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COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

SHARYN MCPHERSON and RICHARD MCPHERSON, individually and as a marital community,

Appellants,

v.

CHARLES SANDOVAL and LUPITA SANDOVAL,

Respondents.

BRIEF OF RESPONDENTS

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. Appellants assign error to the trial court's dismissal of the underlying complaint with *prejudice* instead of without prejudice by order entered on March 31, 2006.

B. Issues Pertaining to Assignments of Error

1. Did the trial court abuse its discretion by dismissing the underlying complaint with prejudice less than five weeks prior to the scheduled trial date because of appellants' continuum of violations of multiple discovery orders and case scheduling orders?

   (a) Was appellants' continuum of violations willful and deliberate?

   (b) Were respondents prejudiced by appellants' continuum of violations?

   (c) Did the trial court properly consider and impose lesser sanctions?

   (d) Were respondents entitled to the relief they sought?

II. STATEMENT OF THE CASE

A. Introduction.

This is an appeal from the dismissal of a products liability lawsuit in which the appellants Sharyn McPherson ("McPherson") and Richard McPherson (collectively "the McPhersons") claim they sustained injuries arising out of a shock McPherson allegedly received in her workplace while operating multiple pieces of equipment and parts that collectively made up an x-ray room, defined by the McPhersons as an x-ray machine ("X-Ray Machine"). The McPhersons allege that the General Electric Company ("GEC") or one of its affiliates or subsidiaries manufactured, sold, and/or maintained the X-Ray Machine.

This appeal relates to the second of three separate lawsuits filed by the McPhersons based upon the same alleged injuries arising out of the same alleged incident. Following oral argument on a motion to dismiss brought by respondents Charles Sandoval ("Sandoval") and Lupita Sandoval (collectively "the Sandovals") and arising out of the McPhersons' failure to prosecute their case and violation of multiple court orders, the trial court dismissed the McPhersons' complaint with prejudice. The McPhersons appealed.

B. First, Second, and Third Lawsuits (Overview).

1. Parties and common claims.

McPherson worked as a radiology technician for Capital Medical Center ("Capital"). Capital leased space in a building in Olympia, Washington owned by Tumwater Family Practice Clinic ("Tumwater"), and McPherson operated the X-Ray Machine in that space. The McPhersons allege in all three lawsuits that McPherson was shocked on December 4, 2002 when the X-ray Machine allegedly malfunctioned, and further allege they sustained injuries from this event. In all three lawsuits the McPhersons have maintained that the General Electric Company ("GEC") or one of its affiliates or subsidiaries manufactured, sold, and/or maintained parts of or the entire X-Ray Machine. At the time of the alleged incident, Sandoval was an employee of GE Medical Systems ("GEMS"), a division of GEC, and the McPhersons allege that Sandoval negligently maintained the X-Ray Machine for Capital. CP 10-13, 235. General Electric Medical Systems Information Technologies, Inc. ("GEMS-IT") is a business entity affiliated with GEC but legally distinct from both GEC and GEMS, and GEMS-IT does not manufacture medical equipment such as the equipment at issue in this case. CP 112, 201-2; 236-38.

2. First Lawsuit.

The McPhersons filed the first complaint with the Thurston County Superior Court on October 9, 2003, naming only GEC as a defendant and alleging that GEC manufactured, sold, and/or maintained the entire X-Ray Machine ("First Lawsuit"). GEC promptly removed to the Federal District Court for the Western District of Washington based on complete diversity, and the McPhersons subsequently took a voluntary nonsuit on March 17, 2004. CP 40, 110-14. The McPhersons' attorney, Steven Meeks ("Meeks"), later attempted to explain his rationale for nonsuiting the First Lawsuit as follows:

> Mr. Meeks concluded that there were two procedural options: move in federal court for substitution and addition of parties defendant then remand, or simply take a nonsuit against GEC and refile in Thurston County against [GEMS-IT] and the new defendants. The second option was taken because it was easier, less expensive, and saved 30-60 days to get to the same inevitable result.

CP 113; *see also* RP December 9, 2005 at 18.

3. Second Lawsuit: procedural history.

The McPhersons refiled their claims in a second lawsuit from which this appeal arises ("Second Lawsuit"). Their second complaint ("Complaint") was filed in Thurston County Superior Court, Case No. 04-2-01099-1 on June 2, 2004. CP 10. Instead of naming GEC as the sole defendant, the Complaint names GEMS-IT, the Sandovals, Tumwater, and

various Doe defendants. CP 10. The Complaint alleges similar injuries arising from the same alleged event as the First Lawsuit. CP 10-13, 40; BOA 10. The Complaint alleges that GEMS-IT manufactured the entire X-Ray Machine, that GEMS-IT and/or Sandoval negligently performed maintenance on the X-Ray Machine, and that Tumwater had premises liability as the owner of the property leased by McPherson's employer, Capital. CP 10-13, 40.

The McPhersons initially served process on GEMS-IT and Tumwater. Tumwater subsequently filed a motion for summary judgment seeking dismissal based on its lack of control over the premises rented by its tenant, Capital. The McPhersons responded by moving for voluntary dismissal of their claims against Tumwater, and the court entered an order dismissing Tumwater. CP 41. The McPhersons did not initially serve process on the Sandovals, CP 41, but GEMS-IT's counsel agreed to accept service on their behalf and the trial court ultimately arranged for service of the Sandovals in the Second Lawsuit, RP December 9, 2006 at 21. Meeks admits he arranged for service of pleadings upon Sandoval four days later, and that Sandoval appeared at Meeks' office and accepted service of various documents. RP March 31, 2006 at 9-11. The McPhersons and Meeks currently maintain in written and signed submissions to the trial court, in their opening brief here, and during oral argument on the

underlying motion to dismiss that Sandoval was never served process in the Second Lawsuit.[1] CP 338, 350-51; RP January 6, 2006 at 36-37; RP March 31, 2006 at 9-11; BOA 19, 21-22, 29.

GEMS-IT appeared through counsel and answered the Complaint. CP 20-26. The trial court entered a case schedule order ("First Case Schedule Order") assigning the case to the Honorable Judge Wm. Thomas McPhee and setting the following deadlines: McPhersons' fact and expert witness disclosures – August 15, 2005; and discovery cutoff – December 15, 2005; trial – February 6, 2006. CP 27. These dates were subsequently continued pursuant to an amended case schedule order. CP 265-67.

The Sandovals voluntarily appeared in the Second Lawsuit on March 10, 2006 by bringing the motion that resulted in the underlying action being dismissed with prejudice. CP 324. On March 15, 2006, the Second Lawsuit was dismissed as against GEMS-IT by stipulation and order dismissing all claims against GEMS-IT with prejudice after the McPhersons acknowledged that GEMS-IT did not manufacture, sell, or

---

[1] This position is perplexing because the trial court ordered that Sandoval was to be served in the Second Lawsuit, not in the Third Lawsuit over which it had no jurisdiction. CP 264; RP December 9, 2005 at 23-25. Furthermore, Meeks confirmed to GEMS-IT's counsel in writing that the service of process conducted on December 13, 2005 was for both the Second Lawsuit and the Third Lawsuit. A copy of Meeks' confirming email is attached hereto as Appendix A.

maintain the X-Ray Machine. CP 343-46. On March 31, 2006, the Second Lawsuit was also dismissed with prejudice as against the Sandovals, as described below in Section II(C)(6). This appeal relates only to the trial court's dismissal of the Second Lawsuit with prejudice as against the Sandovals. BOA 4.

4. Third Lawsuit.

On November 14, 2005, prior to the order dismissing the Second Lawsuit with prejudice, Meeks and the McPhersons filed a third complaint alleging identical facts and nearly identical claims in Thurston County Superior Court, Case No. 05-2-02263-6 ("Third Lawsuit"). The Third Lawsuit names GEC and Sandoval as defendants. BOA 17. Neither the First Lawsuit nor the Third Lawsuit are at issue in this appeal and are mentioned here only to clarify the rather confusing procedural history.

C. Second Lawsuit in Detail.

1. GEMS-IT's discovery requests.

On July 7, 2005, GEMS-IT served Defendants First Set of Interrogatories and Requests for Production on the McPhersons ("Discovery Requests"). CP 52. The Discovery Requests consist of thirty-five interrogatories, four requests for production, and a stipulation to obtain McPherson's medical records in lieu of deposition of records custodians. CP 54-76. The McPhersons' answers and responses to the

Discovery Requests were due on August 8, 2005. CP 41. Pursuant to the First Case Schedule Order, the McPhersons' expert and fact witness disclosures and expert reports were due on August 15, 2005. CP 28.

2. GEMS-IT's motion to compel discovery responses and for sanctions ("First Motion").

The McPhersons and Meeks failed to meet the First Case Schedule Order fact and expert witness disclosure deadline, and wholly failed to respond to the Discovery Requests due on August 8, 2005. CP 45-46. Accordingly, on October 28, 2005, approximately two and a half months after the Discovery Requests were served and seven weeks after the McPhersons' answers and responses to the Discovery Requests were due, GEMS-IT filed a motion for an order compelling discovery and for sanctions ("First Motion"). CP 39-50. In the First Motion GEC argued that Meeks and the McPhersons had been granted several extensions but had failed to respond to the Discovery Requests in any manner by October 28, 2005, and that this refusal to respond had prejudiced GEMS-IT's ability to defend, including its ability to engage and prepare its own expert witnesses. CP 42, 45. The First Motion requested the court enter an order compelling full and complete answers and response to the Discovery Requests and further providing the Second Lawsuit would be dismissed if the discovery responses were not forthcoming. CP 46-47.

(a) Hearing and Order on First Motion.

The hearing on the First Motion was held on November 4, 2005, less than five weeks before the original discovery cutoff and only three months before the original trial date. RP November 4, 2005 at 1.

At the outset of the hearing, Meeks stated:

> I will stipulate to the discovery motion. Counsel is correct. There has been a problem, for reasons that we don't need to go into, and I'll stipulate to the granting of the order. I'll stipulate to the monetary sanctions. But the sanctions need to be against me, not the client.

RP November 4, 2005 at 4-5.

GEMS-IT's attorney, Paul Miller ("Miller"), argued that discovery responses were still not forthcoming as of the hearing date, and that GEMS-IT had already given Meeks several extensions which Meeks had promised to meet. Miller argued that Meeks' history of failing to meet discovery deadlines warranted a court order compelling discovery and providing for dismissal with prejudice in the event the McPhersons failed to meet the court ordered deadline. Miller argued as follows:

> There has been excessive delay in this case in responding to discovery, which was initially due in August, August 8th of this year, and now three months later we still don't have any discovery from the [McPhersons]. It's not that it's been insufficient. It's been nonexistent. . . . with a trial on March 1,[2] and more importantly, a discovery cutoff on the

[2] Miller apparently misspoke here as the trial date was set for February 6, 2006.

> 15th of December, that we need to get this stuff, and we need to get it fast. . . . My fear here, though, is in the event that Mr. Meeks does not and the [McPhersons] do not meet whatever timeframe you put in there – and again we're suggesting it's five days – that you dismiss this case with prejudice.
>
> I just want to alert the court how this case has proceeded, and I think it may aid you in your decision as to why that kind of sanction should be imposed here in a discovery case.

RP November 4, 2005 at 6-7.

In response, Meeks stated: "the reasons that this has happened is that I don't have a factual basis under Civil Rule 11 to really proceed against [GEMS-IT] so far. So that is why <u>I have not been active on the case. . . . I don't believe at this point that we can even proceed to trial</u>." RP November 4, 2005 at 11 (emphasis added). The following exchange between Meeks and Judge McPhee followed:

> THE COURT: Mr. Meeks, do your plans include responding to this discovery?
>
> MR. MEEKS: I always follow court orders, and yes, I do --
>
> THE COURT: All right.
>
> MR. MEEKS: -- if that is the case.
>
> . . .
>
> THE COURT: Here's what I'm going to do: I will give the responding party, the plaintiff here [the McPhersons] ten days in which to answer the overdue discovery. <u>At the end of ten days, if that is not fully</u>

> completed, if discovery is not fully tendered by that time, then the court will consider whether dismissal is appropriate. I suspect that I would conclude that it is appropriate, but I will go slowly and with caution here, because the court rules are clear that a court should consider all other possibilities of sanctions prior to entering an order dismissing a claim or dismissing a case.

RP November 4, 2005 at 15-16 (emphasis added).

Judge McPhee entered an order compelling the McPhersons and Meeks to respond to the Discovery Requests by November 18, 2005, and ordering Meeks to pay monetary sanctions to GEMS-IT ("First Discovery Order"). CP 88-90.

3. The McPhersons' motion to consolidate and for CR 11 sanctions against GEMS-IT's counsel.

Shortly after filing the Third Lawsuit on November 14, 2005,[3] on November 22, 2005, the McPhersons filed a motion ("the McPhersons' Motion") seeking, among other things, consolidation of the Second Lawsuit and the newly filed Third Lawsuit, and seeking CR 11 sanctions against GEMS-IT's counsel alleging misrepresentations related to the proper defendants and manufacturers, allegedly occurring in the First Lawsuit. CP 109, 121, 123-125.

[3] Because McPherson's alleged injury occurred on December 4, 2002, the third lawsuit was filed just 23 days before the expiration of the three-year statue of limitations on the McPhersons' claims. CP 121.

GEMS-IT and its counsel strenuously objected to the McPhersons' Motion. GEMS-IT filed the declaration of Peggy C. Hughes ("Hughes"), one of GEMS-IT's attorneys, in opposition to the McPhersons' Motion, which clarifies that prior to Meeks' voluntary nonsuit of the First Lawsuit, Hughes told Meeks that GEMS "a division of GEC, was responsible for the manufacture of some of the components of what was then understood to be the so-called "x-ray machine." CP 234-35. GEMS-IT also filed the declaration of Miller in opposition to the McPhersons' Motion, which clarifies that prior to Meeks' nonsuit of the First Lawsuit, Miller informed Meeks that GEC, not GEMS-IT, would be providing documents for the initial laydown. CP 236-38. The Miller declaration also included a copy of GEC's FRCP 26(a)(1) initial disclosure to the McPhersons, which lists relevant documents that were in GEC's possession, not GEMS-IT's. CP 243, 246; *see also* RP December 9, 2005 at 17-18. GEMS-IT also filed a brief in opposition to the McPhersons' Motion and argued that the Thurston County Superior Court in the Second Lawsuit lacked jurisdiction to even consider CR 11 sanctions for alleged and completely disputed conduct arising from the First Lawsuit in federal court. CP 244-258.

4. GEMS-IT's motion to dismiss and for sanctions ("Second Motion").

On December 2, 2005, GEMS-IT filed a second discovery motion ("Second Motion"), this time seeking an order dismissing the Second Lawsuit as a sanction for Meeks' and the McPhersons' violations of the First Case Schedule Order and the First Discovery Order. CP 183-200. The Second Motion argues that Meeks and the McPhersons produced late, unsigned, and inadequate responses to the Discovery Requests, and that the responses were served after the deadline stated in the First Discovery Order. CP 184-86. The Second Motion reiterates the fact that Meeks and the McPhersons failed to produce their fact and expert witness lists or their expert witness reports, all of which were due under the First Case Schedule Order by August 15, 2006. CP 193.

(a) Hearing on McPhersons' Motion and Second Motion.

Both the McPhersons' Motion and the Second Motion were heard by Judge McPhee on December 9, 2005. CP 259. Judge McPhee denied the McPhersons' Motion regarding consolidation of the Second Lawsuit and the Third Lawsuit. CP 263. Judge McPhee concurred with GEMS-IT that he lacked jurisdiction to impose CR 11 sanctions against Hughes or Miller and denied the McPhersons' Motion regarding sanctions. CP 264.

Miller argued at the hearing in opposition to McPhersons' Motion as follows:

> It's well set out in our written pleadings the issues we take with most of what Mr. Meeks has said this morning in terms of the communications levels and what was represented to him, and in particular, communication that I had with Mr. Meeks prior to his non suit of the federal case, which I did indicate that GE did have some role, and I provided him with a lay down disclosure statement in that federal case indicating that GE was going to provide certain documents, product specification documents and everything else in defending that claim.
>
> . . .
>
> I do know why he non suited, despite that fact, and that's the simple fact that he wanted to get that case out of federal court. That is why he non suited the case. . . . He's even admitted that in his pleadings . . ..

RP December 9, 2005 at 17-18.

Regarding the Second Motion and the McPhersons' inadequate discovery responses, Meeks admitted: "[t]he case is not ready to go to trial. It cannot be ready to go to trial because of the lapses both on my part, in a sense, because I hadn't moved earlier on it, as I explained . . .." RP December 9, 2005 at 5. Meeks went on to argue that another reason he and the McPhersons were not ready to go to trial was their inability to locate and serve Sandoval. RP December 9, 2005 at 7. In response, Miller argued that Meeks' and the McPhersons' failure to serve Sandoval

in the nearly eighteen months since the lawsuit was filed was not due to any misconduct by GEMS-IT:

> I don't have any recollection in my files or my mind that Mr. Meeks ever asked us to accept service on Mr. Sandoval. So we have not refused service on Mr. Sandoval, and I will represent to the court right now that we will . . . we'll accept service for him. So there's been no attempt here to hide Mr. Sandoval or keep him away from Mr. Meeks.

RP December 9, 2005 at 21.

During Meeks' rebuttal on this issue, the following exchange occurred:

> THE COURT: When do you want to serve him [Sandoval]?
>
> MR. MEEKS: Pardon?
>
> THE COURT: When do you want to serve him?
>
> MR. MEEKS: As soon as I find him, I will -- I will serve him now. That's always been --
>
> THE COURT: Here's what I'm going to do about that. . . . I'm going to direct, Mr. Miller, that you direct Mr. Sandoval to be in the office next Tuesday morning and be available to be served. Does that make sense to you?
>
> . . .
>
> In the morning, regular business hours, 8:00 to 12:00 -- 9:00 to 12:00.
>
> MR. MEEKS: All right.

RP December 9, 2005 at 23-25.

The hearing continued with argument on the requested relief of dismissal of the Second Lawsuit with prejudice. Miller restated the deadline and requirements of the First Discovery Order and recited how the late and inadequate discovery responses violated that order. RP December 9, 2005 at 32-36. Miller argued:

> I think you asked Mr. Meeks straight out as to, are you going to comply with the order, and he said I have every -- you know, I always obey court's orders. Clearly that hasn't been the case here. And so, you know, as much as Mr. Meeks wants to paint this case in terms of GE's trying to hide its -- hiding the ball or avoiding its discovery obligations, plaintiffs, the very people who filed a lawsuit in this case, have given us nothing, essentially. I mean, they've given us a few things, but nothing to properly defend this case, in violation of your order. . . . you have broad discretion here. And that discretion includes ordering a dismissal of the case.

RP December 9, 2005 at 36-7.

Judge McPhee and Meeks had the following exchange:

> MR. MEEKS: . . . The answers are complete to the best of our knowledge. . . . Ms. McPherson has been in California for the last month taking care of her mother.
>
> THE COURT: Ms. McPherson is going to have to come back.
>
> MR. MEEKS: No, she's coming back. She will be back here shortly.
>
> THE COURT: That's simply not an explanation that I, frankly, am willing to accept anymore.
>
> MR. MEEKS: Very well. Very well.

THE COURT: I've heard it constantly throughout this case.

. . .

I'm going to reserve ruling on this request to dismiss this case and give the [McPhersons] one more bite at the apple. . . . Today is the 9th. The [McPhersons] will have until the close of business on December 19 to make their final response to those discovery requests. If they are satisfactory, then I will consider whether a sanction is justified for unsatisfactory, incomplete, legally insufficient discovery responses. I will consider that on Friday, January 6. . . . And then I will decide on January 6 whether they are or not, and if they are not, I am going to dismiss the case.

. . .

We have dealt with this issue on two prior occasions by my count, and now on the 6th of January we will be dealing with it for the third time if it remains an issue. Mr. Meeks, I don't know where the problem lies, whether it's with your clients or whether it is with your ability to communicate with them. But that problem has got to be solved if the case is going to proceed.

MR. MEEKS: . . . The problem lies with the fact that I have inadequate information to answer any further than I did . . ..

THE COURT: It may be that the information is not then sufficient to sustain your --

MR. MEEKS: That could be.

THE COURT: -- your lawsuit.

MR. MEEKS: That could be.

THE COURT: And if that's the case, dismissal is appropriate.

RP December 9, 2005 at 38-39, 41-43 (emphasis added).

Judge McPhee entered an order ("Second Discovery Order") directing Meeks and the McPhersons to provide full and complete discovery responses by December 19, 2005, and further providing that the Second Lawsuit would be dismissed with prejudice if the answers were inadequate at the hearing to be held on January 6, 2006. CP 260-61. The Second Discovery Order also continued the trial date and discovery cutoff, and a subsequent Amended Case Schedule Order ("Amended Case Schedule Order") was entered with the following deadlines: McPhersons' expert witness disclosures – January 31, 2006; expert depositions and discovery cutoff – March 15, 2006; and trial – May 1, 2006. CP 265-66.

5. GEMS-IT's subsequent motion to dismiss and for sanctions ("Third Motion").

On December 29, 2005, GEMS-IT filed another motion to dismiss and for sanctions against the McPhersons and Meeks ("Third Motion"). CP 272-84. In the Third Motion, GEMS-IT argues that the McPhersons' supplemental discovery responses were still inadequate and were in violation of the Second Discovery Order, and that the McPhersons had still not disclosed their fact or expert witnesses or their expert witness reports. CP 277-280; 282-83.

(a) Hearing on Third Motion.

On January 6, 2006, Judge McPhee heard oral argument from Miller and Meeks on the Third Motion. Judge McPhee directed Miller to describe the specific failures to respond by the McPhersons and how they were prejudicial to GEMS-IT, stating: "parts of the discovery clearly are extremely important to [GEMS-IT], and I want you to acquaint me with those parts of this discovery, exclusive of 5, 6, and 7."[4] RP January 6, 2006 at 11-12. Miller argued that the insufficient responses to the Discovery Requests included inadequate description of injuries and damages, inadequate description of the loss of consortium claim, inadequate information about the X-Ray Machine, insufficient disclosure of medical records, and most importantly the lack of production of any sort of expert witness list, expert witness CVs, or summaries of expert opinions. RP January 6, 2006 at 14-17, 22, 23. Miller argued:

> I just, frankly, don't understand why at this stage they can't even identify medical experts that may testify at trial. And in terms of other experts, you know, the situation is that they were ordered to provide full and complete responses. And that means identifying your experts. . . . You know, the time for that was a long time ago. The time for that was back in the summer. The time for that was in November

[4] "5, 6, and 7" is a reference to the Discovery Requests, Interrogatory Nos. 5, 6, and 7, which the court had previously identified as "basically the request or interrogatories concerning the x-ray machine . . . clearly, it seems to me, that is an issue of compelling interest to the defendants." RP January 6, 2006 at 10.

> after your first order. The time for that was in December on your second order. I don't know when we're ever going to get it, and that's what troubles me. . . . I think, clearly, the time has come and gone for identification of experts. . . . it takes a while to get information about experts to kind of look at what they've concluded, to make decisions on how you're going to proceed and defend this case.

RP January 6, 2006 at 19-20.

In response the following exchange between Meeks and Judge McPhee took place:

> MR. MEEKS: You know, this order that Mr. Miller is referring to [the Second Discovery Order] was an agreed order following the last hearing. We sat in that room in there and scribbled something out, and he wanted me to say full and complete and et cetera, et cetera.
>
> THE COURT: Let me disabuse you of that argument; all right? That is not an accurate characterization of what happened. What happened was, I said I would give you one more bite at the apple. Those are my words. I'm reading from the transcript I have. And I said that if this case came back to me and I found that discovery was not complete within the time limits I set forth, the case was going to be dismissed.
>
> . . .
>
> <u>My characterization of it is that is a hard and fast order, based upon my determination that I was not going to dismiss your case</u>. And one of the reasons that I am so concerned about that here is that, because as I read these responses and some of the discovery issues here, particularly Interrogatories 5, 6, and 7 and Interrogatory 26, I see that is very much focused on what will be expert testimony in this case. . . . And those deadlines were set at August 15 of 2005. That was the date by which all the reports from all expert witnesses were to be in the

> defendant's hands. And that time has come and passed. And now the interrogatories are not unreasonable interrogatories because we are hard on the trial date. . . . And so I look at the case schedule order that is hard and fast and see that you've got 16 business days until all of those reports are due. And if they are not presented at that time, then I'm going to be back here facing another motion to dismiss. . . .
>
> MR. MEEKS: I appreciate that, Judge. But I -- I -- my characterization was not going to be as you mentioned.
>
> THE COURT: All right.
>
> . . .
>
> MR. MEEKS: . . . I have given all the information that is presently available.
>
> THE COURT: Are you on schedule to present all of the written reports of your experts --
>
> MR. MEEKS: I doubt that.
>
> THE COURT: -- on January 31?
>
> MR. MEEKS: I doubt that will happen . . ..

RP January 6, 2006 at 26-30 (emphasis added).

The exchange between Meeks and Judge McPhee continued:

> MR. MEEKS: . . . As far as the -- well, the experts -- we've already talked about that. But as far as the responses now, I contend that I have complied with the court's order to the best available information. To say that after the initial motion activity that I was now required to go and dig out that information and get it fully analyzed, prepared, and processed within 10 days or 20 days, that's just -- I can't do it. And it wasn't my understanding. And it's not necessary.

> THE COURT: With all due respect, Mr. Meeks, it's not 10 days in that sense. It's 18 months. That is how --
>
> MR. MEEKS: Pardon?
>
> THE COURT: It's 18 Months. That's how long this case has been pending. We are within just 30 days of the originally scheduled trial date. That trial date was extended, but it was not extended with the idea that nothing had been done in the case to establish the basis for [the McPhersons'] claim and that it would then start at that point, December 10th --
>
> MR. MEEKS: Okay.
>
> THE COURT: -- to build a case. And so I am sitting here listening to the arguments that you make, but I have yet to draw any conclusions that this case can possibly be prepared within the time limits that have been established here.

RP January 6, 2006 at 33-34.

Judge McPhee proceeded to make an eight-page oral ruling, including specific findings that a number of the McPhersons' responses to the Discovery Requests were inadequate. RP January 6, 2006 at 42-50. Judge McPhee orally ruled, in relevant part, as follows ("Oral Discovery Order"):

> This motion comes before me as a motion seeking a specific sanction for failure to provide adequate discovery and failure to comply with the court's orders that were entered earlier . . .. Because the remedy of dismissal of the claim is such a harsh sanction, this court needs to proceed very carefully, and among other things, I need to consider all lesser sanctions to see if they could not accomplish what needs to be accomplished before the case is dismissed.

Where, however, the claim is that discovery has been withheld that goes to the essence of the plaintiffs' case, it is appropriate in certain circumstances to dismiss that case, not just the claim or not just withholding evidence, because it is patently unfair and inappropriate for this court to say to a defendant that you must proceed and defend, recognizing that at the end of the day you're going to be entitled to dismissal because a necessary element of the plaintiffs' case cannot be presented to the jury by reason of the plaintiffs' failure to make discovery. That situation, of course, would be intolerable, and under those circumstances, dismissal of the case, or in certain circumstances dismissal of one of several claims, would be appropriate. That is what had been asked for here.

I've considered this very carefully and considered my responsibilities in that regard and considered the arguments that Mr. Meeks has presented to me. At this time I am going to deny [the Third Motion], but I am going to reserve the right to impose an appropriate sanction here. . . . I will tell you, Mr. Meeks, I fully expect that this case at some point will be dismissed, and I say that for a couple of reasons:

Number one, because it may be that you will discover the information that Mr. Miller contends you already have that will cause it to be clear that [GEMS-IT] has no liability in this case, and therefore it should be dismissed. . . .

The other reason that I would expect, ultimately, that this case would be dismissed . . . is because the case schedule order that is presently in place and was permitted as a condition of my refusal to dismiss the case on December 9 contains deadlines that, given the state of preparation that I have now discovered exists here, I don't believe can be met. You contend that they may be, and if that turns out to be the case, I say good for you. But the fact of the matter is that we have 16 business days in which you must generate a case that will be based upon expert testimony about the malfunction of a very complicated piece of x-ray machinery.

. . .

> The new case schedule order significantly compresses that time [for expert witness depositions and GEMS-IT's identification of rebuttal witnesses], and it requires that the reports be submitted on January 31, and it then has a 43-day window in which to complete discovery. And then following that, of course, the case begins trial in another, approximately, 45 days. The point here is that those discovery deadlines are hard and fast.

. . .

> So it may be that this matter will simply be back before me shortly after the 31st of January seeking dismissal because the reports of the experts have not been submitted, and without those reports, a necessary element of plaintiffs' case, the ability to establish liability, will be missing. Under those circumstances, it seems to me that it's not unreasonable to predict at this point that at that time the case would be dismissed.

RP January 6, 2006 at 42-46 (emphasis added).

After Judge McPhee's oral ruling, Meeks explained his rationale for not simply nonsuiting the Second Lawsuit against Sandoval and GEMS-IT as follows:

> Your Honor, one of the reasons -- I've considered voluntary dismissal, as any reasonable lawyer would. One of the problems has to do with the dismissal I took of General Electric Company in federal court. The two dismissal rule might come into effect. There is some authority to the effect that even a dismissal of a defendant who is not the same defendant named but has some relationship with them

> might have the benefit of the two dismissal rule. . . . That's the reason it hasn't been done.[5]

RP January 6, 2006 at 51-52.

In his conclusion, Judge McPhee stated he was "placing a significant burden on the plaintiffs in terms of warning them about the consequences of failing to meet deadlines." RP January 6, 2006 at 61.

6. GEMS-IT and the Sandovals' motion for discovery sanctions and dismissal ("Fourth Motion").

On March 10, 2006, GEMS-IT and Sandoval filed a motion requesting the trial court enter an order dismissing the Second Lawsuit and/or prohibiting the McPhersons from presenting witnesses at trial ("Fourth Motion"). CP 324-39. In the Fourth Motion, GEMS-IT and Sandoval argue that the McPhersons verified that GEMS-IT did not manufacture, sell, and/or maintain the X-Ray Machine, that Meeks confirmed in writing his intention to dismiss the Second Lawsuit, and also that the McPhersons had failed to produce their witness lists and expert witness disclosures in violation of the Amended Case Schedule Order. CP 326.

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[5] "The Two Dismissal Rule" refers to CR 41(a)(4)'s provision that "an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any State." *See, e.g., Burley v. Johnson*, 33 Wn.App. 629, 638, 658 P.2d 8 (1983).

(a) Dismissal of GEMS-IT with prejudice.

On March 15, 2006, Meeks filed an executed stipulation and order dismissing GEMS-IT with prejudice. The order does not address or dismiss the Sandovals. CP 343-46.

7. Hearing on Fourth Motion.

On March 31, 2006, Judge McPhee heard argument by Meeks and Miller on the Fourth Motion. CP 361. The trial date was less than five weeks away. RP March 31, 2006 at 6. In response to the Fourth Motion, the McPhersons stated they did not object to the dismissal of the Sandovals, but did object to the dismissal being with prejudice. CP 338. Thus, the narrow issue before the trial court at the time of the hearing on the Fourth Motion was whether dismissal of the Sandovals would be with or without prejudice. RP March 31, 2006 at 4.

Miller argued that Meeks and the McPhersons had violated at least two discovery orders, had failed to disclose fact or expert witnesses or expert witness reports in violation of the Amended Case Schedule Order, and that although the McPhersons had dismissed GEMS-IT, they had refused to take a nonsuit against the Sandovals. RP March 31, 2006 at 5-7. Miller stated that instead of the stipulated dismissal without prejudice proposed by Meeks, the Sandovals would "rather just go ahead and get a dismissal with prejudice and feel we are entitled to it because of the fact

that plaintiffs have not taken the proper action to prosecute this case in a diligent manner." RP March 31, 2006 at 7.

When asked by Judge McPhee why he refused to take a nonsuit against the Sandovals, Meeks again recited his concerns related to the possible application of the Two Dismissal Rule to the Third Lawsuit and stated "I am duty bound not to use or to give the defense the opportunity to assert that kind of a position anywhere by taking a voluntary non suit. And so I am not taking a voluntary non suit." RP March 31, 2006 at 10. Judge McPhee replied that the question of the application of the Two Dismissal Rule to the Sandovals in the Third Lawsuit, which was at that time pending in federal court, was not presently before his court. RP March 31, 2006 at 11. The following exchange between Judge McPhee, Meeks, and Miller brought the hearing to a close:

> THE COURT: . . . What's an issue before me is that I either grant the [Fourth Motion] or I deny it. If I deny it, we proceed to trial, [Miller] comes in with a motion to dismiss and a motion for CR 11 sanctions. I presumably would dismiss the case at that point and certainly would grant the sanctions for bringing [Miller] back to do that. Or you can take a voluntary non suit and you can take the lead for your client in dismissing the case and avoid that exposure. It's one or the other. I'm not going to amend the [Fourth Motion] to suit your clients, given the posture of this case and the reason why it's being dismissed. So the choice is yours. You can either deny that motion and we proceed to a trial and clearly consideration of a motion to dismiss or take a non suit, one or the other.

MR. MEEKS: Your comment raises something. There is -- the defendants had made the motion to dismiss. I have joined in the motion to dismiss.

THE COURT: Then I grant it.

MR. MEEKS: So we are -- for the purpose of bringing the case to a close, case administration --

THE COURT: The [Fourth Motion] is granted as presented by the defendants.

MR. MEEKS: With prejudice?

THE COURT: With prejudice.

MR. MILLER: Thank you, Your Honor.

MR. MEEKS: Your Honor, given the court's ruling, prior to entry of the order, I will -- I hereby move for a voluntary non suit.

MR. MILLER: Object to that, Your Honor. You've already ruled.

THE COURT: I've already ruled.

MR. MEEKS: Okay.

THE COURT: I've signed the order.

MR. MEEKS: Thank you, Your Honor.

MR. MILLER: Thank you, Your Honor.

RP March 31, 2006 at 12-13.

Judge McPhee signed and entered an order dismissing the Second Lawsuit with prejudice. The order, prepared by Miller prior to GEMS-IT's stipulated dismissal, originally read that the Fourth Motion was

brought by both GEMS-IT and the Sandovals, but the executed order is interlineated to remove the reference to GEMS-IT. CP 362-63.

III. SUMMARY OF ARGUMENT

Judge McPhee did not abuse his discretion in dismissing the Second Lawsuit with prejudice because 1) the McPhersons and Meeks knowingly and willfully violated multiple court orders and by their own admission were not ready for trial; 2) their violations prejudiced GEMS-IT and the Sandovals; and 3) Judge McPhee explored on the record and imposed several generous lesser sanctions, including amending the case schedule and continuing the trial, before finally dismissing the case with prejudice. The McPhersons' argument that the Sandovals were not entitled to relief is contrary to the facts, statutory law, and case law. Finally, Meeks' arguments alleging any misrepresentations by GEC and GEMS-IT's attorneys are not properly before this court on appeal, and are unsupported by the record, inflammatory, irrelevant, and adamantly disputed by GEC, GEMS-IT, and the Sandovals' attorneys. In sum, the Court should affirm the trial court's dismissal of the Second Lawsuit with prejudice.

IV. ARGUMENT

A. The Standard of Review is Abuse of Discretion.

The abuse of discretion standard governs review of sanctions for noncompliance with court orders. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002) (discovery order); *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn.App. 125, 130, 896 P.2d 66 (1995) (case schedule order). "Discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *E.g., Rivers*, 145 Wn.2d at 684. The McPhersons bear a heavy burden and must demonstrate that Judge McPhee's decision was an abuse of discretion.

B. Dismissal of the Second Lawsuit with Prejudice is Supported by Law and was well within Judge McPhee's Discretion.

1. A court may dismiss a case with prejudice for violation of a case schedule order or other court order.

A trial court has "discretionary authority to manage its own affairs so as to achieve the orderly and expeditious disposition of cases" and "may impose such sanctions as it deems appropriate for violation of its scheduling orders to effectively manage its caseload, minimize backlog, and conserve scarce judicial resources." *Woodhead*, 78 Wn.App. at 129.

The Court Rules provide: "for failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her." CR 41(b). "Under CR 41(b), a trial court has the authority to dismiss an action for noncompliance with a court order or court rules." *E.g., Rivers,* 145 Wn.2d at 686.

The sanction of dismissal with prejudice pursuant to CR 41(b) "is justified when a party acts in willful and deliberate disregard of reasonable and necessary court orders, the other party is prejudiced as a result, and the efficient administration of justice is impaired." *See Apostolis v. City of Seattle*, 101 Wn.App. 300, 303-5, 3 P.3d 198 (2000) (trial court's dismissal of an action with prejudice for violation of case schedule and court orders affirmed on appeal); *accord Woodhead*, 78 Wn.App. 129-131 (trial court's dismissal of an action with prejudice for conduct including violation of case schedule order affirmed on appeal). "A party's disregard of a court order without reasonable excuse or justification is deemed willful." *Rivers*, 145 Wn.2d at 686-87. However, before dismissing a case as a sanction, a trial court must consider on the record whether a lesser sanction would suffice. *See Woodhead*, 78 Wn.App. at 132. Thus, a trial court in Washington may dismiss a case with prejudice if a party violates an order of the court, including a case schedule order, if 1) the

violation is willful and deliberate; 2) the violation prejudiced the other party; and 3) the court considered lesser sanctions. *See Rivers,* 145 Wn.2d at 686.

In *Apostolis*, an aggrieved plaintiff filed a complaint alleging unfair labor practices, which was heard and subsequently dismissed by an administrative agency, and the plaintiff filed a petition for review with the Superior Court. 101 Wn.App. at 310. The plaintiff failed to timely serve a copy of the case schedule order on the defendant, and only did so a month after the defendant specifically requested it. The plaintiff failed to timely file his opening brief, and only did so after the defendant's opening brief had been timely filed pursuant to the case schedule order. *Id.* at 302. Plaintiff's counsel then failed to attend a pretrial conference, failed to engage in court-ordered mediation, and filed the plaintiff's reply brief ten days late. *Id.* at 303. The superior court dismissed plaintiff's petition for review with prejudice, applying the CR 41(b) test cited above, and the court of appeals affirmed. *Id.* at 303-305; *see also Woodhead*, 78 Wn.App. at 129-131 (trial court dismissed complaint with prejudice for plaintiff's willful failure to comply with court rules and orders in addition to plaintiff's counsel deliberately misleading the court).

2. A court may dismiss a case with prejudice as a sanction for discovery abuse.

The law is well settled in Washington concerning dismissal of a complaint as a sanction for discovery abuse. *Rivers*, 145 Wn.2d at 686. "A spirit of cooperation and forthrightness during the discovery process is mandatory for the efficient functioning of modern trials." *Johnson v. Jones*, 91 Wn.App. 127, 132, 955 P.2d 826 (1998). Sanctions are permitted under CR 37 "for unjustified or unexplained resistance to discovery and serve the purposes of deterring, punishing, compensating, and educating a party or its attorney for engaging in discovery abuses." *Id.* at 133.

CR 37 "authorizes sanctions to be imposed on a party or its attorney for (1) failure to comply with a discovery order or (2) failure to respond to a discovery request or to appear for a deposition." *Johnson*, 91 Wn.App. at 133. A court has broad discretion in applying sanctions to parties violating discovery duties or discovery orders. *Hampson v. Ramer*, 47 Wn.App. 806, 813, 737 P.2d 298 (1987). Sanctions for failure to respond to interrogatories and/or requests for production may include excluding a disobedient party from introducing designated matters into evidence, and/or dismissing the action and entering a default judgment against the disobedient party. CR 37(b)(2); CR 37(d).

A court may impose harsher sanctions including dismissal of the action with prejudice for violation of a discovery order, and a reviewing court will apply the same three-part test cited above for CR 41(b) in determining whether a trial court abused its discretion by imposing harsher sanctions. *See Rivers,* 145 Wn.2d at 686; *see also Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

The issue of dismissal as a sanction was explored by the court of appeals in *Anderson v. Mohundro*, 24 Wn.App. 569, 604 P.2d 181 (1979). In the action underlying the *Anderson* decision, the defendants served interrogatories on the plaintiff requesting factual information essential to defendants' understanding of plaintiff's claims. Plaintiff did not timely answer, and defendants filed a motion to compel. Plaintiff gave insufficient and evasive answers one day prior to the hearing on the motion, prompting defendants to file a second motion to compel. *Id.* at 570. The court ordered plaintiff to fully respond to the interrogatories within two weeks. Several months later, plaintiff had still failed to fully respond to the interrogatories and defendants filed a motion to dismiss. The trial court granted the motion and dismissed plaintiff's complaint for willful violation of a discovery order. *Id.* at 571.

The court of appeals reviewed the decision and affirmed the trial court's dismissal of the complaint, holding "where one party has acted in

willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice, and has prejudiced the other side by so doing, the application of even so stringent a sanction is justified and will not be disturbed on appeal." *Id.* at 575; *see also Johnson*, 91 Wn.App. at 132-135 (where party failed to answer interrogatories and produce documents after being ordered to do so, the court of appeals "strongly endorsed" the use of sanctions as "entirely appropriate").

Thus, a trial court is within its discretion to dismiss a case with prejudice as a sanction for violation of either a case scheduling order or a discovery order if 1) the violation is willful and deliberate; 2) such violation prejudiced the other party; and 3) the court considered lesser sanctions on the record. Here, all three factors are met.

3. The McPhersons and Meeks willfully and deliberately violated the three Discovery Orders and the Case Schedule Orders.

The Fourth Motion sought dismissal with prejudice as a sanction for the McPhersons and Meeks' continuum of violations of the three Discovery Orders and the Case Schedule Orders. Here, as in the cases cited above, the McPhersons and Meeks' repeated failure to produce discovery responses and the sanctions to be applied for such failure should be viewed within the context of the entire action.

The McPhersons apparently did not even attempt to serve process on the Sandovals for more than sixteen months after the Second Lawsuit was filed and never identified or served the Doe defendants. Meeks admitted several times that his personal problems contributed to his egregious periods of inactivity in prosecuting the Second Lawsuit during the first sixteen months of its pendency. The McPhersons and Meeks first violated the First Case Schedule Order by failing to disclose their fact and expert witnesses and expert witness reports by August 15, 2005. In fact, they never made these disclosures despite being ordered to do so in both Case Schedule Orders and in all three Discovery Orders.

GEMS-IT served the Discovery Requests in time to conclude its discovery under the case schedule, but three months after discovery was served, GEMS-IT had not received a scrap of paper or a single answer to an interrogatory from the McPhersons. GEMS-IT filed the First Motion long after the deadline for fact and expert witness disclosures under the First Case Schedule Order, approximately six weeks before the discovery cutoff, and four months before the trial date.

The McPhersons and Meeks had no reasonable excuse or justification for their refusal to respond to discovery and the case schedule deadlines. If fact, their disregard was so indefensible that Meeks was willing to stipulate to personally pay sanctions and to produce discovery

on a short timeline. Having given Meeks several extensions prior to being forced to file the First Motion, Miller requested entry of an order compelling discovery. Judge McPhee granted Miller's request, ordering the McPhersons to respond to the Discovery Requests, including fact and expert witness disclosures, by November 18, 2005, and awarding monetary sanctions against Meeks. The McPhersons responded to the Discovery Requests, but their responses were untimely and inadequate, thereby violating the First Discovery Order.

GEMS-IT filed the Second Motion on December 2, 2005, within two weeks of the discovery cutoff and approximately two and a half months before trial. The McPhersons had yet to disclose a single expert, had failed to describe their injuries with specificity, and had not even advanced a theory as to how the complicated X-Ray Machine caused the shock alleged in the Second Lawsuit. Judge McPhee considered the stricter sanction of dismissal with prejudice given the gravity and willfulness of the McPhersons and Meeks' violation of the First Discovery Order and their failure to prosecute the case. However, Judge McPhee elected a lesser sanction and instead continued the trial date, witness disclosure deadline, and discovery cutoff, and again ordered full and complete responses to the Discovery Requests, including witness disclosures, by December 19, 2006. The McPhersons supplemented their

responses to the Discovery Requests, but again their responses were inadequate, constituting a violation of the Second Discovery Order.

GEMS-IT filed the Third Motion on December 29, 2005. At the time of the hearing on the Third Motion, five months after GEMS-IT first served the Discovery Requests on the McPhersons, defendants still did not have complete answers or critical information with which to prepare the defense. During the hearing, Judge McPhee sternly corrected Meeks on his attempted re-characterization of the Second Discovery Order, and reminded Meeks that the McPhersons and Meeks' willful failure to prosecute the case stemmed back to the filing of the case 18 months prior. Judge McPhee went on to make specific findings on the record that the McPhersons' supplemental discovery responses were inadequate and violated the Second Discovery Order. Judge McPhee stated that he fully expected the case to be dismissed at some point, but again he elected a lesser remedy and declined to dismiss the case. Instead, in the Oral Discovery Order, Judge McPhee specifically reserved judgment on GEMS-IT's motion for dismissal and for sanctions for a later date in the event the McPhersons and Meeks failed to strictly adhere to the Amended Case Schedule Order. When the McPhersons and Meeks once again failed to timely disclose their fact and expert witnesses and expert witness

reports on March 15, 2006, they violated both the Oral Discovery Order and the Amended Case Schedule Order.

At no point in the motions practice or oral argument on the four motions did Meeks state a reasonable excuse or justification for his and the McPhersons' complete disregard for the trail court's orders, the discovery rules, and their continuum of violations. The only explanation Meeks offered included his own inactivity on the case, personal problems, and a lack of information with which to respond due to his failure to prosecute the case. Under the case law cited above, the McPhersons and Meeks' violation of these court orders was willful and deliberate.

4. GEMS-IT and the Sandovals were substantially prejudiced by the McPhersons' multiple violations of the court's orders.

The prejudice to the defendants here is readily apparent. The McPhersons, having filed the lawsuit and named the parties, had a duty under the Case Schedule Orders to develop their theory of the case and to disclose the fact and expert witnesses they would call at trial to support their case. They also had a duty to produce expert witness reports that the defendants would use to prepare their defense. In addition, the McPhersons and Meeks had a duty under the court rules and the Discovery Orders to respond to the Discovery Requests by, among other things, stating the McPhersons' alleged damages, describing the X-Ray Machine,

describing the nature and extent of the McPhersons' alleged injuries, and producing complete medical records. Both GEMS-IT and the Sandovals had a right under the Case Schedule Orders and the Discovery Orders to receive this discovery and mandatory disclosure information, and the fact that the information was never adequately produced placed both defendants in the untenable position of facing a fast-approaching trial date without knowing what evidence or theories the McPhersons would present at trial or how they would present a defense.

GEMS-IT and the Sandovals presented the issue of prejudice to the court both in the written motions and in Miller's oral arguments. In addition, Judge McPhee found on the record that the McPhersons and Meeks' multiple violations were prejudicial. Judge McPhee acknowledged the importance to the defendant of the information regarding the X-Ray Machine, RP January 6, 2006 at 11-12, then insisted that Miller go through each discovery request and describe how the McPhersons' failure to adequately respond was prejudicial. After ruling that the McPhersons' responses were inadequate, Judge McPhee stated it would be "patently unfair and inappropriate" to force a defendant to proceed to trial knowing that at the end of the day the case would be dismissed due to the plaintiffs' failure to make discovery. RP January 6, 2006 at 43, 26-30. Thus, Judge McPhee clearly identified the prejudice to

GEMS-IT and the Sandovals from the McPhersons and Meeks' continuum of violations of the Discovery Orders and the Case Schedule Orders.

5. The record is replete with evidence of Judge McPhee's consideration and application of lesser sanctions prior to dismissing the Second Lawsuit with prejudice.

Judge McPhee was careful to state on the record at each motion hearing that he was considering lesser sanctions before he would entertain the sanction of dismissal with prejudice. RP November 4, 2005 at 16; RP December 9, 2005 at 41-43; RP January 6, 2006 at 42; March 31, 2006 at 11-12. In addition to stating his consideration of lesser sanctions on the record, Judge McPhee in fact applied lesser sanctions on three separate occasions. The First Motion sought an order that would automatically grant dismissal with prejudice if the discovery responses were inadequate, but Judge McPhee elected the lesser sanction of an order compelling responses and monetary sanctions.

The Second Motion and Third Motions sought dismissal with prejudice outright, yet Judge McPhee imposed lesser sanctions in response to each motion. It was not until the Fourth Motion, after issuing two written discovery orders, one oral discovery order, imposing monetary sanctions, and after issuing a new case schedule continuing the trial and other deadlines, that Judge McPhee dismissed the case with prejudice.

Moreover, Judge McPhee predicted on the record during each of the preceding hearings that the case would eventually be dismissed.

Finally, prior to dismissing the case, Judge McPhee once again offered a lesser sanction by giving Meeks the opportunity to take a nonsuit instead of forcing Judge McPhee to rule on the motion. In doing so, Judge McPhee discussed the remedy of prohibiting the McPhersons from calling witnesses at trial, and noted that he would likely grant CR 11 sanctions against Meeks if he elected to proceed to trial under these circumstances. These discussions on the record evidence extensive consideration of and an affirmative offer by the trial court to actually apply lesser sanctions, yet Meeks insisted on proceeding to a ruling, inviting Judge McPhee to implement the dismissal he had warned Meeks he would impose.

In sum, Judge McPhee's decision to dismiss the Second Lawsuit with prejudice was well within his discretion because the McPhersons and Meeks knowingly and willfully violated multiple orders of the court, their continuum of violations severely prejudiced GEMS-IT and the Sandovals, and Judge McPhee explored and utilized numerous lesser sanctions before opting for dismissal with prejudice. The McPhersons have completely failed to meet their burden of demonstrating an abuse of discretion here.

C. The McPhersons' Incorrectly Assert that the Sandovals were not Entitled to Relief.

"A defendant appears in an action when he answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance." RCW 4.28.210. "However, these methods of appearing are not exclusive, and courts have recognized various informal acts as sufficient to constitute an appearance." *Skilcraft Fiberglass, Inc. v. Boeing Co.*, 72 Wn.App. 40, 45, 863 P.2d 573 (1993); *accord Professional Marine Co. v. Those Certain Underwriters at Lloyd's*, 118 Wn.App. 694, 708, 77 P.3d 658 (2003). "Whether a party has appeared is generally a question of intention, as evidenced by acts or conduct, such as the indication of a purpose to defend or a request for affirmative action from the court, constituting a submission to the court's jurisdiction." *Id.*[6]

1. It is undisputed that the Sandovals were under the trial court's jurisdiction when the Second Lawsuit was dismissed.

It is undisputed that the Sandovals voluntarily appeared by seeking affirmative relief from the court in the Fourth Motion. The Fourth Motion

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[6] There is currently a split of authority in the Washington Court of Appeals regarding the appropriate standard of review for factual determinations surrounding an informal appearance. *Compare Professional Marine*, 118 Wn.App. at 708 (abuse of discretion in Division I) *and Gutz v. Johnson*, 128 Wn.App. 901, 912-13, 117 P.3d 390 (2005) review granted, 156 Wn.2d 1017, 132 P.3d 734 (Mar 7, 2006) (substantial evidence in Division II). However, the standard of review issue should not be at issue here because the facts surrounding the Sandovals' voluntary statutory appearance are uncontested.

was filed on March 10, 2006, which is the very latest the Sandovals submitted to the jurisdiction of the court. Meeks admits this fact.

Five days later, on March 15, 2006 GEMS-IT was dismissed from the case, leaving only the Sandovals as defendants subject to personal jurisdiction of the court. When the court heard oral argument on the Fourth Motion, Miller presented argument on behalf of the Sandovals seeking relief in the form of dismissal of the Second Lawsuit. When Judge McPhee granted the Fourth Motion, he did so for the benefit of the Sandovals, who had been involved in the Second Lawsuit for twenty months, and who had been subject to personal jurisdiction in this action for several weeks at a minimum. Pursuant to RCW 4.28.210, the Sandovals formally appeared by seeking relief in the Fourth Motion.

The court could also determine from the record that the Sandovals informally appeared prior to filing the Fourth Motion. The Sandovals had actual notice of this action and were named as parties in both the Second and Third Lawsuits. Sandoval was an employee of GEMS with knowledge of the pendency of these actions and had been assisting with and defending the Second Lawsuit accordingly. During the hearing on the Second Motion, Miller offered to accept service on the Sandovals' behalf, and the trial court ordered that Sandoval voluntarily appear at Meeks' office to be served process. It is undisputed that Sandoval was served

process four days later by Meeks' process server at Meeks' office pursuant to the court's Second Discovery Order; whether this constituted service in the Second Lawsuit is all that Meeks disputes. Sandoval contends he was served in the Second Lawsuit, and Meeks confirmed this via email.[7]

Despite the McPhersons and Meeks' inexcusable delay in serving Sandoval, the Sandovals undisputedly and voluntarily appeared by filing the Fourth Motion, and may have informally appeared prior to that date. Regardless, the Sandovals submitted to the court's jurisdiction prior to the hearing on the Fourth Motion, so the trial court correctly granted the Sandovals the relief they requested.

2. The McPhersons cite inadequate legal authority in support of their argument that the Sandovals were not entitled to relief.

The McPhersons and Meeks argue that Sandoval was never served process in the Second Lawsuit, so the case scheduling order did not apply to him. The McPhersons cite only Thurston County Local Court Rule 16 in support of this proposition. As stated above, there is a serious discrepancy in this case regarding whether Sandoval was in fact served in the Second Lawsuit on December 13, 2005. However, regardless of

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[7] See Footnote 1, above. The service issue was not argued at length before the trial court in the Fourth Motion due to the fact that the court had already reached its decision to dismiss the lawsuit and did not ask for rebuttal argument from Miller on

whether Sandoval was personally served, TCLCR 16 does not support the McPhersons' argument. TCLCR 16 delineates procedures the plaintiff must follow related to the case schedule order, including a requirement that a plaintiff must serve an amended case schedule order on all parties, but the rule does not create a shield for a plaintiff to hide behind after violating a court order.

Here, the McPhersons and Meeks, without citation to authority, attempt to use their failure to timely serve process on the Sandovals as an excuse for their continuum of violations. This misconstrues the issue. All parties to this lawsuit and their attorneys, most importantly the McPhersons and Meeks, were subject to the Discovery Orders and the Case Schedule Orders. Judge McPhee ultimately dismissed the Second Lawsuit because the McPhersons and Meeks violated multiple court orders and utterly failed to prepare their case for trial. It is *their* violations that are at issue here. There is no question the McPhersons and Meeks subjected themselves to the court's sanction power by filing the Second Lawsuit, regardless of which defendant sought relief in the Fourth Motion.

In addition to lacking legal foundation, the McPhersons and Meeks' argument is patently unjust and inequitable. Under this argument,

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the service issue. This issue is raised here for the sole reason that it should be brought to the Court's attention.

the McPhersons and Meeks could name sham defendants, string them along with the threat of pending trial, force them to prepare a defense without adequate information, violate multiple court orders, and then insist on being granted a dismissal without prejudice so they could refile the lawsuit and name the same defendants without fear of running afoul of the doctrine of res judicata or the Two Dismissal Rule. Such a result is not contemplated by the Court Rules, is not supported by statutory law or case law, and it is not surprising the McPhersons and Meeks present the argument here without citation to adequate legal authority.

D. Meeks' Arguments Regarding Counsel are Unsupported, Irrelevant, and Disputed.

The Brief of Appellants dedicates considerable space to the highly inflammatory argument that Hughes and Miller misrepresented facts to Meeks in the First Lawsuit, and that these wholly unsupported allegations have some bearing on the procedural history of this appeal. This entire line of argument is inapposite.

First, the misrepresentations Meeks alleges occurred are unsupported. Meeks' allegations of wrongdoing, although prevalently featured in a high percentage of the Brief of Appellants, are not supported by the record. What is evident in the record is the consistent and adamant opposition lodged by Hughes and Miller disputing Meeks' allegations and

the trial court's denial of the McPhersons' Motion for CR 11 sanctions. As such, these bare assertions of wrongdoing made against other attorneys are inflammatory, inappropriate, and have no place in the publicly filed opening brief of the Appellants.

Second, the alleged misrepresentations reportedly occurred in another case, and Meeks failed to appeal the trial court's decision on this issue. Meeks' allegations relate to things he alleges occurred in the First Lawsuit offered as an improper excuse for why he failed to take the trial court's offer of a nonsuit at the hearing on the Fourth Motion. When Meeks presented the same arguments to the trial court in the form of a motion for CR 11 sanctions, Judge McPhee correctly concluded that he lacked jurisdiction to rule on the merits of Meeks' claim. The McPhersons and Meeks did not appeal that decision, nor have they identified this issue as an assignment of error in their opening brief. CP 123-125, 264; BOA 4. As such, these inflammatory and unsupported allegations are completely outside the scope of this appeal.

E. This Appeal is Frivolous and Sanctions should be Imposed.

The appellate court may order a party or counsel who files a frivolous appeal to pay terms or compensatory damages to any injured party. RAP 18.9(a). In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition

of terms and compensatory damages, a court should be guided by the following considerations: "(1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." *E.g., Streater v. White*, 26 Wn.App. 430, 434-35, 613 P.2d 187 (1980) (monetary sanctions awarded for meritless factual appeal).

Here, considering all factors listed above, it is apparent that the Brief of Appellants presents no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal. The burden is great to show abuse of the trial court's discretion, and Meeks has failed to provide any support in the record to meet this burden. Many of the arguments in the Brief of Appellants do not cite to the record or to authority, and Meeks also inappropriately raises a myriad of inflammatory and irrelevant arguments not properly appealed or before the Court. It is apparent that this appeal was filed to harass and/or delay the Sandovals and their attorneys in proceeding with defense of the Third Lawsuit, and as such is frivolous.

Accordingly, the Sandovals respectfully request the Court impose monetary sanctions against Meeks and the McPhersons in the form of an award in favor of the Sandovals for their attorney fees and costs incurred defending this frivolous appeal.

V. CONCLUSION

For the reasons stated herein, the Sandovals respectfully request the Court AFFIRM the decision of the trial court dismissing the Second Lawsuit with prejudice.

RESPECTFULLY SUBMITTED this 19th day of October, 2006.

MONTGOMERY PURDUE
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CERTIFICATE OF SERVICE

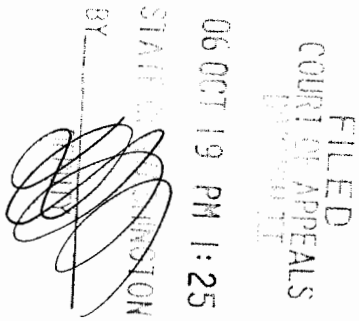
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 19, 2006, I had hand delivered a true and correct copy of the preceding Brief of Respondents to:

Steven Meeks
2405 Evergreen Park Dr. A2
Olympia, WA 98502

DATED this 19th day of October, 2006, at Seattle, Washington.

Diane Zeck



From: Steven Meeks [mailto:stevenmeeks@qwest.net]
Sent: Tuesday, December 13, 2005 1:32 PM
To: Paul Miller
Subject: Re: McPherson v. GE

Mr. Sandoval was served this morning, in both cases, by my process server Roger Cote, so the court-ordered requirement that he appear on Thursday at the Sammamish area office is now moot. I will have Roger's declaration of service within a day or so, ready for filing in both cases.

Now that Mr. Sandoval has been served, there is no basis any longer for diversity jurisdiction in the 05 case. I assume you will now stipulate to remand, so let me know if I am correct and I will prepare an order. If not, I will be making that motion shortly, which will have to include a request for attorney's fees under the removal remand statute. Your stipulation will simplify things and remove this financial risk for your client.

----- Original Message -----
From: Paul Miller
To: Steven Meeks
Cc: Peggy Hughes ; Diane Zeck
Sent: Monday, December 12, 2005 4:49 PM
Subject: FW: McPherson v. GE

I write to follow up on my telephone call to you today, in which you confirmed that Mr. Sandoval can come by your office tomorrow at 11:00 a.m. to receive service of process. I have instructed Mr. Sandoval not to talk about any details of the case.

Paul J. Miller

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Privileged or confidential information may be contained in this message. If you are not the intended recipient, you may not copy or communicate this message to anyone. If you received this message in error, please destroy this message and notify the sender by reply email. Thank you.

From: Paul Miller
Sent: Monday, December 12, 2005 11:07 AM
To: 'Steven Meeks'
Cc: Peggy Hughes; Diane Zeck
Subject: McPherson v. GE

If possible, Mr. Sandoval can arrange to be at your office at about 11:00 tomorrow, Dec. 13th to be served with process. Does that work for you? Please let me know right away so Mr. Sandoval has sufficient time to re-arrange his schedule. Thanks.

Paul J. Miller

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