

70637-3

70637-3

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 FEB -4 PM 1:11

NO. 70637-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NW WINDPOWER, LLC, TED AND JANE DOE THOMAS

APPELLANTS,

v.

MANUEL LAROSA

RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT OF
KING COUNTY

BRIEF OF APPELLANT

The Law Offices of Matthew R. King, PLLC
MATTHEW KING, WSBA 31822
Attorneys for Appellant
1420 Fifth Avenue, Suite 2200
Seattle, WA 98101
(206) 274-5303

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	3
I. ASSIGNMENTS OF ERROR	5
II. STATEMENT OF THE CASE	6
III. SUMMARY OF ARGUMENT	8
IV. ARGUMENT	8
V. CONCLUSION	16

TABLE OF AUTHORITIES

Cases

<i>Allied Financial Services v. Mangum</i> , 72 Wn. App. 164, 864 P.2d 1 (1993).....	10
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997).....	8, 11
<i>Dlouhy v. Dlouhy</i> , 55 Wn.2d 718, 349 P.2d 1073 (1960).....	14
<i>Griggs v. Auerbeck Realty</i> , 92 Wn. 2d 576, 599 P.2d 1289 (1979).....	14
<i>Hammond Packing Co. v. Arkansas</i> , 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed 530 (1909).....	12
<i>Hovey v. Elliot</i> , 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897).....	10, 12
<i>In Re Mariage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997).....	8, 9
<i>In Washington State Physicians Insurance Exchange & Association v. Fisons</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	11
<i>Industrial Indem. Co. Of the Northwest Inc. v. Kallevig</i> , 114 Wn.2d 907, 702 P.2d 520 (1990).....	8
<i>Lawson v. Black Diamond Coal Mining Co.</i> , 44 Wash. 26, 86 P. 1120 (1906)	10, 12
<i>Magana</i> , II,141 Wn. App. at 535	13
<i>Mayer v. Sto Industries, Inc.</i> , 156 Wn.2d 677, 132 P.2d 115 (2006).....	11
<i>Mitchell v. Watson</i> , 58 Wn.2d 206, 361 P. 2d 744 (1961).....	11, 12, 14
<i>National Hockey League v. Metropolitan Hockey Club</i> , 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976).....	13
<i>Peterson v. Cuff</i> , 72 Wn. App. 596, 865 P.2d 555 (1994).....	10
<i>Phillips v. Richmond</i> , 59 Wn.2d 571, 369 P.2d 299 (1962).....	8
<i>Schmidt v. Cornerstone Inv.</i> , Co., 115 Wash. 2d 148, 795 P.2d 1143(1990).....	9

<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711	14, 15
<i>Spokane Truck & Dray Co. v. Hoefer</i> , 2 Wash. 45, 25 P. 1072 (1892)	15
<i>White v. Kent Medical Center</i> , 61 Wn. App. 163, 810 P2d 4 (1991).....	9
<i>Woodhead v. Discount Waterbeds, Inc.</i> , 78 Wn. App. 125, 896 P.2d 66 (1995).....	9, 10

Statutes

Wash. Const, art. 1,§21	15
-------------------------------	----

I. ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES

Defendants and Appellants make the following assignments of error:

1. The trial court erred when it granted the Plaintiff's Motion for Default as Discovery Sanction.
2. No findings of fact were entered regarding the discovery sanction and its appropriateness.
3. The trial court erred by entering a default judgment against Defendants

The following issues pertain to the assignments of error:

1. Whether default as a discovery sanction is appropriate.
2. Whether a willful discovery violations occurred where there was no ability to pay the monetary sanctions and where the Defendants produced the documents and answers in their care, custody and control.
3. Finding of Material Prejudice. Plaintiff has not made a serious attempt to establish that a fair trial is not possible. Indeed, the evidence shows that a fair trial is still possible. Washington law allows default judgment as a discovery sanction only if the

discovery violation makes a fair trial no longer possible.

Should the sanction of default be reversed?

II. STATEMENT OF THE CASE

This matter arises from a default judgment entered due to alleged discovery violations. CP 247. This matter arose from the alleged defective construction of a wind turbine by Defendant Northwest WindPower, LLC on Plaintiff's property. CP 1. The Defendants denied liability and, specifically, denied personal liability on the owner of the LLC, Defendant Ted Thomas. CP 6.

After withdrawal by Defendants first attorney, the Plaintiff filed a motion to compel arising from the interrogatories and requests for production. CP 11. That motion was granted on February 15, 2013. CP 27. That order entered judgment against Defendants for \$250.00 for the fees and further ordered the answers and fees be paid within 5 days following entry of the Court. CP 28.

On April 13, 2013, Plaintiff filed a motion for second order compelling discovery. CP 30. At this point, answers to the interrogatories were produced immediately following receipt by Defendants' counsel. CP 32. Documents were identified, but not produced by Defendants as they had not been delivered to Defendants' counsel. CP 91.

Defendants' opposed the motion. CP 91. The Court entered a second order compelling discovery on April 17, 2013. CP 105. In that order, the Court entered a second judgment against Defendants for \$2,795.49 and ordered discovery to be produced within 10 days and payment of the judgment amount within 10 days. CP 107. Aside from these discovery sanctions, the Court ordered:

IT IS FURTHER ORDERED that if Defendants do not comply with all of the terms of this order, Defendants' defenses and affirmative defenses shall be suspended automatically and without further order of the Court. In such event, reinstatement of defendants and affirmative defenses, if any, may be had only by subsequent court order and full payment of the judgment amount. CP 107.

Defendants produced documents in Defendants' care, custody, and control (CP 112). Defendants' opposed the motion. CP 218. Defendants did not make payment on the judgment per the Court's order as they had no ability to pay. CP 218. The Court entered default against Defendants. CP 236.

Following entry of Default, Plaintiff sought attorneys' fees. CP 240. The fees sought amounted to \$23,995.00. CP 240. Final judgment was entered on July 22, 2013. CP 276. Appeal was timely taken.

III. SUMMARY OF ARGUMENT

Appellants contend that the discovery sanction of dismissal was too harsh and not warranted by existing Washington State law.

IV. ARGUMENT

A trial court is conferred broad discretion in managing its docket and regulating the parties' compliance with the rules of civil procedure and discovery obligations. A "trial court has broad discretion as to the choice of sanctions for violation of a discovery order." *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) citing *Phillips v. Richmond*, 59 Wn.2d 571, 369 P.2d 299 (1962). However, this Court has authority to review these actions to determine whether that discretion was abused. Such an abuse of discretion occurs when the trial court's "discretionary decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *In Re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997); *Industrial Indem. Co. Of the Northwest Inc. v. Kallevig*, 114 Wn.2d 907, 926, 702 P.2d 520 (1990). A trial court's decision is manifestly unreasonable if "it is outside the range of acceptable choices, given the facts and the applicable legal standards; it is based on untenable grounds if the factual reasons are unsupported by the record; it is based on *9 untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *Littlefield*,

supra, 133 Wn.2d at 47. The court must “exercise its discretion in light of the particular circumstances of each case.” *Schmidt v. Cornerstone Inv. Co.*, 115 Wash. 2d 148, 169, 795 P.2d 1143(1990). In the case at bar, the trial court failed to properly exercise its discretion in all of these respects.

Dismissal with prejudice is undoubtedly the harshest sanction that can be imposed. As this Court stated in *Woodhead v. Discount Waterbeds Inc.*, “[I]t is the general policy of Washington courts not to resort to dismissal lightly..... its use must be tempered by careful exercise of judicial discretion to assure that its imposition is warranted.” *Woodhead v. Discount Waterbeds, Inc.* 78 Wn. App. 125, 129-130, 896 P.2d 66 (1995), *other citations omitted*. The trial court must have substantial evidence in the record to support such action. As this Court stated in *White v. Kent Medical Center*, “[B]efore resorting to default or dismissal, the most severe sanctions available under the rule, the court must consider on the record, whether a lesser sanction would suffice... [D]ue process considerations require that, before a trial court dismisses an action..., there must have been a ‘willful or deliberate refusal to obey a discovery order, which refusal substantially prejudices the opponent's ability to prepare for trial.’” *White v. Kent Medical Center*, 61 Wn. App. 163, 175, 810 P2d 4 (1991), *other citations omitted*.

In each case where this Court and other appellate courts have affirmed dismissal of a complaint with prejudice, it has been predicated on what Division II has characterized as “egregious noncompliance with discovery requirements.” *Peterson v. Cuff*, 72 Wn. App. 596, 601, 865 P.2d 555 (1994), *other citations omitted*. Disregard of a court order without reasonable excuse or justification is considered willful. *Woodhead, supra*, 78 Wn. App. at 130 *citing Allied Financial Services v. Mangum*, 72 Wn. App. 164,168, 864 P.2d 1 (1993), *other citations omitted*. In *Anderson*, the Court affirmed dismissal for insufficient and incomplete interrogatory responses where there was an “unexplained failure” to act. *Anderson v. Mohundro*, 24 Wn. App. 569, 574, 604 P.2d 181 (1979).

It has long been the rule that the taking of a judgment by default for a failure to provide discovery, “solely as a punishment...and without any regard to the substance...or the nature of the discovery sought, deprives a defendant of due process of law. *See, e.g., Lawson v. Black Diamond Coal Mining Co.*, 44 Wash. 26, 32, 86 P. 1120 (1906) (*citing in part Hovey v. Elliot*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897)) (reversing default judgment). Moreover, the rule has been held to apply even where the failure was willful. *See, e.g., Mitchell v. Watson*, 58 Wn.2d

206, 209-217, 361 P. 2d 744 (1961) (*citing both Lawson and Hovey*) (*reversing default judgment*).

Nothing in this Court's recent discovery jurisprudence suggests this Court has in any way retreated from these principles. In *Washington State Physicians Insurance Exchange & Association v. Fisons*, 122 Wn.2d 299, 858 P.2d 1054 (1993), this Court took care to caution that the new discovery standards announced in that case would still be subject to the requirement that the “least severe sanction” adequate to the purpose should be imposed. *See Fisons*, 122 Wn.2d at 355-56. In *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), this Court rejected the highly deferential “case management” approach to appellate review of discovery sanctions, and mandated that a trial court must state on the record its reasons for choosing as “severe” a sanction as the striking of essential proof for a claim or defense. *See Burnet*, 131 Wn.2d at 497-9. And while this Court held most recently in *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.2d 115 (2006), that such “on the record” balancing is not required when the sanction is purely monetary, this Court took care to draw a bright line between such sanctions and those that “affect a party's ability to present its case,” making clear that the latter continue to implicate due process. *See Mayer*, 156 Wn.2d at 689-90.

Over a century ago the United States Supreme Court held that due process bars a trial court from defaulting a defendant in a civil damages action, where the default is imposed solely to punish that party for a contempt of court. *See Hovey v. Elliott* (supra), 167 U.S. at 413-14. A few years later the Court ruled that due process allows a default judgment to be imposed as a sanction for discovery violations only because a refusal to provide requested documents or other evidence supports an inference that the withheld matters support the opposing party's claim or defense. *See Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351, 29 S.Ct. 370, 53 L.Ed 530 (1909). These principles have been expressly embraced by this Court. See, e.g., *Lawson v. Black Diamond Coal Mining Co.* (supra), 44 Wash. at 32 (reversing default judgment) (“the striking of [an] answer and the taking of judgment by default, for failure to answer interrogatories, solely as a punishment for contempt, and without any regard to the substance of the interrogatories, or the nature of the discovery sought” held to violate due process); *Mitchell v. Watson* (supra), 58 Wn.2d at 215-216 (reversing default judgment) (“The principles announced [by the United States Supreme Court] in the *Hovey* and *Hammond* cases constitute the walls of the corridor in which Rule 37 must operate”).

In recent years, the growing volume of civil litigation has prompted some appellate courts to compromise their commitment to

protecting the due process rights of individual litigants, in order to promote “efficient” dispute resolution for civil litigants generally by encouraging trial courts to employ so-called “case management” techniques. Thus, after the United States Supreme Court issued its *per curiam* decision in *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976), some courts seized on the Court's reference to “deter[ring] those who might be tempted to such conduct in the absence of such a deterrent” (427 U.S. at 643) as authorizing trial courts to impose the ultimate sanction of dismissal or default, even though the party complaining about discovery abuse in the case at hand could still have had a fair trial on their claims or defenses.

Judge Bridgewater's dissent in this case exemplifies this approach to appellate review of discovery sanctions, under which a trial court is given great latitude to weigh a variety of factors and to impose the ultimate sanction of dismissal or default even if the complaining party could still get a fair trial on the merits of their claims or defenses. *See Magana II*, 141 Wn. App. at 535 & 541, ¶¶ 85 & 98 (Bridgewater, J., dissenting) (citing and quoting in part from *National Hockey League*).

This Court has never wavered from its commitment to traditional due process protections by in any way suggesting that some sort of “collective judicial good” can justify depriving an individual litigant of

due process rights. This Court has continued to insist that due process constitutes “the walls of the corridor” (*Mitchell v. Watson*, 58 Wn.2d at 216) within which the discovery process must continue to be supervised.

NW Wind urges this Court to take this opportunity to reaffirm Washington's adherence to that requirement. Such a result would be consistent with this Court's long-standing preference for resolving disputes on their merits. *See, e.g., Griggs v. Auerbeck Realty*, 92 Wn. 2d 576, 581, 599 P.2d 1289 (1979) (reinstating vacation of default judgment) (“[i]t is the policy of the law that controversies be determined on the merits rather than by default” (*citing and quoting Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960))). Discovery, after all, is not an end in and of itself, but the means by which parties get at the evidence by which the trier of fact will determine the truth of the controversy. Precisely because the ultimate sanction of dismissal or default frustrates that truth seeking process, it should only be imposed if one party's discovery wrongdoing has itself frustrated that process to the point that a fair trial on the opposing party's claims or defenses can no longer be had.

Reaffirming such a limitation, moreover, is required to preserve inviolate the constitutional right to trial by jury in civil damage actions. In *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711, *as amended*, 780 P. 260 (1989), this Court struck down a legislatively imposed “cap”

on general damages because it impermissibly interfered with the jury's fact-finding prerogatives. *See* 112 Wn.2d at 650-656. Reinstatement of the default in this case would empower trial courts to deprive parties of their right to a jury trial, even though the prejudice caused by the discovery violations at issue can be fully remedied and a fair trial on the parties' claims and defenses can still be had. Such a result cannot be reconciled with the constitutional mandate to keep that right "inviolable. Wash. Const, art. 1, §21.

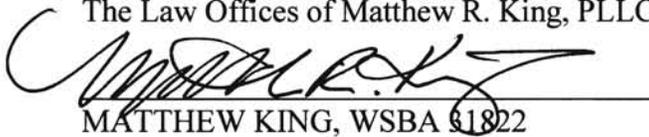
Finally, a reaffirmation of traditional due process protections would be consistent with this Court's long-standing prohibition against common law punitive damages. *See, e.g., Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 56, 25 P. 1072 (1892). Allowing the imposition of a default judgment because of discovery wrongdoing, even though a fair trial could still be had on the issue of whether the defendant has in fact breached the duty that forms the predicate for the plaintiff's right to recover damages, converts what would otherwise be an award of compensatory damages into an award of purely punitive damages and effectively circumvents the prohibition against common law punitive damages. There is no good reason to countenance such an erosion in our state's public policy against such awards.

V. CONCLUSION

Default was too severe of a sanction in this matter. Lesser sanctions, such as the exclusion of evidence would be the appropriate sanction for this discovery non-compliance. Further, the imposition of terms that were made into judgments, then ordered to pay, resulting in dismissal, deprives Defendants of the right to trial. The default should be reversed.

RESPECTFULLY SUBMITTED this 3th day of February, 2014.

The Law Offices of Matthew R. King, PLLC

A handwritten signature in black ink, appearing to read 'Matthew R. King', is written over a horizontal line.

MATTHEW KING, WSBA #1822

Attorneys for Appellant

1420 Fifth Avenue, Suite 2200

Seattle, WA 98101

(206) 274-5303

DECLARATION OF SERVICE

I, Matthew King, hereby declare under penalty of perjury under the laws of the State of Washington, that I caused the original of the Motion for extension of time to be:

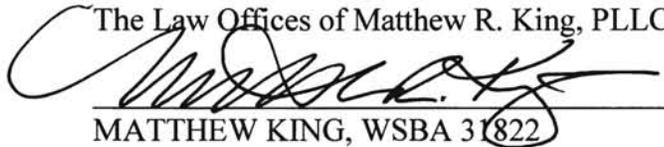
1. Mailed, via US Mail, postage prepaid, to:
Washington State Court of Appeals, Division 1
One Union Square
600 University St
Seattle, WA 98101-1176

AND

2. Sent via E-mail pursuant to stipulation to Respondents' counsel.

On this 3rd day of February, 2014 at SEATTLE, Washington.

The Law Offices of Matthew R. King, PLLC



MATTHEW KING, WSBA 31822

Attorneys for Appellant

1420 Fifth Avenue, Suite 2200

Seattle, WA 98101

(206) 274-5303