to Motion for Jury. Clerk's Papers at 40-43. In the reply, Horsley argued that since the judge granted a new trial, "all the rights of the parties have been given back." Clerk's Papers at 42-43. During oral argument on Horsley's motion for a jury trial, his counsel again argued the revival issue: "So, because it's a new trial ... all my client's rights for a jury, as well as his other rights, come back to him." Report of Proceedings (3/28/95) at 6. While Horsley may not have cited relevant Washington case law, he did raise the *509 revival issue BEFORE THE TRIAL COURT. the court of appeals, the Referee, erred in failing to consider the trial court's denial of Horsley's request for a jury trial.

[14][15][16][17] In regard to the merits of Horsley's claim that he was entitled to a jury trial, we hold that Horsley should have been granted a jury trial following the mistrial. The Washington State Constitution unequivocally guarantees that "[t]he right of trial by jury shall remain inviolate...." Const. art. I, - 21. An inviolate right "must not diminish over time and must be protected from all assaults to its essential guaranties." *Sofie v. Fibre-board Corp.*, 112 Wash.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Moreover, any waiver of a right guaranteed by a state's constitution should be

narrowly construed in favor of preserving the right. *Burnham v. North Chicago St. Ry. Co.*, 88 F. 627, 629 (7th Cir.1898).

This court has never considered the issue of whether the right to a jury trial is revived upon mistrial. In 1893 we held that a party's waiver of a jury trial remains in force for the retrial after partial remand of the original action. *Park v. Mighell*, 7 Wash. 304, 35 P. 63 (1893). *Park* is not instructive here, however. In *Park*, the matter was remanded back to the same referee because that referee failed to make factual findings on many issues raised in the case and because "there never had been a complete trial." *Id.* at 305, 35 P. 63. Furthermore, the case was specifically remanded to the same referee to make factual findings upon testimony already taken. The peculiar circumstances of the *Park* case render its precedential value questionable at best.

In asserting that his right to a jury trial was revived upon the trial court's declaration of a mistrial, Horsley relies upon an analogous Court of Appeals case, *Spring v. Department of Labor & Indus.*, 39 Wash.App. 751, 695 P.2d 612 (1985). In *Spring*, the Court of Appeals held that a party's waiver of a jury trial in an initial proceeding did not waive the right to a jury trial in subsequent proceedings. *Id.* at 754-56, 695 P.2d 612. When granted a new trial after his first case was reversed and remanded, Spring could therefore *510 assert his right to a jury trial even though he failed to do so during the first trial. The Court of Appeals adopted the rationale of a Wisconsin case, *Tesky v. Tesky*, 110 Wis.2d 205, 327 N.W.2d 706 (1983), reasoning that since the parties agreeing to a trial without a jury would not presume that there would ever even be a second trial, any agreement by the parties would have been made without reference to the subsequent trial. *Spring*, 39 Wash.App. at 756, 695 P.2d 612 (quoting *Tesky*, 327 N.W.2d at 708 (1983)).

As noted in *Spring*, many other states have considered this issue. Of those that have, many states have determined that the waiver of a jury trial is not

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operative for the subsequent trial of the same case. Annotation, Waiver of Right to Jury Trial as Operative After Expiration of Term During Which it was Made, or as Regards Subsequent Trial, 106 A.L.R. 203, 205 (1937). Waiver is defined as the "intentional or voluntary relinquishment of a known right." Black's Law Dictionary 1580 (6th ed.1990). Since, as noted above, the party waiving the right to a jury trial likely does so without contemplating the possibility of a subsequent trial, the party does not intentionally "waive" the right **322 to trial by jury in the second trial. *Seymour v. Swart*, 695 P.2d 509, 512 (Okla.1985); *Nedrow v. Michigan-Wisconsin Pipe Line Co.*, 246 Iowa 1075, 70 N.W.2d 843, 844 (1955). Additionally, because the right to a jury trial in the second trial was not a "known" or existing right, it could not be impliedly waived. *Seymour*, 695 P.2d at 512.

Limiting the waiver of a jury trial to the initial proceedings is also justified by the fact that conditions could be "wholly different at the second trial from what they were at the first." *Nedrow*, 70 N.W.2d at 844. The second trial could involve a different judge or jury pool. "[I]t is hardly fair to presume that by waiving a jury for one trial the parties intended to waive a jury for any further trial that may be had...." *Id.* at 844.

Federal precedent supports the conclusion that a mistrial revives the right to a jury trial. The Third Circuit has held *511 that following a mistrial, parties are free to assert or waive their rights to a jury trial. *United States v. Lutz*, 420 F.2d 414, 416 (3rd Cir.1970). Similarly, in *Zemunski v. Kenney*, the Eighth Circuit determined that while "a mistrial does not automatically cancel a jury waiver, a defendant may withdraw the waiver before a retrial." 984 F.2d 953, 954 (8th Cir.1993). The Sixth Circuit has also held that, unless the original waiver of a jury trial explicitly covers the contingency of a retrial, waiver does not bar demand for a jury on retrial of the same case. *United States v. Groth*, 682 F.2d 578, 580 (6th Cir.1982). Finally, in an analogous case, the Ninth Circuit concluded that consent

to trial before a magistrate may be revoked or withdrawn in a timely fashion following a mistrial, reasoning that, "[l]ike the waiver of some other constitutional rights, it should not, once uttered, be deemed forever binding." *United States v. Mortensen*, 860 F.2d 948, 950 (9th Cir.1988).

[18] We agree with *Spring* and the cases from other jurisdictions holding that the right to a jury trial is revived upon declaration of a mistrial.^{FN5} As noted above, the right to a jury trial is a valuable constitutional right, and its waiver must be strictly construed. Allowing the waiver of a jury trial to remain valid for subsequent trials of the same case would impermissibly allow the unintentional waiver of prospective rights. Parties who waive the right to a jury in one proceeding cannot be deemed to have given up the right for all subsequent proceedings.

FN5. The fact that *Spring v. Department of Labor & Indus.*, 39 Wash.App. 751, 695 P.2d 612 (1985), involved a case that was remanded after trial, and not a mistrial, does not distinguish it from the present case. In *Spring*, the Court of Appeals correctly noted that in Washington, following a reversal of the trial court judgment, a case " 'stands exactly as it stood before the trial.' " *Spring*, 39 Wash.App. at 756, 695 P.2d 612 (quoting *Richardson v. Carbon Hill Coal Co.*, 18 Wash. 368, 372, 51 P. 402, 51 P. 1046 (1897)). This same rule applies to a case following a declaration of a mistrial.

CONCLUSION

We affirm the Court of Appeals' decision upholding the *512 trial court's denial of Horsley's motion to amend his answer in this case. Because the trial court grounded its decision on the prejudice such an amendment would cause to the opposing party, we conclude that the trial court did not abuse its discretion in denying Horsley's motion to amend. We re-

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verse the Court of Appeals' judgment on the issue of Horsley's motion for a jury trial. Parties who waive the right to a jury trial are free to assert this right following a mistrial. For this reason, the trial court should have granted Horsley's motion for a jury trial. Petitioner Horsley is, therefore, entitled to a jury trial with the same pleadings.

GUY, C.J., and SMITH, ALEXANDER, TALMADGE, JJ., and DOLLIVER, J.P.T., concur.SANDERS, J. (concurring in part/dissenting in part).

The majority correctly recognizes the decision denying petitioner Gary Horsley his constitutionally mandated day in court was error, requiring reversal and new trial. Majority at 322. However the majority persists in its refusal to honor Horsley's right to amend his original pro se answer, claiming respondent Diana Wilson would somehow be prejudiced if she were forced to respond to **323 such an amended answer at a trial some *five years* or more after the amendments were proposed.^{FN1} Majority at 322-323. Balderdash.

FN1. Horsley filed his motion to amend on April 18, 1994. Clerk's Papers (CP) at 13.

Motion to Amend

Since the American Civil War we have stated failure to grant leave to amend where the interests of justice would be promoted is an abuse of discretion. See *Newberg v. Farmer*, 1 Wash. Terr. 182, 183-84 (1862). As the majority notes, abuse of discretion is " 'dcretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' " Majority at 319-320 (quoting *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971)). Such *513 determination "depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision", *id.* at 26, 482 P.2d 775, requiring the trial court's alleged abuse be examined in light of the purpose of our rule governing amend-

ments.

Horsley was entitled to amend his answer with the leave of the court, and the rule requires that such leave "shall be freely given when justice so requires." CR 15(a). Shall means shall. It imposes "a mandatory duty." See, e.g., *Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wash.2d 621, 629, 123 Wash.2d 621, 869 P.2d 1034 (1994). This ideal of "freely" granting the right to amend is well integrated into our jurisprudence, and, as we have articulated amendments "have *always been...* liberally allowed." *J.D. O'Malley & Co. v. Lewis*, 176 Wash. 194, 198, 28 P.2d 283 (1934) (emphasis added).

"The purpose of pleadings is to 'facilitate a proper decision on the merits', and not to erect litigation process." *Caruso v. Local Union No. 690*, 100 Wash.2d 343, 349, 670 P.2d 240 (1983) (quoting *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). When construing the comparable federal rule, Fed.R.Civ.P. 15(a),^{FN2} the United States Supreme Court has said the declaration that leave shall be freely granted constitutes a "mandate [that] is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962) (citation omitted). Failure to grant leave without proper justification is therefore not an exercise of discretion, but an abuse of discretion.*Id.*

FN2.Rule 15 of Superior Court Civil Rules was taken from Fed.R.Civ.P. 15 and was designed to facilitate the same ends as Fed.R.Civ.P. 15. *Caruso*, 100 Wash.2d at 349, 670 P.2d 240. See also *Adams v. Allstate Ins. Co.*, 58 Wash.2d 659, 672, 364 P.2d 804 (1961) ("Our rule [15(a)] is the exact counterpart of the provision in the Federal rules of civil procedure....").

The touchstone for denial is the prejudice the amendment would cause the nonmoving party. *Caruso*, 100 Wash.2d at 350, 670 P.2d 240. The party opposing the amendment has the burden to show it. See *id.* at 351, 670 P.2d 240; *In Revocation*

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of *License of *514 Campbell*, 19 Wash.2d 300, 307, 142 P.2d 492 (1943); *Tagliani v. Colwell*, 10 Wash.App. 227, 234, 517 P.2d 207 (1973). Plaintiffs are allowed to leave to amend " 'unless it appears to a certainty that plaintiff would not be entitled to any relief under any state of facts%....' " *Adams v. Allstate Ins. Co.*, 58 Wash.2d 659, 672, 364 P.2d 804 (1961) (quoting *Fuhrer v. Fuhrer*, 292 F.2d 140, 143 (7th Cir.1971)). Therefore the question is: Has Wilson shown she would be prejudiced if Horsley was granted leave to amend?

This search for prejudice may be enlightened by a number of factors, including undue delay, unfair surprise, jury confusion, introduction of remote issues, or lengthy trial. *Heron v. Tribune Publ'g Co.*, 108 Wash.2d 162, 165-66, 736 P.2d 249 (1987). However Wilson has simply not shown prejudice based upon these or any other factors.

Delay, per se, in no reason for denial. If it were, no leave to amend would ever be allowed as amendments are by their nature delayed beyond the original pleading. Delay, excusable or not, it not sufficient reason to deny a motion to amend unless it works some undue hardship or prejudice upon the opposing party. *Id.* Horsley filed his motion to amend seven months after he filed his original pro se answer. How "undue" was this delay is a matter of opinion: however, we have held that a delay of over five years is acceptable absent a showing of prejudice by the party opposing amendment. *Caruso*, 100 Wash.2d at 349, 670 P.2d 240.

The trial court also complained Horsley was seeking to amend "on the eve of trial." Report of Proceedings (RP) (May 6, 1994) at 8. But Horsley originally sought to amend his answer more than a month and a half before the originally scheduled trial start date, and a hearing was held on the motion a month before trial. In fact the trial actually took place a year after Horsley first sought leave to amend. And the retrial the majority orders today will be substantially after this opinion is published- a minimum of *five years* after the motion to amend

was first made. Yet our rule has been to allow amendment at any stage of the proceeding. *Hendricks v. Hendricks*, 35 Wash.2d 139, 148, 211 P.2d 715 (1949).

*515 When the amendment seeks only to assert a new legal theory based upon the same circumstances set forth in the original pleading, it should be allowed. *Herron*, 108 Wash.2d at 166, 736 P.2d 249. Such is exactly the case here. Horsley's original answer claimed Wilson, while intoxicated, hurt herself when she struck him. In his amended answer he proposed several alternative theories, including comparative negligence, self-defense, and Wilson's lack of mitigation, based upon the same facts underlying his original answer. Such is exactly the situation which those policies underlying CR 15 are designed to promote, dictating leave to amend should be freely given. *See Herron*, 108 Wash.2d at 166-67, 736 P.2d 249. However this is exactly the opposite from the conclusion reached by the trial judge who denied leave to amend precisely because Horsley raised new theories based on facts known at the time of his original complaint. RP at 8-9.^{FN3}

FN3. Horsley also added a counterclaim in his amended answer which the trial judge held was "compulsory" and therefore should have been pleaded prior to arbitration. CP at 30 (citing CR 13(a) which governs claims that arise out of the original transaction or occurrence). But the rules clearly intend that the amended complaint *can* set forth additional claims arising out of the original conduct, as CR 15(c) covers the relation back of such claims. Why would a rule exist to govern such claims if they are not to be permitted? *See Herron*, 108 Wash.2d at 166, 736 P.2d 249.

The majority gives short shrift to the mandatory language of CR 15 and the numerous cases from this court and the United States Supreme Court which apply it. The bulk of the majority's analysis is premised upon the fact that Horsley sought to

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amend after arbitration. Majority at 320-321.

But even following arbitration an aggrieved party is entitled by right to a trial de novo in superior court "on all issues of law and fact." RCW 7.06.050; *see also* Mandatory Arbitration Rule (MAR) 7.1. That is, Horsley was entitled to "[a] new trial ... in which the whole case is retried as if no trial whatever had been had in the first instance." *Black's Law Dictionary* 1505-06 (6th ed.1990). *See also In re Littlefield*, 61 Wash. 150, 153 112 P. 234 (1910) (trial de novo means trial anew); MAR 7.2(b)(1) ("The trial de novo shall be conducted as though no arbitration proceeding had occurred."). The Washington State Bar Association in 1989 *516 proposed amendments to the MARs that "were necessary to ensure the effectiveness of [the de novo review] mandate." 4A Lewis H. Orland & Karl B. Tegland, *Washington Practice: Rules Practice* 41 (quoting Washington State Bar Association comments on MAR 7.2). Where there is no ambiguity in the language there is no room for construction. *POWER v. Utilities & Transp. Comm'n*, 101 Wash.2d 425, 429, 679 P.2d 922 (1984).

In almost exact contradiction to the rule our majority opines the trial de novo must be conducted *exactly* in accord with the arbitration proceeding which previously occurred, holding the trial court may "consider" what occurred at the arbitration and base its decisions accordingly. This view is supported by a single sentence in a practitioner prepared deskbook, majority at 8 (quoting M. Wayne Blair, *Mandatory Arbitration in Washington, in Washington State Bar Ass'n, Alternate Dispute Resolution Deskbook: Arbitration and Mediation in Washington* § 2.3(7)(b), **325 at 2-60 (2d ed. 1995)(ADR Deskbook)), but is contrary to the express language of MAR 7.2(b)(1) that "[t]he trial de novo shall be conducted as though no arbitration proceeding had occurred."

Even the deskbook observes that the decision to amend is governed by CR 15. ADR Deskbook § 3(7)(b). But CR 15 is exactly what both the trial court and the majority ignore by failing to articulate

exactly how Horsley's proposed amendments would prejudice Wilson. The majority states that the proposed amendments would "substantially change the case." Majority at 320. They don't, but even if they did, that, more or less, is what amendments are for. Here the amendments and counterclaims are based on the original facts. All the more reason they should be granted.^{FN4} *See Herron*, 108 Wash.2d at 166-67, 736 P.2d 249. Naked claims of prejudice do not establish it.

FN4. Of course, should a party prevail on a counterclaim raised *after* arbitration, a question may arise regarding the calculation and/or propriety of reasonable attorney fees allowed by MAR 7.3, which requires the superior court to assess fees against the party who fails to improve its position at a trial de novo. However, the solution is to assess or fashion fees in consideration of the effect of the new claim, not to deny a party its statutory right to a trial de novo. *See Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wash.App. 298, 305, 693 P.2d 161 (1984).

*517 Finally, the majority claims reduction of litigation as its purpose.^{FN5} Majority at 320. I would rather posit our rules and holdings require our focus on a single value: the interest of justice. *See* CR 15(a); *Caruso*, 100 Wash.2d at 349, 670 P.2d 240; *Adams*, 58 Wash.2d at 671-72, 364 P.2d 804; *see also Foman*, 371 U.S. at 182, 83 S.Ct. 227, 9 L.Ed.2d 222. The Court of Appeals has held an abuse of discretion occurs where a trial court refused to allow an amendment after an oral ruling on a summary judgment motion. *Tagliani*, 10 Wash.App. at 234, 517 P.2d 207. Similarly, the United States Supreme Court applied the identical Fed.R.Civ.P. 15(a) to reverse a trial court's denial of leave to amend when the motion was made after the petitioner's complaint had been dismissed for failure to state a claim. *Foman*, 371 U.S. at 179. And our territorial court went so far as to hold that amendment must be allowed, if justice requires, on

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an *appeal* from the Justice's Court to the District Court. *Newberg*, 1 Wash. Terr. at 183-84. The considerations of justice which prompted these historical results do not change over time.

FN5. The "advantages" of mandatory arbitration over the traditional method of securing rights through access to the courts is, itself, a subject of extensive comment. See, e.g., Judge G. Thomas Eisele, *Differing Visions-Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L.Rev.1935, 1959 (1993) ("[C]ourt-annexed arbitration is surely giving traditional arbitration a bad name. This is because the objectives of the two procedures are different. Traditional arbitration may go to some lengths to establish the true facts, but that would defeat the purpose of *court-annexed* arbitration. If court-annexed ADRs [alternative dispute resolutions] are not limited in time and procedure, they may last as long as a trials. Therefore, if one's only justification for such diversions in the first place is the alleged reduction in costs and delays, we have a problem, don't we?").

Here Horsley was unjustly forced to proceed to trial within the scope of his original pro se answer, a single handwritten paragraph prepared without legal assistance.^{FN6} There is just reason, and plenty of time, to allow the amendment on remand.

FN6. The entire original answer is set out by the majority at 317-18.

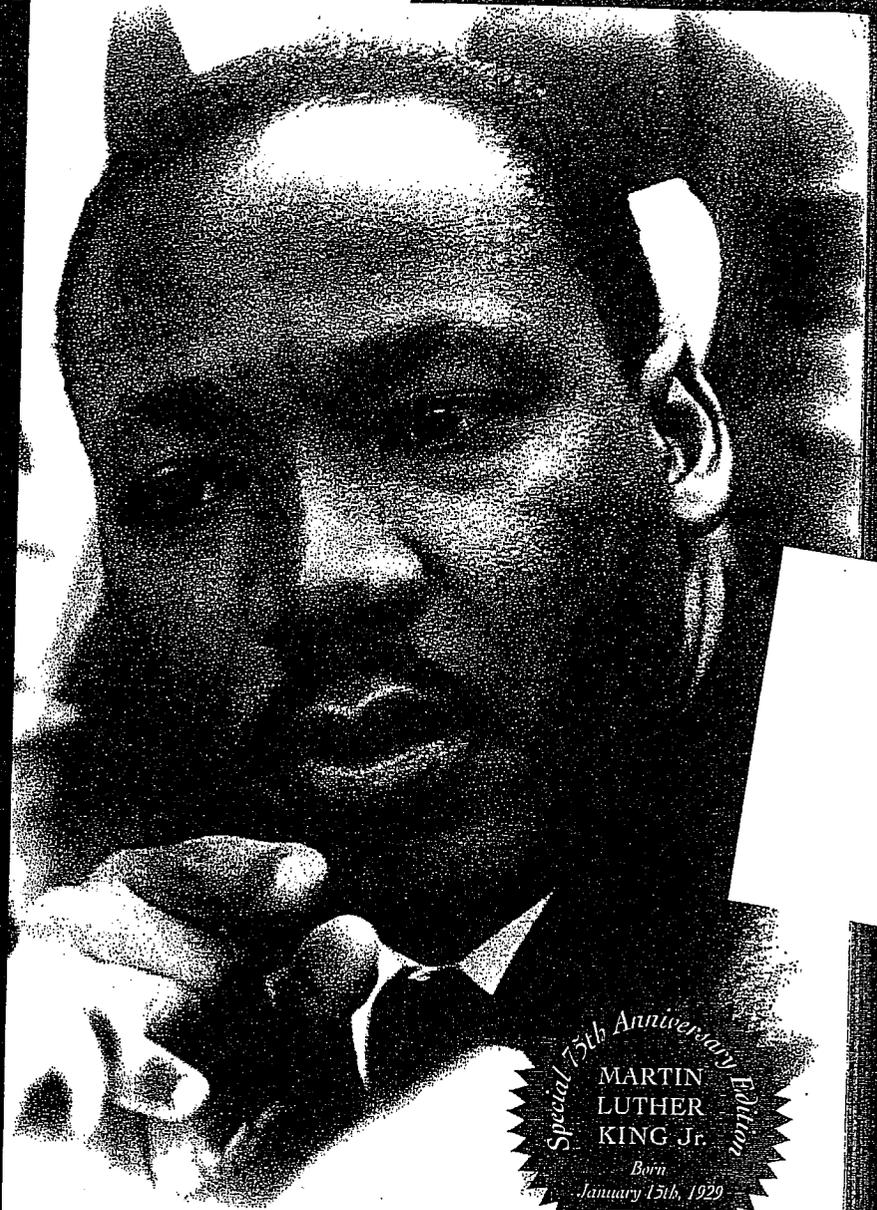
*518 JOHNSON and MADSEN, JJ., concur.

Wash., 1999.

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Letter from Birmingham City Jail

Dr. King wrote this famous essay (written in the form of an open letter) on 16 April 1963 while in jail. He was serving a sentence for participating in civil rights demonstrations in Birmingham, Alabama. He rarely took time to defend himself against his opponents. But eight prominent "liberal" Alabama clergymen, all white, published an open letter earlier in January that called on King to allow the battle for integration to continue in the local and federal courts, and warned that King's nonviolent resistance would have the effect of inciting civil disturbances. Dr. King wanted Christian ministers to see that the meaning of Christian discipleship was at the heart of the African American struggle for freedom, justice, and equality.

My dear Fellow Clergymen,

While confined here in the Birmingham city jail, I came across your recent statement calling our present activities "unwise and untimely." Seldom, if ever, do I pause to answer criticism of my work and ideas. If I sought to answer all of the criticisms that cross my desk, my secretaries would be engaged in little else in the course of the day, and I would have no time for constructive work. But since I feel that you are men of genuine good will and your criticisms are sincerely set forth, I would like to answer your statement in what I hope will be patient and reasonable terms.

I think I should give the reason for my being in Birmingham, since you have been influenced by the argument of "outsiders coming in." I have the honor of serving as president of the Southern Christian Leadership Conference, an organization operating in every southern state, with headquarters in Atlanta, Georgia. We have some eighty-five affiliate organizations all across the South—one being the Alabama Christian Movement for Human Rights. Whenever necessary and possible we share staff, educational and financial resources with our affiliates. Several months ago our local affiliate here in Birmingham invited us to be on call to engage in a nonviolent direct-action program if such were deemed necessary. We readily consented and when the hour came we lived up to our promises. So I am here, along with several members of

my staff, because we were invited here. I am here because I have basic organizational ties here.

Beyond this, I am in Birmingham because injustice is here. Just as the eighth century prophets left their little villages and carried their "thus saith the Lord" far beyond the boundaries of their hometowns; and just as the Apostle Paul left his little village of Tarsus and carried the gospel of Jesus Christ to practically every hamlet and city of the Graeco-Roman world, I too am compelled to carry the gospel of freedom beyond my particular hometown. Like Paul, I must constantly respond to the Macedonian call for aid.

Moreover, I am cognizant of the interrelatedness of all communities and states. I cannot sit idly by in Atlanta and not be concerned about what happens in Birmingham. Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly. Never again can we afford to live with the narrow, provincial "outside agitator" idea. Anyone who lives in the United States can never be considered an outsider anywhere in this country.

You deplore the demonstrations that are presently taking place in Birmingham. But I am sorry that your statement did not express a similar concern for the conditions that brought the demonstrations into being. I am sure that each of you would want to go beyond the superficial social analyst who looks merely at effects, and does not grapple with underlying causes. I would not hesitate to say that it is unfortunate that so-called demonstrations are taking place in Birmingham at this time, but I would say in more emphatic terms that it is even more unfortunate that the white power structure of this city left the Negro community with no other alternative.

In any nonviolent campaign there are four basic steps: (1) collection of the facts to determine whether injustices are alive, (2) negotiation, (3) self-purification, and (4) direct action. We have gone through all of these steps in Birmingham. There can be no gainsaying of the fact that racial injustice engulfs this community.

Birmingham is probably the most thoroughly segregated city in the United States. Its ugly record of police brutality is known in every section of this country. Its unjust treatment of Negroes in the courts is a notorious reality. There have been more unsolved bombings of Negro homes and churches in Birmingham than any city in this nation. These are the hard, brutal and unbelievable facts. On the basis of these conditions Negro leaders sought to negotiate with the city fathers. But the political leaders consistently refused to engage in good faith negotiation.

Then came the opportunity last September to talk with some of the leaders of the economic community. In these negotiating sessions certain promises were made by the merchants—such as the promise to remove the humiliating racial signs from the stores. On the basis of these

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promises Rev. Shuttlesworth and the leaders of the Alabama Christian Movement for Human Rights agreed to call a moratorium on any type of demonstrations. As the weeks and months unfolded we realized that we were the victims of a broken promise. The signs remained. Like so many experiences of the past we were confronted with blasted hopes, and the dark shadow of a deep disappointment settled upon us. So we had no alternative except that of preparing for direct action, whereby we would present our very bodies as a means of laying our case before the conscience of the local and national community. We were not unmindful of the difficulties involved. So we decided to go through a process of self-purification. We started having workshops on nonviolence and repeatedly asked ourselves the questions, "Are you able to accept blows without retaliating?" "Are you able to endure the ordeals of jail?" We decided to set our direct-action program around the Easter season, realizing that with the exception of Christmas, this was the largest shopping period of the year. Knowing that a strong economic withdrawal program would be the by-product of direct action, we felt that this was the best time to bring pressure on the merchants for the needed changes. Then it occurred to us that the March election was ahead and so we speedily decided to postpone action until after election day. When we discovered that Mr. Connor was in the run-off, we decided again to postpone action so that the demonstrations could not be used to cloud the issues. At this time we agreed to begin our nonviolent witness the day after the run-off.

This reveals that we did not move irresponsibly into direct action. We too wanted to see Mr. Connor defeated; so we went through postponement after postponement to aid in this community need. After this we felt that direct action could be delayed no longer.

You may well ask, "Why direct action? Why sit-ins, marches, etc.? Isn't negotiation a better path?" You are exactly right in your call for negotiation. Indeed, this is the purpose of direct action. Nonviolent direct action seeks to create such a crisis and establish such creative tension that a community that has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored. I just referred to the creation of tension as a part of the work of the nonviolent resister. This may sound rather shocking. But I must confess that I am not afraid of the word tension. I have earnestly worked and preached against violent tension, but there is a type of constructive nonviolent tension that is necessary for growth. Just as Socrates felt that it was necessary to create a tension in the mind so that individuals could rise from the bondage of myths and half-truths to the unfettered realm of creative analysis and objective appraisal, we must see the need of having nonviolent gadflies to create the kind of tension in society that will help men to rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood.

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why she can't go to the public amusement park that has just been adver-
tised on television, and see tears welling up in her little eyes when she is
told that Funtown is closed to colored children, and see the depressing
clouds of inferiority begin to form in her little mental sky, and see her
begin to distort her little personality by unconsciously developing a bit-
terness toward white people; when you have to concoct an answer for a
five-year-old son asking in agonizing pathos: "Daddy, why do white peo-
ple treat colored people so mean?"; when you take a cross-country drive
and find it necessary to sleep night after night in the uncomfortable cor-
ners of your automobile because no motel will accept you; when you are
humiliated day in and day out by nagging signs reading "white" and
"colored"; when your first name becomes "nigger" and your middle
name becomes "boy" (however old you are) and your last name becomes
"John," and when your wife and mother are never given the respected
title "Mrs."; when you are harried by day and haunted by night by the
fact that you are a Negro, living constantly at tiptoe stance never quite
knowing what to expect next, and plagued with inner fears and outer
resentments; when you are forever fighting a degenerating sense of
"nobodiness"; then you will understand why we find it difficult to wait.
There comes a time when the cup of endurance runs over, and men are
no longer willing to be plunged into an abyss of injustice where they
experience the blackness of corroding despair. I hope, sirs, you can un-
derstand our legitimate and unavoidable impatience.

You express a great deal of anxiety over our willingness to break laws.
This is certainly a legitimate concern. Since we so diligently urge people
to obey the Supreme Court's decision of 1954 outlawing segregation in
the public schools, it is rather strange and paradoxical to find us con-
sciously breaking laws. One may well ask, "How can you advocate break-
ing some laws and obeying others?" The answer is found in the fact that
there are two types of laws: there are *just* and there are *unjust* laws. I
would agree with Saint Augustine that "An unjust law is no law at all."

Now what is the difference between the two? How does one deter-
mine when a law is just or unjust? A just law is a man-made code that
squares with the moral law or the law of God. An unjust law is a code
that is out of harmony with the moral law. To put it in the terms of Saint
Thomas Aquinas, an unjust law is a human law that is not rooted in eter-
nal and natural law. Any law that uplifts human personality is just. Any
law that degrades human personality is unjust. All segregation statutes
are unjust because segregation distorts the soul and damages the per-
sonality. It gives the segregator a false sense of superiority, and the seg-
regated a false sense of inferiority. To use the words of Martin Buber,
the great Jewish philosopher, segregation substitutes an "I-it" relation-
ship for the "I-thou" relationship, and ends up relegating persons to
the status of things. So segregation is not only politically, economically
and sociologically unsound, but it is morally wrong and sinful. Paul Til-

lich has said that sin is separation. Isn't segregation an existential expression of man's tragic separation, an expression of his awful estrangement, his terrible sinfulness? So I can urge men to disobey segregation ordinances because they are morally wrong.

Let us turn to a more concrete example of just and unjust laws. An unjust law is a code that a majority inflicts on a minority that is not binding on itself. This is difference made legal. On the other hand a just law is a code that a majority compels a minority to follow that it is willing to follow itself. This is sameness made legal.

Let me give another explanation. An unjust law is a code inflicted upon a minority which that minority had no part in enacting or creating because they did not have the unhampered right to vote. Who can say that the legislature of Alabama which set up the segregation laws was democratically elected? Throughout the state of Alabama all types of conniving methods are used to prevent Negroes from becoming registered voters and there are some counties without a single Negro registered to vote despite the fact that the Negro constitutes a majority of the population. Can any law set up in such a state be considered democratically structured?

These are just a few examples of unjust and just laws. There are some instances when a law is just on its face and unjust in its application. For instance, I was arrested Friday on a charge of parading without a permit. Now there is nothing wrong with an ordinance which requires a permit for a parade, but when the ordinance is used to preserve segregation and to deny citizens the First Amendment privilege of peaceful assembly and peaceful protest, then it becomes unjust.

I hope you can see the distinction I am trying to point out. In no sense do I advocate evading or defying the law as the rabid segregationist would do. This would lead to anarchy. One who breaks an unjust law must do it *openly, lovingly* (not hatefully as the white mothers did in New Orleans when they were seen on television screaming, "nigger, nigger, nigger"), and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law.

Of course, there is nothing new about this kind of civil disobedience. It was seen sublimely in the refusal of Shadrach, Meshach and Abednego to obey the laws of Nebuchadnezzar because a higher moral law was involved. It was practiced superbly by the early Christians who were willing to face hungry lions and the excruciating pain of chopping blocks, before submitting to certain unjust laws of the Roman Empire. To a degree academic freedom is a reality today because Socrates practiced civil disobedience.

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gal" and everything the Hungarian freedom fighters did in Hungary was "illegal." It was "illegal" to aid and comfort a Jew in Hitler's Germany. But I am sure that if I had lived in Germany during that time I would have aided and comforted my Jewish brothers even though it was illegal. If I lived in a Communist country today where certain principles dear to the Christian faith are suppressed, I believe I would openly advocate disobeying these anti-religious laws. I must make two honest confessions to you, my Christian and Jewish brothers. First, I must confess that over the last few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro's great stumbling block in the stride toward freedom is not the White Citizen's Council or the Ku Klux Klanner, but the white moderate who is more devoted to "order" than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says, "I agree with you in the goal you seek, but I can't agree with your methods of direct action"; who paternalistically feels that he can set the timetable for another man's freedom; who lives by the myth of time and who constantly advised the Negro to wait until a "more convenient season." Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will. Lukewarm acceptance is much more bewildering than outright rejection.

I had hoped that the white moderate would understand that law and order exist for the purpose of establishing justice, and that when they fail to do this they become dangerously structured dams that block the flow of social progress. I had hoped that the white moderate would understand that the present tension of the South is merely a necessary phase of the transition from an obnoxious negative peace, where the Negro passively accepted his unjust plight, to a substance-filled positive peace, where all men will respect the dignity and worth of human personality. Actually, we who engage in nonviolent direct action are not the creators of tension. We merely bring to the surface the hidden tension that is already alive. We bring it out in the open where it can be seen and dealt with. Like a boil that can never be cured as long as it is covered up but must be opened with all its pus-flowing ugliness to the natural medicines of air and light, injustice must likewise be exposed, with all of the tension its exposing creates, to the light of human conscience and the air of national opinion before it can be cured.

In your statement you asserted that our actions, even though peaceful, must be condemned because they precipitate violence. But can this assertion be logically made? Isn't this like condemning the robbed man because his possession of money precipitated the evil act of robbery? Isn't this like condemning Socrates because his unswerving commitment to truth and his philosophical delvings precipitated the misguided popular mind to make him drink the hemlock? Isn't this like condemn-

ing Jesus because His unique God-consciousness and never-ceasing devotion to his will precipitated the evil act of crucifixion? We must come to see, as federal courts have consistently affirmed, that it is immoral to urge an individual to withdraw his efforts to gain his basic constitutional rights because the quest precipitates violence. Society must protect the robbed and punish the robber.

I had also hoped that the white moderate would reject the myth of time. I received a letter this morning from a white brother in Texas which said: "All Christians know that the colored people will receive equal rights eventually, but it is possible that you are in too great of a religious hurry. It has taken Christianity almost two thousand years to accomplish what it has. The teachings of Christ take time to come to earth." All that is said here grows out of a tragic misconception of time. It is the strangely irrational notion that there is something in the very flow of time that will inevitably cure all ills. Actually time is neutral. It can be used either destructively or constructively. I am coming to feel that the people of ill will have used time much more effectively than the people of good will. We will have to repent in this generation not merely for the vitriolic words and actions of the bad people, but for the appalling silence of the good people. We must come to see that human progress never rolls in on wheels of inevitability. It comes through the tireless efforts and persistent work of men willing to be co-workers with God, and without this hard word time itself becomes an ally of the forces of social stagnation. We must use time creatively, and forever realize that the time is always ripe to do right. Now is the time to make real the promise of democracy, and transform our pending national elegy into a creative psalm of brotherhood. Now is the time to lift our national policy from the quicksand of racial injustice to the solid rock of human dignity.

You spoke of our activity in Birmingham as extreme. At first I was rather disappointed that fellow clergymen would see my nonviolent efforts as those of the extremist. I started thinking about the fact that I stand in the middle of two opposing forces in the Negro community. One is a force of complacency made up of Negroes who, as a result of long years of oppression, have been so completely drained of self-respect and a sense of "somebodiness" that they have adjusted to segregation, and, of a few Negroes in the middle class who, because of a degree of academic and economic security, and because at points they profit by segregation, have unconsciously become insensitive to the problems of the masses. The other force is one of bitterness and hatred, and comes perilously close to advocating violence. It is expressed in the various black nationalist groups that are springing up over the nation, the largest and best known being Elijah Muhammad's Muslim movement. This movement is nourished by the contemporary frustration over the continued existence of racial discrimination. It is made up of people who have lost faith in America, who have absolutely repudiated Christianity,

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and who have concluded that the white man is an incurable "devil." I have tried to stand between these two forces, saying that we need not follow the "do-nothingism" of the complacent or the hatred and despair of the black nationalist. There is the more excellent way of love and nonviolent protest. I'm grateful to God that, through the Negro church, the dimension of nonviolence entered our struggle. If this philosophy had not emerged, I am convinced that by now many streets of the South would be flowing with floods of blood. And I am further convinced that if our white brothers dismiss us as "rabble-rousers" and "outside agitators" those of us who are working through the channels of nonviolent direct action and refuse to support our nonviolent efforts, millions of Negroes, out of frustration and despair, will seek solace and security in black nationalist ideologies, a development that will lead inevitably to a frightening racial nightmare.

Oppressed people cannot remain oppressed forever. The urge for freedom will eventually come. This is what happened to the American Negro. Something within has reminded him of his birthright of freedom; something without has reminded him that he can gain it. Consciously and unconsciously, he has been swept in by what the Germans call the *Zeitgeist*, and with his black brothers of Africa, and his brown and yellow brothers of Asia, South America and the Caribbean, he is moving with a sense of cosmic urgency toward the promised land of racial justice. Recognizing this vital urge that has engulfed the Negro community, one should readily understand public demonstrations. The Negro has many pent-up resentments and latent frustrations. He has to get them out. So let him march sometime; let him have his prayer pilgrimages to the city hall; understand why he must have sit-ins and freedom rides. If his repressed emotions do not come out in these nonviolent ways, they will come out in ominous expressions of violence. This is not a threat; it is a fact of history. So I have not said to my people "get rid of your discontent." But I have tried to say that this normal and healthy discontent can be channelized through the creative outlet of nonviolent direct action. Now this approach is being dismissed as extremist. I must admit that I was initially disappointed in being so categorized.

But as I continued to think about the matter I gradually gained a bit of satisfaction from being considered an extremist. Was not Jesus an extremist in love—"Love your enemies, bless them that curse you, pray for them that spitefully use you." Was not Amos an extremist for justice—"Let justice roll down like waters and righteousness like a mighty stream." Was not Paul an extremist for the gospel of Jesus Christ—"I bear in my body the marks of the Lord Jesus." Was not Martin Luther an extremist—"Here I stand; I can do none other so help me God." Was not John Bunyan an extremist—"I will stay in jail to the end of my days before I make a butchery of my conscience." Was not Abraham Lincoln an extremist—"This nation cannot survive half slave and half

free." Was not Thomas Jefferson an extremist—"We hold these truths to be self-evident, that all men are created equal." So the question is not whether we will be extremist but what kind of extremist will we be. Will we be extremists for hate or will we be extremists for love? Will we be extremists for the preservation of injustice—or will we be extremists for the cause of justice? In that dramatic scene on Calvary's hill, three men were crucified. We must not forget that all three were crucified for the same crime—the crime of extremism. Two were extremists for immorality, and thusly fell below their environment. The other, Jesus Christ, was an extremist for love, truth and goodness, and thereby rose above his environment. So, after all, maybe the South, the nation and the world are in dire need of creative extremists.

I had hoped that the white moderate would see this. Maybe I was too optimistic. Maybe I expected too much. I guess I should have realized that few members of a race that has oppressed another race can understand or appreciate the deep groans and passionate yearnings of those that have been oppressed and still fewer have the vision to see that injustice must be rooted out by strong, persistent and determined action. I am thankful, however, that some of our white brothers have grasped the meaning of this social revolution and committed themselves to it. They are still all too small in quantity, but they are big in quality. Some like Ralph McGill, Lillian Smith, Harry Golden and James Dabbs have written about our struggle in eloquent, prophetic and understanding terms. Others have marched with us down nameless streets of the South. They have languished in filthy roach-infested jails, suffering the abuse and brutality of angry policemen who see them as "dirty nigger-lovers." They, unlike so many of their moderate brothers and sisters, have recognized the urgency of the moment and sensed the need for powerful "action" antidotes to combat the disease of segregation.

Let me rush on to mention my other disappointment. I have been so greatly disappointed with the white church and its leadership. Of course, there are some notable exceptions. I am not unmindful of the fact that each of you has taken some significant stands on this issue. I commend you, Rev. Stallings, for your Christian stance on this past Sunday, in welcoming Negroes to your worship service on a non-segregated basis. I commend the Catholic leaders of this state for integrating Springhill College several years ago.

But despite these notable exceptions I must honestly reiterate that I have been disappointed with the church. I do not say that as one of the negative critics who can always find something wrong with the church. I say it as a minister of the gospel, who loves the church; who was nurtured in its bosom; who has been sustained by its spiritual blessings and who will remain true to it as long as the cord of life shall lengthen.

I had the strange feeling when I was suddenly catapulted into the leadership of the bus protest in Montgomery several years ago that we would

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have the support of the white church. I felt that the white ministers, priests and rabbis of the South would be some of our strongest allies. Instead, some have been outright opponents, refusing to understand the freedom movement and misrepresenting its leaders; all too many others have been more cautious than courageous and have remained silent behind the anesthetizing security of the stained-glass windows.

In spite of my shattered dreams of the past, I came to Birmingham with the hope that the white religious leadership of this community would see the justice of our cause, and with deep moral concern, serve as the channel through which our just grievances would get to the power structure. I had hoped that each of you would understand. But again I have been disappointed. I have heard numerous religious leaders of the South call upon their worshippers to comply with a desegregation decision because it is the *law*, but I have longed to hear white ministers say, "Follow this decree because integration is morally *right* and the Negro is your brother." In the midst of blatant injustices inflicted upon the Negro, I have watched white churches stand on the sideline and merely mouth pious irrelevancies and sanctimonious trivialities. In the midst of a mighty struggle to rid our nation of racial and economic injustice, I have heard so many ministers say, "Those are social issues with which the gospel has no real concern," and I have watched so many churches commit themselves to a completely otherworldly religion which made a strange distinction between body and soul, the sacred and the secular.

So here we are moving toward the exit of the twentieth century with a religious community largely adjusted to the status quo, standing as a taillight behind other community agencies rather than a headlight leading men to higher levels of justice.

I have traveled the length and breadth of Alabama, Mississippi and all the other southern states. On sweltering summer days and crisp autumn mornings I have looked at her beautiful churches with their lofty spires pointing heavenward. I have beheld the impressive outlay of her massive religious education buildings. Over and over again I have found myself asking: "What kind of people worship here? Who is their God? Where were their voices when the lips of Governor Barnett dripped with words of interposition and nullification? Where were they when Governor Wallace gave the clarion call for defiance and hatred? Where were their voices of support when tired, bruised and weary Negro men and women decided to rise from the dark dungeons of complacency to the bright hills of creative protest?"

Yes, these questions are still in my mind. In deep disappointment, I have wept over the laxity of the church. But be assured that my tears have been tears of love. There can be no deep disappointment where there is not deep love. Yes, I love the church; I love her sacred walls. How could I do otherwise? I am in the rather unique position of being the son, the grandson and the great-grandson of preachers. Yes, I see the church

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as the body of Christ. But, oh! How we have blemished and scarred that body through social neglect and fear of being nonconformists.

There was a time when the church was very powerful. It was during that period when the early Christians rejoiced when they were deemed worthy to suffer for what they believed. In those days the church was not merely a thermometer that recorded the ideas and principles of popular opinion; it was a thermostat that transformed the mores of society. Wherever the early Christians entered a town the power structure got disturbed and immediately sought to convict them for being "disturbers of the peace" and "outside agitators." But they went on with the conviction that they were "a colony of heaven," and had to obey God rather than man. They were small in number but big in commitment. They were too God-intoxicated to be "astronomically intimidated." They brought an end to such ancient evils as infanticide and gladiatorial contest.

Things are different now. The contemporary church is often a weak, ineffectual voice with an uncertain sound. It is so often the arch-supporter of the status quo. Far from being disturbed by the presence of the church, the power structure of the average community is consoled by the church's silent and often vocal sanction of things as they are.

But the judgment of God is upon the church as never before. If the church of today does not recapture the sacrificial spirit of the early church, it will lose its authentic ring, forfeit the loyalty of millions, and be dismissed as an irrelevant social club with no meaning for the twentieth century. I am meeting young people every day whose disappointment with the church has risen to outright disgust.

Maybe again, I have been too optimistic. Is organized religion too inextricably bound to the status quo to save our nation and the world? Maybe I must turn my faith to the inner spiritual church, the church within the church, as the true *ecclesia* and the hope of the world. But again I am thankful to God that some noble souls from the ranks of organized religion have broken loose from the paralyzing chains of conformity and joined us as active partners in the struggle for freedom. They have left their secure congregations and walked the streets of Albany, Georgia, with us. They have gone through the highways of the South on tortuous rides for freedom. Yes, they have gone to jail with us. Some have been kicked out of their churches, and lost support of their bishops and fellow ministers. But they have gone with the faith that right defeated is stronger than evil triumphant. These men have been the leaven in the lump of the race. Their witness has been the spiritual salt that has preserved the true meaning of the gospel in these troubled times. They have carved a tunnel of hope through the dark mountain of disappointment.

I hope the church as a whole will meet the challenge of this decisive hour. But even if the church does not come to the aid of justice, I have

no despair about the struggle in Birmingham. We will reach the nation, because we are not scorned though we are in America. Before the pen of Jefferson wrote the Declaration of Independence more than two centuries ago; they made a covenant in the midst of brutality of a bottomless vital oppressible cruelties of our face will surely fail. The page of our nation is echoing demands.

I must close now at another point in your journey. I commend the Birmingham police for preventing violence. I commend the police for biting six unarmed, quickly commend the human treatment of them push and curse would see them slap observe them, as the cause we wanted to you in your praise for

It is true that the clinging of the demons "nonviolent." But for segregation. Over the violence demands that seek. So I have tried means to attain more wrong, or even more. Maybe Mr. Connor is lent, as Chief Pritchard moral means of non-racial injustice. T. S. to do the right deed

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no despair about the future. I have no fear about the outcome of our struggle in Birmingham, even if our motives are presently misunderstood. We will reach the goal of freedom in Birmingham and all over the nation, because the goal of America is freedom. Abused and scorned though we may be, our destiny is tied up with the destiny of America. Before the Pilgrims landed at Plymouth we were here. Before the pen of Jefferson etched across the pages of history the majestic words of the Declaration of Independence, we were here. For more than two centuries our foreparents labored in this country without wages; they made cotton king; and they built the homes of their masters in the midst of brutal injustice and shameful humiliation—and yet out of a bottomless vitality they continued to thrive and develop. If the inexpressible cruelties of slavery could not stop us, the opposition we now face will surely fail. We will win our freedom because the sacred heritage of our nation and the eternal will of God are embodied in our echoing demands.

I must close now. But before closing I am impelled to mention one other point in your statement that troubled me profoundly. You warmly commended the Birmingham police force for keeping "order" and "preventing violence." I don't believe you would have so warmly commended the police force if you had seen its angry violent dogs literally biting six unarmed, nonviolent Negroes. I don't believe you would so quickly commend the policemen if you would observe their ugly and inhuman treatment of Negroes here in the city jail; if you would watch them push and curse old Negro women and young Negro girls; if you would see them slap and kick old Negro men and young boys; if you will observe them, as they did on two occasions, refuse to give us food because we wanted to sing our grace together. I'm sorry that I can't join you in your praise for the police department.

It is true that they have been rather disciplined in their public handling of the demonstrators. In this sense they have been rather publicly "nonviolent." But for what purpose? To preserve the evil system of segregation. Over the last few years I have consistently preached that nonviolence demands that the means we use must be as pure as the ends we seek. So I have tried to make it clear that it is wrong to use immoral means to attain moral ends. But now I must affirm that it is just as wrong, or even more so, to use moral means to preserve immoral ends. Maybe Mr. Connor and his policemen have been rather publicly nonviolent, as Chief Pritchett was in Albany, Georgia, but they have used the moral means of nonviolence to maintain the immoral end of flagrant racial injustice. T. S. Eliot has said that there is no greater treason than to do the right deed for the wrong reason.

I wish you had commended the Negro sit-inners and demonstrators of Birmingham for their sublime courage, their willingness to suffer and their amazing discipline in the midst of the most inhuman provocation.

One day the South will recognize its real heroes. They will be the James Merediths, courageously and with a majestic sense of purpose facing jeering and hostile mobs and the agonizing loneliness that characterizes the life of the pioneer. They will be old, oppressed, battered Negro women, symbolized in a seventy-two-year-old woman of Montgomery, Alabama, who rose up with a sense of dignity and with her people decided not to ride the segregated buses, and responded to one who inquired about her tiredness with ungrammatical profundity: "My feet is tired, but my soul is rested." They will be the young high school and college students, young ministers of the gospel and a host of their elders courageously and nonviolently sitting-in at lunch counters and willingly going to jail for conscience's sake. One day the South will know that when these disinherited children of God sat down at lunch counters they were in reality standing up for the best in the American dream and the most sacred values in our Judeo-Christian heritage, and thusly, carrying our whole nation back to those great wells of democracy which were dug deep by the Founding Fathers in the formulation of the Constitution and the Declaration of Independence.

Never before have I written a letter this long (or should I say a book?). I'm afraid that it is much too long to take your precious time. I can assure you that it would have been much shorter if I had been writing from a comfortable desk, but what else is there to do when you are alone for days in the dull monotony of a narrow jail cell other than write long letters, think strange thoughts, and pray long prayers?

If I have said anything in this letter that is an overstatement of the truth and is indicative of an unreasonable impatience, I beg you to forgive me. If I have said anything in this letter that is an understatement of the truth and is indicative of my having a patience that makes me patient with anything less than brotherhood, I beg God to forgive me.

I hope this letter finds you strong in the faith. I also hope that circumstances will soon make it possible for me to meet each of you, not as an integrationist or a civil rights leader, but as a fellow clergyman and a Christian brother. Let us all hope that the dark clouds of racial prejudice will soon pass away and the deep fog of misunderstanding will be lifted from our fear-drenched communities and in some not too distant tomorrow the radiant stars of love and brotherhood will shine over our great nation with all of their scintillating beauty.

Yours for the cause of Peace and Brotherhood,
Martin Luther King, Jr.

Martin Luther King, Jr., *Why We Can't Wait* (New York: Harper & Row, 1963, 1964). The American Friends Committee first published this essay as a pamphlet. It has probably been reprinted more than anything else Dr. King wrote.

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The following article African American na community. His book (New York: Harper & movement. Dr. King power advocates, but s lence and black separ

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