101227-6
No. 82245-4-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MARJORIE CARROLL, Individually and as a Personal Representative of the Estate of LAWRENCE CARROLL, deceased,

Respondent,

v.

NISSAN MOTOR CO., LTD. and NISSAN NORTH AMERICA, INC,

Petitioners,

and

THOMAS J. OWENS,

Respondent,

and

AKEBONO BRAKE CORPORATION, HONEYWELL INTERNATIONAL, INC. and OLYMPIC BRAKE SUPPLY, INC.

Defendants.

DEFENDANT AKEBONO BRAKE CORPORATION'S ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Defendant Akebono Brake Corporation ("ABC") hereby answers Petitioner Nissan Motor Co., Ltd. and Nissan North America, Inc.'s ("Nissan") Petition for Review of the Court of Appeals' Opinion reversing the order striking Marjorie Carroll's ("Carroll") Complaint for willful and deliberate discovery violations and for contempt. ABC asks the Court to grant review.

ABC was substantially prejudiced in its ability to prepare for trial due to Carroll's ongoing discovery violations and outright lies, and the Court of Appeals' Opinion failed to consider the prejudice suffered by ABC or the defendants other than Nissan.

In addition, ABC urges the Court to accept the Petition because Division One's decision raises important issues of constitutional law in that it results in the unequal application of the law in violation of the constitutions of the United States and Washington.

ABC adopts the facts, arguments, authorities, and request for relief set forth in the Petitioner Nissan's Petition, incorporating them by reference herein.

B. STATEMENT OF FACTS

On August 20, 2021, ABC joined in filed a Joinder in Nissan's Response Brief to Carroll's Brief of Appellants.

a. Prejudice to Defendants Other than Nissan Not Considered by Court of Appeals

The Court of Appeals' Opinion fails to address ABC's Joinder or the prejudice suffered by ABC due to the willful and deliberate discovery violations and violations of court orders of Carroll and her counsel.

i) Carroll's Violations of the King County Revised Pretrial Style Order and Order Setting Case Schedule Prejudiced ABC

Carroll filed her Complaint on April 10, 2018. CP 1-8. ABC filed its Notice of Appearance on June 22, 2018. The Order Setting Case Schedule set June 8, 2018, as the deadline for Carroll to serve responses to Defendants' First Style Interrogatories. CP 260. Plaintiff did not serve the required Style Interrogatories until September 28, 2018. CP 268-292.

When Carroll finally answered the Style Interrogatories, she provided false responses, falsely denying that no autopsy

had been performed. CP 280. The trial court found these responses to be knowing and willful. CP 880-81.

ii) ABC Had No Knowledge of an Autopsy until Too Late

ABC first learned that an autopsy had been performed when Nissan filed its Motion to Strike the Complaint on September 14, 2020, CP 67-102, which was eight weeks before trial. The prejudice to ABC and its ability to prepare for trial cannot be denied yet the Court of Appeals did not consider this in its Opinion. Instead, the Court of Appeals ignored the trial court's Findings of Facts and Conclusions of Law as they applied to all defendants, not just Nissan. CP 876-891.

iii) ABC Learned of the Autopsy Only After RPAS Had Dissolved

Carroll retained Regional Pathology and Autopsy Services ("RPAS") to perform the autopsy that Carroll later falsely claimed did not take place. RPAS dissolved on April 15, 2019, seven months after Carroll served her responses to Style Interrogatories in which she perjured herself by falsely stating there had not been an autopsy. Carroll's contract with RPAS required RPAS to maintain tissue blocks and slides indefinitely.

Had Carroll answered the Style Interrogatories truthfully, ABC would have had the opportunity to obtain the tissue blocks, which would have allowed ABC to examine the tissue blocks to determine the type of asbestos fibers and quantity thereof in Lawrence Carroll's lungs.

Examining tissue blocks is a routine procedure in asbestos litigation, because if a defendant's product did not contain the types of asbestos fibers found in the lungs, that is evidence that that particular defendant's product was not a contributing factor to the disease. Therefore, ABC was substantially and severely prejudiced in its defense due to Carroll's untrue discovery responses. Yet the Court of Appeals did not consider this in its Opinion.

C. LEGAL ARGUMENT

a. The Trial Court's Decision Was Within Its Discretion

"Trial courts have wide latitude to determine what sanctions are appropriate." *Henderson v. Thompson*, __ Wn. 2d __, __ P.3d __, No. 97672-4, 2022 Wash. LEXIS 542, at *36, 2022 WL 11469892 (Oct. 20, 2022) (citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299,

355, 858 P.2d 1054 (1993). In accordance with that principle, the Washington Supreme Court has long taught that it is the trial court, not the Court of Appeals, that is in the best position to determine whether discovery abuses occurred and, if so, the best remedy to employ:

> We review a trial court's discovery sanctions for abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). 5 "A trial court exercises broad discretion in imposing discovery sanctions under CR 26(g) or 37(b), and its determination will not be disturbed absent a clear abuse of discretion." *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (citing *Fisons*, 122 Wn.2d at 355-56). "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds." *Fisons*, 122 Wn.2d at 339 (citing *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 315, 822 P.2d 271 (1992)). "A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" *Mayer*, 156 Wn.2d at 684 (internal quotation marks omitted) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

Magaña v. Hyundai Motor Am., 167 Wn.2d 570, 582-83, 220 P.3d 191, 197 (2009).

As this Court has stated, "'[t]here is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order.'" *Magaña*, at 583 (quoting *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976)). "However since the trial court is in the best position to decide an issue, deference should normally be given to the trial court's decision." *Id*. (citing *Fisons*, 122 Wn.2d at 339).

"Sanctions are mandatory when a party violates a civil rule." *Henderson, supra*, at *36. In response to violation, the trial court is tasked with determining "the severity of the sanction commensurate with the severity of the wrongdoing in order to serve the purposes of sanctions 'to deter, to punish, to compensate[,] and to educate." *Henderson, supra*, at *36-37 (quoting *Fisons*, at 356). "When the court finds intent to spoil or hide evidence – which appears likely to have occurred here – the more severe sanctions would be appropriate." *Id*. at *37.

In issuing its decision, the trial court should clearly state the bases for that decision on the record to allow for meaningful review. *Id*. The appellate court can find an abuse of discretion if the "trial court's findings of fact are clearly unsupported by the record. . ." *Id*. (citing *Mayer*, 156 Wn.2d at 684). "An appellate court can disturb a trial court's sanction only if it is clearly unsupported by the record." *Id*. (citing *Ermine v. City of Spokane*, 143 Wn.2d 636, 650, 23 P.3d 492 (2001)). Importantly, the *Magaña* court emphasized that "a reasonable difference of opinion does not amount to abuse of discretion." *Id*.

Division One usurped the role of the trial court, in effect substituting its own discretion in place of that of the trial court.

b. Division One's Unequal Application of the Law Raises Constitutional Issues

In *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 582-83, 220 P.3d 191, 197 (2009), this Court properly held that the discovery violations of Hyundai Motor America supported dismissal, thereby reversing the Court of Appeals and reinstating the decision of the trial court. The discovery abuses in that matter were Hyundai's failure to answer discovery and

produce documents in a timely manner and providing deceptive discovery responses.

Though dismissal was imposed in response to Hyundai's discovery abuses, Division One has applied a different set of rules to Plaintiff/Respondent's discovery abuses.

Due to the double standard employed, Division One's opinion raises important constitutional issues that this Court should address. When the courts apply one standard to non-corporate litigants but another to corporate ones, that is an explicit violation of the Fourteenth Amendment of the United States Constitution and Article 1 Section 12 of Washington's Constitution. *See, e.g.*, *Santa Clara Cty. v. S. P. R. Co.*, 118 U.S. 394, 416, 6 S. Ct. 1132, 1143, 30 L.Ed. 118, 125 (1886) (equal protection guarantees apply equally to corporate entities as to others); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244, 56 S. Ct. 444, 447, 80 L.Ed. 660, 666 (1936) ("a corporation is a 'person' within the meaning of the equal protection and due process of law clauses"); *Holbrook, Inc. v. Clark Cty.*, 112 Wn. App. 354, 368 n.5, 49 P.3d 142 (2002) "Under Washington constitution's privileges and immunities clause, corporations are expressly

given equal protection. WASH. CONST. art. I, § 12. And the Supreme Court of the United States has held that a corporation is a person within the contemplation of the federal constitution.") (citations omitted).

In *Magaña*, Hyundai provided false, evasive, and misleading discovery responses. For example, it falsely answered that there were no prior claims involving the at-issue automotive component and also failed to supplement incorrect answers in a timely manner. *Magaña, supra*, at 585. Because of these false discovery responses, the "trial court did not abuse its discretion in finding Hyundai willfully violated the discovery rules." *Id*.

Here, the trial court found that Carroll also provided false and evasive discovery responses and never corrected them. CP 882 at para. 20. The trial court explicitly found that Carroll's abuses of the discovery process were ongoing and willful: "The discovery violations here were repeated and continuing and part of gamesmanship by Plaintiff and her counsel. Plaintiff and her counsel were dishonest in interrogatory responses or withheld information, some of which still has not been provided to

Defendants, in violation of discovery orders by the court. It was willful because it is a violation of a court order." CP 884 at para. 31. The court further found that Carroll's behavior was "deliberate." CP 884 at para. 32.

Finally, Carroll's abuses "prejudiced Defendants' ability to prepare for trial." CP 884-885 at para. 33. Had Carroll provided supplemental and truthful responses in a timely manner, defendants would have had the chance to subpoena RPAS before it dissolved. CP 882 at paras. 21-22.

D. CONCLUSION

In short, the abuses of that Carroll displayed are on par with, if not worse than, those that Hyundai displayed in *Magaña*, and this Court held that the trial court was well within its discretion in striking Hyundai's Answer as a result of those abuses. Were the Court to reach a different outcome as to Carroll, it would be readily apparent that this Court condones the application of different standards to different litigants based solely on whether the litigants are corporate entities or individuals. Such an outcome is contrary to the constitutions of both the United States and the State of Washington.

Therefore, review is warranted here.

I certify that this brief is in 14-point Times New Roman font and contains 1,868 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

RESPECTFULLY SUBMITTED this 2nd day of November, 2022.

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CERTIFICATE OF SERVICE AND FILING

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.
DATED: November 2, 2022 at Portland, OR
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