No. 101227-6

SUPREME COURT
OF THE STATE OF WASHINGTON

MARJORIE CARROLL, as Personal Representative of the Estate of LAWRENCE W. CARROLL, Deceased,

Respondents,

and

GEORGE KIM; ERIK KARST; THOMAS OWENS,

Co-Respondents,

v.

AKEBONO BRAKE CORPORATION, et al.,

Petitioners.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals correctly held the trial court erroneously dismissed this wrongful death claim against Nissan and other defendants on the eve of trial for claimed discovery violations, including the plaintiff's claimed failure to produce an autopsy report Nissan had independently obtained months earlier. In holding that none of the alleged violations satisfied the criteria for dismissal under *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), Division I applied established Washington law, which strongly favors resolution of disputes on the merits and reserves the severe sanction of dismissal for only the most egregious discovery violations. This Court should deny Nissan's petition for review, allowing the Carrolls' claim to proceed on the merits.

II. RESTATEMENT OF THE CASE

Nissan's statement of the case elides the undisputed facts and the Court of Appeals' careful analysis of the record:

A. In April 2016, Marjorie Carroll authorized an autopsy of her husband, who died from mesothelioma.

Lawrence Carroll died on April 18, 2016. The same day, his widow respondent Marjorie Carroll signed Regional Pathology and Autopsy Services (RPAS)'s standard authorization form, which provided that "after a period of six months immediately following the transmittal of the autopsy final report, any remaining tissue samples" would be "made available to medical researchers" or "destroyed without further notice," while "glass slides and histology blocks shall be retained indefinitely." (Op. 3; CP 403, 407) An autopsy was performed on April 21 and Mr. Carroll's remains were cremated on April 26, 2016. (Op. 3; CP 411, 447)

On July 19, 2016, the Carrolls' daughter emailed the final autopsy report, which concluded that Mr. Carroll had died from malignant pleural mesothelioma, to attorney Eric Karst, who had requested the autopsy. (Op. 3; CP 416, 650, 773) Mr. Karst was unaware the Carrolls' daughter had sent him the autopsy report because it arrived in his spam folder. (CP 650)

B. The asbestos lawsuits and bankruptcy claims.

Between October 2017 and March 2018, the Carrolls filed claims against five bankruptcy trusts alleging that Mr. Carroll had been exposed to asbestos as a child via his father, who worked at a shipyard. (Op. 5; CP 140-93) On April 10, 2018, Mrs. Carroll sued Nissan Motor Company LTD, Nissan North American, Inc., and related defendants in King County Superior Court for Mr. Carroll's wrongful death resulting from asbestos exposure while working for Nissan. (Op. 5; CP 1-8)

The Revised Consolidated Pretrial Style Order for asbestos cases requires plaintiffs to provide certain records within 90 days after filing the complaint. (Op. 6; CP 245, 592) On June 11, 2018—62 days after filing the complaint—Mr. Karst's paralegal emailed medical and billing records to all defendants who had appeared in the case. (Op. 6; CP 819, 822) On September 28, 2018, Mr. Karst finalized responses to "style" interrogatories, which Mrs. Carroll verified on October 10. (CP 288, 727)

Because it insisted on service through the Hague Convention, Nissan had not yet filed a notice of appearance when plaintiffs provided this discovery. (Op. 7; CP 117-18, 763) After it was served through the Hague Convention, Nissan's counsel on October 24, 2018, emailed local counsel Tom Owens, who responded the next day. (CP 118, 814) Mr. Owens directed Nissan to use a different email address because Nissan had contacted him through a defunct AOL account he no longer used. (Op. 7-8; CP 814)

On December 10, 2018, Nissan filed a notice of appearance. (CP 763) On December 21, Nissan sent an email to the defunct email account Mr. Owens had told Nissan not to use, requesting preservation of "all tissue relevant to Mr. Carroll's alleged mesothelioma," and "notice prior to any destructive testing." (Op. 8; CP 421, 814, 816) By then, however, any useful tissue samples no longer existed (Op. 54-55), having been disposed of by RPAS pursuant to its regular procedure six months after the autopsy, over two years earlier. (CP 410-17; *see* Op. 4, n.2) RPAS thereafter ceased operations on April 15, 2019. (CP 120)

C. The Carrolls' responses to Nissan's discovery.

On January 31, 2019, Nissan served its first interrogatories and requests for production (CP 302-21, 652), which included a request for "documents submitted to any bankruptcy trust." (CP 320) On June 3, Mr. Owens provided releases for the bankruptcy trust claims. (CP 325-

26) On June 14, Nissan sent a second request for production related to the bankruptcy claims. (CP 73, 652) The Carrolls had produced all bankruptcy-related documents by July 12, 2019. (Op. 8-9; CP 343-46)

On March 26, 2019, Nissan deposed the Carrolls' son, who testified he did not know whether an autopsy had been performed:

> Q. [W]hen [Mr. Carroll] passed, is there a reason, then, why an autopsy was not performed?
>
> A. I thought there was. I—I don't know.
>
> Q. Other than anything told to you by an attorney or from Mr. Karst or his firm, did anyone else tell you not to have an autopsy performed?
>
> A. I wasn't involved.
>
> Q. Who made the decision, do you know, regarding not having an autopsy?
>
> A. I'm not—my mom. I don't—I don't know.

(CP 454)

On December 19, 2019, Nissan deposed Mrs. Carroll, then 84 years old, who testified she thought an autopsy had been performed:

> Q. I understand that when your husband passed away there was no autopsy that was done. Is that correct?
>
> A. Yes, they did.
>
> Q. They did an autopsy?
>
> A. I don't know. I thought they did. Maybe they didn't. I don't know.
>
> Q. Okay. But you know that you did not tell anybody "do not do an autopsy"?
>
> A. No, I didn't tell anybody that.

(CP 138)

D. On the eve of trial, Nissan moved to dismiss as a discovery sanction.

Nissan "located the autopsy report on their own in 2019" (FF 8, CP 879) and had begun researching the consequences of failure to provide autopsy evidence by January 2020. (CP 961) On January 7, and again on February 26, 2020, Nissan asked the Carrolls to

supplement specific interrogatories and requests for production (CP 423, 425), but it did not ask about specific interrogatories related to the autopsy. Nor did Nissan inform the Carrolls that it believed any previous discovery responses were inaccurate. (CP 652, 656, 658)

By May 2020, Nissan was researching "discovery obligations and sanctions for providing false discovery responses and possible spoliation of evidence" and creating a "timeline" for "sanctions for false discovery responses regarding autopsy." (CP 965) Nissan claims it obtained the autopsy report itself on July 13, 2020 (Resp. Br. 44); it deposed the Carrolls' expert Dr. Jacqueline Moline two weeks later, on July 31. (CP 568) But Nissan did not ask Dr. Moline any questions about the autopsy or the autopsy report. Instead, Nissan acted as if no autopsy had occurred, specifically seeking testimony about what "helpful pieces of information" an autopsy might have revealed. (CP 569)

On September 14, 2020—nearly a year after learning of the autopsy and 46 days before commencement of trial on November 9—Nissan moved to strike the Carrolls' complaint as a sanction for discovery violations (CP 67-102), claiming the Carrolls had failed to notify Nissan before conducting the autopsy, had failed to retain tissue samples or to properly disclose information about the autopsy and the bankruptcy claims in responses to the October 2018 interrogatories; that Mrs. Carroll and her son had provided "evasive testimony" in their depositions regarding whether an autopsy had occurred; and that the Carrolls violated discovery deadlines by belatedly providing authorizations for social security records, untimely disclosing a list of witnesses for trial, and delayed making witnesses available for deposition. (Op. 11-12)

E. Division I reversed the trial court's order dismissing the Carrolls' complaint.

After the trial court stated that it intended to grant Nissan's motion (Op. 12), the Carrolls asked the trial court

to consider an adverse inference jury instruction as a lesser sanction. (Op. 12-13; CP 761-69) The trial court denied the motion without a hearing or explanation (Op. 12; CP 867), and on January 19, 2021, entered its written order granting Nissan's motion to strike the complaint, along with written findings of fact and conclusions of law. (Op. 13; CP 876-90)

Division I reversed the dismissal, but let stand as unchallenged $76,477.46 in monetary sanctions awarded to Nissan.

III. WHY REVIEW SHOULD BE DENIED

A. Division I correctly applied *Burnet* in holding the alleged discovery violations here did not support the severe sanction of dismissal.

Nissan's fact-specific attack on Division I's decision offers no more than a conclusory assertion that the opinion "contradicts this Court's discovery decisions." (Pet. 7) To the contrary, the decision is supported by settled precedent.

Because the law "favors resolution of cases on their merits," trial courts "should impose the least severe sanction that will be adequate to serve the purpose of the sanction." (Op. 15, quoting *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 495-98, 933 P.2d 1036 (1997)) Division I correctly recognized that "Washington courts should not resort to dismissal lightly." (Op. 15, quoting *Anderson v. Mohundro*, 24 Wn. App. 569, 575, 604 P.2d 181 (1979), *rev. denied*, 93 Wn.2d 1013 (1980)); *see also Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002). Instead, any sanction "should be proportional to the discovery violation and the circumstances of the case." (Op. 16, quoting *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 590, ¶39, 220 P.3d 191 (2009)). Before an action can be dismissed as a discovery sanction, it must be apparent from the record that (1) the violation was willful or deliberate, (2) the violation substantially prejudiced the other party, and (3)

the trial court explicitly considered whether a lesser sanction would have sufficed. *Burnet*, 131 Wn.2d at 494; Op. 16.

Mischaracterizing the standard employed on review, Nissan repeatedly accuses Division I of "second-guess[ing] the trial court's findings of fact," and "review[ing] the trial court's findings de novo." (Pet. 1-2, 6, 11, 24, 26, 27 n.21, 32) To the contrary, Division I correctly reviewed for substantial evidence the trial court's factual findings and reviewed its conclusions of law de novo to hold that the trial court abused its discretion when it dismissed the complaint. (Op. 14-15)[1] Division I engaged in "a careful review" of this purely documentary record, which "demonstrates that *none* of the conduct that the trial court relied on in dismissing Carroll's claims met all [the *Burnet*] factors." (Op. 17) (emphasis in original)

[1] Division I properly noted that some of the trial court's "findings" are legal conclusions. (Op. 21, n.16)

Division I correctly recognized that its assessment of factual findings is inextricably tied to determining whether the trial court abused its discretion:

> When determining whether a trial court abused its discretion by imposing a severe discovery sanction, we do not merely evaluate whether the trial court's factual findings are supported by the evidence. We must also determine whether the evidence supporting these findings justifies the sanction imposed.

(Op. 42) In other words, "the evidence supporting [a] finding" "of a willful violation" "is necessarily considered in determining whether the [trial court's] discretion . . . was properly exercised." (Op. 42, n.31) The Opinion comports with established precedent and presents no grounds for review.

B. Division I properly rejected Nissan's claim that the Carrolls had a duty to preserve autopsy samples years before any litigation commenced.

Division I correctly held that "Carroll did not have a duty to preserve any remaining tissue samples before this litigation commenced." (Op. 29) While intentionally

destroying evidence before litigation might amount to spoliation, there is no duty to preserve evidence when a "lawsuit had not commenced and no request had been made to retain" that evidence. *Ripley v. Lanzer*, 152 Wn. App. 296, 326, ¶82, 215 P.3d 1020 (2009).

A trial court may not sanction a party for evidence lost before litigation absent a showing that "the party acted in bad faith or conscious disregard of the importance of the evidence." *Henderson v. Tyrrell*, 80 Wn. App. 592, 609, 910 P.2d 522 (1996). Even "a party's negligent failure to preserve evidence relevant to foreseeable litigation is not sanctionable[.]" *Cook v. Tarbert Logging, Inc.*, 190 Wn. App. 448, 464, ¶40, 360 P.3d 855 (2015), *rev. denied*, 185 Wn.2d 1014 (2016); *see Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 136, ¶29, 307 P.3d 811 (2013). Division I relied on this precedent in holding that the Carrolls had no duty to preserve autopsy tissue samples, which were

"disposed of pursuant to RPAS's own retention policy before the litigation commenced." (Op. 29)

Mrs. Carroll did not file her complaint until years after any remaining evidence from the autopsy was lost. (*See* Op. 4, n.2, 5) Nissan claims it requested preservation in a December 2018 letter sent to Mr. Owens (Pet. 6, 16, n.14), but Nissan's counsel "sent this letter to an e-mail address that she knew [Mr. Owens] did not monitor," and in any event "there is no evidence" that "any tissue samples existed" "that would have assisted Nissan in preparing for trial" when the letter was sent. (Op. 33; CP 814)

Nissan argues that King County's style orders nevertheless impose a *retroactive* duty to preserve evidence years before a lawsuit commences, and that the decision "invalidates" those orders. (Pet. 16) But the trial court based its sanction on the discovery rules, not the style orders. (Op. 22) Moreover, the style orders are "specifically applicable" only to "cases *filed* in the Superior Court of

Washington for King County," and do not impose any retroactive duty. *See* Second Revised Consolidated Pretrial Style Order, No. 89-2-18455-9, §1.1 (May 25, 2018) (emphasis added); *see also* Op. 25-26 n.19.

More importantly, no court rule—much less a local style order—could impose discovery obligations years before litigation began, because courts "cannot promulgate rules that seek to impose duties on the public in general—as opposed to actual litigants." (Op. 22) Nissan criticizes this observation, claiming it ignores the courts' inherent and statutory authority to promulgate rules. (Pet. 16-17) But this Court has long held this rulemaking power does not authorize "the promulgation of a rule that would impose a duty on the public in general and that does not relate to the governance of superior court procedure."(Op. 23, citing *State ex. rel. Foster-Wyman Lumber Co. v. Superior Court of King Cnty.*, 148 Wash. 1, 10, 267 P. 770 (1928)).

State v. Templeton, 148 Wn.2d 193, 59 P.3d 632 (2002) (Pet. 17-18) has nothing to do with judicial authority to regulate "prelitigation conduct." *Templeton* addressed a Criminal Rule for Courts of Limited Jurisdiction providing that the "right to a lawyer shall extend to all criminal proceedings" and "shall accrue as soon as feasible after the defendant has been arrested[.]" CrRLJ 3.1(a), (b)(1). The Court's conclusion that a rule may give a criminal defendant the right to an attorney at "every critical stage of *the proceedings*," including arrest, CrRLJ 3.1 (emphasis added), in no way conflicts with Division I's rejection of Nissan's argument that King County's style orders in civil litigation apply years before *any* proceedings commenced.

The prelitigation loss of evidence is governed by Washington authority on spoliation, which Division I correctly applied in holding the Carrolls had no duty to preserve autopsy tissue samples. (Op. 28-33) Nissan has

cited no conflicting authority meriting this Court's review under RAP 13.4(b).

C. Division I correctly recognized only a "willful" violation of the discovery rules could justify dismissal.

Consistent with *Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013), Division I correctly required a "willful" discovery violation as a predicate to dismissal, the most severe sanction. In *Jones,* this Court clarified that "*Burnet*'s willfulness prong would serve no purpose if willfulness follows necessarily from the violation of a discovery order," and thus "[s]omething more" than "a party's failure to comply" with discovery obligations "is needed" to establish willfulness. (Op. 43, quoting *Jones*, 179 Wn.2d at 345, ¶50); *see also Farrow v. Alfa Laval, Inc.*, 179 Wn. App. 652, 664 n.8, 319 P.3d 861 ("*Jones* disavowed the usual presumption that violating a rule constitutes a willful act, holding instead that willfulness must be demonstrated."), *rev. denied*, 181 Wn.2d 1003 (2014). As

Division I correctly recognized, many of the discovery violations alleged by Nissan were not willful, or even violations at all. Nissan's fact-bound challenge to the court's straightforward analysis of the undisputed documentary record provides no basis for further review:

1. Interrogatory 13 and the bankruptcy trust claims.

The Carrolls did not provide "misleading" answers to style interrogatory 13, which directs a plaintiff to provide information regarding asbestos exposure "[i]f you contend decedent was exposed to asbestos or asbestos products under circumstances outside of decedent's employment[.]" (Op. 35; CP 276) (Pet. 13-14)[2] "A reasonable interpretation of [interrogatory 13] is that it is meant to apply only when a plaintiff sues a defendant who is not a former employer,

[2] Leaving aside that such a failure would not provide a basis for review in this Court, Nissan wrongly claims (Pet. 13-14) the Carrolls failed to assign error to this issue. (*See* App. Br. 2 & App. A (assigning error to FF 12-13, 15-16, 24-25, 31-32))

which was not the case here" and thus the trial court erred in concluding the Carrolls "*willfully* sought to answer untruthfully" "by "giving a truthful answer to the plain meaning of the interrogatory" (Op. 36, emphasis in original) Even if the interrogatory required more, "a party's mere failure to comply with a discovery obligation does not establish a willful violation" under the *Burnet* factors. (Op. 43, quoting *Jones*, 179 Wn.2d at 345, ¶50).

Division I also correctly rejected the trial court's suggestion that the bankruptcy trust claims were "materially inconsistent" with the claims against Nissan, noting that "[t]here may, of course, be more than one proximate cause of an injury" (Op. 37-38, quoting *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 396, 558 P.2d 811 (1976)), particularly in asbestos exposure claims. Nissan's bald assertion that Division I "is simply wrong" (Pet. 14) provides no basis for review under RAP 13.4(b).

2. Interrogatory 16.

The Carrolls did not willfully violate discovery obligations in responding to interrogatory 16, which sought information about a plaintiff's "asbestos-related disease," including the "[d]ate disease was diagnosed," the "[p]hysician or health care facility diagnosing the asbestos-related condition," and "[p]hysicians or health care facilities which have provided care or treatment for the asbestos-related condition since diagnosis." (CP 277; Op. 38-39)

Division I correctly read this interrogatory, as the Carrolls did, to seek information on health care providers who treated Mr. Carroll while he was alive (Op. 39), and not, as Nissan argues, to require the Carrolls to disclose the pathologist who performed the autopsy. (Pet. 20-21; Op. 39) Nissan's strained reading would make the specific

questions in interrogatories 21 and 22 superfluous.[3] Division I properly gave effect to the ordinary meaning of interrogatory 16, which "did not explicitly require Carroll to disclose information regarding the pathologist who performed the autopsy." (Op. 39)

3. Interrogatory 20.

Division I also correctly held that the Carrolls "provided exactly" what interrogatory 20 required: "a true copy of [Mr. Carroll's] death certificate." (Op. 40) Nissan complains that the certificate erroneously stated that no autopsy had been performed (Pet. 20-21), but as Division I observed, the Carrolls were "in no way obligated to alter a public document in order to answer the interrogatory." (Op. 40)

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[3] Division I's analysis of the Carrolls' discovery violation in connection with these style interrogatories is addressed *infra,* Section D.

4. The Carrolls' honest deposition testimony.

Finally, because both Mrs. Carroll and her son provided answers that "were literally true and plainly set forth [their] knowledge of the situation" (Op. 45), Division I properly held that the record could not support a finding that either Mrs. Carroll or her son willfully provided "evasive" deposition testimony. (*See* Pet. 21-23)

When Nissan asked Doug Carroll "why an autopsy was not performed" (CP 454), he responded: "I thought there was." When asked if anyone told him "not to have an autopsy performed," he responded, "I wasn't involved." When asked "who made the decision . . . regarding not having an autopsy," he said "my mom," and then "I don't know." (CP 454)

Similarly, when asked if "there was no autopsy that was done," Mrs. Carroll immediately corrected Nissan, saying "Yes, they did." (CP 138) When Nissan again asked "They did an autopsy?" Mrs. Carroll said, "I don't know. *I*

thought they did. Maybe they didn't. I don't know." (CP 138, emphasis added)

These answers are not evasive, false, or misleading. Both Mrs. Carroll and Doug testified there *had* been an autopsy, expressing confusion only after Nissan implied that wasn't true. Further, "the record is devoid of any evidence that either Carroll or Douglas knew—at the time of their depositions—that an autopsy had been performed." (Op. 43) Doug had nothing to do with the autopsy, and while Mrs. Carroll signed the authorization form, nothing establishes that she knew the autopsy occurred. (Op. 43)

Nissan argues that because Mrs. Carroll's daughter Dana knew of the autopsy, "the family" must also have known. (Pet. 23) But Nissan "did not inquire into" what other family members knew, nor did it include Dana's deposition testimony with its motion. (Op. 46) Regardless, Dana's knowledge cannot be imputed to her brother, or her

mother, to support Nissan's claim that they *willfully* provided evasive testimony.

D. Division I followed settled law in reversing a dismissal for alleged discovery violations that did not prejudice Nissan's ability to prepare for trial.

Division I agreed that the Carrolls and their counsel violated the discovery rules in failing to disclose the autopsy report and information regarding retained tissue samples, in response to style interrogatories 21 and 22. (Op. 47-48, 52-53) It properly reversed dismissal on this basis because these violations did not prejudice Nissan's ability to prepare for trial based on established law that presents no issue for further review in this Court. (Op. 47-55)

1. Nissan manufactured the "prejudice" it claimed justified dismissal.

A trial court's discovery sanction must "be proportional to the nature of the discovery violation and the surrounding circumstances" (Op. 47, quoting *Rivers*,

145 Wn.2d at 695), including "the other party's failure to mitigate." (Op. 47, citing *Wash. State Physicians Ins. Exchange & Ass'n v. Fisons Corp.,* 122 Wn. 2d 299, 356, 858 P.2d 1054 (1993). Nissan claims it "did not delay seeking relief" after it learned of the autopsy (Pet. 26-28), but the record tells a different story: Nissan went "far beyond a failure to mitigate" and adopted "an apparent tactical decision to self-create prejudice" (Op. 52) after it "located the autopsy report on their own in 2019." (FF 8, CP 879)

By January 2020, Nissan was researching the consequence of failure to provide autopsy records. (CP 961) By May 2020, Nissan was researching sanctions for false discovery responses and possible spoliation and creating a "timeline" for "sanctions for false discovery responses regarding the autopsy." (CP 965) In July 2020, *with the autopsy report in its possession,* Nissan deposed plaintiff's expert asking questions as if no autopsy had occurred,

including what “helpful pieces of information" an autopsy might reveal. (Op. 51-52; CP 569)

Nissan then waited until September 2020—just 46 days before trial—to move to strike the complaint. Nissan falsely claimed it had been denied an opportunity to depose expert witnesses regarding the autopsy while in the same motion relying on its hypothetical questioning of plaintiff's expert to demonstrate the alleged prejudice stemming from the late disclosure (Op. 52), claiming the proximity to trial had deprived it of the ability to depose witnesses again. (CP 94-97)

But Nissan planned it that way—Nissan never asked experts about the autopsy, never asked to meet and confer about alleged discovery violations (as required by CR 37(a) and CR 26(i)), never moved to compel corrections to interrogatory responses about the autopsy (despite seeking supplemental discovery on other topics), and never alerted the trial court to the autopsy until filing its motion to strike

the complaint. Nissan remained strategically silent, deliberately manufacturing a record intended to maximize its "prejudice" to seek a harsher sanction than if Nissan had promptly raised the issue.

Division I properly concluded that the trial court erred in failing to consider this conduct before dismissing the Carrolls' claims. (Op. 52) Its decision is fully consistent with *Rivers* and *Fisons* and concerns only Nissan, and not the public. RAP 13.4(b)(1), (4).

2. Prompt discovery responses would not have given Nissan any additional evidence.

As Division I recognized, there was "no indication in the record that Nissan would have been able to test any tissue samples had Carroll" provided prompt, accurate discovery responses. (Op. 54-55) The autopsy occurred nearly three years before RPAS went out of business and any remaining tissue samples were disposed of pursuant to standard RPAS policy long before that (*See* Op. 4, n.2);

nothing in the record supports Nissan's claim (Pet. 30) that "tissue blocks . . . were lost when RPAS went out of business"—rather than before—or that it "may have been able to obtain tissue" and "independently examine . . . what caused [Mr. Carroll's] mesothelioma." (Pet. 29; Op. 54-55)

Nor was Nissan denied an opportunity to interview RPAS employees. (Pet. 29) Nothing prevented Nissan from deposing either the pathologist or the autopsy assistant, both of whom were still in practice, whether RPAS still existed or not. (Op. 54) Nissan's claim that the Carrolls prejudiced its ability to prepare for trial by denying it the opportunity to evaluate "crucial evidence" (Pet. 28-29) rings particularly hollow.

3. Nissan conceded the autopsy evidence had no impact on the case.

Division I also correctly analyzed whether either party gained an "investigative advantage" from withholding or destroying evidence. *Cook*, 190 Wn. App. at 462, ¶34; (Op. 50) Nissan claims the Carrolls "had an

unfair advantage in preparing for trial" (Pet. 33) but does not explain what, precisely, that advantage was— Nissan represented to the trial court "that the content of the autopsy report appeared to be, by itself, entirely neutral" (Op. 50; RP 12-14, 77), and neither party had any other autopsy evidence shedding light on a material issue. Nissan insisted the only way to know how the autopsy affected its case would be to evaluate tissue samples (RP 12-14; Pet. 28, n.22), but those were lost years before litigation began and the Carrolls had no duty to preserve them.[4]

Division I's decision does not conflict with *Magaña* (Pet. 25, 29), where the withheld evidence directly supported the plaintiff's claims. 167 Wn.2d at 578-80, ¶14. Here, Nissan conceded that the autopsy evidence would be

[4] That plaintiffs' experts were unaware of the autopsy (*see* Pet. 30) further supports Division I's conclusion that Nissan was not prejudiced: "the fact that neither party presents the testimony of an expert who examined the evidence before its destruction diminishes its importance." (Op. 51, quoting *Cook*, 190 Wn. App. at 462)

helpful only if it could perform its own autopsy to determine the kind of asbestos fibers that caused Mr. Carroll's mesothelioma. The loss of evidence—which could just as well have supported the Carrolls—does not establish prejudice.

4. Other delays did not prejudice Nissan.

Nissan suffered no prejudice from delays in disclosing Carroll's bankruptcy claims, witnesses, and social security authorizations (Pet. 23-24); as Division I recognized, there was undisputed evidence that Nissan received all that information long before trial. (Op. 34 n.24, 36-37 n.26, 55; CP 81, 112, 260, 463-87, 652, 782, 852); *Burnet*, 131 Wn.2d at 496 (reversing sanctions because party not prejudiced by discovery violations when "a significant amount of time yet remained before trial.").

E. Division I correctly recognized an adverse inference instruction was a sufficient lesser sanction.

Established authority endorses an adverse inference as a remedy for spoliation and as a sanction for discovery violations. *See* cases cited in *Henderson v. Thompson*, No. 97672-4, 2022 WL 11469892, at *10 (Oct. 20, 2022). As Division I followed settled law (Op. 30-33, 47, 52 n.36, 55 n.37, 56), Nissan's contention that there is not "a single case in which an adverse inference instruction has been employed to sanction a discovery violation" (Pet. 32) is without merit.

Further, because dismissal is a harsh remedy "the record must clearly show" that "the trial court explicitly considered whether a lesser sanction would have sufficed." (Op. 16, quoting *Magaña*, 167 Wn.2d at 584, ¶24) It is a reversible abuse of discretion for a trial court to dismiss a case for discovery violations "without considering . . . a less severe sanction" "on the record." *Rivers,* 145 Wn.2d at 698-

99. Yet the trial court here failed to even "consider a proposed adverse inference instruction." (Op. 33)

Despite Nissan's claimed confusion as to "[w]hat . . . such an instruction [might] say" (Pet. 33), the Carrolls offered an instruction that would have given Nissan far more than had the autopsy tissues been retained. Nissan speculates that an autopsy could show whether the fibers in Mr. Carroll's lungs were amphibole or chrysotile, and therefore whether his mesothelioma resulted from his employment with Nissan. (Pet. 28, n.22) The Carrolls proposed an instruction that "had tissue from the 2016 autopsy been retained, it would likely have shown the presence of amphibole asbestos fibers" (Op. 31), giving Nissan a far more advantageous inference than had the autopsy tissue samples been preserved.

Division I's holding that an adverse inference jury instruction, along with the award of $76,477.46 in fees, would have been a sufficient lesser sanction (Op. 13, 31) is

entirely consistent with Washington law, presents no question of substantial public interest, and does not merit review under RAP 13.4(b).

IV. CONCLUSION

Division I correctly applied the *Burnet* factors in holding that none of the Carrolls' alleged discovery violations warranted the severe sanction of dismissal. Nissan's petition fails to identify any basis for further review.

I certify that this answer is in 14-point Georgia font and contains 4,974 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 1st day of November, 2022.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 1, 2022, I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

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/s/ Eliana C. Belenky
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November 01, 2022 - 4:06 PM

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