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STATE OF WASHINGTON

JESSE MAGANA,

Petitioner,

v.

HYUNDAI MOTOR AMERICA and HYUNDAI MOTOR COMPANY,

Respondents,

and RICKY and ANGELA SMITH, husband and wife; et al.,

Defendants.

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF WASHINGTON
BUSINESS IN SUPPORT OF RESPONDENTS

Hugh D. Spitzer,
WSBA No. 5827
Emanuel F. Jacobowitz,
WSBA No. 39991
Attorneys for *Amicus Curiae*
Association of Washington Business

FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Facsimile No.: (206) 447-9700

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. INTERESTS OF AMICUS	1
III. ANALYSIS	3
A. THE RIGHT TO TRIAL BY JURY REQUIRES THE NARROW DEFAULT RULE USED BY THE COURT OF APPEALS.....	3
B. THE RIGHT TO A CIVIL JURY PROTECTS LITIGANTS FROM ARBITRARY TERMINATION OF FACT-BASED DISPUTES.....	8
1. The Broad Washington Civil Jury Right Goes Back To The American Revolution.....	8
2. The Civil Jury Is A Populist Check On Arbitrary Law	10
3. The Jury is Key to Washington's Constitutional Of Control Of the Courts By the Sovereign People.	12
4. The Jury As Fact-Finder Makes Trials Fairer.	14
C. THE SUPERIOR COURT'S ONE-JUDGE, NON- MERITS-BASED RESOLUTION IN THIS CASE IS THE KIND OF ARBITRARY PROCESS THAT OUR STATE CONSTITUTION INTENDED TO PREVENT.....	16
IV. CONCLUSION	20

TABLE OF AUTHORITIES

Washington Cases

<i>Andersen v. King County</i> , 158 Wn.2d 1, 138 P.3d 963 (2006).....	13
<i>Associated Mortgage Invest. v. G.P. Kent Constr. Co.</i> , 15 Wn. App. 223, 548 P.2d 558 (1976).....	6
<i>Auburn Mechanical, Inc. v. Lydig Constr., Inc.</i> , 89 Wn. App. 893, 951 P.2d 311 (1998).....	6
<i>Brown v. Safeway Stores, Inc.</i> , 94 Wn.2d 359, 617 P.2d 704 (1980).....	5
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997).....	19
<i>Dlouhy v. Dlouhy</i> , 55 Wn.2d 718, 349 P.2d 1073 (1960).....	4
<i>Goodner v. Speed</i> , 96 Wn.2d 838, 640 P.2d 13 (1982).....	4
<i>Griggs v. Averbek Realty, Inc.</i> , 92 Wn.2d 576, 599 P.2d 1289 (1979).....	4, 5
<i>Johnson v. Goodtime</i> , 1 Wn. Terr. 484, 485 (1875).....	4
<i>Magana v. Hyundai Motor Amer.</i> , 141 Wn. App. 495, 170 P.3d 1165 (2008).....	6
<i>Mitchell v. Watson</i> , 58 Wn.2d 206, 361 P.2d 744 (1961).....	6
<i>Mullen v. Doherty</i> , 16 Wn. 382, 47 P. 958 (1897).....	14

<i>Quesnell v. State</i> , 83 Wn.2d 224, 517 P.2d 568 (1974).....	1, 15
<i>Smith v. Behr Process Corp.</i> , 113 Wn. App. 306, 54 P.2d 665 (2002).....	4, 19
<i>Snedigar v. Hoddersen</i> , 114 Wn.2d 153, 786 P.2d 781 (1990).....	6
<i>Sofie v. Fibreboard Corp.</i> , 112 Wash.2d 636, 771 P.2d 711 (1989)	8, 9, 14
<i>State v. Anderson</i> , 175 P.3d 788 (Idaho 2008)	5
<i>State v. Evans</i> , 154 Wn.2d 438, 114 P.3d 627 (2005).....	12
<i>State v. Hicks</i> , 163 Wn.2d 477, 181 P.3d 831 (2008).....	9
<i>Washington State Phys. Ins. Exch. & Ass'n v. Fisons</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	20
<i>Wilson v. Volkswagen of America, Inc.</i> , 561 F.2d 494 (4th Cir. 1977)	7

Other Cases

<i>Beacon Theatres, Inc. v. Westover</i> , 359 U.S. 500 (1959)	5
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004)	12
<i>Granfinanciera, S.A. v. Nordberg</i> , 492 U.S. 33, 63-64 (1989)	6
<i>Hardenbergh v. Both</i> , 73 N.W.2d 103 (Iowa 1955).....	4

<i>In re One Star Class Sloop Sailboat</i> , 517 F. Supp. 2d 546 (D.Mass. 2007).....	16
<i>In re Relafen Antitrust Litig.</i> , 231 F.R.D. 52 (D. Mass. 2005)	16
<i>In re Warner Comm. Sec. Litig.</i> , 618 F. Supp. 735 (S.D.N.Y. 1980)	18
<i>In re Zyprexa Products Liab. Litig.</i> , 489 F. Supp. 2d 230 (E.D.N.Y. 2007)	16, 17
<i>Jacob v. New York</i> , 315 U.S. 752 (1942)	1
<i>Jacuzzi v. Jacuzzi Bros., Inc.</i> , 243 Cal. App. 2d 1 (1966)	5
<i>Kawamata Farms, Inc. v. United Agr. Prod.</i> , 948 P.2d 1055 (Haw. 1997).....	5
<i>Lyle v. Household Mfg., Inc.</i> , 494 U.S. 545 (1990)	6
<i>National Hockey League v. Metropolitan Hockey Club</i> , 427 U.S. 639 (1976)	7, 8
<i>Puget Sound Nav. Co. v. Associated Oil Co.</i> , 56 F.2d 605 (D. Wash. 1932)	5
<i>Scott v. Neely</i> , 140 U.S. 106 (1891)	5
Statutes, Rules, and Constitutions	
CR 1	3
CR 37	4, 7
CR 38	4

RAP 13

Wn. Const. Art. I § 1 8

Wn. Const. Art. I § 21*passim*

Wn. Const. Art. I § 328

Wn. Const. Art. IV § 5.....13

Wn. Const. Art. IV § 16.....14

Ga. Const. of 1777, § 519

N.C. Decl. of Rights, § 14 (1776).....9

N.Y. Const. of 1777, § 519

Oregon Const. of 1857, Art. I § 189

Treatises, Articles, and Other

John Adams, *Instructions of the Town of Braintree on the Stamp Act (1765)* in *The Founders Constitution* (Philip Kurland & Ralph Lerner, eds., 1987), <http://press-pubs.uchicago.edu/founders/>.....10

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Judge Richard S. Arnold, *Mr. Justice Brennan and the Little Case*, 32 Loy. L. Rev. 663, 670 (1999)16

Sir William Blackstone, *Commentaries On The Laws Of England* (1769).3

Sir Winston H. Churchill, *A History of the English Speaking Peoples*, (1956).....12

Civil Justice, Report of the 2001 Forum for State Appellate Court Judges, (Roscoe Pound Foundation, ed., 2005).....15, 17

Hon. Wm. L. Dwyer, <i>In The Hands Of The People</i> 134 (2002).....	15, 17
J. Kendall Few, <i>In Defense of Trial By Jury</i> (1993).....	9
Alexander Hamilton, <i>The Federalist</i> , No. 83	11
Thomas Jefferson, <i>The Writings of Thomas Jefferson</i> 84 (H.A. Washington, ed., 1864).....	13
Ga. Const., § of.....	9
Harry Kalven, Jr. and Hans Zeisel, <i>The American Jury</i> (1966)	15
Roger W. Kirst, <i>The Jury's Historic Domain in Complex Cases</i> , 58 Wn. L. Rev. 1 (December 1982).....	
Lebbeus J. Knapp, <i>Origin of the Constitution of the State of Washington</i> , IV Wn. Hist. Q. 4, 227 (1913)	9
Stanley Kubrick, <i>Paths of Glory</i> (1957).....	8
Stephen Landsman, <i>Appellate Courts and Civil Juries</i> , in <i>The Jury As Fact Finder and Community Presence</i> , in <i>Civil Justice, Report of the 2001 Forum for State Appellate Court Judges</i> , (Roscoe Pound Foundation, ed., 2005)	10, 12, 18
James Madison, <i>Debates in the Federal Convention</i> in 2 <i>Records of the Federal Convention of 1787</i> (M. Farrand ed., 1911).....	
Todd D. Peterson, <i>Restoring Structural Checks On Judicial Power In The Era Of Managerial Judging</i> , 29 U.C. Davis L. Rev. 41, 45 (1995)	18
Judith Resnik, <i>Trial As Error, Jurisdiction As Injury: Transforming The Meaning of Article III</i> , 113 Harv. L. Rev. 924, 925 (2000)	18
<i>Journal of the Washington State Constitutional Convention, 1889</i> (Beverly J. Rosenow, ed., 1962).....	10, 13
14 Karl B. Tegland, <i>Washington Practice: Civil Procedure</i> § 1.2 (2008).	

Suja A. Thomas, <i>Judicial Modesty And The Jury</i> , 76 U. Colo. L. Rev. 767, 790-91 (2005)	16
Hon. Robert F. Utter & Hugh D. Spitzer, <i>The Washington State Constitution: A Reference Guide</i> (2002)	9
Neil Vidmar, <i>Juries, Judges, and Civil Justice</i> , in <i>Civil Justice, Report of the 2001 Forum for State Appellate Court Judges</i> , (Roscoe Pound Foundation, ed., 2005).....	15
Washington Superior Court Caseload Trend Table, online at http://www.courts.wa.gov/caseload/?fa=caseload.display_years&folderID=Superior&subfolderID=ann&year=2007&fileID=ACTVCIV	17
John Henry Wigmore, <i>A Program For The Trial Of The Jury Trial</i> , 12 J. Am. Jud. Soc. 166 (April 1929).....	15
Charles W. Wolfram, <i>The Constitutional History of the Seventh Amendment</i> , 57 Minn. L. Rev. 639, 654-55 (1973).....	10, 11, 12
4 Wright & Miller, <i>Federal Practice and Procedure, Civil 3rd</i>	4

I. INTRODUCTION

At the heart of this case is a vital question of individual right: may a trial judge commandeer a live factual dispute away from the jury, to serve the court system's perceived needs for speed and deterrence? Petitioner Magaña has asked this Court to rule that a trial court may shut down a meritorious case merely to punish, deter, and prevent delay. Those interests justify lesser sanctions for Hyundai's lapses. But as a defendant at law, Hyundai has the constitutional right to bring the merits of its case before a jury of its peers. To destroy a constitutional right as a lesson for others, violates both the Washington State Constitution and fundamental principles of American law.

The right to a civil jury is inviolate under our State's Constitution. This Court, among others, has called it "sacred."¹ In an age when few cases go to a jury, it is easy to lose sight of the fundamental principle that justice is not a function of judges alone. *Amicus* asks this Court to recur to fundamental principles to protect the right of the individual civil litigant to seek justice from a jury.

II. INTERESTS OF AMICUS

Amicus is the Association of Washington Business, Washington's largest statewide trade organization, representing more than 6,500

¹ *Quesnell v. State*, 83 Wn.2d 224, 241, 517 P.2d 568 (1974)(quoting *Jacob v. New York*, 315 U.S. 752, 753 (1942)).

members ranging from single entrepreneurs to the State's largest private employers. Since 1904, the Association and its membership have promoted prosperity and enterprise in Washington State.

Discovery burdens fall more heavily on businesses, large and small, than on a private individual. Hyundai, for example, produced thousands of papers in this case. Even a solo doctor or architect keeps extensive records, any of which might in discovery parlance "relate to" some lawsuit. Further, as seen here, courts expect a high standard of performance from 'sophisticated' litigants – i.e., businesses. As a result, businesses (and other records-heavy parties such as governments) are more likely than other litigants to be deemed in violation of discovery rules. This imbalance has become more pronounced as electronic discovery has mushroomed, and it seems likely this trend will accelerate.

Justice, it is said, hears the small and the great alike. But if Mr. Magaña's trial court ruling becomes a rule of decision for courts in this state, small-records litigants will have a royal road to a money judgment against their record-laden opponents, whose defense on the merits **will not be heard at all**. Such a rule would distort settlement incentives, encourage costly satellite litigation on discovery sanctions, and remove genuine disputes of fact from their constitutional decider, the jury.

Accordingly, a ruling for Respondent would harm the Association's members and this state. Instead, this Court should re-affirm the right to a jury trial except where a willful discovery violation irretrievably impairs a party's right to a fair trial.

III. ANALYSIS

*[T]he liberties of England cannot but subsist, so long as this palladium remains sacred and inviolate, not only from all open attacks... but also from...new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern." 4 Blackstone, Commentaries On The Laws Of England, 343-44 (1769)
(online at <http://avalon.law.yale.edu/default.asp>)*

A. The Right To Trial By Jury Requires The Narrow Default Rule Used By The Court Of Appeals.

As shown in Hyundai's appellate briefs, the interpretation of the Civil Rules is guided by Washington's strong public policy in favor of trial on the merits.² For this reason, defaults are not favored.³

² CR 1; RAP 1.

In cases at law, an even stronger public policy weighs against the use of default or dismissal as a discovery sanction: “The right of trial by jury shall remain inviolate.” Wn. Const. Art. I, § 21;⁴ CR 38. This right is preserved in substance as it was when the Constitution was adopted: it applies to cases cognizable in common law, although not to strictly equitable cases.⁵ In a case at law, Washington judges before the adoption of the State Constitution could not usurp the jury’s prerogative of finding the facts.⁶ A default, however, is nothing less than a finding of facts by the court – **without the trouble of testing those facts.** *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 333, 54 P.2d 665 (2002) (after default on liability, mitigation evidence is barred as to damages because default decided those facts). A default in a case in law therefore raises grave constitutional issues.

Rule 37 was adapted from the Federal Rules of Civil Procedure.⁷ The Federal Rules, in turn, were based on the procedures of equity courts.⁸

³ *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979); *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960)).

⁴ Art. I § 21 also provides for jury size, supermajority, and waiver.

⁵ *State ex rel. Goodner v. Speed*, 96 Wn.2d 838, 840, 640 P.2d 13 (1982).

⁶ *Johnson v. Goodtime*, 1 Wn. Terr. 484, 485 (1875).

⁷ 14 Karl B. Tegland, *Washington Practice: Civil Procedure* § 1.2 (2008).

⁸ 4 Wright & Miller, *Federal Practice and Procedure, Civil* 3rd § 1008 & n. 9 (changes from equity practice are few and include trial by jury); and see *Hardenbergh v. Both*, 73 N.W.2d 103, 107 (Iowa 1955) (discovery procedures are “bottomed on the old equity practice”); *Puget Sound Nav.*

Thus, in administering pre-trial discovery sanctions under the modern rules, a court exercises its equitable powers, and is guided by equitable considerations.⁹

Since the merger of law and equity (*see* CR 2), many cases combine claims, defenses, or issues in law with those in equity. In all such cases, the rule is clear: because “the right to jury trial is a constitutional one,” the court must “wherever possible” preserve it. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959). The right to a jury cannot be impaired by “any blending with...a demand for equitable relief in aid of the legal action, or during its pendency.”¹⁰

This Court agreed—and expressly cautioned against allowing litigants to use “sophisticated” new procedures (such as impleader) as a “simple expedient” to withhold cases from the jury.¹¹ Instead, “great

Co. v. Associated Oil Co., 56 F.2d 605, 606 (D. Wash. 1932) (discovery originated in equity practice).

⁹ *State v. Anderson*, 175 P.3d 788, 794 (Idaho 2008); *Kawamata Farms, Inc. v. United Agr. Prod.*, 948 P.2d 1055, 1083-84 (Haw. 1997); *Jacuzzi v. Jacuzzi Bros., Inc.*, 243 Cal.App.2d 1, 33 (1966) (choice of default or other discovery sanctions is guided by equity); *and see Griggs*, 92 Wn.2d at 581 (“proceeding to vacate a default judgment is equitable in character and relief is to be afforded in accordance with equitable principles.”)

¹⁰ *Id.* at 511 (quoting *Scott v. Neely*, 140 U.S. 106, 109-10 (1891)).

¹¹ *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 367, 617 P.2d 704 (1980).

weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed.”¹²

A court must if possible prioritize the legal aspects of the case, to preserve the jury right. *Lyle v. Household Mfg., Inc.*, 494 U.S. 545, 550 (1990). The expense, delay, and administrative inconvenience attendant upon jury trial do not excuse stripping a party of that right. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 63-64 (1989).

This strong policy demands at the least that when considering a default or dismissal sanction, courts must carry out, and take seriously, the same analysis required by due process. As the Court of Appeals held, a motion to terminate the legal case via equitable sanction must show both fault and “substantial” prejudice—prejudice that **irremediably** taints the process and denies the moving party’s right to a fair trial.¹³ For example, default may be apt where a litigant refuses to produce key evidence straight through the sanction hearing, making trial by jury **impossible**.¹⁴

¹² *Id.* at 368; *Auburn Mechanical, Inc. v. Lydig Const., Inc.*, 89 Wn. App. 893, 898, 951 P.2d 311 (1998).

¹³ *Magana v. Hyundai Motor Amer.*, 141 Wn. App. 495, 519-20, 170 P.3d 1165 (2008); and see *Snedigar v. Hodderson*, 114 Wash.2d 153, 169, 786 P.2d 781 (1990) (reversing default sanction because record did not show substantial prejudice); and cf. CR 55, 60 (default for failure to proceed with case may be equitably vacated if due to excusable neglect).

¹⁴ *Associated Mortgage Invest. v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 548 P.2d 558 (1976); see also, *Mitchell v. Watson*, 58 Wn.2d 206, 209-217, 361 P. 2d 744 (1961).

But when, as here, the litigant submits to the court's first check and produces all requested discovery before trial, the equity power to punish and deter **cannot** end the case. *See* Resp. Supp. Br., 9-12 *and cases cited*. The lesser sanction of fines and a continuance will punish, deter, and cure (and can also cure Magaña's alleged harms other than prejudice). This doctrine preserves inviolate the right to a jury trial protected by the Constitution.

A federal Court of Appeals acknowledged this constitutional issue when it reversed a default sanction against a car maker that had withheld documents in discovery. *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 503-04 (4th Cir. 1977). It held that a court's discretion to impose ultimate sanctions under Rule 37 is sharply limited because default infringes upon the public policy of trial on the merits and upon the right to trial by jury. *Id.* at 503. Only the most "flagrant case" of willful and prejudicial abuse, therefore, should meet a default. *Id.* at 503-04.

One such "flagrant case" was *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976), in which the defaulted defendant had made trial **impossible** by repeatedly flouting orders to produce key evidence, despite continuances. *Wilson*, 461 F.2d at 505. Here, in contrast, Hyundai cured its fault before dismissal, and irreversible prejudice was simply not shown. Magaña misreads the *NHL per curiam*

opinion as recommending defaults purely for general deterrence. But *NHL* merely rejected the theory that it should reverse because the trial court's dismissal had finally terrorized the defendant into submission. *NHL*, 427 U.S. at 642-43. If appellate courts always gave fresh chances on a *post hoc* basis, clearly the trial courts could not deter any litigant. *Id.* at 643. But *NHL* nowhere suggests that a trial court should, every now and then, throw a litigant against the wall just to show the rest of them that it means business. Unlike the French General Broulard in Stanley Kubrick's 1957 film, *Paths of Glory*, civil courts should not select occasional miscreants for execution as "a perfect tonic for the entire division." That is not what American courts do.

B. The Right To A Civil Jury Protects Litigants From Arbitrary Termination Of Fact-Based Disputes.

1. The Broad Washington Civil Jury Right Goes Back To The American Revolution.

The right to a jury trial under the Washington Constitution deserves the courts' "highest protection." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). In Washington, the fundamental purpose of government is "to protect and maintain individual rights." Wn. Const. Art. I § 1. To secure these rights, a "frequent recurrence to fundamental principles" is "essential." *Id.* § 32. The potential impact of

the Superior Court's default ruling is best understood in light of the fundamental principles underlying the individual right to a civil jury.

To remain "inviolate," the civil jury right must "remain the essential component of our legal system that it has always been." *Sofie*, 112 Wn.2d at 656.

What is the jury's role in our system?

Article I § 21 carries forward a universal American consensus. But the Washington provision reserves broader rights than the Seventh Amendment to the federal Constitution.¹⁵ The text derives from the Oregon Constitution of 1857, Art. I § 18, which was based on the Indiana Constitution of 1851, and it can be traced further to the first state constitutions.¹⁶ The wording was widespread in American states when the Washington Constitution was adopted in 1889.¹⁷ It needed no debate or

¹⁵ *State v. Hicks*, 163 Wn.2d 477, 492, 181 P.3d 831 (2008).

¹⁶ *Id.* at 510; Hon. Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 10 (2002) ("Utter"); 1 J. Kendall Few, *In Defense of Trial By Jury* 177-78 (1993) (quoting N.C. Decl. of Rights, § 14 (1776) ("trial, by jury, is one of the best securities of the rights of the people and ought to remain sacred and inviolate."); Ga. Const. of 1777 § 51 ("trial by jury [is] to remain inviolate forever"); N.Y. Const. of 1777, § 51 ("trial by jury...shall be established and remain inviolate forever.")).

¹⁷ Most states have substantially this constitutional provision. Lebbeus J. Knapp, *Origin of the Constitution of the State of Washington*, IV Wn. Hist. Q. 4, 227, 236-37 (1913).

explanation at the time.¹⁸ To understand the point of the right to trial by jury, it is necessary to go back to the Nation's origins.

2. The Civil Jury Is A Populist Check On Arbitrary Law.

Juries developed in England between the twelfth and fourteenth centuries and came to the New World in the first English settlements.¹⁹ The first American bill of rights, the 1641 Massachusetts Body of Liberties, guarantees a jury trial in civil cases.²⁰ By the 1770s, the civil jury was firmly ensconced in all thirteen colonies.²¹

The civil jury right became a flash point for colonial resentment when the British government gave admiralty courts jurisdiction over civil seizure cases arising from the Townsend and Stamp Acts.²² John Adams fumed at this "most grievous innovation," where "one judge presides alone!"²³ Thomas Jefferson cited the denial of trial by jury as grounds for revolution in the Declaration of Causes And Necessity For Taking Up

¹⁸ *Journal of the Washington State Constitutional Convention, 1889* 510 (Beverly J. Rosenow, ed., 1962) ("Rosenow").

¹⁹ Stephen Landsman, *Appellate Courts and Civil Juries*, in *The Jury As Fact Finder and Community Presence*, in *Civil Justice, Report of the 2001 Forum for State Appellate Court Judges*, (Roscoe Pound Foundation, ed., 2005) 42-43, ("Landsman" in "2001 Report").

²⁰ 1 Few, *supra*, at 121-22.

²¹ Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 654-55 (1973)

²² *Id.* at 654.

²³ John Adams, *Instructions of the Town of Braintree on the Stamp Act* (1765) in *The Founders Constitution* (Philip Kurland & Ralph Lerner, eds., 1987), online at <http://press-pubs.uchicago.edu/founders/>.

Arms (1775) ¶3, and the Declaration of Independence (1776) ¶ 18. After independence, the right to a civil jury was the only liberty guaranteed by every original Constitution.²⁴

The original federal Constitution did not include an express civil jury right, although antifederalist delegate Elbridge Gerry “urged the necessity of Juries to guard agst. corrupt judges.”²⁵ During the ratification struggle, Alexander Hamilton complained that this flaw in the design was “the objection which has met with most success” against ratification.²⁶ Hamilton and his fellows finally bowed to popular pressure and included a civil jury right as the Seventh Amendment. To rally this level of popular demand, the antifederalists’ chief arguments were that the civil jury would: protect defendants against debt purchasers,²⁷ meliorate unwise legislation, avoid admiralty procedures, empower citizens against the government, and protect litigants from overbearing, oppressive judges.²⁸

²⁴ Wolfram, *supra*, at 655.

²⁵ Wolfram, *supra*, at 659 (quoting James Madison, *Debates in the Federal Convention in 2 Records of the Federal Convention of 1787* 587-88 (M. Farrand ed., 1911)).

²⁶ The Federalist, No. 83.

²⁷ During wartime inflation, many Americans incurred debts which were later commodified and bought up by foreign speculators. (*Plus ça change, plus c'est la même chose.*)

²⁸ Wolfram, *supra*, at 670-71.

These antifederalist arguments are therefore the best evidence of the sovereign will embodied in Constitutional civil jury guarantees.²⁹ The common thread is that the jury is meant to guard all litigants – but especially defendants – against arbitrary government treatment, whether as law, currency revaluation, court procedure, or judicial overreach.³⁰

The jury still serves this fundamental purpose in Washington.

3. The Jury is Key to Washington’s Constitutional Of Control Of the Courts By the Sovereign People.

The jury acts as an internal check on the judiciary, distributing power away from judges to the people.³¹ By sharing power, Alexis de Tocqueville observed, America’s judges gained so much trust that they became stronger than in any other country.³² This Court recognizes that jury trial “is no mere procedural formality but instead a fundamental reservation of power in our constitutional structure,” retaining power to the people much as the direct election of legislators does.³³

²⁹ Wolfram, *supra*, at 669.

³⁰ See 1 Winston H. Churchill, *A History of The English Speaking Peoples*, 218-19 (1956) (“as long as a case has to be scrutinized by twelve honest men, defendant and plaintiff alike have a safeguard from arbitrary perversion of the law.”)

³¹ Landsman, *supra*, at 46.

³² *Id.* (citing 1 *Democracy in America* 281 (1830) (“In no country are judges so powerful as where the people share their privileges.”))

³³ *State v. Evans*, 154 Wn.2d 438, 445, 114 P.3d 627 (2005) (quoting *Blakely v. Washington*, 542 U.S. 296, 305-06, (2004) (reversing this Court and requiring jury for sentencing facts)); and see 3 *The Writings of*

Indeed, the structure and history of the Washington Constitution show an especially strong intent to constrain judges along with other government officials. In the decade before statehood, the transcontinental railroad reached Washington, bringing in a 500 percent population increase, an economic boom, corruption, and social turmoil.³⁴ Many Constitutional Convention delegates ran on populist platforms, and incorporated populist ideals of direct democracy into Washington's Constitution.³⁵

In particular, the Territorial judiciary was criticized for unaccountability – absentee judges, non-local appointments, and “political manipulations.”³⁶ Under the resulting Constitution, Washington judges must stand for election.³⁷ At the Constitutional Convention, the superior court judgeship term was reduced from the proposed six years to four years, with one delegate arguing that was as long as one judge should control probate.³⁸ The delegates also rejected a motion to hold judicial

Thomas Jefferson 84 (H.A. Washington, ed., 1864) (jury participation is more important than legislative election, because “the execution of the laws is more important than the making.”)

³⁴ Utter, *supra*, at 11.

³⁵ *Id.*

³⁶ *Andersen v. King County*, 158 Wn.2d 1, 16, 138 P.3d 963 (2006) (Madsen, J., with two Justices and two concurring in the judgment).

³⁷ Wn. Const. Art. IV § 5.

³⁸ Rosenow, *supra*, at 608.

elections in off-years to reduce public pressure.³⁹ Moreover, judges are expressly forbidden to charge or even opine on disputed facts to the jury in instructions or during trial.⁴⁰ A motion to allow judges to sum up evidence was soundly defeated after a delegate declared that the jury system began as a safeguard against judges who served corrupt monarchs.⁴¹ The jury is insulated from the judge, so that it in turn can insulate litigants from arbitrary judgment. Thus in Washington, any judge's potential for arbitrary power is supposed to be tempered by the will of the people, both in the voting booth and in the jury box.

4. The Jury As Fact-Finder Makes Trials Fairer.

Few cases should or do go to trial. Most settle. Some are dismissed because they lack any basis. Judges are better than juries at helping parties towards settlement and deciding the law. But for the few (non-equity) cases that do go to trial, this Court has repeatedly held that each party has the right to jury decisions "upon an issue of fact," because fact finding is "the essence" of the jury's role.⁴² A jury "serves the critical function of introducing into the process a lay judgment, reflecting values

³⁹ *Id.*

⁴⁰ Wn. Const. Art. IV § 16.

⁴¹ Rosenow, *supra*, at 622.

⁴² *Sofie*, 112 Wn.2d at 645 (quoting *State ex rel. Mullen v. Doherty*, 16 Wn. 382, 385, 47 P. 958 (1897)).

generally held in the community.”⁴³ This may explain why, as Judge William L. Dwyer observed, most judges would prefer to be tried by a jury.⁴⁴

John Henry Wigmore (of *Evidence* fame) agreed that by reconciling several people’s judgment, a jury approximates the average judgment of the community, and not incidentally makes the outcome and the courts tolerable and trustworthy in the eyes of the community.⁴⁵ This does not mean that juries pick favorites: the seminal study of civil jury outcomes found that jury liability verdicts are no more systematically biased than judges’ towards plaintiffs or defendants; and later studies confirm these results.⁴⁶ Instead, jury outcomes act as an ongoing referendum on questions such as what constitutes negligence, how much to compensate for pain, and so forth.⁴⁷ The effect extends far beyond trial, providing benchmarks for settlements in that vast majority of cases that never reach a jury.⁴⁸

⁴³ *Quesnell*, 83 Wn.2d at 242.

⁴⁴ Hon. Wm. L. Dwyer, *In The Hands Of The People* 134 (2002).

⁴⁵ John Henry Wigmore, *A Program For The Trial Of The Jury Trial*, 12 J. Am. Jud. Soc. 166, 169-71 (April 1929).

⁴⁶ Harry Kalven, Jr. and Hans Zeisel, *The American Jury* 63-64 (1966); Neil Vidmar, *Juries, Judges, and Civil Justice*, in *2001 Forum*, 8-16.

⁴⁷ See Roger W. Kirst, *The Jury's Historic Domain in Complex Cases*, 58 Wn. L. Rev. 1, 29 (December 1982).

⁴⁸ See *2001 Forum*, *supra*, at 72-73 (state bars re-assess cases based on jury outcomes in similar cases).

C. The Superior Court's One-Judge, Non-Merits-Based Resolution In This Case Is The Kind Of Arbitrary Process That Our State Constitution Intended To Prevent.

Recently, some federal judges have sounded the alarm that judges are encroaching on the jury.⁴⁹ District Court judges, under pressure from increased case loads and trained in the aggressive use of modern case-management techniques, find ways to end cases at any cost, to the detriment of the right to a civil jury:

I think in the 20 years since I was a district court judge, we've seen a tremendous increase in volume, tremendous pressure to decide cases without thinking very much about them, tremendous pressure to avoid deciding cases. I mean, **some judges will do almost anything to avoid deciding a case on the merits** and find some procedural reason to get rid of it, coerce the parties into settling or whatever it might be.

In re One Star Class Sloop Sailboat, 517 F. Supp. 2d 546, 555 (D.Mass. 2007) (emphasis added) (quoting Judge Richard S. Arnold, *Mr. Justice Brennan and the Little Case*, 32 Loy. L. Rev. 663, 670 (1999)); *see also In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 90-91 (D. Mass. 2005) (“we seem to be forgetting that the very reason for our judicial existence is to afford jury trials to our people pursuant to the United States Constitution.”); *In re Zyprexa Products Liability Litigation*, 489

⁴⁹ *See* Suja A. Thomas, *Judicial Modesty And The Jury*, 76 U. Colo. L. Rev. 767, 790-91 (Summer 2005) (jury, unlike other constitutional checks and balances, has no intrinsic defenses against encroachment)

F. Supp. 2d 230, 263 (E.D.N.Y. 2007) (“The increasing use of bench trials, Daubert hearings, summary judgments, and directed verdicts...to limit jury fact finding and set aside verdicts poses a threat to the continued viability of the Seventh Amendment jury trial.”); Dwyer, *supra*, at 4 (“overloaded calendars can lead judges to convert what should be a scalpel into a meat ax.”)

Although this trend is markedly less pronounced in state courts, the United States Department of Justice found a steep 47% decline from 1992 to 2001 in the number of state court civil trials in the nation’s 75 largest counties; and 1976-2001 court data from 22 states including Washington shows that the disposition of civil cases by civil jury trials dropped by half, from 1.8% to .6%.⁵⁰ Since then, Washington’s records for 2003-2007 show that Superior Court civil jury trials decreased from 534 (out of 127,943 filings) to 405 (out of 126,977).⁵¹

Case management decisions generally fly under the radar of a reviewing court, so the trend toward case management and away from trial has the potential to subject litigants to the kind of arbitrary, one-person

⁵⁰ American College of Trial Lawyers, *The Vanishing Trial: the College, the Profession, the Civil Justice System*, 5-6 (October 2004).

⁵¹ Superior Court Caseload Trend Table, online at http://www.courts.wa.gov/caseload/?fa=caseload.display_years&folderID=Superior&subfolderID=ann&year=2007&fileID=ACTVCIV.

rule that the Washington Constitution is designed to avoid.⁵² Fortunately, the danger is limited: generally, even a judge who is determined to avoid trial cannot force that outcome, because parties may still choose to take material disputed facts to a different decision maker – the jury. A judge, who may have soured on a case, a party, or a lawyer during the long and contentious pre-trial process, normally does not have the final say.⁵³ A default judgment, however, is a final say.

The temptation to finally decide a case on the basis of the pre-trial process would be especially great in a case like this one. Although only a few judges say out loud that trial is “lawyer failure,” or that “a bad settlement is almost always better than a good trial,” many quietly agree.⁵⁴ Here, Hyundai had gone to trial, and lost, and then gotten the judge reversed on appeal. After such a harsh pre-trial period, the fresh start of a jury would be invaluable for getting at the merits.

But the rule that Mr. Magaña proposes would sweep far more broadly than this unusual case might suggest. A court may in its discretion apply a default for a “willful” discovery violation causing

⁵² See Todd D. Peterson, *Restoring Structural Checks On Judicial Power In The Era Of Managerial Judging*, 29 U.C. Davis L. Rev. 41, 45 (1995).

⁵³ Landsman, *supra*, at 48.

⁵⁴ Judith Resnik, *Trial As Error, Jurisdiction As Injury: Transforming The Meaning of Article III*, 113 Harv. L. Rev. 924, 925 (2000) (quoting *In re Warner Comm. Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1980))

“substantial” prejudice which a lesser sanction will not cure. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). Under some appellate decisions, “willful” means lacking “reasonable excuse” and need not include intent or malice. *Behr*, 113 Wn. App. at 327. In an electronic discovery world, very many records-laden defendants, whether public or private, large or small, will make some error during a long pre-trial process. A skilled lawyer could make the case that almost any failure to disclose had caused delay. If simple delay is “substantial prejudice,” and cannot be cured by a continuance and/or fines, then in practice, an adversary can force default or dismissal by sandbagging the other party with his own discovery error late in the game.

As Hyundai points out in its Supplemental Brief, a too-easy default rule will encourage litigants to try to win the constitutionally-mandated boxing match of trial—on a TKO. As the Court of Appeals observed, Respondent’s seasoned counsel must have known what might happen when he resurrected an early discovery disagreement four months before trial and demanded evidence of a type that would begin, not end, fact investigation. Did Respondent play that card at that time to force a default? Whether Respondent did or not, other litigants will. This Court has urged the trial courts to lessen, not raise, the incentives for satellite

litigation over discovery. *Washington State Phys. Ins. Exch. & Ass'n v. Fisons*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993).

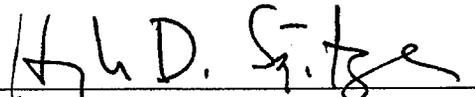
It is not only the Hyundais of this world who are put at risk. A business of any size, a solo practitioner with poor filing skills, an underfunded county agency, or even a modern technophile with accounts in many electronic social networks – any and all of these, as plaintiffs or defendants, can be caught up in discovery abuse or neglect. Penalties must check those litigants – but must not destroy their right to a jury trial.

IV. CONCLUSION

Because the extreme penalty of default or dismissal trenches upon the right to trial by jury, AWB urges this Court to affirm, and to hold that delay alone does not substantially prejudice a party whose strategy helped cause the delay. Otherwise, this State risks the arbitrary, one-judge rule that the Constitution means to constrain.

RESPECTFULLY SUBMITTED this 23rd day of December, 2008.

FOSTER PEPPER PLLC



Hugh D. Spitzer, WSBA #5827
Emanuel F. Jacobowitz, WSBA #39991
Attorneys for *Amicus Curiae*
Association of Washington Businesses

DECLARATION OF SERVICE

I, Colleen Hickman, declare that on December 23, 2008 I caused to be served in the manner noted copies of the following upon designated counsel:

1. Motion Of Association Of Washington Business To File Brief Of Amicus Curiae In Support Of Respondents;
2. Brief Of *Amicus Curiae* Association Of Washington Business In Support Of Respondents; and
3. This Declaration of Service.

Counsel for Petitioner

Charles K. Wiggins
Kenneth W. Masters
Shelby Frost Lemmel
Wiggins & Masters, PLLC
241 Madison Avenue North
Bainbridge Island, WA 98110
Fax: (206) 842-6356

Via U.S. Mail
Via Facsimile
Via Messenger
Via Email

Counsel for Petitioner

Paul W. Whelan
Stritmatter Kessler Whelan Coluccio
200 2nd Ave West
Seattle, WA 98119
Fax: (206) 728-2131

Via U.S. Mail
Via Facsimile
Via Messenger
Via Email

Counsel for Petitioner

Alisa R. Brodkowitz
Brodkowitz Law
200 Second Avenue West
Seattle, WA 98119
Fax: (206) 728-2131

Via U.S. Mail
Via Facsimile
Via Messenger
Via Email

Counsel for Petitioner

Mr. Michael Withey
Law Offices of Michael Withey
Two Union Square
601 Union Square #4200
Seattle, WA 98101
Fax: (866) 793-7216

Via U.S. Mail
Via Facsimile
Via Messenger
Via Email

Counsel for Petitioner

Derek Vanderwood
English, Lane, Marshall & Vanderwood
PLLC
12204 SW Mill Plain Blvd. #200
Vancouver, WA 98684-6026
Fax: (360) 449-6111

Via U.S. Mail
Via Facsimile
Via Messenger
Via Email

Counsel for Defendants

Mr. Douglas Foley
Foley & Buxman PLLC
13115 NE 4th St, Ste 260
Vancouver, WA 98684-5957
Fax: (360) 944-6808

Via U.S. Mail
Via Facsimile
Via Messenger
Via Email

Counsel for Petitioner

Peter O'Neil
Attorney at Law
3300 East Union Street
Seattle, WA 98122
Email: peter@peteroneil.net

Via U.S. Mail
Via Facsimile
Via Messenger
Via Email

Counsel for Respondent

Heather K. Cavanaugh
Jeffrey D. Austin
Miller Nash LLP
111 SW - 5th Ave. #3400
Portland, OR 97204
Fax: (503) 224-0155

Via U.S. Mail
Via Facsimile
Via Messenger
Via Email

Counsel for Respondent

Michael B. King
Gregory M. Miller
Carney Badley Spellman, P.S.
701 Fifth Ave., Suite 3600
Seattle, WA 98104
Fax: (206) 607-4142

Via U.S. Mail
Via Facsimile
Via Messenger
Via Email

Counsel for Petitioner

Ray W. Kaler
Stritmatter Kessler Whelan Coluccio
413 - 8th Street
Hoquiam, WA 98550
Fax: (206) 728-2131

Via U.S. Mail
Via Facsimile
Via Messenger
Via Email

DATED this 23rd day of December, 2008.



Colleen Hickman