

No.: 42245-0-II

12 MAR -5 AM 10:01
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY 
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KRISTEY L. RICKEY and KELLEY R. CAVAR, Individually, and as
Co-Executrixes of the Estate of Gerald Lee Munce, Deceased,

Petitioners

v.

MICHAEL B. SMITH, as Litigation Guardian Ad Litem for
CLARENCE G. MUNCE,

Respondent

RESPONDENT'S BRIEF

Shellie McGaughey, WSBA 16809
James Bulthuis, WSBA 44089
Attorneys for Respondent
McGaughey Bridges Dunlap PLLC
325 118th Avenue SE, Suite 209
Bellevue, WA 98005
Telephone: (425) 462-4000

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR 1

II. ISSUES RELATING TO ASSIGNMENT OF ERROR..... 1

III. INTRODUCTION 2

IV. STATEMENT OF THE CASE..... 4

V. STANDARD OF REVIEW:..... 9

VI. ARGUMENT 10

 a. The Trial Court Has the Authority and Power to Modify an Earlier Ruling..... 10

 b. A Subsequent Judge May Correct an Error Made By Her Predecessor. 16

 c. Revision of the Discovery Sanction Order is Consistent with the *Burnet* factors on Sanctions. 19

 d. The Law of the Case Doctrine Does Not Apply to Orders on Discovery Sanctions..... 22

 e. The Revival of the Comparative Fault Affirmative Defense Does Not Substantially Alter the Status Quo and Plaintiffs are Not Substantially Limited in Preparing for Trial. 26

VII. CONCLUSION..... 31

TABLE OF AUTHORITIES

Washington Cases

1000 Virginia Ltd. P’ship v. Vertecs Corp., 127 Wn. App. 899, 112 P.3d 1276 (Div. 1, 2005).....	17
American Mobile Homes of Washington, Inc. v. Seattle First Nat. Bank, 115 Wn.2d 307, 796 P.2d 1276 (2000).....	14
Ashley v. Pierce County, 83 Wn.2d 630, 521 P.2d 711 (1974).....	16
Blair v. TA-Seattle East No. 176, 171 Wn.2d 342, 254 P.3d 797 (2011)..	9, 19, 20
Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997)..	19
Callan v. Callan, 2 Wn. App. 446, 468 P.2d 456 (Div. 1, 1970).....	23, 24
Coggle v. Snow, 56 Wn. App. 499, 784 P.2d 554 (Div. 1, 1990) ..	9, 24, 25
Cooper v. Viking Ventures, 53 Wn. App. 739, 770 P.2d 659 (1989).....	22
Ferree v. The Doric Co., 62 Wn.2d 561, 383 P.2d 900 (1963).....	24
Fox v. Sunmaster Prods. Inc., 115 Wn.2d 498, 798 P.2d 808 (1990).....	12
Howard v. Royal Specialty Underwriting, Inc., 121 Wn. App. 372, 89 P.3d 265 (Div. 1, 2004).....	9
Minehart II v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 232 P.3d 591 (Div. 3, 2010).....	26, 27
Moratti v. Farmers Ins. Co. of Washington, 162 Wn. App. 495, 254 P.3d 939 (Div. 1, 2011).....	13, 17
Owens v. Kuro, 56 Wn.2d 564, 354 P.2d 696 (1960).....	11, 12
Pearson v. State Dept. of Labor & Indus., 164 Wn. App. 426, 262 P.3d 837 (Div. 1, 2011).....	24
Raymond v. Ingram, 47 Wn. App. 781, 737 P.2d 314 (Div. 1, 1987).....	18
Snyder v. State, 19 Wn. App. 631, 577 P.2d 160 (Div. 1, 1978).....	12, 18

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971).....	10
Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 840 P.2d 860 (1992)....	12, 13, 17
Washington State Physicians Ins. Exch. & Assoc. v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993).....	9, 10, 21

Out of State Authorities

<i>Arizona v. California</i> , 460 U.S. 605, 103 S.Ct. 1382 (1983).....	22
<i>Christianson v. Colt Indus. Operating Corp.</i> , 486 U.S. 800, 108 S.Ct. 2166 (1988).....	22, 23
<i>First American Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.</i> , 412 F.3d 1166 (10th Cir. 2005)	15
<i>Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.</i> , 460 U.S. 1, 103 S.Ct. 927 (1983).....	14
<i>Trust v. Bailey</i> , 837 F. Supp. 1083 (E.D. Wash. 1993).....	14
<i>U.S. v. Asarco Inc.</i> , 471 F. Supp. 2d 1063, (D. Id. 2005).....	16

Rules

CR 1	25
CR 54(b).....	passim
CR 60(b).....	13
FRCP 54(b)	14
KCLR 7(b)(6).....	17
RAP 2.3(b)(2)	26

I. ASSIGNMENT OF ERROR.

Defendant-Respondents disagree with the imprecise and multiple assignments of error plaintiffs raise. There should be one assignment, and it should read:

Whether the trial court committed probable error by modifying an earlier sanctions order to reinsert the affirmative defense of contributory negligence based on the court's perception of an inconsistency between the earlier oral and written orders.

II. ISSUES RELATING TO ASSIGNMENT OF ERROR.

1. Did the currently assigned trial judge (Stoltz) abuse her discretion by modifying an earlier judge's decision to strike the defendant's Answer, Counterclaim, and Affirmative Defenses as discovery sanctions by reviving the single affirmative defense of comparative fault?

2. Did the revival of the affirmative defense of comparative fault substantially alter the status quo and substantially limit the plaintiffs' freedom to try their case when the affirmative defense is based on and supported by the very same evidence plaintiffs rely on for their own case?

III. INTRODUCTION.

This case addresses the authority and propriety of a trial judge's decision to modify an earlier judge's ruling on discovery sanctions.

Severe discovery sanctions were entered against defendant in this civil case for his refusal to cooperate in discovery based on his assertions of incompetency and Fifth Amendment privilege. At oral argument on the plaintiffs' motion for sanctions, the trial judge at the time, Judge Larkin, ordered sanctions striking the defendant's Affirmative Defenses and Counterclaim. Judge Larkin refused, however, to enter a default or direct verdict in favor of the plaintiffs. The written order submitted by plaintiffs included language which struck the Answer as well. Plaintiffs then moved, before a new judge (Stoltz), for default and, in the alternative, summary judgment on proximate cause. Judge Stoltz found an irreconcilable inconsistency between the written order submitted by plaintiffs and the oral articulations of Judge Larkin. She corrected that inconsistency by refusing to enter default and by reviving the single affirmative defense of contributory negligence (a.k.a. comparative fault). Judge Stoltz did not reinsert the other affirmative defenses or defendant's counterclaim.

Plaintiff-petitioners challenge the ability of Judge Stoltz to modify an earlier ruling. Defendants respond that the inherent power of the trial

court and CR 54(b) authorize Judge Stoltz to correct earlier errors because no final judgment has been entered. Plaintiffs also argue that Judge Stoltz had an untenable basis for reviving the affirmative defense of comparative fault. Defendants respond that a tenable basis existed because of the unique facts in this case which warrant a jury's determination on the parties' respective level of fault. Further, the evidence which plaintiffs rely upon is the same evidence which the defense plans to use to argue its affirmative defense, and therefore there is no substantial prejudice or limitation to the plaintiffs in now having to deal with this single affirmative defense.

Commissioner Schmidt granted discretionary review based on the perception there was no inconsistency between Judge Larkin's oral ruling and the written order prepared by plaintiffs. Defendants disagree because the written order clearly strikes the Answer which Judge Larkin did not intend to do. Further, Commissioner Schmidt is incorrect in suggesting there must be an inconsistency in order to justify modification of an earlier ruling. CR 54(b) does not require such an inconsistency. Modification of an order may be made at any time before final judgment, and Judge Stoltz's order conformed the case and defenses to the evidence which will be presented.

Commissioner Schmidt also concluded that revival of the comparative fault defense substantially altered the status quo because

Regrettably the shot hit and killed Gerald. Clarence immediately contacted 9-1-1 for help, but it was too late.

Petitioners are the plaintiffs in this action and consist of the Estate of Gerald Munce and his two daughters. They have sued defendant-respondent, Clarence Munce, for causing the death of his son, Gerald. Clarence Munce is a 82 year old man who is incompetent. In fact, he has been deemed incompetent on no less than three occasions. (CP 2396–2405, 2434–68).

In addition to these civil claims, Clarence faced criminal charges. The criminal charges and this civil suit proceeded in tandem. Initially the trial court stayed the civil proceedings, but eventually the parties undertook discovery under the shadow of the criminal charges. Plaintiffs served discovery requests upon defendant. Defendant asserted his Fifth Amendment rights and also raised objections based on his incompetency. (1025–41). Nevertheless, the defense identified several witnesses and other documentary information which it relied upon for its affirmative defenses. *Id.* Defendant also filed a motion for protective order seeking guidance from the Court on the objections raised. The trial court (Judge Larkin) did not rule on that motion. (611).

Plaintiffs then took steps to conduct Clarence's deposition, which are detailed in Petitioners' brief. After Judge Larkin entered an order imposing sanctions, defendant immediately raised concerns regarding

Regrettably the shot hit and killed Gerald. Clarence immediately contacted 9-1-1 for help, but it was too late.

Petitioners are the plaintiffs in this action and consist of the Estate of Gerald Munce and his two daughters. They have sued defendant-respondent, Clarence Munce, for causing the death of his son, Gerald. Clarence Munce is a 82 year old man who is incompetent. In fact, he has been deemed incompetent on no less than three occasions. (CP 2396–2405, 2434–68).

In addition to these civil claims, Clarence faced criminal charges. The criminal charges and this civil suit proceeded in tandem. Initially the trial court stayed the civil proceedings, but eventually the parties undertook discovery under the shadow of the criminal charges. Plaintiffs served discovery requests upon defendant. Defendant asserted his Fifth Amendment rights and also raised objections based on his incompetency. (1025–41). Nevertheless, the defense identified several witnesses and other documentary information which it relied upon for its affirmative defenses. *Id.* Defendant also filed a motion for protective order seeking guidance from the Court on the objections raised. The trial court (Judge Larkin) did not rule on that motion. (611).

Plaintiffs then took steps to conduct Clarence's deposition, which are detailed in Petitioners' brief. After Judge Larkin entered an order imposing sanctions, defendant immediately raised concerns regarding

inconsistencies between the oral ruling and the order submitted by plaintiffs. (2241–54). Specifically, defendant alerted the trial court:

While this Court stated in its oral ruling that it was not imposing the most severe sanction of a directed verdict, the court has for all practical purposes, granted a directed verdict for the plaintiffs by dismissing the defendant's affirmative defenses and counterclaims.

(2241). At the hearing, Larkin acknowledged considering this motion for reconsideration, but nevertheless signed plaintiff's proposed order which struck both the Answer and the affirmative defenses. (18)

Over a year later found the case transferred to Judge Stoltz. Plaintiffs moved for both default of the entire case and summary judgment on proximate cause, relying chiefly on the sanctions order. (640–74). During oral argument Judge Stoltz identified the inconsistency between Judge Larkin's oral comments at the sanctions hearing and the order which was submitted by plaintiffs:

MR. LINDENMUTH: Correct. And he did not enter an order of default at that time. What he did do -- and to the extent -- I want to touch on a point: To the extent that they are trying to argue that the conclusions of law and the findings of facts are inconsistent, I would also point out that he also directed that all of their request for admissions at page 13 should be deemed admitted, as well, which was amongst the other relief that we are requesting that he, in fact, granted, even though it's not listed out in the Answer. It's listed out in the conclusions of law. The document very clearly indicates that all findings that are more appropriately deemed

conclusions should be treated as such, et cetera. I would call that the savings clause, so they had a full and complete opportunity to do that.

The Court brings up the issue as, yes, he did not enter an order of default. That was the -- that was one of the request of relief that he did not provide, but what he did do is he struck their Answer; and the fact that he struck their Answer is something that has consequences; and ultimately, what the consequences are is that if we analyze it and take it to the next step, what else is left to do but to enter an order of default?

THE COURT: Which he didn't want to do.

MR. LINDENMUTH: He didn't do it at that time; but what, procedurally, is left once the Answer is stricken? There's nothing left to do but to enter an order of default.

THE COURT: Well, I understand that. I would say that there's, probably, a good argument that this order is inconsistent, one part with the other. All right.

THE COURT: I understand. This case is probably going to wind up in front of the appellate courts at some point, and they'll deal with those issues. Now, looking at the findings of facts and conclusions of law that were entered by Judge Larkin just before this case got dumped on me, it says here on page 11 starting at paragraph -- the second full paragraph, line 7, The Court, in the exercise of its discretion, shall not award the following sanctions requested by the plaintiff in this matter: The Court shall not enter an order of default which would be tantamount to a directed verdict on the issue of liability. And when he gets to the conclusions of law, he is striking the affirmative defenses. He has not stricken the Answer, no matter how inconsistent this might seem to the poor sucker who got this case

afterwards. Nonetheless, that's what he did is: He struck the counter claim and affirmative defenses. He didn't strike the Answer; so at this point, we still have an Answer, such as it is --

MR. LINDENMUTH: All right.

THE COURT: -- and the Court will deny the motion for default.

MR. LINDENMUTH: All right. Well, you're going to grant summary judgment, anyway, Your Honor; so let's move onto that issue.

(RP 10:16-11:21; 17:3-18:1, 5/20/11 Hrg.).

Ultimately Judge Stoltz corrected the inconsistency by stating in the summary judgment order:

The percentage of fault attributable to Clarence Munce is a question of fact for the jury to determine at trial as Defendant will be allowed to argue contributory negligence at trial and it will be for the jury to determine the relative percentage of fault between Clarence Munce and Gerald Munce.

(1075-76). Plaintiffs moved to reconsider this order, contending that the affirmative defenses were permanently struck by Judge Larkin. In their motion, plaintiffs conceded that contributory negligence involves issues of proximate cause, the elements were the same, and the analysis for proximate cause and contributory negligence were the same. (913-14).

Judge Stoltz denied plaintiff's motion for reconsideration and offered to certify her order and those entered by Judge Larkin for

discretionary review, but the parties were unable to reach an agreement on that. Stoltz also entered a trial continuance to enable plaintiffs the time they needed to prepare for trial in light of the revived affirmative defense. (2646–47).

V. STANDARD OF REVIEW:

The proper standard of review is for an abuse of discretion. Here, the Court is confronted with Judge Stoltz’s order revising and modifying an earlier discovery order. Rulings which reconsider an earlier decision are reviewed for “a manifest abuse of discretion.” *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (Div. 1, 1990). Contrary to plaintiffs’ assertions, this is not a judicial interpretation case and de novo review does not apply.

The underlying order plaintiffs seek to preserve from Judge Larkin is for discovery sanctions. It is well established that orders on discovery motions are subjected to review for abuse of discretion. *Blair v. TA-Seattle East No. 176*, 171 Wn.2d 342, 348, 254 P.3d 797 (2011); *Washington State Physicians Ins. Exch. & Assoc. v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993); *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 379, 89 P.3d 265 (Div. 1, 2004).

An abuse of discretion occurs when a court exercises its discretion in a way that is “manifestly unreasonable, or . . . on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482

P.2d 775 (1971). The standard “recognizes that deference is owed to the judicial actor who is ‘better positioned than another to decide the issue in question.’” *Fisons*, 122 Wn.2d at 339 (citations omitted).

Thus it should be clear that unless plaintiffs can demonstrate Judge Stoltz had an untenable basis for correcting an earlier error and modifying the sanctions order to enable defendants to argue comparative fault, then Stoltz’s ruling should not be disturbed.

VI. ARGUMENT

a. The Trial Court Has the Authority and Power to Modify an Earlier Ruling.

It is important to recognize this case has not yet gone to trial. As a result, the trial court has the authority and power to modify one of its earlier rulings to conform to the evidence as justice requires. This authority derives from both the court’s inherent power to relax its rules as well as CR 54(b) which reads:

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or

thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(Emphasis added). The discovery sanction order issued by Judge Larkin was not a final order or decision. It is therefore subject to revision *at any time* in the case before final judgment is entered. Judge Stoltz had the authority to revise the sanctions order.

Our Supreme Court has repeatedly made clear that trial courts have the authority to modify interlocutory orders. The case of *Owens v. Kuro* dealt with two vehicles that were involved in a collision, and the occupants of both cars sued one another. 56 Wn.2d 564, 354 P.2d 696 (1960). The trial court found two of the parties were negligent as a matter of law, dismissed their claims, and narrowed the issues for trial to contributory negligence and damages. A mistrial ensued, and before the case could be retried an appeal was attempted. The Supreme Court found that such an appeal was unwarranted because no final judgment had been entered, reasoning that “[t]he stage for final judgment had not yet been reached. At any time before judgment, the order could be revised or

changed.” 56 Wn.2d at 566.

Two decades later, Division I recognized that a trial court’s order is subject to change:

The orderly administration of justice requires that the trial court, after having full opportunity to hear, consider, and decide all material questions of the case, will enter formal judgment resolving those questions. In managing the litigation, the trial court must have wide discretion and authority, including the power to issue interlocutory orders, upon every aspect of the case. These orders or rulings may be changed, modified, revised, or eliminated as the case progresses. The court’s final say on the merits is subject to revision at any time before final judgment.

Snyder v. State, 19 Wn. App. 631, 635–36, 577 P.2d 160 (Div. 1, 1978) (emphasis added). The same is true here. Judge Stoltz is the trial judge charged with managing the direction of this litigation and retains the wide discretion and authority to direct the case in a manner that is consistent with the evidence.

Twelve years after *Snyder*, the Supreme Court again noted that under CR 54(b), an order adjudicating less than all claims is modifiable until the point of final judgment. *Fox v. Sunmaster Prods. Inc.*, 115 Wn.2d 498, 504, 798 P.2d 808 (1990).

The Supreme Court revisited *Fox* in its decision, *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992). *Washburn*

controls the outcome here. In *Washburn*, the trial court dismissed one defendant on summary judgment early in the case. The case continued with the remaining defendants. Later, the plaintiff successfully moved to reinstate the dismissed defendant, relying on CR 60(b) for vacating the partial summary judgment. The Supreme Court rejected that CR 60(b) allowed this, but found that CR 54(b) allowed such a revision:

Absent a proper certification, an order which adjudicates fewer than all claims or the rights and liabilities of fewer than all parties is subject to revision at any time before entry of final judgment as to all claims and the rights and liabilities of all parties. . . . The partial summary judgment order was not properly certified and it was not a final judgment; the trial court had the authority to modify the order at any time prior to final judgment.

Id. at 300 (internal citations omitted). *Washburn* makes it abundantly clear that a trial court has the power and authority under CR 54(b) to revise and modify one of its prior orders.

The recent case of *Moratti v. Farmers Ins. Co. of Washington*, demonstrates that *Washburn* still controls in this state. 162 Wn. App. 495, 254 P.3d 939 (Div. 1, 2011). In *Moratti*, the trial court denied a motion to dismiss based on the statute of limitations defense. Due to scheduling conflicts the case was reassigned to a new judge for trial. Following trial, the new judge set aside the jury's verdict and held that the statute of limitations barred recovery. The Court of Appeals held the subsequent

trial judge was authorized to reverse an earlier ruling, relying on CR 54(b) and *Washburn*. 162 Wn. App. at 501–02 (“However, absent a proper certification of finality, ‘an order which adjudicates fewer than all claims or the rights and liabilities of fewer than all parties is subject to revision at any time before entry of final judgment as to all claims and the rights and liabilities of all parties’”).

Decisions from other jurisdictions are in accord. In *Birkenfeld Trust v. Bailey*, the federal district court in Spokane noted that Fed. R. Civ. Pro. 54(b) “provides that absent an express entry of a final judgment, all orders of a district court are ‘subject to reopening at the discretion of the district judge.’” 837 F. Supp. 1083, 1085 (E.D. Wash. 1993) (citing *Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 12, 103 S.Ct. 927, 935, 74 L.Ed.2d 765 (1983)).¹ Indeed, in *Moses*, the United State Supreme Court accepted the premise that FRCP 54(b) provides that “virtually all interlocutory orders may be altered or amended before final judgment if sufficient cause is shown; . . .” 460 U.S. 1, 13 n. 14, 103 S.Ct. 927, 935.

The Tenth Circuit noted that a court’s sua sponte grant of summary

¹ Stylistically FRCP 54(b) differs from CR 54(b), but a comparison of the rules reveals they are substantially similar, and thus this Court may consider federal decisions on the application of the rule as persuasive authority. *American Mobile Homes of Washington, Inc. v. Seattle First Nat. Bank*, 115 Wn.2d 307, 313, 796 P.2d 1276 (2000) (“When a state rule is similar to a parallel federal rule we sometimes look to analysis of the federal rule for guidance. . . . Of course we will follow federal analysis only to the extent we find federal reasoning persuasive”) (internal citations omitted).

judgment which modified a prior order was permissible. *First American Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166 (10th Cir. 2005). In *Kickapoo*, the trial court denied summary judgment in a case alleging tortious interference with contract and business claims, finding that the contract in that case was ambiguous. During the following three months the trial court changed its mind in a less than clear fashion.

The Tenth Circuit remarked:

. . . we cannot tell whether the September 6 order was in the nature of a reconsideration of the district court's order . . . denying Multimedia's first motion for summary judgment, or whether it was a sua sponte grant of summary judgment. Ultimately, this does not matter, because either approach would be permissible. A court's disposition of a single claim in a suit involving multiple claims is subject to reconsideration until the entry of judgment on all of the claims, absent an explicit direction for the entry of judgment on the single claim.

Id. at 1169–70. The Court continued by noting that the trial court could grant summary judgment sua sponte. *Id.* at 1170. “While it would have facilitated appellate review for the district court to be more explicit about what it was doing, the district court did not commit reversible error in proceeding as it did.” *Id.* The same reasoning applies here. Although Judge Stoltz's orders are not the clearest in explaining the basis for her partial reversal of the sanctions order, she had the authority to do so *sua sponte*. Moreover, this Court should take note that Judge Stoltz had

opportunity to address her decision again during plaintiffs' motion for reconsideration, and she stuck to her guns by denying that motion. There is no evidence that her decision came out of left field; she carefully considered the issue.

A federal trial court in our sister state, Idaho, also agreed it had the inherent power to sua sponte revise its rulings. *U.S. v. Asarco Inc.*, 471 F. Supp. 2d 1063, 1067, (D. Id. 2005) (“ . . . the Court also finds it has inherent power to revise its rulings when justice so requires any time before final judgment has been entered in the case”). *Asarco* is consistent with our own Supreme Court's confirmation that trial courts possess the authority to waive their own rules when warranted. *Ashley v. Pierce County*, 83 Wn.2d 630, 636–37, 521 P.2d 711 (1974).

As the foregoing cases demonstrate, trial courts have the inherent power to modify their orders sua sponte. Coupled with that inherent power is CR 54(b)'s explicit authorization that trial courts may revise an earlier ruling before entry of final judgment. It should be without question that Judge Stoltz had the authority to modify the sanctions order.

b. A Subsequent Judge May Correct an Error Made By Her Predecessor.

Plaintiffs assert Judge Stoltz acted inappropriately by revising a prior order entered by Judge Larkin. Plaintiffs contend it is debatable whether CR 54(b) should be utilized at all in this scenario. That is clearly

incorrect for the reasons articulated *supra*. Whether Judge Stoltz or Judge Larkin was manning the helm, the trial court is the trial court. Under plaintiff's logic, a subsequent trial judge could never correct an error made by their predecessor, and that certainly is not an acceptable use of judicial resources. Indeed, *Moratti* made clear that a subsequent trial judge could use CR 54(b) to modify an earlier ruling made by their predecessor. 162 Wn. App. at 501–02. *Moratti* is directly on point for this issue and contradicts plaintiffs' position.

Nevertheless, Plaintiffs seek to distinguish the controlling law of *Washburn* and *Moratti* by citing the case of *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, for the proposition that it is inappropriate for a later trial judge to revisit or revise an earlier judge's ruling. 127 Wn. App. 899, 112 P.3d 1276 (Div. 1, 2005). That opinion does not stand for that proposition. *Vertecs* dealt with a statute of limitations determination. In a footnote, the Court made a passing reference to a party's complaint that the other party violated a King County Local Rule by reapplying for relief which was earlier denied by a different judge. Division 1 noted that was simply false because the moving party was different from the one who earlier sought relief: "KCLR 7(b)(6) does not prohibit a subsequent motion by *a different party*." 127 Wn. App. at 906 n. 10 (emphasis added). *Vertecs* absolutely does not stand for the proposition that a later trial judge is precluded from modifying an earlier ruling.

Similarly, Plaintiffs reliance on *Raymond v. Ingram* is also misplaced. 47 Wn. App. 781, 737 P.2d 314 (Div. 1, 1987). That opinion dealt with a trial court's waiver of a King County Local Rule. Procedurally, the case involved a trial court decision on a summary judgment motion which was later revisited by a subsequent trial judge. The petitioner complained this was inappropriate given the King County Local Rule, but Division 1 squarely rejected that argument by noting, "[t]he trial court, however, has the inherent power to waive its rules." *Id.* at 784. The Court of Appeals went further by finding that a trial court was justified in suspending its own rules, even when a different judge made the previous ruling, so long as an injustice is not done. *Id.*

The same result occurred in *Snyder*, where Division 1 rejected the argument that a subsequent trial judge could not revisit an earlier ruling made by its predecessor. 19 Wn. App. at 637. Again, the setting stemmed from King County's Local Rule prohibiting reconsideration on the same matter. The Court of Appeals noted a superior court may, for good reason, relax its own local rules. *Id.*

Plaintiffs' argument that Judge Stoltz cannot modify an earlier ruling by Judge Larkin is unsupported and contradicts the rules and case authority. The real issue, now, is whether Judge Stoltz's modification was reached on tenable grounds.

c. Revision of the Discovery Sanction Order is Consistent with the *Burnet* factors on Sanctions.

When a trial court enters an order for sanctions based on discovery violations it is to “impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery.” *Blair*, 171 Wn.2d at 348 (quoting *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 495–96, 933 P.2d 1036 (1997)). When a *severe* sanction is entered, the trial court must make a record illustrating that it considered three factors: (1) a lesser sanction; (2) the willfulness of the violation; and (3) substantial prejudice arising from it. *Blair*, at 348.

In the instant case, there is no question that Judge Larkin was required to create a record before entering the severe sanctions of striking defendant’s Answer and affirmative defenses. The purpose of creating such a record is to facilitate later review by the trial or appellate courts to determine consistency and/or an abuse of discretion. Here, Judge Stoltz looked at Larkin’s sanction order, looked at the record, and found the order prepared and submitted by plaintiffs was inconsistent with what Judge Larkin articulated on the record during the sanctions hearing. He clearly stated he was not entering default or a directed verdict in favor of plaintiffs, and yet plaintiffs submitted a written order striking the Answer

and now contend the written order trumps the reasons Larkin articulated. That is plainly error by plaintiffs and Judge Stoltz was justified in fixing it.

While trial courts are required to create a record when entering harsh sanctions, such a record is not required when entering a lesser sanction. *Blair*, at 349 (“*Mayer* clearly held that trial courts do not have to utilize *Barnet* when imposing *lesser* sanctions, such as monetary sanctions, but must consider its factors before imposing a harsh sanction such as witness exclusion”) (emphasis in original). Thus, Judge Stoltz was not required to formulate a detailed record when she revived the comparative fault defense because she did not enter a harsh sanction, she removed one.

When Judge Larkin entered his order on sanctions, he did so based on a limited knowledge of the case at that time. Concededly Larkin knew the issues of Fifth Amendment incrimination and discovery conduct based on the numerous motions by the parties, but he did not have the benefit of the full evidence of the case because no summary judgment motion was before him. When Judge Stoltz was presented with plaintiffs’ motion for summary judgment she had the benefit of a developed record. Judge Stoltz understood the case as a whole, including the parties’ arguments and theories of the case, the evidence, and recognized which theories were viable. Thus, the Order on summary judgment represented greater familiarity with the case than at the time Judge Larkin announced his

ruling on the narrow issue of discovery sanctions.

Judge Larkin's universe of information when fashioning the discovery sanction order was limited to the pleadings then on hand, written discovery answers, and the transcript of the deposition and discovery hearings. He did not, at that time, understand the full import of the parties' claims and affirmative defenses. Judge Stoltz had the benefit of a better developed record and perceived that striking defendant's affirmative defense of comparative fault imposed too great of a sanction under the case's facts. Judge Larkin could not appreciate just how severe of a sanction striking comparative negligence was in this particular case. Between the two trial judges, Judge Stoltz had a better grasp on the case and its facts, and therefore was in a superior position to determine whether striking the affirmative defense of comparative fault was warranted. Furthermore, Judge Stoltz recognized that reviving the single affirmative defense of comparative fault worked no great prejudice on plaintiff because the defendant's evidence on comparative fault was the same as plaintiff's evidence for proximate cause. The defense did not rely on Clarence Munce to support its affirmative defense and so no tactical advantage was gained.

The Court should recall that "the sanction rules are 'designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are proper in a given case . . .'" *Fisons*, 122 Wn.2d at 340

(citing *Cooper v. Viking Ventures*, 53 Wn. App. 739, 742–43, 770 P.2d 659 (1989)). Just as plaintiffs contend that Judge Larkin had the discretion to enter the sanctions they wanted, Judge Stoltz has the discretion to tailor those sanctions to the facts of this case. Judge Stoltz did not abuse her discretion by reviving the single affirmative defense of comparative fault.

d. The Law of the Case Doctrine Does Not Apply to Orders on Discovery Sanctions.

What plaintiffs appear to be fumbling for in arguing that Judge Stoltz improperly interpreted a prior court order is the Law of the Case Doctrine. At least, this is presumed given that plaintiffs are arguing de novo review applies. Regardless, the doctrine and de novo review do not apply here. “As most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a *rule of law*, that decision should continue to govern the same issues in subsequent stages in the same case.” *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815–16, 108 S.Ct. 2166, 2177, 100 L.Ed.2d 811 (1988) (citing *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1983) (emphasis added)). Necessarily, the doctrine applies to courts’ decisions on *law*. Here, Judge Larkin’s order struck the affirmative defense of contributory negligence not as a matter of law, nor upon any basis arising from the affirmative defense’s legal merits. The decision was

based on discovery violations. Thus, his order granting discovery sanctions was not “the law of the case.”

Even if a discovery sanction order could be considered the law of the case, the doctrine does not preclude a court from revisiting one of its orders to correct error. *Christianson*, 486 U.S. at 817, 108 S.Ct. at 2178 (“A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was ‘clearly erroneous and would work a manifest injustice’”). Thus, Judge Stoltz had the power to revise an earlier decision and appropriately reversed the error made in striking the affirmative defense of comparative fault because striking this particular defense worked too great of an injustice on defendant based on the unique facts of this case. Defendant is deemed incompetent and faces the threat of continued criminal charges, but he should at least be afforded the opportunity to present a defense through other witnesses and circumstantial evidence available to all parties.

Plaintiffs rely on a Division 1 opinion rendered four decades ago that is confusing at best. *Callan v. Callan* does not apply here. What happened in *Callan* was a divorce decree was entered December 9, 1965. 2 Wn. App. 446, 468 P.2d 456 (Div. 1, 1970). Sometime later, the husband sought an interpretation and modification of this decree and

judgment. Admittedly the opinion states that “[t]he interpretation or construction of findings, conclusions and judgments presents a question of law for the court.” *Id.* at 448 (citing foreign decisions). However, Judge Stoltz was not confronted with a judgment entered in a closed case. This case is ongoing. No trial has occurred and no judgment has been entered. The rule about constructing judgments does not apply here. If it applied to pre-judgment orders then there would be an immediate conflict with CR 54(b).

Under plaintiffs’ logic, every reconsideration order would be subjected to de novo review. Yet, decisions on motions to reconsider are subjected to review for manifest abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (Div. 1, 1990). The whole purpose for motions to reconsider and for allowing trial courts to revise, modify, or even reverse themselves under CR 54(b) is to correct an error which may be overly prejudicial to one party or otherwise waste judicial resources.

Plaintiffs correctly state the general rule that written orders control over oral pronouncements. *Ferree v. The Doric Co.*, 62 Wn.2d 561, 383 P.2d 900 (1963). Yet despite this general rule, plaintiffs’ own cited authority acknowledges that this Court “may affirm a lower court decision on any ground supported by the record.” *Pearson v. State Dept. of Labor & Indus.*, 164 Wn. App. 426, 441, 262 P.3d 837 (Div. 1, 2011). Indeed, the general rule should not be construed so as to allow one party to prepare

an order differing from what the judge has stated and then slip it in hoping the judge will not notice. Plaintiffs' inclusion of language which struck defendant's Answer was improper and conflicted with Judge Larkin's order. Judge Stoltz identified that impropriety and corrected it. It is entirely within her authority to do so under CR 54(b). Furthermore, striking the Answer was not only inconsistent with Larkin's oral ruling, but it was internally inconsistent with the rest of the 14 page written order which stated the Court declined to enter default. (CP 18). The inclusion of the language was inconsistent and Judge Stoltz had a tenable basis for fixing it. The correction of that inconsistency is not a basis for reversing her decision.

The civil rules are to "be construed and administered to secure the just, speedy, and inexpensive determination of every action." CR 1; *Coggle*, 56 Wn. App. at 507-08. Judge Stoltz reviewed Judge Larkin's order, noticed an inconsistency, and in light of all the available information before her on a summary judgment motion she recognized that Judge Larkin erred and she corrected it. Judge Stoltz is the best situated individual to know whether Judge Larkin's striking of the comparative fault defense went too far because she is tasked with managing the direction of the litigation. Stoltz identified that this error needed correction before the parties and court conducted a needless trial. In light of the developed record which Stoltz considered, this Court cannot

hold that she had untenable grounds for modifying an earlier ruling to remove an inconsistency and conform the case to the evidence.

e. The Revival of the Comparative Fault Affirmative Defense Does Not Substantially Alter the Status Quo and Plaintiffs are Not Substantially Limited in Preparing for Trial.

This is a discretionary review. Trial has not yet occurred. Commissioner Schmidt approved review under the circumstances of RAP 2.3(b)(2) only. As such, plaintiffs must demonstrate that Judge Stoltz committed probable error by reinstating a single affirmative defense, and that by doing so substantially altered the status quo in a manner that *substantially* limits plaintiffs' ability to prepare their case. Plaintiffs fail to show that. As the trial judge, Judge Stoltz had the authority to modify an earlier decision so the case would conform to the evidence as justice required. CR 54(b). Plaintiffs may disagree with Judge Stoltz but they cannot show *probable* error. The error – which Stoltz corrected – was spawned by plaintiffs when they submitted a written order that conflicted with what Judge Larkin articulated on the record.

In *Minehart II v. Morning Star Boys Ranch, Inc.*, Division 3 noted that “[i]nterlocutory review is disfavored.” 156 Wn. App. 457, 462, 232 P.3d 591 (Div. 3, 2010). It further noted: “[a]n appellate court is not competent to review most evidentiary rulings when a trial has not yet occurred both because it does not find its own facts and because it is

incapable of assessing the impact of the evidence on the whole case.” *Id.* Here that reasoning applies. Trial has not yet occurred. Plaintiffs have offered nothing but hypotheticals and speculation on how they have been prejudiced by now having to deal with the affirmative defense of comparative fault. Until a trial has been completed and final judgment entered, this Court cannot know whether reviving the affirmative defense substantially limited plaintiffs’ freedom to try their case. In fact, the record before this Court reflects that plaintiffs have been afforded additional time to prepare for trial because Judge Stoltz granted a trial continuance. (CP 2646–47).

Indeed, contending with an affirmative defense is not an injustice, it is a part of nearly every civil suit. If Clarence Munce was dead as opposed to being incompetent, plaintiffs would not have a leg to stand on in complaining that they do not have access to the defendant, and yet comparative fault could still be raised as an affirmative defense. Here, Clarence has been declared incompetent at least three times. (CP 2396–2405, 2434–68). In effect, his unavailability as a witness is the equivalent of being deceased.

The sanctions order gave short shrift to the fact that Clarence is deemed incompetent and instead focused largely on objections raised on Fifth Amendment grounds. Although that issue is not yet on appeal, this Court should recognize that this is a civil case in which an incompetent

defendant who invoked his Fifth Amendment rights is now being penalized by having his entire civil defense scrapped. Concededly the Fifth Amendment only protects against criminal charges, but an incompetent defendant should not have a civil judgment automatically entered against him for invoking his rights, especially when there are sources of evidence at trial other than from the defendant. It is improper to penalize a civil defendant for being incompetent and being unable to assist in his own defense, yet that is exactly what Judge Larkin's sanction order did, and what plaintiffs ask this court to continue. Judge Stoltz recognized this, saw that the evidence of comparative fault was the same as plaintiffs' evidence for proximate cause, and in the interests of justice revived the affirmative defense of comparative fault to give the defendant an opportunity to present a defense in this civil suit without reaping any benefit from perceived discovery abuse. That was not probable error and does not work a manifest injustice on plaintiffs.

The only showing of prejudice that plaintiffs point to is their inability to depose Clarence Munce because of his unavailability as a witness and discovery source. However, it bears emphasis that Clarence Munce's own defense cannot use him as a witness and discovery source. He is incompetent. He is unavailable to either party. The defense is not gaining an unfair advantage from his unavailability. Judge Larkin's perception that the defense was attempting to have its cake and eat it too

was simply incorrect as it relates to the affirmative defense of comparative fault. The burden is on the defense to prove their affirmative defense, so if anything, Clarence's unavailability works a greater burden on the defense than plaintiffs.

Plaintiffs conceded to Judge Stoltz that the evidence, elements and analysis of proximate cause and comparative fault are the same. (CP 913–14). Therefore, revival of comparative fault does not substantially limit plaintiffs' freedom to prepare for trial, or even substantially alter the status quo. Revival of the affirmative defense does not change the matrix of how the case is tried, it merely provides the defense with the opportunity to argue to the jury that Gerald was partially at fault for causing this unfortunate event. This does not spring upon plaintiffs an unforeseeable and unbearable burden. In fact, plaintiffs have long been aware of the sources of evidence the defense seeks to rely on – it is the same as theirs.

Ample evidence supports an affirmative defense of comparative fault, including statements of prior altercations between Clarence and Gerald, Clarence's admissible statements to the police describing the altercation and being wounded by Gerald, and the toxicology report showing Gerald was grossly intoxicated when he came to his father house at night and started banging on the door. That plaintiffs rely on the very same sources of evidence demonstrates there is no prejudice, much less substantial limitation of freedom on the plaintiffs in allowing the defense

to use that very same evidence to argue to the jury that Gerald was contributory negligent.

Judge Stoltz recognized this. She looked at the written order Judge Larkin entered (prepared by plaintiffs), considered the transcript of the oral argument on the sanctions motion, and concluded that Judge Larkin did not want to enter a directed verdict in favor of plaintiffs. That much is clear. (RP 17, 5/20/11 Hrg.). She observed the discrepancy between Larkin's not wanting to enter a directed verdict and nevertheless striking both the affirmative defenses *and* the Answer. This was inconsistent. Judge Larkin very clearly stated he was not entering an order of default against respondents, but by striking the Answer and Affirmative Defenses he did essentially that. With no Answer, the defense is unable to argue anything in this case, which in effect, works a directed verdict in plaintiffs' favor. Indeed, plaintiffs even moved for a default based on the sanctions order. Judge Stoltz recognized the inconsistency and cured it at the pretrial stage to make clear to all parties on what could be argued at trial.

During summary judgment, Judge Stoltz reviewed all of this evidence and concluded that under the facts of this case a jury could find Gerald contributory negligent and assign his estate some percentage of fault. Yet, the only way for the jury to apportion any fault on the verdict form is to allow the comparative fault defense. Otherwise defendant

would be confined to arguing innuendos to the jury of Gerald's comparative fault all the while meeting relevancy objections. Without an apportionment question on the verdict form there is, in essence, a directed verdict, leaving only the question of damages to be decided. This result was clearly not Judge Larkin's intention originally. Judge Stoltz acted appropriately as the current posture of the case promotes clarity for how the trial will be conducted, how the jury may consider Gerald's contribution, and how the verdict form should read. That will certainly guide the parties post-verdict in determining potential appealable issues and/or resolution of the case. As a result, Judge Stoltz's revival of the single affirmative defense of comparative fault is not only based on tenable reasons, but it is the most efficient and effective use of judicial resources, and was within her sound discretion. The order reviving the affirmative defense of comparative fault should stand and this case should proceed to trial.

VII. CONCLUSION

In this Discretionary Review, plaintiffs have the burden to show that Judge Stoltz committed probable error by reviving the sole affirmative defense of comparative fault, and that by doing so their ability to prepare for trial has been substantially limited. Plaintiffs have failed to carry that burden as Judge Stoltz did not err in correcting an inconsistency between Judge Larkin's oral ruling and the written order presented by plaintiffs.

CR 54(b) plainly authorizes a trial court to correct errors and/or modify its earlier rulings, even if by different trial judges. Moreover, the inherent power of the trial court allowed Judge Stoltz to do this *sua sponte*.

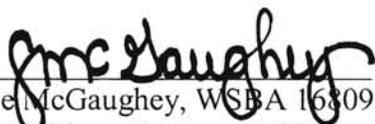
Plaintiffs have failed to show substantial limitation in their ability to prepare for trial because the trial court granted plaintiffs a trial continuance. Moreover, defendant's unavailability does not substantially limit plaintiff's ability to prepare for trial nor does it bestow upon defendant any gain from past sanctioned conduct because the defense will rely on sources of evidence other than defendant himself.

Judge Stoltz is the most familiar judge with the evidence in this case. She is the best positioned person to weigh the effect of sanctions in this matter. Judge Stoltz did not abuse her discretion. This Court should affirm Judge Stoltz's order.

DATED this 2nd day of march, 2012.

McGAUGHEY BRIDGES DUNLAP, PLLC

By:


Shellie McGaughey, WSBA 16309
James Bulthuis, WSBA 44089
Attorneys for Clarence Munce

12 MAR -11 20 14 15
BY al
CLERK

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

KRISTEY L. RICKEY and KELLEY R.)
CAVAR, Individually, and as Co-Executrixes)
of the Estate of Gerald Lee Munce, Deceased) NO. 42245-0-II
Petitioners,) DECLARATION OF
vs.) SERVICE
MICHAEL B. SMITH, as Litigation Guardian)
Ad Litem for CLARENCE G. MUNCE)
Respondent.)

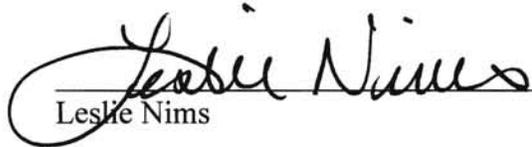
I, Leslie Nims, hereby declare under penalty of perjury that
the following statements are true and correct:

1. I am over the age of 18 years and am not a party to this case.
2. On Friday, March 02, 2012, I caused to be deposited for delivery to the attorney for the Petitioners, a copy of Respondent's Brief and this declaration of service, and caused those same documents to be filed with the Clerk of the above captioned court. The address to which these documents were provided to respondents' attorney was:

Ben Barcus
LAW OFFICES OF BEN F. BARCUS & ASSOCIATES
4303 Ruston Way
Tacoma, WA 98402

- by hand delivery
- legal messenger (ABC Messenger Service)
- facsimile
- email
- U.S. Mail

DATED this 2nd day of March, 2012.



Leslie Nims