

No. 68315-2-I

THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON  
DIVISION I

---

ERIKA HOWE,

*Appellant,*

v.

McDONALD'S RESTAURANTS OF WASHINGTON, INC., a  
Washington Corporation, *Respondent*

and

McDONALD'S, INC. a foreign corporation, *Defendant.*

---

**RESPONDENT'S BRIEF**

---

Earl Sutherland, WSBA #23928  
Eric P. Gillett, WSBA #23691  
Christine E. Tavares, WSBA#24868  
Preg O'Donnell & Gillett PLLC  
1800 Ninth Ave., Suite 1500  
Seattle, WA 98101-1340  
(206) 287-1775  
Attorneys for Respondent  
McDonald's Restaurants of  
Washington, Inc.

01/23/2015 10:00 AM  
K



## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ASSIGNMENTS OF ERROR, ISSUES ON APPEAL.....	2
III.	STATEMENT OF THE CASE .....	3
	A. STATEMENT OF FACTS.....	3
	B. STATEMENT OF THE CASE.....	4
	1. Inaction in the Trial Court.....	4
	2. Delays and Missed Deadlines in the Court of Appeals.....	9
IV.	ARGUMENT .....	12
	A. SUMMARY OF ARGUMENT .....	12
	B. STANDARD OF REVIEW .....	14
	C. DISMISSAL FOR FAILURE TO MAKE DISCOVERY WAS APPROPRIATE.....	15
	1. WILLFULNESS OF THE DISOBEDIENT PARTY	17
	2. SUBSTANTIAL PREJUDICE TO McDonalds Restaurants/Washington .....	19
	3. LESSER SANCTION CONSIDERED AND EXPLICITLY REJECTED .....	19
	D. MOTION FOR RECONSIDERATION PROPERLY DENIED.....	21
	E. THE MOTION FOR RECONSIDERATION WAS IMPROPERLY BROUGHT.....	23
	F. IN THE ALTERNATIVE, THE COURT CAN REMAND TO THE TRIAL COURT WITH DIRECTION TO CONSIDER THE <i>BURNET</i> FACTORS .....	26
V.	CONCLUSION.....	28

## TABLE OF AUTHORITIES

### All Cases

<i>Associated Mortgage Investors v. G.P. Kent Constr. Co.</i> , 15 Wn. App. 223, 229, 548 P.2d 558 (1976)).....	14
<i>Barr v. MacGugan</i> , 119 Wn. App. 43, 46, 78 P.3d 660 (2003).....	25, 26
<i>Blair v. TA–Seattle E. No.</i> 176, 171 Wn.2d 342, 348–49, 254 P.3d 797 (2011) .....	16
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) ....	13, 14, 15, 16, 27
<i>Coggle v. Snow</i> , 56 Wn. App. 499, 507, 784 P.2d 554 (1990).....	15
<i>Fisons Corp., supra</i> , 122 Wn.2d at 355-56.....	20
<i>Graves v. P.J. Taggares Co.</i> , 94 Wn.2d 298, 303-04, 616 P.2d 1223 (1980).....	25
<i>Haller v. Wallis</i> , 89 Wn.2d 539, 547, 573 P.2d 1302 (1978).....	25
<i>In re Marriage of Flannagan</i> , 42 Wn. App. 214, 221, 709 P.2d 1247 (1985).....	25
<i>Jaeger v. Cleaver Const. Inc.</i> , 148 Wn. App. 698, 717-18, 201 P.3d 1028, <i>review denied</i> , 166 Wn.2d 1020, 217 P.2d 335 (2009).....	23
<i>JDFJ Corp. v. Int'l Raceway, Inc.</i> , 97 Wn. App. 1, 7, 970 P.2d 343 (1999).....	24
<i>Lane v. Brown &amp; Haley</i> , 81 Wn. App. 102, 107, 912 P.2d 1040 (1996).....	25

<i>Luckett v. Boeing Co.</i> , 98 Wn. App. 307, 309, 989 P.2d 1144 (1999).....	25
<i>Magaña v. Hyundai Motor Am.</i> , 167 Wn.2d 570, 584, 220 P.3d 191 (2009) .....	17
<i>McCoy v. Kent Nursery, Inc.</i> , 163 Wn. App. 744, 769, 260 P.3d 967 (2011).....	23
<i>Physicians Ins. Exch. v. Fisons Corp.</i> , 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993) .....	15
<i>Rivers v. Wash. State Conf. of Mason Contractors</i> , 145 Wn.2d 674, 697, 41 P.3d 1175 (2002) .....	22, 26, 27
<i>Snedigar v. Hodderson</i> , 53 Wn. App. 476, 487, 768 P.2d 1 (1989)).....	16
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971) .....	15
<i>State v. Keller</i> , 32 Wn. App. 135, 140, 647 P.2d 35 (1982).....	25
<i>Teter v. Deck</i> , 174 Wn.2d 207, 219, 274 P.3d 336 (2012) .....	17, 18, 19, 27
<i>Truck Ins. Exchange v. Vanport Homes, Inc.</i> , 147 Wn.2d 751, 766, 58 P.3d 276 (2002) .....	14
<i>Wagner v. McDonald</i> , 10 Wn. App. 213, 217, 516 P.2d 1051 (1973)).....	15
<i>Wilcox v. Lexington Eye Institute</i> , 130 Wn. App. 234, 241, 122 P.3d 729 (2005).....	21, 23
<i>Woodhead v. Discount Waterbeds, Inc.</i> , 78 Wn. App. 125, 129, 896 P.2d 66 (1995).....	15, 17, 18, 19

**Statutes & Court Rules**

CR 26(i) ..... 18  
CR 37 ..... 22  
CR 59(a)(9) ..... 23  
CR 60(b)..... passim  
KCLR 4..... 22  
KCLR 4(g) ..... 14  
RAP 5.2(a), 9.6(a); 9.2(a), 10.2(a)..... 9, 24, 10

## I. INTRODUCTION

In this case, the plaintiff Erika Howe filed a complaint against a number of defendants and then did nothing. Eventually after failing to comply with deadlines and several court orders she suffered the consequence of dismissal of her case. This Court should affirm the trial court's dismissal on the record of neglect and contempt for the rules, deadlines and orders of the court.

McDonald's Restaurants of Washington, Inc. ("defendant") answered an essentially unintelligible complaint, and served discovery and a request for statement of damages. Ms. Howe did nothing: no discovery answers and no response to the request for statement of damages were forthcoming. McDonalds Restaurants of Washington, Inc. had no way to understand the claim, no way to prepare its defense.

McDonalds Restaurants of Washington, Inc. moved to compel. No one responded. The trial court entered an order compelling responses. Nothing happened during the 40 days the court allowed for answers or responses.

Defendant moved to dismiss given the complete failure to answer discovery or prosecute the case. No one responded to the motion to dismiss. The court ordered dismissal.

Finally, Ms. Howe filed a motion for reconsideration on the eleventh day after the order of dismissal at the last possible

moment. She finally offered her arguments against dismissal. The court considered the law of the state of Washington and rejected the arguments, finding that the failure to answer discovery was willful and substantially prejudiced Defendant's ability to prepare its defense. The court considered but rejected the imposition of lesser sanctions.

The trial court did not abuse its discretion. This Court should affirm dismissal. Trial courts must have available the full panoply of sanctions for a party who flouts all rules of procedure and fails to do anything to prosecute its case.

## **II. ASSIGNMENTS OF ERROR, ISSUES ON APPEAL**

Should this Court affirm dismissal of the case below where the trial court did not abuse its discretion to dismiss the case, and where the trial court found that the failure to answer discovery was willful, that the failure to answer discovery substantially prejudiced Defendant's ability to prepare its defense, and where the court considered but rejected lesser sanctions?

Does the court's consideration of the motion for reconsideration and entry of the order denying reconsideration constitute a sufficient record that the court "explicitly rejected" the reasons proffered by Ms. Howe to avoid dismissal for her willful disobedience of the discovery orders in this case?

Should this Court affirm dismissal when Ms. Howe did not properly seek to set aside the dismissal of the case, where the motion for reconsideration raised matters not raised to the trial court in earlier pleadings, and where no motion to set aside the judgment under CR 60(b) was filed?

In the alternative, should this Court remand with directions to the trial court to consider the *Burnet* factors more explicitly?

### **III. STATEMENT OF THE CASE**

#### **A. STATEMENT OF FACTS**

According to the complaint in this case, the plaintiff/appellant Erika Howe (“Ms. Howe” herein) is the mother of Kathryn Howe. See, CP 2 ¶ 6 (reference to Kathryn as “Plaintiff’s daughter”). Kathryn was born on April 16, 1990. CP 2 ¶ 3.

Ms. Howe claims that on April 4, 2000 a bizarre incident occurred when “plaintiff’s daughter went to the McDonald’s restaurant located in downtown Bellevue, Washington, with her step-father.” CP 2 ¶ 6. The details are immaterial; and who was injured is unclear. See, *id.*, ¶¶ 8, 10-12 (damages to “plaintiff,” which would be Ms. Howe); *but see, id.*, ¶ 9 (“Plaintiff’s step-father” allegedly involved in the incident with his daughter.) The incident, however, forms the basis for the present lawsuit.

## **B. STATEMENT OF THE CASE**

### **1. Inaction in the Trial Court**

Based on the allegations that something happened on April 4, 2000, at a McDonald's restaurant, Ms. Howe, appearing through David Joseph Smith, PLLC, on April 15, 2011 made claim for herself against the defendant/respondent McDonald's Restaurants of Washington, Inc., against a non-existent entity, McDonald's, Inc., and several other defendants. See, Complaint, CP 1-3. Attorney Mr. Smith filed the summons and complaint at 4:19 p.m. that day.<sup>1</sup> See, time stamps on CP 1, 4.

McDonalds Restaurants of Washington, Inc. answered. CP 6-9. Defendant served the answer by U.S. Mail at the address provided on the complaint. CP 10.

McDonalds Restaurants of Washington, Inc. propounded its First Set of Interrogatories and Requests for Production of Documents and a Request for Statement of Damages upon plaintiff by serving her counsel, Mr. Smith, via ABC delivery, on August 12, 2011. CP 25-42. The responses would have been due on September 14, 2011. The original discovery requests were returned to the office of Defendant's counsel. See, CP 12. Despite the requirements of APR 13, Mr. Smith did not have an office at the address listed on the Summons and Complaint. *Id.* Subsequent

---

<sup>1</sup> April 15, 2011 was the penultimate day a minor born on April 16, 1990 could bring suit after her 18<sup>th</sup> birthday. See, RCW 4.16.190.

attempts were made to contact Mr. Smith, by contacting the Washington State Bar Association, and by calling and sending a facsimile to the phone numbers listed for him. See, CP 15-17 declaration of counsel referencing attached exhibits.

On August 4, 2011, Defendant requested that Mr. Smith provide an address for service of documents and papers. CP 16. The request was sent to the facsimile number listed on the Washington State Bar Association website. See, CP 44-45 (letter)

On August 23, 2011, Defendant forwarded a copy of the Notice of Appearance, Answer and McDonald's Restaurant's of Washington, Inc.'s First Set of Interrogatories and Requests for Production and the Request for Statement of Damages that were previously either sent via messenger service or via US Mail to Mr. Smith. CP 16. He was asked to contact Defendant's counsel. See, CP 47-48 (August 23, 2011 correspondence to Smith). McDonalds Restaurants of Washington, Inc. filed a Declaration of Service detailing the multiple attempts made to effect service. CP 49-51.

On August 31, 2011, a Bellevue attorney, John Peick, left a telephone message and sent an email indicating that Mr. Smith was ill and that Mr. Peick had been contacted to assume the handling of the matter. CP 16. After a prompt reply from Defendant's counsel to Mr. Peick's email, nothing further was heard from Mr. Peick.

See, email thread between Mr. Peick and Mr. Gillett for Defendant CP 53.

Ms. Howe never provided any answers to the discovery. Her lawyers never made contact with Defendant's counsel about the reasons for the delay. Neither she nor her attorneys provided any information regarding the nature and extent of her damages. She did not answer the discovery. She never clarified the unintelligible allegations of the complaint about who was injured or the nature of the injuries in the incident so long before. See CP 17, 57-58.

McDonalds Restaurants of Washington, Inc. was forced to move to compel. CP 11-54. No response of any kind was received. After a reply by Defendant, CP 57-58, the court on October 26, 2011 ordered Ms. Howe to respond to the discovery. CP 61-62. The court generously afforded Ms. Howe 40 days in which to provide answers. See, CP 62.

Around this same time, Mr. Smith for Ms. Howe stipulated to the dismissal of other defendants. CP \*. The stipulated order was entered on October 25, 2011. *Id.*

No explanation is found in the court record for the complete lack of attention to the discovery during the 40 days the court gave Ms. Howe to answer. Despite his attention to the stipulation for dismissal, Mr. Smith's eventual declaration in the trial court is silent

---

\* 10/25/2011 stipulation, dkt #23 is subject of a supplemental designation of clerk's papers.

on what occurred between the end of October and December 20, 2011. See, CP 108-109.

Ms. Howe did not comply with the order. See, CP 71-72. She provided nothing by way of discovery or even an explanation for delay or request for additional time. *Id.*

After the expiration of the 40 days, on December 13, 2011, McDonalds Restaurants of Washington, Inc. moved for the dismissal of the case. CP 65-81. Defendant cited Ms. Howe's complete lack of any effort to prosecute the matter, as well as the abject refusal to respond to discovery, in addition to the prejudice to McDonalds Restaurants of Washington, Inc. CP 68, 71-72. Defendant had received no communication at all from Ms. Howe, no explanation or other response during the time the court gave for discovery. *Id.*

The motion to dismiss was noted for hearing on December 21<sup>st</sup>. See, CP 65-81. Ms. Howe did not oppose the motion. Defendant's reply stating that fact was duly filed and served. CP 82-86. The court entered an order on December 23, 2011 that the case would be dismissed within five days. CP 87-88.

On January 3, 2012, eleven days after the entry of the order, Ms. Howe moved for reconsideration. CP 91-127. Finally, with the motion, a number of facts were disclosed about the lack of action on the case. See, CP 107-119. For example, Mr. Smith stated he had been "retired" since January 1, 2011. CP 117. He admittedly

attended to some matters in the case in October 2011, but he did nothing to comply with the court order regarding discovery at that time. CP 108.

No one, however, explained why nothing was done between October 26 and mid-December 2011. The first date of any activity to comply with discovery was December 20, 2011. See, CP 109.

A series of *ex parte* e-mail communications with the court was documented. See, CP 109-119. In those e-mails, McDonalds Restaurants of Washington, Inc. counsel had insisted that Smith follow the court rules and stop communicating by e-mail with the court. CP 115. The trial court also admonished Mr. Smith to follow the local rules. CP 117. Mr. Smith simply did not do so at the critical junctures in the case. He was completely *incommunicado* to the court and the parties. See, CP \*.

The motion for “reconsideration” also raised legal arguments pertinent to the motion for dismissal for the first time. CP 100-106. McDonalds Restaurants of Washington, Inc. opposed the motion for reconsideration. CP 128-139. Ms. Howe did not reply.

After considering the briefing, without oral argument, the trial court entered an order denying reconsideration on January 25, 2012. CP 140-141. In so doing, the court considered and explicitly rejected the proposed findings of the plaintiff that her failure to

---

\* 1/23/2012 dkt #42 mail from the court to Mr. Smith returned unclaimed.

make discovery was not willful, that the Defendant was not substantively prejudiced in its defense, and that lesser sanctions should be imposed. *Id.*

## **2. Delays and Missed Deadlines in the Court of Appeals**

Ms. Howe filed her notice of appeal on February 8, 2012. CP 142-147. On February 15, 2012, the perfection notice from this Court established the case schedule for the appeal. Ms. Howe proceeded to ignore the next deadline. The Court set the case for hearing pursuant to RAP 9.6(a) and 9.2(a). See, 3/13/2012 letter from COA.

At an April 6, 2012 court hearing conducted by Court Commissioner Mary Neel, counsel for Defendant explained how this case was before the Court of Appeals due to lack of prosecution and failure to comply with court orders regarding discovery. Commissioner Neel stated that the Court would issue a letter setting forth a final deadline by which the Appellant must comply with filing a Designation of Clerk's Papers. See, Opposition to Motion for Extension, 8/22/2012, and declaration of Earl Sutherland filed concurrently therewith.

An April 18, 2012 letter confirmed the ruling of Commissioner Neel. On May 9, 2012, Ms. Howe served her Designation of Clerk's Papers.

Pursuant to RAP 10.2(a), Ms. Howe's opening brief was June 25, 2012. But no brief was filed or served.

On June 29, 2012, the Court clerk issued a letter establishing a deadline of July 9, 2012 for the appellant to either file a Brief or a Motion for Extension of Time. On July 6, 2012, Appellant chose to move for an extension of time until August 1, 2012 to file the opening brief. The request was granted.

Ms. Howe did not timely file or serve her brief. On August 8, 2012, the Court Clerk issued another letter stating that the deadline for appellant to file either a brief or a Motion for Extension of Time was August 20, 2012.

No brief or Motion for Extension of Time was served by August 20, 2012. Instead, on August 21, 2012, Defendant's counsel received a Motion for Extension of Time that had been mailed. It had been received by the Court on Tuesday, August 21, 2012 as well. See Opposition to Motion for Extension of Time, 8/22/2012; declaration of Earl Sutherland.

Ms. Howe continued to flout the court rules and deadlines. On August 22, 2012, the Court of Appeals clerk issued a letter providing the notation ruling by Commissioner Mary Neel that appellant had an additional extension of time until September 4, 2012 to file her brief. Ms. Howe did not comply.

On September 19, 2012, the Court of Appeals clerk sent a letter with a notation ruling by Commissioner Neel that Appellant's

brief was not filed, nor was a responsive pleading filed by appellant requesting yet another extension, by the deadline of September 4, 2012. The Court provided notice that if the appellant's brief was not filed by September 24, 2012, the appeal would be dismissed without further ruling.

At this juncture, more than six months had elapsed since the Court of Appeals was compelled to issue the initial letter notice dated March 12, 2012, that appellant was not in compliance with the briefing schedule. Six months had passed since the Court assured Defendant's counsel it would address the continued flouting of its rules.

McDonalds Restaurants of Washington, Inc. did receive an opening brief on September 24, 2012. It was not in compliance with the Rules of Appellate Procedure. On September 25, 2012, the Appeals Court clerk issued a letter notifying Ms. Howe and providing counsel with a copy of the checklist of guidelines to insure the brief conformed to the rules. The clerk directed counsel to consult the checklist and re-serve the reconfigured brief no later than October 5, 2012.

Finally, a deadline was met. On October 4, 2012, counsel for respondent received appellant's corrected brief.

## **IV. ARGUMENT**

### **A. SUMMARY OF ARGUMENT**

Nothing was done to prosecute this case after an unintelligible complaint was filed. The court properly entered its order of dismissal since nothing was done to oppose dismissal by or on behalf of Ms. Howe.

Neither Ms. Howe nor anyone acting on her behalf deigned to respond to discovery. No one responded to the motion to compel. No one complied with the order compelling discovery, despite 40 days to answer simple basic discovery requests.

No one responded in any fashion to the motion to show cause why the case should not be dismissed for the utter lack of any effort to comply with the civil rules. Nothing was ever filed by the plaintiff in this case until after the trial court signed an order of dismissal.

Literally on the last possible day to file for relief from the entry of the judgment of dismissal, a motion for reconsideration was filed. The motion argued Ms. Howe's position for the first time under the guise of reconsideration. Ms. Howe did not deign to pay even lip-service to the requirements of the civil rules, especially CR 60(b), and offer some excuse for the complete neglect of the rules. Quite simply, the conduct of the case was inexcusable. It deserved dismissal.

The trial court would not tolerate the conduct. She rejected on the record the arguments offered by Ms. Howe. Ms. Howe appealed; but she has flouted this Court's deadlines and rules at every turn.

On the record of complete neglect in this case, the trial court was well within its discretion in entering the order of dismissal and denying the motion for reconsideration. This Court would have been within its discretion to have dismissed the appeal by now.

The trial court considered the arguments made in the motion for reconsideration. The judge flatly rejected Ms. Howe's feeble argument that the discovery violations were not willful. She rejected the notion that McDonalds Restaurants of Washington, Inc. was not prejudiced by the willful failure to provide any discovery or that a lesser sanction would do to punish or deter this conduct. The trial judge lined out all these proposed findings on the "*Burnet*<sup>2</sup> factors" in Ms. Howe's proffered order and dismissed the case.

The motion for reconsideration was not well-taken. It was probably improper, which would render the appeal untimely. The kind of neglect that led to this dismissal would ordinarily fall within the parameters of a motion for relief from judgment under CR 60(b). Ms. Howe did not request that relief; and the judgment of dismissal should be affirmed.

---

<sup>2</sup> *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

The trial court could have dismissed the case on any of these bases. On the record below, reinforced by more delay and contempt for this Court's rules, this case should remain dismissed.

If this Court does not find that the trial court fully considered the *Burnet* factors, however, then it should remand the case back to Judge Benton for a consideration of those factors now.

## **B. STANDARD OF REVIEW**

This Court can affirm the dismissal of the trial court on any ground found in the record. *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

A trial judge has "broad discretion" as to how to respond to parties' non-compliance with discovery and case management orders. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); KCLR 4(g). The court's "discretionary determination should not be disturbed on appeal except upon a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Burnet*, 131 Wn.2d at 494 (quoting *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976)).

The premise underlying the abuse of discretion standard is to find the acceptable range of decisions in a particular situation. In this case, "the proper standard is whether discretion is exercised on

untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion." *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990) citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971). The court should look at the factual underpinnings of the trial court's decision ("grounds") and the legal standard the court applied ("reasons") and conclude the court did not abuse its discretion. Its decision to dismiss is within the acceptable range of decisions under these circumstances.

**C. DISMISSAL FOR FAILURE TO MAKE DISCOVERY WAS APPROPRIATE**

The purpose of imposing sanctions generally is to deter, to punish, to compensate, and to ensure that the wrongdoer does not profit from the wrong. *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993) (citing *Burnet*, 131 Wn.2d at 495-96, 933 P.2d 1036). The trial court also has an interest in effectively managing its caseload, minimizing backlog, and conserving scarce judicial resources that justify the imposition of appropriate sanctions. See *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 129, 896 P.2d 66 (1995) (citing *Wagner v. McDonald*, 10 Wn. App. 213, 217, 516 P.2d 1051 (1973)).

The trial court record must demonstrate that: (1) the trial court found the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the

opponent's ability to prepare for trial; and (2) the court explicitly considered whether a lesser sanction would probably have sufficed. *Burnet*, 131 Wn.2d at 494 (citing *Snedigar v. Hodderson*, 53 Wn. App. 476, 487, 768 P.2d 1 (1989)).

A trial court may make the *Burnet* findings on the record orally or in writing. See *Blair v. TA–Seattle E. No. 176*, 171 Wn.2d 342, 348–49, 254 P.3d 797 (2011) (noting that the trial court did not make *Burnet* findings on the record where it did not engage in a colloquy with counsel or hear oral argument, and did not include the findings in the written order).

The concurrence in *Blair, supra*, clarified the limits of the application of the *Burnet* factors:

In its opinion, the majority reaffirms the rule that a trial court imposing the harsh remedy of dismissal, default, or exclusion of testimony as a sanction for discovery violations must make *Burnet* factor findings on the record. It does nothing to limit the full panoply of sanctions available to a trial court judge to control litigation in his courtroom. With this understanding of the majority opinion, I respectfully concur.

*Blair*, 151 Wn.2d at 353 (Johnson, J. concurring).

In this case, the trial court included the findings in the written order denying the motion for reconsideration, when the *Burnet* factors were first raised by Ms. Howe. The trial court crossed out the proposed findings, rejecting them in writing in the order. See, CP 87-88. This constitutes the requisite consideration of the

factors. *C.f., Teter v. Deck*, 174 Wn.2d 207, 219, 274 P.3d 336 (2012)(no requisite consideration of “willfulness” where “Judge Washington made no reference to the Teters' explanation and **did not explicitly reject it.**” [Emphasis added]) Here, Judge Benton explicitly rejected the proposed findings of Ms. Howe’s proposed order by modification of it. *See also, Woodhead, supra*, 78 Wn. App. at 132 (court considered the imposition of lesser sanctions where alternative form of order providing for same was before the court).

Under the circumstances of this case, the trial court did not exercise its discretion either on untenable grounds or for untenable reasons. The dismissal should be affirmed.

#### **1. WILLFULNESS OF THE DISOBEDIENT PARTY**

A party’s violation of a court’s order is deemed willful if it was without reasonable excuse or justification. *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 584, 220 P.3d 191 (2009). As demonstrated above, no excuse is proffered for the failure to address the discovery during the 40 days from the date of the October 26 order, until the expiration of that time allowed by the order compelling discovery.

The declaration of Mr. Smith is silent on what transpired from October 26, 2011 through December 20. On that date he e-mailed

the court's bailiff and asked for an emergency phone conference to buy more time to answer discovery. See, CP 108-109.

He never offered any explanation to counsel for Defendant as contemplated by the rules pertaining to discovery. See, CR 26(i)(contemplating informal resolution of discovery disputes). He was completely *incommunicado* to the court and the parties. Ms. Howe's counsel had absented himself so thoroughly from the case that counsel for Defendant had no chance to try to resolve any of these matters without the intervention of the court.

Here the trial court excised from the proposed order on reconsideration the proposed language:

[W]hile discovery should have been filed earlier, there is no evidence that the failure to do so was willful or deliberate . . . .

CP 141.

The court was well within its discretion to reject the proposed finding that the violation of its order was not willful or deliberate. The case law supports this action by the trial court as sufficient acknowledgement and consideration of the *Burnet* factors "on the record." *C.f.*, *Teter v. Deck*, 174 Wn.2d at 219 (no requisite consideration of "willfulness" where "Judge Washington made no reference to the Teters' explanation and **did not explicitly reject it.**" [Emphasis added]); *see also*, *Woodhead*, 78 Wn. App. at 132 (court considered the imposition of lesser sanctions, *inter alia*,

where alternative form of order providing for same was before the court). Here, Judge Benton “explicitly rejected” Ms. Howe’s explanation and her proposed findings. She used the proposed order reversing dismissal to affirm dismissal and accomplished consideration of the *Burnet* factors in that fashion. CP 140-141.

## **2. SUBSTANTIAL PREJUDICE TO McDonalds Restaurants/Washington**

Similarly the trial court refused to enter the proposed order to the effect that “there is no evidence that . . . Defendants have been substantially prejudiced . . . .” CP 141. Again, the court’s explicit lining out of the finding proposed by Howe constitutes a written finding by the court. *C.f.*, *Teter*, 174 Wn.2d at 219; *see also*, *Woodhead*, 78 Wn. App. at 132.

McDonalds Restaurants of Washington, Inc.’s motion to compel and motion to dismiss provided the court with ample reasons why the defense was prejudiced. *See*, CP 68, 71-72, 130. This Court can see from the confusing nature of the allegations of the complaint, CP 1-3, that discovery was needed to understand even who was claiming to have been injured in this case, let alone how McDonalds Restaurants of Washington, Inc. was responsible.

## **3. LESSER SANCTION CONSIDERED AND EXPLICITLY REJECTED**

Finally, the trial court considered the arguments of Ms. Howe in her “motion for reconsideration” about the propriety of imposing a

lesser sanction, and the requirements of the *Burnet* case, *supra*. See CP 104-105. In its order, CP 140-141, the court rejected the proposal for a lesser sanction, crossing out the proposed language:

[T]here is no evidence that . . . a lesser sanction would not have sufficed to comply [*sic*] delivery of the now delivered discovery. There is insufficient reason to enter the harsh remedy of dismissal.

In fact, the standard recited by Ms. Howe is not correct. As stated above, the purpose of sanctions is broader than simply compelling discovery once a party has disobeyed an order of the court requiring compliance. Sanctions serve the purpose to deter, to punish, to compensate, and to ensure that the wrongdoer does not profit from the wrong. *Fisons Corp.*, *supra*, 122 Wn.2d at 355-56.

The trial court considered the *Burnet* factors once Ms. Howe woke up and briefed the matter. Up to the time of the motion for “reconsideration,” the trial court had no position of Ms. Howe to consider. All the trial court had was a complete and utter disregard for any deadline or order of the court.

Under the circumstances, the trial court was well within its discretion to reject a lesser sanction and impose the harsh remedy of dismissal where nothing had been done with the case for almost a year, the defendant was substantially prejudiced, and the discovery failures were without excuse.

**D. MOTION FOR RECONSIDERATION PROPERLY DENIED**

Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion. A trial court abuses its discretion when its decision is based on untenable grounds or reasons. *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

The motion for reconsideration posited the following grounds for reversal of the order of dismissal:

(a) Grounds for New Trial or Reconsideration.

On the motion of the party aggrieved . . . any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

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

\* \* \*

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

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

(9) That substantial justice has not been done.

Regarding subsection (1), Ms. Howe argues that the failure of the court to afford oral argument on Defendant's "dispositive

motion” to dismiss for her failure to provide discovery constituted the requisite procedural irregularity. This argument was rejected in *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 697, 41 P.3d 1175 (2002):

Respondent correctly notes that oral argument is not prescribed for motions under CR 37 for sanctions for discovery abuse or under KCLR 4 for violation of a court's scheduling order. It also points out that “oral argument [on a motion] is not a due process right.” “Due process does not require any particular form or procedure....” “[It] requires only ‘that a party receive proper notice of proceedings and an opportunity to present [its] position before a competent tribunal.’”

In this case Petitioner was accorded due process. Prior to rendering judgment on Respondent's motion to dismiss, the trial court considered Petitioner's memorandum in opposition. The Court of Appeals correctly concluded that the trial court did not violate Petitioner's due process right in exercising its discretion to decide the motion to dismiss without oral argument. [Citations and footnotes omitted.]

The issues concerning subsections (7) and (8) are addressed above in section C. The trial court adhered to the requirements of the Washington case law. On the record, she considered the *Burnet* factors, rejecting the lesser sanctions urged by Ms. Howe in the late-brought motion for reconsideration. Clearly the trial court was within her discretion to find that the failure to make discovery was willful and deliberate, and that the lack of any information on the claim against it was prejudicial to McDonalds Restaurants of Washington, Inc.'s defense.

Ms. Howe's arguments may have had greater force and effect had she offered them timely and concurrently with the ordered discovery, instead of after violation of orders compelling discovery and after the entry of an order of dismissal.

Courts rarely grant new trials under CR 59(a)(9) because of the other more specific grounds for relief under CR 59(a). *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 769, 260 P.3d 967 (2011) (citing *Jaeger v. Cleaver Const. Inc.*, 148 Wn. App. 698, 717-18, 201 P.3d 1028, *review denied*, 166 Wn.2d 1020, 217 P.2d 335 (2009)). This case is hardly the exception to that rule, despite the remarkable chronicle of neglect.

For the foregoing reasons, the trial court did not abuse its discretion by denying the motion for reconsideration and leaving in place the judgment of dismissal for McDonalds Restaurants of Washington, Inc. The trial court could have left the dismissal in place for other reasons as well.

#### **E. THE MOTION FOR RECONSIDERATION WAS IMPROPERLY BROUGHT**

Civil Rule 59 does not permit a plaintiff who finds a judgment unsatisfactory to suddenly propose a new theory of the case when that theory could have been raised before entry of the adverse decision. *Wilcox v. Lexington Eye Institute, supra*, 130 Wn. App. at 241. In *Wilcox*, arguments for reconsideration were based on new legal theories with new and different citations to the record. The

plaintiff provided no explanation for why the arguments were not timely presented. *See also, JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999) (plaintiff's motion for reconsideration was an inadequate and untimely attempt to amend its complaint).

The same is true here. No response at all was filed to the motion to dismiss (or to earlier motion to compel which led to the entry of the discovery order).<sup>3</sup> Ms. Howe cannot use the vehicle of a motion for reconsideration to set aside the court's judgment of dismissal based on the unopposed record of neglect in this case.

Under CR 60(b), a court may vacate a final judgment for reasons such as "excusable neglect," "unavoidable casualty or misfortune preventing the party from prosecuting or defending," or any other reason justifying relief from the judgment:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

\* \* \*

---

<sup>3</sup> If the motion for reconsideration was not proper, then query whether the motion extends the time for appeal. *See, RAP 5.2(a), (e).*

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

\* \* \*

(11) Any other reason justifying relief from the operation of the judgment.

However, CR 60(b)(11) should only be applied to “situations involving extraordinary circumstances not covered by any other section of the rule.” *In re Marriage of Flannagan*, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985) (quoting *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982)). This Court will review a trial court’s CR 60(b) decision for abuse of discretion. See *Barr v. MacGugan*, 119 Wn. App. 43, 46, 78 P.3d 660 (2003); *Luckett v. Boeing Co.*, 98 Wn. App. 307, 309, 989 P.2d 1144 (1999). A court abuses its discretion when its decision is based on untenable grounds or reasoning. *Luckett*, 98 Wn. App. at 309-10.

The incompetence or neglect of a party’s own attorney is not sufficient grounds for relief from a judgment in a civil action. *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978); *Lane v. Brown & Haley*, 81 Wn. App. 102, 107, 912 P.2d 1040 (1996). Instead, the Washington rule holds that vacation of a judgment is warranted when an attorney surrenders a “substantial right” of his client through unauthorized stipulations or compromises. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 303-04, 616 P.2d 1223 (1980).

This Court examined the issue further in *Barr*, 119 Wn. App. at 45. In that case, a plaintiff’s attorney failed to comply with

several discovery requests and show cause orders, resulting in dismissal of her lawsuit with prejudice. The plaintiff learned through a third party that her suit had been dismissed and that her attorney was suffering from severe clinical depression; she then hired new counsel who successfully filed a motion to vacate the dismissal. *Barr*, 119 Wn. App at 45.

The *Barr* court found that the trial court did not abuse its discretion in so ruling. But the Court expressly stated that it was not considering whether gross negligence constituted valid grounds to vacate a judgment under CR 60(b)(11). Instead it was considering whether the attorney's mental illness could constitute such grounds. *Barr*, 119 Wn. App. at 48.

Here, no such showing exists in the record. The trial court was within its discretion to dismiss and would have been within its discretion on the record below even if Ms. Howe had moved under CR 60(b) as the rules contemplate. Ample grounds exist in the record for this Court to affirm the decision of the trial court.

**F. IN THE ALTERNATIVE, THE COURT CAN REMAND TO THE TRIAL COURT WITH DIRECTION TO CONSIDER THE *BURNET* FACTORS**

In *Rivers, supra*, 145 Wn.2d at 700, the court held:

We remand to the trial court for a new determination whether the complaint should be dismissed, with specific findings on the record (1) whether Petitioner's failure to obey discovery orders and case event schedule deadlines was willful or deliberate; (2)

whether Petitioner's actions substantially prejudiced Respondent's ability to prepare for trial; and (3) whether the court considered less severe sanctions than dismissal before resorting to the drastic remedy of dismissal.

In *Teter v. Deck, supra*, the Supreme Court very recently confirmed the propriety of the decision in *Rivers* to remand after dismissal by the trial court, where the record of consideration of the *Burnet* factors was not clear:

Admittedly, we have remanded cases to the trial court for *Burnet* findings. *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 700, 41 P.3d 1175 (2002). However, the action under review in *Rivers* was a dismissal with prejudice rather than the grant of a new trial after a judgment on the merits; we remanded for a new determination of whether the complaint should be dismissed, with specific *Burnet* findings on the record. See *id.*, at 683, 700, 41 P.3d 1175.

*Teter*, 174 Wn.2d at 221.

In *Rivers*, however, the court considered neglect not nearly as egregious as what is presented here; the trial court record was not as explicit in rejecting the arguments on *Burnet*. See, *Rivers*, 145 Wn.2d at 686-689 (timeline of events shows dialog with counsel; interaction and nominal effort to adhere to case schedule and deadlines).

No justification or excuse is found in the present record for vast periods of neglect of the case such that the court was clearly within its discretion to find willfulness. The extended period of time

with no contact or information from the plaintiff certainly prejudiced McDonalds Restaurants of Washington, Inc. All of the argument eventually pleaded by Ms. Howe made a record of her position that she deserved some lesser sanction.

The court "explicitly rejected" those arguments on the record below. There is no need for a remand. The trial court should be affirmed. The case should remain dismissed.

## V. CONCLUSION

The trial court did not abuse its discretion in dismissing this case with prejudice. This Court should affirm dismissal. Trial courts must have available the full panoply of sanctions for a party who flouts all rules of procedure and fails to comply with court orders.

If it concludes that the record was not as clear as it should have been, the Court should remand with directions for the trial court to consider the *Burnet* factors as they relate to the chronicle of neglect in this case.

Respectfully submitted this 3<sup>d</sup> day of December, 2012.

PREG O'DONNELL & GILLETT PLLC

By 

Earl Sutherland, WSBA #23928

Eric P. Gillett, WSBA #23691

Christine E. Tavares, WSBA#24868

Attorneys for Respondent McDonald's  
Restaurants of Washington, Inc

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the foregoing

1. Respondents Brief;

to be served on the following parties in the manner indicated below

on the 4<sup>th</sup> of December, 2012:

**Counsel for Appellant Erika Howe:**

Kurt M. Bulmer, Esq.  
Law Office of Kurt M. Bulmer  
740 Belmont Place East, #3  
Seattle, WA 98102-4442

**X Via Messenger**

DATED this 4<sup>th</sup> day of December, 2012.

By   
Joan L. Kattenhorn, Legal Assistant