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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. _____

CLERK OF SUPREME COURT
STATE OF WASHINGTON

IN THE SUPREME COURT OF THE STATE OF WASHINGTON,

COURT OF APPEALS, DIVISION II, NO. 34630-3-II

JESSE MAGAÑA,

Petitioner,

vs.

HYUNDAI MOTOR AMERICA; HYUNDAI MOTOR COMPANY;

Respondents,

and

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

Defendants.

PETITION FOR REVIEW

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INTRODUCTION AND IDENTITY OF PETITIONER

Eight years ago, Petitioner Jesse Magaña filed this action against respondents Hyundai Motor America and Hyundai Motor Company (collectively, "Hyundai"), seeking to recover for injuries he suffered 11 years ago when Hyundai's seatback collapsed, ejecting Magaña out the rear window and leaving him paraplegic.

Early in the case, Hyundai falsely answered Magaña's discovery requests, withholding evidence of complaints of other Hyundai car-seat collapses. After a three-day hearing, the trial court found that Hyundai's discovery responses were willfully false, that its lies substantially prejudiced Magaña, and that a default judgment was the only sufficient sanction. Two appellate judges second-guessed the trial court's broad discretion, finding – over a vigorous dissent – that Magaña was not substantially prejudiced.

This published decision sends a terrible message to litigants, lawyers and judges: if you lie, sabotage the administration of justice, and get caught by the trial court, then just appeal: the worst that can happen to you is more delay and ultimately a continuance – just what Hyundai wanted all along. This Court needs to reverse this open invitation to cynical gamesmanship and protect our justice system from manipulation and willful dishonesty.

COURT OF APPEALS DECISION

A two-judge majority, Judge Marywave Van Deren joined by Judge Christine Quinn-Brintnall, issued the published opinion on October 30, 2007, over a lengthy and careful dissent by Judge C. C. Bridgewater (copy attached as Appendix A).

ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion in finding that the plaintiff was substantially prejudiced by the defendant giving willfully false discovery responses for over five years, where

- ◆ this case had been pending for almost 6 years (over 8 years by the time this Petition is considered), while plaintiff has desperately needed funds for adequate medical care for his paraplegia and related ailments for over 11 years, CP 4836-38;
- ◆ defendant's late disclosure made the trial date impossible to meet, Finding of Fact ("FF") 60 (findings attached as Appendix B); CP 2350, 2666, 2668, 2670; 01/17/06 RP 136-40; 01/18/06 RP 16-17;
- ◆ the withheld evidence was highly relevant to the central issue in the case – existence of a product defect, FF 56, 59; CP 2665, 2669; 01/17/06 RP 114-15; 01/18/06 RP 17;
- ◆ the withheld evidence was highly relevant to causation of plaintiff's injuries, FF 57-58; 01/17/06 RP 114-16; 01/18/06 RP 17;
- ◆ plaintiff was deprived of substantial opportunities to explore and analyze the evidence, FF 55, 64; 01/17/06 RP 90-96, 123-27; 01/18/06 RP 118-21;
- ◆ plaintiff lost his opportunity to add a failure to warn claim in this case, FF 55; 01/18/06 RP 18; 01/17/06 RP 115;

- ◆ evidence was lost and became irretrievable during defendant's willful concealment, FF 55, 68; 01/17/06 RP 90-96; Ex 1; 01/17/06 RP 98-101, 110;
 - ◆ defendant's willful concealment prejudiced the administration of justice by making it impossible for the court to weigh the relevance of the concealed evidence, FF 62; CP 2652;
 - ◆ a continuance would cause unnecessary delay and expense for plaintiff, FF 69;
 - ◆ plaintiff was off pursuing one theory of liability when he would have been pursuing the evidence of "other similar incidents" had Hyundai told the truth. 01/20/06 RP 32.
2. Does the evidence support the trial court's FF 67-70 that no lesser sanction than default would suffice to cure the prejudice?
 3. Was plaintiff's inability to prepare for the scheduled trial date caused by defendant's willfully false discovery responses or by the plaintiff's tactics and strategy?

STATEMENT OF THE CASE

A. While riding in a Hyundai Accent, Jesse Magaña's seatback collapsed and Magaña was ejected through the back window, leaving him paraplegic.

Eleven years ago, Jesse Magaña was a passenger in a 1996 Hyundai Accent. *Magaña v. Hyundai Motor Am.*, 123 Wn. App. 306, 309, 94 P.3d 987 (2004). When driver Ricky Smith lost control of the car, it left the road in a spin. *Id.* Magaña's seatback collapsed, and despite his seatbelt he was ejected out the rear window, leaving him paraplegic. *Id.* at 310-11.

Magaña sued both Hyundai and driver Ricky Smith, who defaulted. *Id.* at 310. The jury found in Magaña's favor, allocating fault 60% Hyundai, and 40% Smith, *id.* at 313, and finding Magaña's damages to be \$8,064,055. FF 71, CP 5334.

The appellate court reversed the liability verdict for failure to tell the jury that the court had stricken the answers of one of Magaña's expert witnesses to five questions.¹ 123 Wn. App. at 312, 318-19. Hyundai did not challenge the damages verdict.

B. On remand, only weeks before the new trial date, Magana finally discovered that Hyundai had falsely responded to discovery five years earlier by concealing similar claims of seatback collapse in Hyundai cars.

Plaintiffs in automobile product liability cases like Magaña's routinely seek to discover evidence of other similar incidents (OSIs). CP 2648. In February 2000, soon after filing suit, Magaña asked Hyundai for OSIs in Request for Production (RFP) 20, requesting "complaints, answers, police reports, photographs, depositions or other documents relating to complaints, notices,

¹ Magaña argued that Hyundai obtained the reversal by misrepresenting facts to the trial and appellate courts in the first appeal, BR 60-62, which Hyundai disputes. Reply BR 4-5. Neither the trial court nor the appellate court in this second appeal resolved this dispute.

claims, lawsuits or incidents of alleged seat back failure on Hyundai products for the years 1980 to present.” FF 8, CP 5315.

In February 2000, Hyundai already knew of three reported seatback failures for Accents and over 20 reported seatback failures on other Hyundai models. See Ex 48 (chart titled, “Jesse Magaña prejudiced by Hyundai’s willful discovery violations,” attached to this Petition as Appendix C).

Hyundai did not seek a protective order, FF 13, CP 5316, but improperly limited its response to seats or seatbacks of the Hyundai Accent model years 1995-1999, FF 9, CP 5315, contrary to CR 37(d). Even this narrowed response was false because Hyundai had already received reports of three Accent seatback failures causing injury. FF 12, 14, CP 5316.

By the time of the first trial in June 2002, Hyundai had received five more claims for seatback failures in Hyundai Accents. FF 15, CP 5317. Hyundai still did not supplement its false response, but Magaña won at trial even without the OSIs.

Following the first appeal, Magaña immediately noted the case for trial and at the end of May 2005, the court set a trial date of January 17, 2006. CP 750, 758. In July 2005, Magaña’s counsel learned that Hyundai’s new trial attorney, Thomas Bullion,

would likely argue the Accent was not defective because there were no OSIs. CP 2328, 2348-49. When mediation discussions ended, Magaña asked Hyundai to update its discovery responses regarding OSIs on September 13. 1/17/06 RP 51-52, CP 905.

Magaña's counsel still believed that Hyundai's initial response to discovery had been true on the date it was made, but wanted Hyundai to update the responses and to include the Elantra, which appeared to have an identical seat recliner mechanism. CP 905; CP 4792. Hyundai agreed to produce OSIs involving the Elantra and Accent. CP 907.

On October 14, Magaña's counsel began "informal discovery" (CP 5387) networking with other attorneys to find OSIs, leading to Magaña's discovery of two OSIs. CP 790. On October 25, Hyundai finally produced two claims relating to seatback failures, Bobbitt and Dowling, and represented: "Other than the claim of Mr. Magaña, these are the only seat-back failure claims related to either the 1995-1995 (*sic*) Hyundai Accent or the 1992-1995 Hyundai Elantra." CP 812. As Magaña would soon learn, this statement was false. FF 18, CP 5318. Even at this point – unaware of the extensive concealed OSIs – Magaña did not envision a major sanctions motion. CP 4794-95.

On October 27 – almost three months before trial – Magaña moved for an order compelling Hyundai to produce all evidence responsive to Magaña's discovery requests made five-and-a-half years earlier. The trial court granted the motion. 11/07/05 RP 14-17, CP 961-62. Neither Magaña nor the trial court expected to see a large number of concealed OSIs. 11/7/05 RP 14.

On November 8 – two months from trial – through informal discovery Magaña's counsel found another seatback failure case, ***Acevedo v. Hyundai***, (CP 2361, 4663, 5387), and immediately contacted the Acevedo's attorney. CP 2367, 5362. Hyundai provided a supplemental production on November 21, but failed to produce the ***Acevedo*** case. CP 4663. Magaña immediately advised Hyundai that its production was incomplete. CP 4714. On December 1, Hyundai produced three boxes of OSIs and on December 12 – one month before trial – it produced two more boxes, a total of 34 OSIs. CP 2354, 4820 COA Dissent ¶ 70. It was apparent that Hyundai's representations (made just a month earlier) that there were only two other seatback failure claims "were simply false." FF 18, CP 5318. Yet Hyundai still had not disclosed the ***Acevedo*** claim. CP 4663.

C. Following a three-day evidentiary hearing, the trial court found that Hyundai's discovery violations were willful, that Magana was substantially prejudiced, and that no lesser sanction than a default judgment would suffice.

With Hyundai's new revelations, Magaña concluded, "[w]ith less than a month before trial it will be virtually impossible to effectively put together a proper case utilizing the other similar incidents material just produced by Hyundai." CP 2350. At this point, Magaña's counsel had no choice but to develop a default motion. CP 5408, 5364, 5455. On December 23, 2005, Magaña moved for a default judgment against Hyundai. CP 2309-46.

Magaña had relied on Hyundai's response to RFP 20 and other answers before the first trial. CP 2349. Magaña's expert witnesses stated that the OSIs would have been "invaluable" and "extremely useful" in the first trial (CP 2665, 2669) but that it would be difficult, "if not impossible," to prepare and use them in time for the scheduled retrial. CP 2666, 2668, 2670. Retired Justice Robert Utter and attorney Thomas Greenan emphasized the importance of truthful discovery responses and the need to sanction inadequate responses. CP 2651-54, 2655-62.

Hyundai moved for a continuance, which Magaña opposed, explaining that his health had continued to deteriorate since the trial

in June 2002. CP 4836. His diabetes had worsened, and chest pain hindered his ability to exercise. *Id.* He was unable to afford to purchase rehabilitative equipment recommended by his doctor, had been laid off his job, and he did not have the funds to repair or replace his wheelchair-accessible van. CP 4836-37. Magaña concluded, "Every delay is hurting me financially and physically." CP 4838. Any delay in trial prejudiced Magaña. His attorneys had already spent \$300,000 in costs, and his damages award was capped, so every penny in extra costs would come from Magaña's eventual recovery. CP 767. The court denied Hyundai's continuance. 01/13/06 RP 70.

On January 5, 2006, just 12 days prior to trial, Hyundai finally produced the Martinez, McQuary and Salizar claims, proving for the first time that Hyundai's original, narrowed answer to RFP 20 was false when made. FF 14-15, CP 5316-17.

On January 13, 2006, the trial court granted Magaña's motion for an evidentiary hearing, which was held January 17-20. 01/13/06 RP at 72-75. Magaña placed the OSI files into evidence (Exs 2, 5-6, 8-43) and presented live witness testimony. Magaña himself testified to the prejudice of the late-disclosed OSIs:

Q. And how did you feel about not being able to contact potential witnesses?

A. Well . . . that was extremely frustrating . . . because a lot of them were . . . files were purged, you know. We only keep 'em five or six years. But, I mean, it was extremely frustrating. . . .

I guess I felt like at a disadvantage

1/17/06 RP 95-96.

Judge Johnson entered detailed findings, briefly summarized as follows:

- ◆ Hyundai had perpetrated multiple discovery violations.²
- ◆ Hyundai could not unilaterally limit “discovery” to “attorney demand letters” held in Hyundai’s corporate legal department.
- ◆ Magaña and Hyundai never agreed to narrow the discovery requests.
- ◆ Hyundai’s attempts to unilaterally narrow Magaña’s discovery requests failed, and the requests encompassed the withheld OSIs.
- ◆ Hyundai’s failure to produce the **Acevedo** claim “casts doubt on whether all responsive documents have been produced.”
- ◆ Magaña was “severely prejudiced” by Hyundai’s discovery violations, as set forth in the issue statement, *supra*.

App. B; *see also*, BR 13-23. Judge Johnson made these findings and found a default the only workable sanction for Hyundai’s willful, egregious and prejudicial discovery violations. *Id.*

² Hyundai admitted that it failed to produce a “sled test” in response to Magaña’s RFP 6 in 2000. FF 19, CP 5318. A seatback collapsed in the test, which would have been helpful evidence. CP 1050, 2336.

D. Two appellate judges reversed on the ground that Magana was not substantially prejudiced – over a vigorous dissent.

A two-judge majority affirmed the trial court findings that Hyundai willfully violated the discovery rules, the discovery agreement claimed by Hyundai did not exist, Hyundai's responses were evasive and misleading, Hyundai's failure to produce the *Acevedo* case was a discovery violation, and a 2002 case against Hyundai established a "pattern of lack of compliance with discovery obligations." Court of Appeals Opinion (COA) ¶ 31. But the majority reversed the default judgment, holding that insufficient evidence supported the findings of substantial prejudice. COA ¶ 45. The majority faulted Magaña for asking Hyundai to update its original discovery responses four months before trial. COA ¶ 46.

The dissent noted that Magaña made this request only after finding a similar Elantra recliner mechanism, Hyundai had the duty to fully disclose its documents, Hyundai never supplemented its incorrect responses, and Magaña had the right to rely on Hyundai's discovery responses. COA Dissent ¶¶ 68, 72, 74.

The majority held, "Magaña has not demonstrated that he could not complete his inquiry into the incidents, only that he could not do so in the month remaining until trial." COA ¶ 47. But as the

dissent notes, Hyundai finished producing documents only eleven days before trial and never produced the **Acevedo** documents. COA dissent ¶¶ 76 n.36; CP 758; FF 19, CP 5318. The dissent pointed out that “requiring Magaña to disrupt his trial presentation to accommodate Hyundai would reward noncompliance.” COA dissent 79.

The majority found that “Magaña has not shown that any information has been lost as a result of Hyundai’s late production.” COA ¶¶ 48. This is simply wrong. One witness testified at the hearing that her Hyundai seatback had failed in a 1996 accident and that she kept the seat until at least 2005 before discarding it, 01/17/06 RP 98-102, five years after Hyundai’s false response to discovery. Some of the attorneys involved in the OSI litigations had purged their files, some witnesses could not be located, and at least one victim had died. 1/17/06 RP 90-96, Ex. 1. Even Hyundai’s expert witness admitted it is important to investigate OSIs while they are “fresh.” 11/18/06 RP 86-87.

WHY THE COURT SHOULD REVIEW THIS DECISION

Justice stands on a bedrock principle: delay is prejudicial. This is so essential that a tort plaintiff’s fundamental right to seek redress may be cut off after only three years because memories

fade, evidence is lost, people die and the parties are entitled to finality. Finding no prejudice to Jesse Magaña from further delay in this case – after 11 years – defies his fundamental right to justice. The Court should accept review and reverse.

A. This Court should grant review and confirm that *Fisons* and other appellate decisions still require deference to well-supported trial court findings and conclusions on appropriate sanctions for willful discovery violations, contrary to the two-judge majority decision.

The majority and the dissent present radically different interpretations of this Court's decision in *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993). While citing *Fisons* (COA ¶ 28) the majority reinterprets the facts, makes its own findings, and discounts all of the trial court's reasons for finding that a default judgment is the only appropriate sanction. By contrast, the dissent appropriately follows *Fisons* and defers to the trial court's fact finding and choice of sanction. COA Dissent ¶ 66.

The Court should grant review to resolve the majority's conflict with *Fisons*. RAP 13.4(b)(1). If allowed to stand, this published decision will have the pernicious effect this Court sought to avoid in *Fisons*, chilling trial judges from imposing appropriate sanctions for discovery violations. 122 Wn.2d at 339. *Fisons*

emphasized the responsibility of parties and counsel to engage in pretrial discovery in “a spirit of cooperation and forthrightness during the discovery process” *Id.* at 342. This Court held that, “[t]he purposes of sanctions orders are to deter, to punish, to compensate and to educate.” *Id.* at 356. This Court reversed in ***Fisons*** because the trial court applied the wrong standards, *id.* at 344, but emphasized that future appellate courts should generally defer to a trial court’s exercise of discretion. *Id.* at 338-39.

The majority here followed a conflicting standard, apparently finding a continuance an adequate sanction. COA ¶¶ 47. But as the dissent observed, a continuance is unfair to Magaña and would actually reward Hyundai, which had already unsuccessfully sought a continuance. COA Dissent ¶ 89. Nor would a continuance remedy the staleness and loss of evidence, which the majority totally ignored. *Id.* This case grows more stale with each passing year. Any jury will wonder why it is asked to determine the unsafe condition of a 1996 car. The majority also totally ignores the unjustifiable prejudice of continued delay in light of Magaña’s precarious health. Contrary to the majority’s statement that Hyundai “timely” produced OSIs, COA ¶ 47, it produced two boxes of OSIs almost two weeks after the December 1 deadlines, CP

4820; FF 14-15, CP 5316-17, Ex. 48, and produced three Accent OSI's on January 6, 36 days after the deadline and only 12 days before trial. FF 14-15, CP 5316-17, Ex. 48.

The majority's willingness to substitute its own judgment that a continuance adequately sanctions Hyundai is contrary both to **Fisons** and to decisions rejecting the sanction of a continuance as insufficient. **Smith v. Behr Process Corp.**, 113 Wn. App. 306, 54 P.3d 665 (2002); **Rhinehart v. Seattle Times Co.**, 51 Wn. App. 561, 577, 754 P.2d 1243, *rev. denied*, 111 Wn.2d 1025 (1988); **Anderson v. Mohundro**, 24 Wn. App. 569, 575, 604 P.2d 181 (1979), *rev. denied*, 93 Wn.2d 1013 (1980); **Associated Mortgage Invest. v. G. P. Kent Const. Co.**, 15 Wn. App. 223, 548 P.2d 558, *rev. denied*, 87 Wn.2d 1006 (1976). This Court should resolve the conflict between the majority's decision and these cases. RAP 13.4(b)(1), (2).

The conflict between this majority decision and **Behr** is particularly striking. In **Behr**, the trial court could have granted a continuance, but rejected it because "nothing in the discovery of the case is as important as what was not disclosed" and because the defendant misdirected the plaintiff's trial preparation: "They were off in one direction when they should have been working in another,

and the only reason is they didn't know that the other existed." 113 Wn. App. at 325. The same is true here. 01/20/06 RP 32; COA Dissent ¶¶ 84-85. The concealed OSIs were relevant to product defect, injuries, and occupant kinematics. FF 55-58, CP 5329-30.

The majority decision is also directly contrary to CR 26(e), requiring supplementation of discovery responses, and cases interpreting that rule. The majority repeatedly faults Magaña for not demanding supplementation earlier. COA ¶¶ 46-47, 49. But as the dissent notes, the fault lies not with Magaña but with Hyundai, which failed to fully disclose the documents and to supplement its responses. COA Dissent ¶ 72 (citing *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 105 P.3d 378 (2005), and *Seals v. Seals*, 22 Wn. App. 652, 590 P.2d 1301 (1979)).

Thompson is the only case in which this Court has discussed the requirement of supplementing discovery responses, and the majority's opinion is contrary to *Thompson*, *Seals*, and CR 26(e). If allowed to stand, this opinion will encourage parties to ignore their responsibility to comply with CR 26(e). This Court should correct the two-judge majority. RAP 13.4(b)(1) and (2).

B. The majority's focus on Magana's "trial strategy" is contrary to both the evidence and this Court's prior decisions.

One of the majority's more pernicious holdings blames Magaña for "trial strategy" in requesting supplementation of prior discovery responses four months before trial. COA ¶¶ 46-47. As the dissent notes, this Court has clearly held that Magaña had a right to rely on Hyundai's discovery responses:

[W]here a party to an action, in clear and unambiguous terms under oath, asserts the existence or nonexistence of a fact whereof such party has knowledge, or in the ordinary course of affairs would be expected to have knowledge, the adverse party may rely on such statements and, in the exercise of reasonable diligence, is not required to look behind the statements.

COA Dissent ¶ 74 (quoting *Kurtz v. Fels*, 63 Wn.2d 871, 875, 389 P.2d 659 (1964)). This conflict justifies review. RAP 13.4(b)(1).

The focus on Magaña's so-called "tactics" instead of Hyundai's willful and substantial violations of its discovery obligations sets the course for a nightmarish trip back to an era when defendants hid information and falsely answered interrogatories with relative impunity. Although *Fisons* denounced such obstructionism, this Court must perpetually guard against relapses into discovery abuse. The Court should again scotch this ancient stratagem of breaking the rules and blaming the victim.

The majority relied on a declaration in which former justice Phil Talmadge said, "it is likely plaintiff's counsel has pursued a tactical course regarding seatback OSI evidence" in failing to raise the issue immediately following the mandate. COA ¶ 49 n.21 (quoting CP 3255). Talmadge's unsubstantiated speculation was contradicted by the declaration of Magaña's counsel. CP 4794-95.

In light of Talmadge's assertion, Magaña sought to cross-examine Talmadge on tactical delay. 1/14/06 RP 6-7, 9-10, 11-13, 19. Cross-examination became unnecessary, however, when Hyundai's own expert witness, David Swartling, who had previously litigated OSI issues with Magaña's counsel, testified to the professionalism of Magaña's counsel, Whelan and O'Neil, expressing his "high admiration for both of them." 1/18/06 RP 19. Swartling did not believe Magaña's counsel had made a tactical decision to lie-in-wait before seeking OSIs. *Id.* at 38-39, 1/19/06 RP 21. In a prior case, Magaña's counsel obtained OSIs in September and successfully analyzed and introduced them at trial four months later. 1/18/06 RP 20-24, 83-84. After Swartling's testimony, no findings were requested or presented to (or entered by) the trial court about "tactics" or "strategy."

Hyundai did not even argue on appeal that Magaña had “tactically” or “strategically” waited until four months before trial to ask Hyundai to update its discovery. See BA 70-84; Reply BR 24-35. The majority, not Magaña or Hyundai, improperly interjected tactics and strategy into this appeal.

C. The majority elevates concern for Hyundai’s due process rights over Magana’s constitutional right to trial without unnecessary delay.

The majority expresses solicitude for Hyundai’s due process rights, emphasizing the necessity of finding substantial prejudice. COA ¶ 48 n.19. But as the dissent notes, Hyundai is not entitled to “the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon [its] opponent.” COA Dissent ¶ 83 n. 39 (quoting *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 282, 686 P.2d 1102 (1984), *aff’d*, 104 Wn.2d 613, 707 P.2d 685 (1985)).

The majority’s undue concern for Hyundai’s due process right apparently blinded it to Magaña’s own constitutional rights. One hundred years ago, Washington’s founders guaranteed that, “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” Wash. Const. Art. I, § 10. The majority’s decision undermines this fundamental promise of justice.

CONCLUSION

This Court should review the conflicting opinions of the majority and the dissent for every reason justifying review under RAP 13.4(b): (1) & (2) conflicts with multiple decisions of this Court and the Court of Appeals; (3) unmerited concerns about Hyundai's due process rights over Magaña's right to finality without unnecessary delay; and (4) questions of substantial public importance that should be resolved by this Court. Magaña has waited 11 years. He should not suffer the prejudice of yet another remand and a third round of trial and appellate court proceedings.

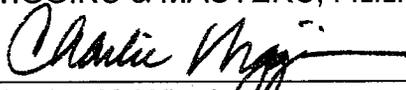
RESPECTFULLY SUBMITTED this 26 day of November 2007.

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CERTIFICATE OF SERVICE

I certify that I caused to be served, a copy of the foregoing **PETITION FOR REVIEW** postage prepaid, via U.S. mail on the 26 day of November 2007, to the following counsel of record at the following addresses:

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1 of 2 DOCUMENTS

Hyundai Motor America, et al., Appellants, v. Jesse Magana, Respondent.

No. 34630-3-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

2007 Wash. App. LEXIS 2944

October 30, 2007, Filed

PRIOR HISTORY: *Magana v. Hyundai Motor Am.*, 123 Wn. App. 306, 94 P.3d 987, 2004 Wash. App. LEXIS 1571 (2004)

COUNSEL: [*1] Heather K. Cavanaugh, (of *Miller Nash LLP*), Michael Barr King, (of *Talmadge Law Group PLLC*), for appellant.

Douglas Fredrick Foley, (of *Foley & Buxman PLLC*), for defendant.

For Respondents: Paul W. Whelan (of *Stritmatter Kessler Whelan Coluccio*), Peter O'Neil, Derek Jay Vanderwood, Alisa R. Brodkowitz, (of *Brodkowitz Law*), Charles Kenneth Wiggins and Kenneth Wendell Master (of *Wiggins & Masters PLLC*), and Michael E. Withey (of *Law Offices of Michael Withey*), for respondents.

JUDGES: Van Deren, A.C.J.

OPINION BY: Van Deren

OPINION

¶1 Van Deren, A.C.J. -- Hyundai Motor Company and Hyundai Motor America (collectively, "Hyundai") appeal the trial court's default order of liability on Jesse Magana's personal injury claim due to Hyundai's willful discovery violations. It argues that the trial court erred (1) in finding that it willfully violated discovery orders, (2) by failing to consider lesser sanctions, and (3) by not requiring evidence of prejudice warranting the default sanction. It also challenges the trial court's award of interest from the date of the jury [*2] verdict on the underlying and unchallenged damages award. Finding no prejudice to Magana's ability to retry his case resulting from Hyundai's discovery violations, we reverse the default order and remand for trial; but we affirm the trial court's ruling that interest on damages runs from date of the verdict in the first trial if liability is found following retrial.

FACTS

I. Background¹

¹ We take these facts from our prior opinion, *Magana v. Hyundai Motor America*, 123 Wn. App. 306, 94 P.3d 987 (2004).

¶2 "On February 15, 1997, Ricky Smith was driving a rented 1996 Hyundai Accent two-door hatchback." *Magana v. Hyundai Motor Am.*, 123 Wn. App. 306, 309, 94 P.3d 987 (2004). Angela Smith and Magana were passengers. *Magana*, 123 Wn. App. at 309. To avoid an apparent collision with an oncoming truck, Ricky Smith jerked the steering wheel, causing the car to "yaw" and leave the road. *Magana*, 123 Wn. App. at 309.

¶3 The car hit at least two trees and the resulting centrifugal force caused it to spin violently. The force threw Magana out of the car's rear window, 50 to 100 feet away from where the car finally stopped. "Magana's resulting injuries

left him a paraplegic; Ricky Smith suffered a concussion, [*3] and Angela Smith broke her leg, collarbone, and shoulder blade." *Magana, 123 Wn. App. at 309.*

¶4 On February 8, 2000, Magana sued Hyundai, the Smiths, and the truck driver and his wife. Clerk's Papers (CP) at 4-5. Magana alleged that the car in which he was riding contained a "defective design [that] was a proximate cause of [his] injuries and damages" and that Ricky Smith's and [the truck driver's] negligent driving proximately caused the car accident. *Magana, 123 Wn. App. at 309.*

II. Discovery--2000 to 2001

¶5 Before the first trial in this case, Magana served a request for production on Hyundai that sought: "copies of any and all documents including but not limited to complaints, answers, police reports, photographs, depositions or other documents relating to complaints, notices, claims, lawsuits or incidents of alleged seat back failure on Hyundai products for the years 1980 to present." CP at 2379. Hyundai responded in April 2000, that "there have been no personal injury or fatality lawsuits or claims in connection with or involving the seat or seat back of the Hyundai Accent model years 1995 to 1999." ² CP at 2379.

2 In response to an identical request, Hyundai Motor Company responded [*4] that there were no claims "that due to the allegedly defective design of the front passenger seat and airbag system in the 1995-1999 model year Hyundai Accent, the airbag allegedly knocked a person back collapsing the front passenger seat." CP at 2385.

¶6 But at the time Hyundai responded, there were at least three claims involving seat failure in 1995-1999 Accents. ³ Exs. 5, 6, 30. Between the initial response and the first trial, Hyundai received four other claims involving seat failure in 1995-1999 Accents. Exs. 36-39. ⁴ But Hyundai never supplemented its initial response to Magana's request for production. CP at 5317.

3 One of the incidents purportedly involved an Accent, but a review of the vehicle identification number revealed that it was a different model Hyundai vehicle. Ex. 3 at 6-7.

4 Hyundai also received a fifth incident in July 2002, after the first trial ended. Ex. 40.

¶7 Magana also served an interrogatory requesting that Hyundai identify all Hyundai vehicles using the same or a substantially similar front passenger seat as the 1996 Accent. CP at 2376, 2383. Hyundai responded that the 1995-1999 Accents used the same front passenger seat and no other Hyundai vehicle used the [*5] same or a substantially similar right front seat. CP at 2376, 2383.

¶8 Throughout discovery, Hyundai refused to answer Magana's requests as written, providing responses that reworded and limited the scope of the original request. CP at 2312, 2379, 2384-85. But at no time did Hyundai seek a protective order narrowing the scope of discovery, nor did Magana move to compel answers from Hyundai before the first trial.

III. First Trial

¶9 On June 3, 2002, trial commenced. CP at 315-16. Magana did not attempt to introduce any evidence of the 21 other similar incidents of aggressive or violent deployment of the passenger side airbag that Hyundai produced during discovery. Br. of Appellant at 22. Instead, "Magana's primary trial theory was that if the seat back had been more rigid, it would not have given way when subjected to the centrifugal forces that caused the car to go into a spin." *Magana, 123 Wn. App. at 318.*

¶10 But Magana's counsel also explored an alternative theory of liability--"the lack of an integrated seat belt design"--with one of his expert witnesses. *Magana, 123 Wn. App. at 311-12.* The trial court initially overruled Hyundai's objection to this line of questioning. *Magana, 123 Wn. App. at 312.* [*6] "Four days later, the trial court reconsidered its decision and ruled that it should have sustained Hyundai's objection to the expert witness's testimony about 'an alternative seat design of an integrated seat belt.'" *Magana, 123 Wn. App. at 312* (citation omitted). The trial court did not inform the jury that the expert's testimony on this issue was not to be considered during deliberations. "In an apparent compromise effort, the court reaffirmed its ruling striking [the expert witness's] challenged testimony but declined to advise the jury of its actions because of concerns that an instruction [after the parties had rested] would highlight the evidence." *Magana, 123 Wn. App. at 313.*

¶11 "By a 10 to 2 vote, the jury returned a verdict in favor of Magana for over eight million dollars, attributing 60 percent of the fault to Hyundai and 40 percent to Ricky Smith." *Magana, 123 Wn. App. at 313*. And the jury also answered "Yes" to the following special verdict form question: "Did Defendant Hyundai supply a product that was not reasonably safe as designed?" *Magana, 123 Wn. App. at 313* (quoting CP at 552).

IV. First Appeal

¶12 Hyundai appealed the trial court's decision not to instruct the jury about [*7] the expert's stricken testimony. *Magana, 123 Wn. App. at 313*.⁵ We reversed, explaining:

Ten jurors concluded that the vehicle was unreasonably unsafe; two jurors disagreed. We have no way of conclusively determining how many of the 10 relied on Magana's defective seat back theory and how many relied on [the expert's] broad and conclusory testimony that an integrated seat belt would have prevented Magana's ejection through the rear window. ... Because one vote would have changed the outcome, the error in failing to advise the jury that the court had stricken [the expert's] seat belt evidence was neither trivial, formal, nor academic.

⁵ Hyundai did not assign error to the damages award and did not seriously challenge the evidence supporting damages at trial or on appeal. *Magana, 123 Wn. App. at 319*.

¶13 *Magana, 123 Wn. App. at 319*. We remanded "for retrial [of] liability issues regarding the occupant restraint system." *Magana, 123 Wn. App. at 319*.⁶ The mandate issued on April 4, 2005. CP at 748. The trial court set the case for a second trial on January 17, 2006.

⁶ In an unpublished portion of the opinion, we affirmed the judgment against Ricky Smith.

V. [*8] 2005 Discovery Issues Following Remand

¶14 On September 13, 2005, Magana's counsel wrote Hyundai "with regard to discovery requests that need to be updated." CP at 4032. He asked Hyundai to update its interrogatory response because it:

seeks identification of Hyundai vehicles that use the same or substantially similar seat as the 1996 Hyundai. The response is that no other vehicles use a seat that is substantially similar. We have a recliner mechanism from another Hyundai vehicle that looks identical. It appears therefore that [Hyundai]'s response was not accurate. Please check and update as necessary.

CP at 4032.

¶15 He also asked that Hyundai update its response to the request for production that:

seeks documents relating to incidents of alleged seat back failure on Hyundai products. The response that I have is now more than 5 years old. Moreover, it is limited to the 1995-1996 Accent. For purposes of discovery, it should not be so limited, especially since it is clear that other Hyundai vehicles used the same recliner mechanism. Please check and update or amend the response as necessary.

CP at 4032.

¶16 Counsel for both parties then exchanged a series of letters discussing the scope of Magana's requests. [*9] Hyundai agreed to provide information relating to alleged seat back failure in 1995-1999 Accents and 1992-1995 Elantras; however, Magana continued to request all seat back failure claims in Hyundai products for the year 1980 to present. CP at 4045-51.

¶17 On October 25, 2005, Hyundai supplemented its response to Magana's interrogatory by stating:

APPENDIX A

The 1995-1999 model year Hyundai Accents used the same or substantially similar right front seat as the 1996 Hyundai Accent. No other Hyundai model automobile uses the same or substantially similar design for the right front seat as the 1996 Hyundai Accent. Although not specifically requested by this interrogatory, [Hyundai] further responds that the 1992-1995 model year Hyundai Elantras had a recliner on the right front seat that was substantially similar to the right front recliner on the 1996 Hyundai Accent.

CP at 4067. Hyundai also supplemented its response to Magana's request for production:

[Hyundai] objects to [the request for production] on the grounds it is overly broad and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objections, [Hyundai] will produce complaints and claims alleging a seat [*10] back failure with respect to the 1995-1999 model year Hyundai Accents and with respect to the 1992-1995 model year Hyundai Elantras.

CP at 4063.

¶18 Hyundai then produced two documents relating to claims of alleged seat back failure (1) a 2002 complaint, filed in California, in which plaintiffs claimed that they were injured in part by an allegedly defective 1999 Hyundai Accent front passenger seat and (2) a 2000 notice of claim letter, in which an attorney notified Hyundai that his client, a rear seat passenger in a 1995 Hyundai Elantra, was injured by an allegedly defective driver's seat. CP at 4054, 4057-60. Hyundai stated that other than Magana's claim, "these are the only seat-back failure claims relating to either the 1995-1999 Hyundai Accent or the 1992-1995 Hyundai Elantra." CP at 4053.

¶19 On October 27, 2005, Magana filed a motion to compel Hyundai "to produce documents relating to other incidents of injury caused by seatback failures as requested by plaintiff in Requests for Production served in the fall of 2000." CP at 787. As per the original request, Magana sought "copies of any and all documents, including but not limited to complaints, answers, police reports, photographs, depositions [*11] or other documents relating to complaints, notices, claims, lawsuits or incidents of alleged seat back failure on Hyundai products for the years 1980 to present." CP at 789 (boldface omitted). Hyundai opposed the motion, arguing that Magana's request was unduly burdensome and not reasonably calculated to lead to discovery of admissible evidence. CP at 909. On November 18, 2005, the trial court ordered Hyundai to produce "[p]olice [r]eports, [l]egal [c]laims, [c]onsumer [c]omplaints and [e]xpert [r]eports or [d]epositions and [e]xhibits and [p]hotographs thereto with respect to all consumer complaints and lawsuits involving allegations of seatback failure on all Hyundai vehicles with single recliner mechanisms regardless of incident date and regardless of model year." CP at 961-62.

¶20 On November 21, 2005, in compliance with the trial court's order, Hyundai produced numerous documents relating to legal claims and consumer complaints of seat failure. CP at 1027, 2353-54; Ex. 48 at unnumbered pp. 3-4. On December 1, 2005, Hyundai produced additional boxes of police reports, photographs, expert records, deposition transcripts, and the first set of records generated from a search of its consumer [*12] "hotline" database. CP at 1027. These documents included nine reports of seat failure involving 1995-1999 Accents. Exs. 5, 6, 9, 30, 36-40.

¶21 Thereafter, Magana complained, "With less than a month before trial it will be virtually impossible to effectively put together a proper case utilizing the other similar incidents material just produced by Hyundai." CP at 2350. Magana's experts stated that it would be "difficult, if not impossible," to prepare and use this material for the second trial on January 17, 2006. CP at 2666, 2670.

¶22 Instead of requesting a continuance, Magana moved for a default judgment against Hyundai on December 23, 2005.⁷ CP at 2307-46. Magana claimed that Hyundai had (1) failed to comply with his request for production, (2) falsely answered his interrogatory, (3) willfully spoiled evidence of other similar incidents, and (4) failed to produce documents relating to rear impact crash tests. CP at 2309-10.

7 Magana objected to a continuance because he "ha[d] waited long enough for justice in this case, and ... [a continuance] would reward the Hyundai defendants for its discovery abuse. ... Moreover, a continuance burdens the other litigants and clogs the court's trial [*13] calendar." CP at 2343-44.

¶23 Magana's counsel also declared that if Hyundai had produced these documents before the first trial, he would have (1) investigated the other similar incidents, (2) provided documents of these other similar incidents to his experts, and (3) conferred with his experts regarding the most important other similar incidents. CP at 2354. Furthermore, Magana's experts stated that these other similar incidents would have been "invaluable" and "useful" during the first trial. CP at 2665, 2669. Regarding prejudice to the upcoming trial, Magana argued that Hyundai's late production "puts an enormous and unfair burden on [him] during the last stages of trial preparation." CP at 2331.

¶24 On January 4, 2006, Magana requested an evidentiary hearing on his motion for sanctions. CP at 3171. Magana also filed a motion to amend his complaint to add a "failure to warn" allegation. CP at 4293. On January 6, Hyundai produced the last of the documents. Also on January 6, Hyundai responded that (1) the parties agreed in a July 2001 letter to relieve Hyundai of the obligation to produce any other similar incidents relating to seat back failure, (2) any conclusion about whether Magana would [*14] be prejudiced by its alleged failure to produce documents was "speculative and premature," and (3) Hyundai had truthfully answered the interrogatory. CP at 3214-15, 3246, 3251, 3267. In addition, Hyundai acknowledged that, because of mistakes, it failed to disclose documents relating to an earlier lawsuit (the "Acevedo" claim)⁸ and documents relating to a sled test. CP at 3301-02, 3303-05, 3245.

⁸ *Acevedo v. Hyundai*, No. ATL-L-2276-01 (N.J. Superior Ct. for Atlantic City). According to Hyundai's counsel, *Acevedo* "was a lawsuit filed in Superior Court of New Jersey arising from a high speed head-on collision involving a 1994 Hyundai Scoupe." CP at 3303.

¶25 In granting Magana's request for an evidentiary hearing the trial court stated:

I do wish to comment that the Court will be focusing on the prejudice to Plaintiffs in this point in time with respect to the retrial of this case following remand by the Court of Appeals. The Court does not find it to be a very useful effort to go into what would amount to be speculation about the first trial or about the outcome of appeal of the case. Although what happened prior to the first trial is part of the overall evidence, when considering a request [*15] for sanction, the Court needs to consider the remedies available at this time, and the totality of the circumstances facing the Court.

In other words, the Court will be focusing primarily on whether or not there has been prejudice to the Plaintiff in preparing for retrial, since the remand in the spring to summer of 2005.

Report of Proceedings (RP) (January 13, 2004) at 73. The court also denied Hyundai's request for a continuance of the trial date after Magana withdrew his motion to amend the complaint. RP (January 13, 2006) at 62, 70.

¶26 Following the evidentiary hearing, the trial court found that: (1) Hyundai's claim that Magana agreed to forego discovery of other seatback failure incidents was not persuasive, (2) Hyundai falsely responded to the interrogatories and requests for production, and (3) Magana was severely prejudiced in preparing for a second trial. CP at 5316, 5322-23, 5331. As a sanction, the trial court granted Magana's request for a default judgment against Hyundai. RP (January 20, 2006) at 32.

¶27 Hyundai appeals, urging us to vacate the default judgment and remand for a new trial before a different judge or, in the alternative, to remand for a sanctions hearing [*16] before a new judge with directions that a default judgment may not be entered on the basis of this record. Br. of Appellant at 100.

ANALYSIS

I. Standard of Review

¶28 Washington's discovery rules give trial courts broad discretion to sanction parties for discovery violations. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); *Snedigar v. Hoddersen*, 114 Wn.2d 153, 169, 786 P.2d 781 (1990); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 324, 54 P.3d 665 (2002) (*Behr*). We review the trial court's sanctions under an abuse of discretion standard that (1) gives the trial court wide latitude in determining appropriate sanctions, (2) reduces trial court reluctance to impose sanctions, and (3) recognizes that the trial court is in a better position to determine this issue. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (*Fisons*). We should not disturb the use of sanctions absent a clear showing that a trial court's discretion was manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Mayer v. Sto Indus.*,

Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006); *Burnet*, 131 Wn.2d at 494. A decision is untenable [*17] if it is based on unsupported facts or an incorrect legal standard, or if no reasonable person would adopt the same view as the trial court. *Mayer*, 156 Wn.2d at 684.

¶29 Here, the trial court relied on *CR 37(d)* as authority for entering a default judgment against Hyundai. CP at 5335-36. *CR 37(d)* authorizes sanctions, including the sanctions set forth in *CR 37(b)(2)*,⁹ for failure to respond to interrogatories and requests for production. Under *CR 37(d)*, courts treat an evasive or misleading answer as a failure to answer. A party objecting to the interrogatory or request is not relieved of a failure to respond unless the party has sought a protective order under *CR 26(c)*. *CR 37(d)*.

9 In pertinent part, *CR 37(b)(2)* provides:

(2) Sanctions by Court in Which Action is Pending. If a party ... fails to obey an order to provide or permit discovery, ... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

...

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default [*18] against the disobedient party;

...

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

¶30 Because a default judgment raises due process concerns, the record must show that the trial court (1) found that a party willfully violated the discovery rules, (2) found the opposing party's ability to prepare for trial was substantially prejudiced, and (3) explicitly considered whether a lesser sanction probably would have sufficed. *Burnet*, 131 Wn.2d at 494; *Snedigar*, 114 Wn.2d at 169-70; *Behr*, 113 Wn. App. at 324-25.

II. Willfulness

¶31 Hyundai argues that the trial court erred in finding that it willfully violated the discovery rules. Br. of Appellant at 56. Specifically, Hyundai claims that the trial court erred when it found that: (1) the parties did not agree to relieve Hyundai of the obligation to produce any other similar incidents relating to seat back failure, (2) Hyundai's responses [*19] to the request for production were evasive and misleading, (3) Hyundai's answers to the interrogatory were evasive and misleading, (4) Hyundai's failure to produce the records of a single similar case was a discovery violation, and (5) a 2002 case against Hyundai established a "pattern of lack of compliance with discovery obligations." Br. of Appellant at 57, 60, 65, 67, 69 (quoting CP at 5319).

¶32 A discovery violation is willful if it is done without reasonable excuse. *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002); *Behr*, 113 Wn. App. at 327. Here, Hyundai's response to the request for production that there were no incidents of seat back failure involving the 1995-1999 Accent was false, as it had received three such complaints at the time of the response. CP at 2379, 2380; Exs. 5, 6, 30. Moreover, the response was evasive, as Magana had requested seat back failure incidents for all Hyundai products since 1980, and Hyundai had received several such complaints. CP at 2379, 2314-15. On these facts, it was reasonable for the trial court to conclude that Hyundai's failure to timely disclose similar incidents of seat back failure was willful.

A. [*20] Agreement to Limit Discovery

¶33 Hyundai argues that the trial court erred in entering finding of fact 35:¹⁰

Based upon this Court's review of all the available evidence, the Court finds Hyundai's claim of an agreement to take the [other similar] seat back [incident] issue "off the table" is not persuasive. The

Court concludes there was no such agreement. Taking into account the false premises created by the defendants' initial discovery responses, the Court finds there was no abandonment by Plaintiff of the pursuit of discovery with respect to seat back failures at any time. The fact the plaintiff focused on certain discovery issues does not indicate in an affirmative manner that the plaintiff ever abandoned his request for obtaining evidence of other seat back failures. It would be unreasonable, and not supported by the totality of the evidence, to conclude Plaintiff abandoned the issue of seatback failure which was the central issue of the trial.

10 Hyundai also disputes findings of fact 33 and 34, which support finding of fact 35. Br. of Appellant at 58-59. Finding of fact 33 states, "Mr. Austin [(Hyundai's counsel)], in his Declaration, asserts that he responded to Mr. O'Neil's [(Magana's [*21] counsel)] April 26, 2001 letter by letter dated July 11, 2001." CP at 5322. Finding of fact 34 states,

Mr. Austin states in his declaration (paragraph 20) that it was his "understanding" that Mr. O'Neil was no longer pursuing documents relating to seatback failures in his letter. But his declaration does not state that Mr. O'Neil and he had even discussed this "understanding", let alone that Mr. O'Neil had agreed to it. Moreover, the very next paragraph (21) in his declaration states that he had memorialized his "understanding" reached with Mr. O'Neil in his letter of July 11, 2001. This letter did not memorialize any such understanding; it is silent on whether any agreement or understanding (that Mr. O'Neil was no longer seeking documents related to seat back failures) was ever reached. Furthermore, Mr. O'Neil, in his declaration, flatly denied having reached any such agreement or understanding to forego discovery of seatback [failure incidents].

CP at 5322. We do not address these findings separately because they are subsumed by finding of fact 35.

¶34 CP at 5322-23.

¶35 Hyundai argues on appeal that counsel had a series of "meet and confer" conversations between April 2001 and July 2001, resulting [*22] in an agreement to relieve Hyundai of the obligation to produce any other similar incidents relating to seat back failure. Br. of Appellant at 58-59; CP at 5322-23. Magana's counsel disputed Hyundai's characterization of the state of discovery before the 2002 trial. CP at 4791. ¹¹ In his appellate brief, Magana argues that Hyundai did not assert the existence of an agreement to limit the scope of discovery until January 6, 2006, almost four-and-a-half years after the letter dated July 11, 2001. ¹² Br. of Resp't at 17.

11 Magana's counsel declared that at the time he filed the motion for sanctions, he believed that Hyundai Motor America had responded truthfully to his initial Request for Production 20. CP at 4792.

12 Hyundai argues that Magana's counsel never disputed the existence of this alleged agreement until "the eve of the second trial." Br. of Resp't at 59.

¶36 But it was the trial court's prerogative to decide which version of events was more credible, and we do not disturb its finding. *Hahn v. Dep't of Retirement Sys.*, 137 Wn. App. 933, 942, 155 P.3d 177 (2007). And in any event, Hyundai had already falsely responded to Magana's interrogatory before entering into the purported agreement [*23] to limit discovery. The trial court's finding that Magana did not intend to abandon discovery of seat failure incidents in light of Hyundai's false initial response is well reasoned and the record supports it.

B. Meaning of "Claim"

¶37 Hyundai further argues that the trial court erred in finding that its responses to the request for production were evasive and misleading in light of its dispute of the term "claim." Br. of Appellant at 60; CP at 5316-19, 5323-29. It contends it presented non rebutted evidence that consumer hotline records ¹³ do not constitute "claims," and therefore it had no obligation to disclose them. Br. of Appellant at 61-62.

13 All three incidents involving Accents reported to Hyundai at the time it responded to Magana's request for production in April 2000, were consumer hotline reports. Ex. 5, 6, 30.

¶38 But Magana's request broadly encompassed

[A]ny and all documents, including but not limited to complaints, answers, police reports, photographs, depositions or other documents relating to complaints, notices, claims, lawsuits or incidents of alleged seat back failure on Hyundai products for the years 1980 to present.

CP at 2379. If Hyundai believed the request was too broad, [*24] it was obligated to obtain a protective order limiting discovery. *CR 37(d); Fisons, 122 Wn.2d at 354*. Having failed to do so, Hyundai may not evade its responsibility to disclose the requested materials by debating the semantics of the request.

¶39 Under Hyundai's interpretation of Magana's request, we cannot conceive how Magana could have obtained the consumer hotline reports without specifically asking for them. *See Fisons, 122 Wn.2d at 354* ("Having read the record herein, we cannot perceive of any request that could have been made to this drug company that would have produced the smoking gun documents."). Hyundai's response created a false impression that it was not aware of any similar incidents of seat failure in any of its products. The trial court, therefore, did not err in finding that Hyundai's response was false, evasive, and misleading.

C. Substantial Similarity of Elantra Seats

¶40 Next, Hyundai argues that the trial court erred in finding that the Elantra seat was "identical" and "substantially similar" to the Accent seat. CP at 5317¹⁴; Br. of Appellant at 65. Based on these findings, the trial court concluded that Hyundai's original response to Magana's interrogatory was incorrect [*25] and that Hyundai should have produced Elantra claims, as well as Accent claims, in response to the request for production. CP at 5317.

14 Findings of fact 13 and 16. CP 5317.

¶41 Hyundai contends that the finding is contrary to the evidence. But Magana's expert testified that seats in various Hyundai vehicles were similar in strength and design and contained nearly identical parts. CP at 785-86. The expert also stated that because the recliners were similar, incidents of seat failure involving other Hyundai models would be relevant and useful. CP at 786. Hyundai ultimately conceded that the 1992-1995 Elantra used the same recliner mechanism as the 1995-1999 Accent. CP at 4067-68. These facts are sufficient to establish substantial similarity between the seats and the findings are not erroneous.

D. Findings of Fact 23, 27, 28, and 29

¶42 Hyundai also challenges the trial court's findings of fact 23,¹⁵ 27, 28, and 29.¹⁶ But even assuming that the record does not support these findings, these findings do not affect the validity of the trial court's legal conclusions and any error related to these findings is harmless. *See Armstrong v. State, 61 Wn.2d 116, 118 n. 3, 377 P.2d 409 (1962)*. Because [*26] Hyundai falsely responded to Magana's request for production and failed to disclose requested materials without first obtaining a protective order, the trial court had sufficient grounds to conclude that the violation was willful regardless of its remaining findings. *See Fisons, 122 Wn.2d at 353-54* ("The rules are clear that a party must *fully* answer all interrogatories and all requests for production. ... If the drug company did not agree with the scope of production or did not want to respond, then it was required to move for a protective order.").

15 Finding of fact 23, as amended by the trial court on reconsideration, stated:

In *Parks v. Hyundai Motor America, Inc.*, 258 Ga.App. 876, 575 S.E.2d 673 (Ga. Court of Appeals 2002), a case in which [Hyundai's counsel] represented Hyundai at the trial court, Hyundai's response to discovery requests was at issue. ... After the case was remanded by the appellate court, Hyundai produced 33 responsive [other similar incidents]. ... There is a similarity of circumstances of the *Parks* case and the case herein regarding production of [other similar incident] documents by Hyundai.

CP at 5902.

16 Findings of fact 27, 28, and 29 relate to Hyundai's [*27] admitted failure to reveal the *Acevedo* claim. CP at 5320-21.

III. Prejudice

¶43 Hyundai further argues that the trial court erred in entering a default judgment when a fair trial was still possible. Br. of Appellant at 70. Here, the trial court's decision to impose sanctions depends on its finding that Magana suffered substantial prejudice in preparing for the second trial. CP at 5331. Because we conclude that finding is unfounded, we hold that the trial court abused its discretion in sanctioning Hyundai with a default judgment.

¶44 We begin by noting that cases should be resolved on the merits rather than by default judgment. *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007). In any particular case, whether a default judgment is appropriate depends on whether it is a just result. *Little*, 160 Wn.2d at 703; see also *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979). "The purposes of sanctions are to deter, punish, compensate, educate, and ensure that the wrongdoer does not profit from the wrong." *Roberson v. Perez*, 123 Wn. App. 320, 337, 96 P.3d 420 (2004) (citing *Fisons*, 122 Wn.2d at 356). And the trial court should impose the least severe sanction that will adequately [*28] serve these purposes, but without undermining the purposes of discovery. *Fisons*, 122 Wn.2d at 355-56.

¶45 Hyundai argues that the trial court should have ordered a continuance so that Magana could investigate the newly-disclosed incidents and determine whether a fair trial was still possible. Br. of Appellant at 74. We agree that on the record presented, there is insufficient evidence to show that the delay occasioned by Hyundai's late production substantially prejudiced Magana.

¶46 First, we note that on remand we limited retrial to the issue of liability without disturbing the jury's damages verdict. *Magana*, 123 Wn. App. at 319. Five months after our mandate issued, and only four months before the scheduled trial date, Magana requested that Hyundai update its original discovery responses. CP at 748, 4024, 4032-33. Magana also sought to amend his complaint to add additional claims against Hyundai. CP at 4293. We do not believe that Magana could have taken these actions without anticipating a trial date continuance.¹⁷

17 The dissent suggests that we "[fault]" Magana for failing to request discovery updates sooner. Dissent at 30. But this is correct only if we regard a default judgment of over [*29] eight million dollars as Magana's entitlement. We agree with the dissent that Hyundai had a duty to update its discovery responses and that its original responses were false, evasive, and misleading, and we do not dispute that the fault in this case lies with Hyundai. Our inquiry into prejudice, however, is limited to examining the effect Hyundai's willful violation had on Magana's ability to prepare for trial. We must, therefore, take into account Magana's trial strategy to determine whether the delayed production caused "[d]amage or detriment to [his] legal rights or claims." Black's Law Dictionary at 1218 (8th ed. 2004) (defining "prejudice"). See also *Carlson v. Lake Chelan Community Hosp.*, 116 Wn. App. 718, 740, 75 P.3d 533 (2003) ("[T]he court must consider the impact of the problem when determining whether a violation took place and designing the sanction."). This approach is consistent with the accepted rule that courts may consider the affected party's failure to mitigate in fashioning discovery sanctions. *Fisons*, 122 Wn.2d at 356.

¶47 In his motion for sanctions, Magana emphasized his need to investigate the newly-disclosed incidents for relevance, to conduct follow-up discovery, [*30] to submit the incidents for review by his experts, and to depose the parties involved, when only one month remained until the scheduled trial date. CP at 2331-35. But Magana has not demonstrated that he could not complete his inquiry into the incidents, only that he could not do so in the month remaining until trial. This does not demonstrate prejudice to his ability to obtain a fair trial when (1) he did not request additional discovery until shortly before trial, (2) the parties litigated the scope of permissible discovery, and (3) Hyundai timely produced documentation of other similar incidents in compliance with the court's order.¹⁸

18 The dissent relies upon *Associated Mortg. Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 229-30, 548 P.2d 558 (1976), to support its argument that Magana suffered prejudice. Dissent at 37. But in that case, the defendants had failed to fully respond to the plaintiff's interrogatories. *Associated Mortg. Investors*, 15 Wn. App. at 225. Accordingly, the plaintiff filed a motion to compel responses by a particular date. *Associated Mortg. Investors*, 15 Wn. App. at 225. The trial court entered an order compelling responses and further provided that [*31] if the defendants failed to comply, it would consider whether to impose a default judgment. When the defendants

failed to comply with the order, the trial court entered a default judgment against them. *Associated Mortg. Investors*, 15 Wn. App. at 225-26. Thus, in that case, the trial court concluded that "an order threatening default if proper answers were not forthcoming within a week was the only sanction which would compel discovery and avert the requirement that plaintiff seek a continuance of the trial," based upon the factors cited by the dissent at page 37. *Associated Mortg. Investors*, 15 Wn. App. at 229.

But the rationale for entering an order threatening default to compel discovery does not apply to this case. Unlike the defendants in *Associated Mtg. Invest.*, here Hyundai complied with the trial court's order to compel production. Moreover, the court in *Associated Mtg. Invest.* did not apply the factors cited by the dissent in determining whether the plaintiff suffered prejudice, but only in considering whether an alternative sanction would have sufficed. 15 Wn. App. at 229. We, therefore, disagree that the factors cited by the dissent are relevant in assessing prejudice to Magana, [*32] noting that "the particular facts and circumstances of each case will determine whether the [trial court's] discretion has been abused." *Associated Mortg. Investors*, 15 Wn. App. at 229.

¶48 Hyundai further argues that Magana cannot establish prejudice without showing that the delay in production rendered the incidents "stale." Br. of Appellant at 75. We agree.¹⁹ The trial court found that "evidence has been lost and much of the information is stale." CP at 5331. But many of the incidents were already several years old when Magana first requested them and Magana has not shown that any information has been lost as a result of Hyundai's late production. Magana was able to contact several of the parties and attorneys involved in the incidents merely by telephoning them. Ex. 1; RP (Jan. 17, 2006) at 91. This record does not show that the delay in production has hindered Magana's ability to investigate the other similar seat failure incidents.²⁰

19 The dissent argues, "It may very well be that timely and complete answers to Magana's interrogatories and requests for production would have made no difference. And it may very well be that effective investigation would have made no difference. But that [*33] is not for us to decide." Dissent at 38. We disagree, in light of the weight of authority requiring a finding of substantial prejudice before the sanction of a default judgment is permissible. See, e.g., *Burnet*, 131 Wn.2d at 494 (The trial court must find that party's willful discovery violation substantially prejudiced the opponent's ability to prepare for trial.); *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 768-69, 82 P.3d 1223 (2004) (same); *Behr*, 113 Wn. App. at 325 (same). Thus, not only is it appropriate for us to consider the practical effect of Hyundai's violation, it is necessary to do so to safeguard Hyundai's constitutional right to due process. See *Behr*, 113 Wn. App. at 325 ("[A]s a default judgment for discovery violations raises due process concerns, the court must first find willfulness and substantial prejudice."). We cannot agree with the dissent that "the egregious nature of Hyundai's willful and evasive tactics in responding to Magana's discovery requests" is sufficient to sustain a default judgment. Dissent at 47.

20 The dissent also relies on the trial court's explanation of prejudice in *Behr*. Dissent at 38-39. In *Behr*, the plaintiffs alleged that the defendant's [*34] product was defective because it caused extensive mildew damage to their homes. 113 Wn. App. at 314-15. The defendant failed to produce results of a test showing its mildewcide was not compatible with other ingredients in its product. *Behr*, 113 Wn. App. at 315-16. In that case, the withheld documents directly supported the plaintiff's allegations. Here, by contrast, the value of the withheld incidents to Magana's case is unclear. Unlike the test results in *Behr*, the other incidents of seat failure in Hyundai vehicles do not clearly establish that the seats are defective or that they caused Magana's injuries, particularly when the parties dispute where Magana was seated in the vehicle. See *Magana*, 123 Wn. App. at 310-11. Thus, we disagree with the dissent that the withheld information went "to the heart of the issue on remand." Dissent at 39. And we disagree that the failure to disclose prevented Magana from pursuing discovery into other seat failure incidents, as Magana was aware before the first trial that Hyundai had limited its responses but did not seek to compel fuller disclosure. Finally, we disagree that evidence of other claims of seat back failure "potentially bolster Magana's [*35] case while potentially undermining Hyundai's case," Dissent at 39, because Hyundai has consistently argued that a more rigid seat back would be more dangerous in a rear impact collision. *Magana*, 123 Wn. App. at 318. Thus, any similar incidents of seat failure would not rebut Hyundai's expert testimony that an alternative design would be less safe overall. *Magana*, 123 Wn. App. at 318.

¶49 Effectively, Magana argues that he was prejudiced because he could not proceed to trial as planned in January 2006. We agree that it is generally inappropriate to disrupt a plaintiff's trial presentation to accommodate a discovery violation. *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 282, 686 P.2d 1102 (1984). But in determining whether a delay is prejudicial, we must take into account the plaintiff's choice of strategy in pursuing the case.²¹ Here, Magana was aware that Hyundai had limited its responses as early as 2000, but he did not seek to expand discovery on the seat

back failure issue until September 2005, four months before the second trial. It was Magana's choice to pursue additional discovery shortly before trial. Although he complains that his experts could not meaningfully evaluate the incidents [*36] in the time remaining until trial, it is unclear why he requested additional evidence if the time required to investigate would have substantially prejudiced his case.

21 The dissent quotes extensively from former Supreme Court Justice Philip Talmadge's dissent in *Burnet* to support the argument that we improperly substitute our judgment for that of the superior court. Dissent at 46-47. But we note that former Justice Talmadge appeared on behalf of Hyundai and testified consistent with our reasoning in this case. He observed,

[P]laintiff's counsel, as experienced as they are in these matters, had to know that when they failed to raise the issue [of supplementing Hyundai's discovery responses] in the Spring of 2005, and instead waited until the fall before addressing the matter, they were creating their own dilemma involving the pursuit of the [other similar incident] material on the one hand, and the ability to try the case as early as January of 2006.

CP at 3255.

¶50 Lastly, the trial court found that a continuance would not benefit Magana, but would benefit Hyundai. CP at 5333. We disagree. The purpose of the trial process is to uncover the truth. *State v. Thompson*, 58 Wn.2d 598, 605, 364 P.2d 527 (1961). [*37] Allowing Magana to investigate the incidents of seat failure will shed light on whether Hyundai manufactured and sold a defective product. Thus, further investigation is likely to assist in resolving the merits of Magana's case.²²

22 The dissent contends that granting a continuance "places the burden on Magana, ... who must prepare again for a lengthy trial," and would reward Hyundai by allowing it time to strengthen its case for trial. Dissent at 41. But we believe these consequences were foreseeable when Magana sought to expand discovery on remand. Even if Hyundai had fully disclosed incidents of seat back failure before the first trial, Magana's request for supplemental responses would have yielded at least six incidents involving Accents reported since the first trial. See Exhs. 9, 36-40. Thus, Magana would have faced the costs of investigating the new incidents and preparing for the second trial regardless of Hyundai's discovery violations and facing those costs now does not establish prejudice. Furthermore, Magana failed to file a timely motion to compel Hyundai's answers in 2000, 2001, 2002, or 2005.

¶51 We conclude that the record does not support the trial court's findings that [*38] the evidence was now "stale" and that a continuance would prejudice Magana's ability to try his case--only that he would be prejudiced in presenting his case in January. If he tries to find experts and they are unable to analyze the evidence and would have been able to analyze it if it had been provided earlier, then and only then could irrevocable prejudice be shown that may warrant the trial court's usurpation of the right to trial and directing a verdict in Magana's favor.

¶52 While we agree that Hyundai's discovery violations warrant sanctions,²³ on this record the trial court's finding that Magana "is severely prejudiced in going into a second trial" is unfounded. CP at 5331. Lesser sanctions here could adequately address the goal of encouraging good faith compliance with discovery requests and timely trial preparation. A default judgment is tantamount to awarding Magana a several million dollar verdict without requiring him to prove his case.²⁴ Absent substantial prejudice, such a sanction is contrary to law. See *Burnet*, 131 Wn.2d at 494.

23 The dissent points out that the choice of sanction is within the trial court's discretion and suggests that in reversing the trial court we [*39] substitute our judgment as to the appropriate sanction. Dissent at 37 n. 38, 43-44. But the dissent fails to acknowledge that the choice of sanction is not without limits. A trial court lacks discretion to sanction a party by entering a default judgment unless the opposing party has been substantially prejudiced. *Behr*, 113 Wn. App. at 325. Because the trial court's finding of prejudice is unsupported by the evidence, it lacked discretion to grant Magana a default judgment.

24 The dissent apparently faults Hyundai for failing to challenge the damages award on the first appeal, suggesting that Hyundai could not have been "concerned about a damages award for over eight million dollars." Dissent at 43, n. 44. We, by contrast, find it laudable that Hyundai did not discount the seriousness of Magana's

injuries by quibbling over the award. Instead, Hyundai limited its arguments on appeal to issues concerning whether it was responsible for those injuries. *See Magana, 123 Wn. App. at 319* (improper admission of expert testimony likely affected the verdict). Certainly, we do not interpret its decision not to challenge the award as an admission that the sum was so insignificant that a monetary [*40] sanction could not have sufficiently remedied its failure to timely disclose discoverable materials.

¶53 Accordingly, we reverse the default judgment and remand for trial, subject to further discovery orders that allow adequate time to examine the additional information for relevance and admissibility and avoid prejudice to either party by further delay.

IV. Grant of Prejudgment Interest

¶54 Hyundai claims that the trial court erred in awarding Magana prejudgment interest dating back to the date of the verdict in the first trial. Br. of Appellant at 97-98. Claiming that Magana's counsel made an unreasonable argument during the first trial, Hyundai asserts that "[it] should not be penalized for successfully pursuing appellate relief from plain error invited by Magana's counsel." Br. of Appellant at 98. We disagree.

¶55 "Prejudgment interest awards are based on the principle that a defendant 'who retains money which he ought to pay to another should be charged interest upon it.'" *Hansen v. Rothaus, 107 Wn.2d 468, 473, 730 P.2d 662 (1986)* (quoting *Prier v. Refrigeration Eng'g Co., 74 Wn.2d 25, 34, 442 P.2d 621 (1968)*); see also *Jones v. Best, 134 Wn.2d 232, 242, 950 P.2d 1 (1998)*. Prejudgment interest [*41] is awardable when a claim is liquidated or readily determinable, as opposed to an unliquidated claim. *Hansen, 107 Wn.2d at 468*. And a liquidated claim is one "where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion." *Prier, 74 Wn.2d at 32*. Finally, this court reviews a trial court's award of prejudgment interest for an abuse of discretion. *Colonial Imports v. Carlton N.W., Inc., 83 Wn. App. 229, 921 P.2d 575 (1996)*.

¶56 Here, the trial court awarded prejudgment interest dating back to the date of the first verdict after relying on *Hadley v. Maxwell, 120 Wn. App. 137, 84 P.3d 286 (2004)*. In *Hadley*, the plaintiffs sought interest on an unchallenged damages award after the appellate court remanded the case for a new trial on liability only. *120 Wn. App. at 139-40*. The court concluded that "an unchallenged damages award on an unliquidated claim results in a liquidated claim for purposes of a subsequent trial on liability alone." *Hadley, 120 Wn. App. at 144*. Here, there was no question that Magana's claim was liquidated when the jury in the first trial awarded Magana over eight million dollars. *Magana, 123 Wn. App. at 313*. [*42] Hyundai did not assign error to or challenge the damages award. *Magana, 123 Wn. App. at 314*. The second trial was limited to liability issues. *Magana, 123 Wn. App. at 319*. And the trial court was not required to exercise its discretion in calculating the claim for purposes of the default judgment. Thus, under *Hadley*, Magana was entitled to prejudgment interest dating back to the date of the verdict in the first trial.²⁵ Therefore, the trial court did not abuse its discretion.

25 The trial court also noted:

The court does not find an equitable basis for denial of interest as argued by Hyundai. Error found by the Court of Appeals which resulted in reversal was made by the trial court, and was not the result of unreasonable argument by plaintiff's counsel. In addition, the request for equity would be outweighed by the court's finding of willful and egregious discovery violations by Hyundai.

CP at 6001.

V. The Smiths

¶57 Next, Hyundai requests that we order the trial court to preclude the Smiths from taking part in the retrial on condition that it dismiss its cross-claim against them for contribution. Br. of Appellant at 99.

¶58 In the first appeal, we affirmed the entry of a default judgment against [*43] the Smiths on the issue of negligence. *Magana, No. 29347-1-II, slip op. at 7-8, 31 (2004)* (unpublished portion), CP at 5461. Thus, the Smiths' liability is established; however, any allocation of fault with Hyundai remains to be determined.

¶59 Under *RCW 4.22.070(1)(b)*,²⁶ when a plaintiff is not at fault, any defendants at fault are jointly and severally liable for the plaintiff's injuries. Tortfeasors who are jointly and severally liable may seek contribution from other defendants for any amounts paid that exceed their allocation of fault. *RCW 4.22.040*; ²⁷ *RCW 4.22.050*.²⁸

26 *RCW 4.22.070(1)(b)* provides: "If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages."

27 *RCW 4.22.040(1)* provides in relevant part: "A [*44] right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all of any of them."

28 *RCW 4.22.050(2)* provides: "If the comparative fault of the parties to the claim for contribution has not been established by the court in the original action, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought."

¶60 Hyundai argues that if it dismisses its cross-claim for contribution against the Smiths, "the Smiths would have no interest in the allocation of fault between them and Hyundai" because the Smiths have limited assets. Br. of Appellant at 99. But the Smiths are not parties to this appeal and we will not rule on their interest in the litigation when they have not had the opportunity to be heard. We decline to consider Hyundai's argument here but do not preclude Hyundai from raising the issue on remand.

VI. Remand to a New Judge

¶61 Finally, Hyundai argues that we should require a different trial court [*45] to preside on remand to avoid an appearance of bias. Br. of Appellant at 85. Litigants are entitled to a judge that both is, and appears to be, impartial and they must submit proof of actual or perceived bias to support an appearance of impartiality claim. *Santos v. Dean*, 96 Wn. App. 849, 857, 982 P.2d 632 (1999).

¶62 Hyundai presents several arguments supporting its claims that the trial court appeared partial. Br. of Appellant at 89-97. Magana challenges Hyundai's characterization of the trial court's statements and rulings. Br. of Resp't at 56-59. But Hyundai never sought to disqualify the trial court judge nor asked her to recuse herself. We think it prudent to allow the trial court to consider Hyundai's arguments in the first instance on remand.

Quinn-Brintnall, J., concurs.

DISSENT BY: BRIDGEWATER, J.

DISSENT

¶63 Bridgewater, J. (dissenting) -- The majority holds that the evidence does not support the trial court's finding that Magana was prejudiced by Hyundai's discovery violations in his ability to prepare for trial. Majority at 18. And therefore, the majority does not examine the appropriateness of the sanction. But I would agree not only that Hyundai's discovery violations were willful, [*46] but that Hyundai's discovery violations were prejudicial and that the default judgment was an appropriate sanction. Because I would affirm the default judgment, I respectfully disagree with the majority.²⁹

29 I agree with the majority's analysis that interest on the damages in this case should run from the date of the verdict in the first trial.

¶64 I nevertheless agree with the majority that the record must show three things: (1) the willfulness of the discovery violation; (2) the prejudice to the opposing party's ability to prepare for trial; and (3) whether a lesser sanction would have sufficed. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494-95, 933 P.2d 1036 (1997); *Snedigar v. Hoddersen*, 114 Wn.2d 153, 169, 786 P.2d 781 (1990); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 325, 54 P.3d 665 (2002). And I agree with the majority that we should not disturb the trial court's decision absent a clear abuse of discretion. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006); *Burnet*, 131 Wn.2d at 494.

¶65 But an abuse of discretion occurs only when a decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Associated Mortg. Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558, [*47] review denied, 87 Wn.2d 1006 (1976). The trial court's decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard.³⁰ *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). The trial court's decision is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" *Rohrich*, 149 Wn.2d at 654 (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)).

30 A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

¶66 Here, where the trial court has weighed the evidence, our review is limited to examining whether the trial court's decision rests on tenable grounds, i.e., whether substantial evidence supports the findings of fact.³¹ *Holland v. Boeing Co.*, 90 Wn.2d 384, 390, 583 P.2d 621 (1978); See *Morgan v. Prudential Ins. Co. of Am.*, 86 Wn.2d 432, 545 P.2d 1193 (1976). Substantial evidence is a sufficient quantity of evidence to persuade [*48] a fair-minded, rational person of the truth of the declared premise. *Holland*, 90 Wn.2d at 390-91. Finally, and most importantly, we should not substitute our judgment for that of the trial court. *Seattle-First Nat'l Bank v. Brommers*, 89 Wn.2d 190, 199, 570 P.2d 1035 (1977).

31 And erroneous findings that do not affect the validity of the court's legal conclusions are harmless. See *Armstrong v. State*, 61 Wn.2d 116, 118 n.3, 377 P.2d 409 (1962).

¶67 Thus, I disagree with the majority's conclusion that there is insufficient evidence to support the trial court's findings of fact that Hyundai's willful discovery violations prejudiced Magana's ability to prepare for trial.

¶68 The majority faults Magana for requesting that Hyundai update its original discovery responses five months after our mandate issued and only four months before the scheduled trial date. Majority at 19. While neither I nor the majority know why Magana took this action when he did, we do know that he took this action *only* after finding a similar-looking recliner mechanism from another Hyundai vehicle. CP at 4032-33. In fact, Magana notified Hyundai Motor America (HMA) that:

Interrogatory No. 12 seeks identification of Hyundai [*49] vehicles that use the same or substantially similar seat as the 1996 Hyundai. The response is that no other vehicles use a seat that is substantially similar. We have a recliner mechanism from another Hyundai vehicle that looks identical. *It appears therefore that HMA's response was not accurate. Please check and update as necessary.*

[Request for Production] no. 20 seeks documents relating to incidents of alleged seat back failure on Hyundai products. The response that I have is now more than 5 years old. Moreover, it is limited to the 1995-1996 Accent. For purposes of discovery, it should not be so limited, especially since it is clear that other Hyundai vehicles used the same recliner mechanism. *Please check and update or amend the response as necessary.*

CP at 4032 (emphasis added). And Magana's counsel notified Hyundai Motor Company (HMC) that:

Interrogatory No. 11 seeks identification of Hyundai vehicles that use the same or substantially similar seat as the 1996 Hyundai. The response is that no other vehicles use a seat that is substantially similar. We have a recliner mechanism from another Hyundai vehicle that looks identical. *HMC's response is not accurate. Please check.*

[Request [*50] for Production] No. 20 seeks documents relating to incidents of alleged seat back failure on Hyundai products. The response that I have is now more than 5 years old. Moreover, it is limited to the 1995-1996 Accent. For purposes of discovery, it should not be so limited, especially since it is clear that other Hyundai vehicles used the same recliner mechanism. *Please check and update or amend the response as necessary.*

CP at 4033 (emphasis added).

¶69 Ultimately, in response to Magana's requests, Hyundai produced two documents relating to claims of alleged seat back failure: (1) a 2002 complaint, filed in California, in which plaintiffs claimed that they were injured in part by an allegedly defective 1999 Hyundai³² front passenger seat; and (2) a 2000 notice of claim letter, in which an attorney notified Hyundai that his client, a rear seat passenger in a 1985 Hyundai Excel,³³ was injured by an allegedly defective driver's seat. CP at 4054-60. These documents are summarized as follows:

Date ³⁴	Name	Model Year	Model
09/08/2000	Dowling	1995	Elantra
07/24/2002	Bobbitt	1999	Accent

32 Hyundai's counsel noted that this vehicle was an Accent. CP at 4053.

33 Hyundai's counsel noted this vehicle was actually a [*51] 1995 Elantra. CP at 4053.

34 In some unknown number of cases, these dates may refer to when the other similar incidents occurred, not when Hyundai became aware of the other similar incidents. CP at 4866-67; Ex. 48.

¶70 But clearly, Hyundai's responses and answers to Magana's discovery requests were misleading, evasive, and incomplete. After all, in response to the trial court's order, Hyundai then produced numerous other documents relating to legal claims and consumer complaints. CP at 1027, 2354; Ex. 48. These documents are summarized as follows:

Date	Name	Model Year	Model
12/04/1987	Contini	1987	Excel
04/25/1988	Hogle	1988	Excel
05/04/1988	Mak	1987	Excel
12/05/1988	Reed	1987	Excel
06/03/1992	McElligatt	1990	Sonata
08/04/1992	Gowanny	1986	Excel
10/27/1993	Harris	1987	Excel
04/23/1994	Stewart	1989	Excel
04/25/1994	Zhang Ni	1988	Excel
04/28/1994	Guy	1990	Excel
05/19/1994	Vincent	1988	Excel
10/07/1995	Schiller	1989	Excel
11/08/1995	Enriquez	1989	Sonata
11/09/1995	Nunez	1992	Excel
11/21/1995	Miller	1989	Excel
12/18/1995	DeJesus	1994	Excel
06/03/1996	Chittick	1994	Excel
10/31/1996	Holcomb	1992	Excel
12/16/1996	Cain	1993	Scoupe
07/10/1997	Randall	1993	Sonata
09/04/1997	Salizar	1995	Accent
02/06/1998	Martinez	1995	Accent
03/09/1998	McQuary	1997	Accent
05/04/1999	Trudeau	1993	Sonata
04/29/2000	Urice	1994	Elantra
09/01/2000	Wagner	1999	Accent
12/18/2001	Pockrus	1999	Accent
01/19/2002	Powell	1999	Accent
12/10/2002	McKinney	1998	Sonata
06/28/2002	Whittiker	1996	Accent
04/16/2003	McDaniel	2000	Elantra
09/23/2003	Ironside	2000	Elantra
01/08/2004	Sanchez	2000	Elantra

Date	Name	Model Year	Model
06/09/2004	Harper	1999	Accent

[*52]³⁵

35 Hyundai notes that the vehicle identification number is actually for a non-Accent car. Br. of Appellant at 40.

¶71 CP at 2354; Ex. 48.

¶72 Thus, the fault should lie with Hyundai, not Magana. Under *CR 26(e)(2)*, Hyundai had the duty to fully disclose its documents. See *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 462, 105 P.3d 378 (2005); *Seals v. Seals*, 22 Wn. App. 652, 654, 590 P.2d 1301 (1979). After all, *CR 26(e)(2)(A)* requires a party, who obtains information that a discovery response was incorrect when made, to amend the response to reflect the correction. *Thompson*, 153 Wn.2d at 462; *Seals*, 22 Wn. App. at 654. And *CR 26(e)(2)(B)* requires a party, who obtains information that a discovery response is no longer true, to amend the response to reflect the truth. *Thompson*, 153 Wn.2d at 462; *Seals*, 22 Wn. App. at 654. Finally, under *CR 26(e)(2)(B)* "a failure to amend the response [may be] in substance a knowing concealment."

¶73 And if a party disagrees with the scope of production, or wishes not to respond, it must move for a protective order. *Johnson v. Mermis*, 91 Wn. App. 127, 133, 955 P.2d 826 (1998). It cannot withhold discoverable materials. *Wash. State Physicians Inc. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 354, 858 P.2d 1054 (1993); [*53] *Johnson*, 91 Wn. App. at 133. A party's failure to comply with these rules may not be excused on grounds that the discovery sought is objectionable. *CR 37(d)*; see also *Johnson*, 91 Wn. App. at 133-34. Under *CR 37(a)(3)*, "an evasive or incomplete answer is to be treated as a failure to answer." (Emphasis added). And under *CR 37(d)*, "an evasive or misleading answer is to be treated as a failure to answer." (Emphasis added).

¶74 Here, Hyundai never supplemented its responses, even though they were either incorrect when made or no longer true. And while the majority questions Magana's motives for requesting that Hyundai update its original discovery responses five months after our mandate issued and only four months before the scheduled trial date, majority at 19, our Supreme Court has stated the following rule:

[W]here a party to an action, in clear and unambiguous terms under oath, asserts the existence or non-existence of a fact whereof such party has knowledge, or in the ordinary course of affairs would be expected to have knowledge, the adverse party may rely on such statements and, in the exercise of reasonable diligence, is not required to look behind the statements.

Kurtz v. Fels, 63 Wn.2d 871, 875, 389 P.2d 659 (1964); [*54] see also *Seals*, 22 Wn. App. at 656. Thus, we can hardly fault Magana for relying on Hyundai's unambiguous, albeit evasive and/or incomplete, responses from 2000 until 2005. The majority claims, "It was Magana's choice to pursue additional discovery shortly before trial." Majority at 23. But it was Hyundai's responsibility to timely answer and supplement its discovery answers. See *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 282, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985). If Hyundai had fulfilled its responsibilities and duties under *CR 26* and *CR 37*, even after our remand, the majority would not be questioning Magana's actions.

¶75 But in determining whether Magana was prejudiced by Hyundai's actions, the majority once again questions Magana's actions, stating, "[W]e must take into account the plaintiff's choice of strategy in pursuing the case. ... It was Magana's choice to pursue additional discovery shortly before trial. ... [I]t is unclear why he requested additional evidence if the time required to investigate would have substantially prejudiced his case." Majority at 22-23 (footnote omitted).

¶76 And again, the majority faults Magana when it should fault Hyundai. [*55] Hyundai failed to disclose its documents before the second trial. Hyundai failed to disclose its documents after Magana requested it to do so. And, even after the trial court's order, Hyundai failed to timely and fully disclose its documents.³⁶ CP at 1027, 2354; Ex. 48.

³⁶ Hyundai finished producing the documents on January 6, 2006, after Magana had moved for a default judgment. CP at 1027, 2307-46, 2354, 4792-93; Ex. 48.

¶77 Nevertheless, the majority still notes, "Hyundai complied with the trial court's order to compel production." Majority at 20 n.18. And the majority seems to imply that absent a failure to comply with a trial court's discovery order, sanctions against Hyundai are inappropriate. Majority at 20 n.18. But I note that Washington law is otherwise.

¶78 A discovery order as provided in *CR 37(a)* and *(b)* is not necessarily a prerequisite to enforcement of the sanctions in *CR 37(d)*. See *Pamelin Indus., Inc. v. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 401, 622 P.2d 1270 (1981). Our Supreme Court has summarized *CR 37* as follows:

Thus, it can be seen the rule provides two alternative sources of authority for granting sanctions under *CR 37(b)(2)*. They are: (1) failure of a party to comply with [*56] an order entered pursuant to *CR 37(a)*; and (2) failure of a party to respond to a request for discovery under *CR 33* or *CR 34*.

Pamelin, 95 Wn.2d at 401; see also *Charter House Ins. Brokers, Ltd. v. N. H. Ins. Co.*, 667 F.2d 600, 604 (7th Cir. 1981) (under *FRCP 37(d)*, the court may impose sanctions directly, without first issuing an order to compel discovery); *Robison v. Transamerica Ins. Co.*, 368 F.2d 37, 39 (10th Cir. 1966) (it is generally agreed that *FRCP 37(d)* permits an immediate sanction against parties for their willful failure to respond to discovery requests).

¶79 While fair and reasoned resistance to discovery is not sanctionable, it is the misleading nature of Hyundai's responses that is contrary to the purposes of discovery and most damaging to the fairness of the litigation process. See *Fisons*, 122 Wn.2d at 346. And requiring Magana to disrupt his trial presentation to accommodate Hyundai would reward noncompliance. *Gammon*, 38 Wn. App. at 282.

¶80 In fact, in support of his motion for a default judgment, Magana argued:

Obviously plaintiffs in this case have little time to develop the evidence that has been supplied to them just weeks before trial. There is little chance to obtain [*57] the available information from the injured people or from their attorneys. There is little time for experts in this case to do a thorough review of the accidents produced to date or data assembled by plaintiff's attorneys. There is no time to note up depositions of the injured parties. Indeed, the discovery cutoff in this case has already run--and ran just days after the initial documents were produced to plaintiff. All of this puts plaintiff at a serious and perhaps insurmountable disadvantage.

CP at 2335.

¶81 This case is not one where Hyundai's evasive and/or incomplete answers affected only one or two issues on remand. On remand, the sole issue was whether Hyundai was liable for the allegedly defective occupant restraint system. *Magana v. Hyundai Motor Am.*, 123 Wn. App. 306, 319, 94 P.3d 987 (2004). Thus, Magana's trial preparation necessarily centered around investigating the requested documents.³⁷ And many factors in this case support the trial court's finding that Magana was prejudiced by Hyundai's actions. These factors include: (1) the evasive and/or incomplete nature of Hyundai's answers to Magana's discovery requests; (2) the proximity of the trial date and the effect Hyundai's [*58] answers would have on Magana's claims and Hyundai's defenses; (3) the requested documents were primarily within Hyundai's knowledge and control; (4) the nature of the action, i.e., simply whether Hyundai was liable for the allegedly defective occupant restraint system; and (5) the materiality of these documents to Magana's proper preparation for trial. See, e.g., *Associated Mortg. Investors*, 15 Wn. App. at 229-30.³⁸ In other words, Hyundai's actions prevented Magana from timely discovering essential facts and evidence pertaining to the litigation. See, e.g., *Associated Mortg. Investors*, 15 Wn. App. at 230.

37 The parties refer to this discovery evidence as "[o]ther similar incidents" or OSI. As Hyundai notes, it "is a term of art in the products liability field familiar to practitioners." Br. of Appellant at 12 n.6.

38 Although the majority is correct that we used these factors in *Associated Mortgage Investors* to consider the appropriateness of a sanction, majority at 20 n.18, these factors are just as relevant here in considering whether Magana was prejudiced by Hyundai's actions.

¶82 Hyundai even suggests that "there is a very good chance that most--perhaps all--of the OSI's at issue would [*59] not be admissible at trial." Br. of Appellant at 79. While Hyundai focuses on whether its discovery violations were

material, i.e., will probably change the result of the trial, the trial court properly focused on whether Hyundai's discovery violations "substantially prejudiced the opponent's ability to prepare for trial." *Burnet*, 131 Wn.2d at 494; *Roberson v. Perez*, 123 Wn. App. 320, 336, 96 P.3d 420 (2004), review denied, 155 Wn.2d 1002 (2005).

¶83 It may very well be that timely and complete answers to Magana's interrogatories and requests for production would have made no difference. And it may very well be that effective investigation would have made no difference. But that is not for us to decide.³⁹ See *Gammon*, 38 Wn. App. at 282.

39 As Washington courts have repeatedly stated in affirming a trial court's order of a new trial as a remedy for a discovery violation:

[I]t cannot be stated with certainty that all of this would have changed the result of the case. But, as said by the Supreme Court, a litigant who has engaged in misconduct is not entitled to "the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." [*60] *Minneapolis, St. Paul & [Sault Ste.] Marie Ry. Co. v. Moquin*, [] 283 U.S. 520, 521-522, 51 S. Ct. 501, [] 75 L. Ed 1243 [(1931)].

Gammon, 38 Wn. App. at 282 (quoting *Seaboldt v. Pa. R.R. Co.*, 290 F.2d 296, 300 (3d Cir. 1961)).

¶84 In *Behr*, a case in which we found that the trial court properly entered a default judgment against a defendant for failing to disclose documents and information, we quoted with approval the trial court's explanation for finding that the plaintiffs were prejudiced:

I conclude that the discovery violations complained of suppressed evidence that was relevant, because it goes to the heart of the plaintiffs' claims, and it supports them. It's relevant in that it goes to the heart of the defenses raised by *Behr*, because it undermines them. The discovery violations here prevented the plaintiffs from doing what the law really allows them to do, and that's to follow up on leads from developed facts. They were off in one direction when they should have been working in another, and the only reason is they didn't know that the other existed.

...

The evidence that has been discovered and the implications from that evidence that has been discovered in the last week or so [*61] is highly important. As I said, it bolsters the plaintiffs' case, it undermines positions that the defendant has taken, it suggests that the plaintiffs' problems may have a more particular cause, ... it casts doubt on the discovery that has gone on before, it affects the work that the experts have done, at least the plaintiffs' experts.

... Perhaps nothing in the discovery of this case is as important as what was not disclosed.

Behr, 113 Wn. App. at 325-26.

¶85 Here, I would similarly conclude that Hyundai's actions suppressed documents and information that were relevant, as they go to the heart of the issue on remand, i.e., whether Hyundai was liable for the allegedly defective occupant restraint system. Hyundai's actions have prevented Magana from "doing what the law really allows [him] to do, and that's to follow up on leads from developed facts." *Behr*, 113 Wn. App. at 325. Magana was "off in one direction when [he] should have been working in another [direction]." *Behr*, 113 Wn. App. at 325. The documents potentially bolster Magana's case while potentially undermining Hyundai's case. "[They] cast[] doubt on the discovery that has gone on before." *Behr*, 113 Wn. App. at 325. And, given [*62] the number of documents that were suppressed, "[p]erhaps nothing in the discovery of this case is as important as what was not [initially] disclosed." *Behr*, 113 Wn. App. at 325. Finally, even if Magana were able to begin an investigation into these documents, it still does not alleviate the prejudice that Hyundai caused by withholding information that was relevant to Magana's theory of causation.⁴⁰ See *Behr*, 113 Wn. App. at 326.

40 The majority implies that Hyundai timely produced the documents in compliance with the trial court's order. Majority at 20 n.18. But belated compliance with discovery orders does not necessarily preclude the imposition

of sanctions. See *N. Am. Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir. 1986). "Last-minute tender of documents does not cure the prejudice to opponents nor does it restore to other litigants on a crowded docket the opportunity to use the courts." *N. Am. Watch Corp.*, 786 F.2d at 1451.

¶86 Nevertheless, the majority concludes that "further investigation is likely to assist in resolving the merits of Magana's case." Majority at 23-24 (footnote omitted). Thus, the majority faults the trial court for imposing a default judgment, [*63] suggesting that it should have imposed a continuance. Majority at 23-25. Essentially, the majority questions the trial court's discretion in imposing a default judgment.

¶87 But the question, of course, is not whether we would have dismissed the action; it is whether the trial court abused its discretion in so doing. *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976). It is proper to leave that determination to the trial court because it has "tasted the flavor" of the litigation and is in the best position to make that determination.⁴¹ *Burnet*, 131 Wn.2d at 509 (Talmadge, J., dissenting) (quoting *Watson v. Maier*, 64 Wn. App. 889, 896, 827 P.2d 311 (citations omitted), review denied, 120 Wn.2d 1015 (1992)). And in making that determination, the trial court should consider whether the requested documents go to a dispositive issue in the case and whether the party seeking discovery may be protected by imposition of a sanction short of dismissal. See *Vickers v. Kansas City*, 216 Kan. 84, 93, 531 P.2d 113, 121 (1975).

41 The language of CR 37 compels the conclusion that the trial court has the discretion to choose the most appropriate [*64] sanction suitable to the history and circumstances of the case before it. See *Vickers v. Kansas City*, 216 Kan. 84, 91, 531 P.2d 113, 119 (1975).

¶88 While the trial court should impose the least severe sanction sufficient to serve the purpose of the particular sanction, *Burnet*, 131 Wn.2d at 494, 497-98, we should not require the trial court to sequentially impose lesser sanctions before imposing the ultimate sanction of dismissal. See *Mallard's Pointe Condo. Ass'n, Inc. v. L & L Investors Group, LLC*, 859 N.E.2d 360, 364 (Ind. Ct. App. 2006). Instead, the sanction simply should be proportional to the nature of the discovery violation and the surrounding circumstances. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 695, 41 P.3d 1175 (2002). "[*Burnet*] establishes a gauge for determining disproportionate sanctions." *Rivers*, 145 Wn.2d at 695.

¶89 Here, the trial court noted that a continuance would be unfair to Magana and would not punish Hyundai. CP at 5333. The trial court explained:

69. **Continuance.** The second possible sanction, which was the sole sanction proposed by defendants, is a continuance. Sanctions for discovery violations are not intended to reward the party who [*65] has committed the violations. Defendant Hyundai has sought a continuance in this case previously, which has been denied by the Court. The motion for a continuance would not remedy the staleness of the evidence in question; it would not remedy the difficulty of the Court in addressing these issues; it would involve further substantial costs to the parties in terms of analyzing the evidence with respect to their experts; it would involve substantial duplication of effort which ... previously had been done in preparation and re-preparation for this trial. A continuance would only exacerbate that situation. It would not benefit the plaintiff, it would benefit the defendant. Therefore, a continuance is not an appropriate remedy.

CP at 5333.

¶90 Certainly, there is "a clear record of delay or contumacious conduct" by Hyundai. See *Durham v. Fla. E. Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967). After all, the facts show that Hyundai's noncompliance was due to its callous disregard for Magana's discovery requests, not due to its inability to comply. And I agree with the trial court that granting a continuance is not an appropriate remedy.

¶91 Here, a continuance places the burden on Magana, the [*66] innocent party, who must prepare again for a lengthy trial. See *Lampard v. Roth*, 38 Wn. App. 198, 201, 684 P.2d 1353 (1984). "Such preparation is costly to the parties, risks the loss of much of the original trial preparation, and burdens the other litigants on the court's trial calendar." *Lampard*, 38 Wn. App. at 201. Thus, a continuance that would allow Magana to investigate the documents and information would hardly be a satisfactory resolution of the problem. *Lampard*, 38 Wn. App. at 201; see also *Behr*, 113 Wn. App. at 329-30.

¶92 Moreover, a continuance effectively rewards Hyundai's noncompliance by allowing it a further opportunity to investigate the documents and refine its own trial strategy.⁴² But such a result would go against the very purposes of discovery sanctions. As our Supreme Court stated in *Fisons*, "The purposes of sanctions orders are to deter, to punish, to compensate and to educate." *Fisons*, 122 Wn.2d at 356. "The sanction should insure that the wrongdoer does not profit from the wrong." *Fisons*, 122 Wn.2d at 356. And "[i]n fashioning an appropriate sanction, the trial judge must of necessity determine priorities in light of the deterrent, punitive, compensatory, and educational [*67] aspects of sanctions as required by the particular circumstances." *Miller v. Badgley*, 51 Wn. App. 285, 303, 753 P.2d 530 (emphasis added), review denied, 111 Wn.2d 1007 (1988).

42 And a continuance would effectively overrule the trial court's earlier decision denying Hyundai's motion for a continuance, in which Hyundai noted that one of its trial attorneys, who had been selected because of his experience in accident reconstruction, occupant kinematics, and seat back design issues, was unable to prepare for trial because of family problems. RP (Jan. 13, 2006) at 63-64, 70.

¶93 Clearly, given the particular circumstances in this case, the trial court determined that a continuance would not deter, punish, or educate Hyundai.⁴³ CP at 5333. And the trial court's decision is fully supported by the record. Therefore, because "[r]esolution of these matters lies within the informed discretion of the trial court," *Miller*, 51 Wn. App. at 304, we should not disturb the trial court's decision. See *Associated Mortg. Investors*, 15 Wn. App. at 229.

43 It is true that Magana sought to amend his complaint to add additional claims against Hyundai. CP at 4293-94. But Magana sought to amend his complaint *only* [*68] after Hyundai disclosed its documents in response to the trial court's order. CP at 4293-94. And when it became clear that Hyundai was seeking a continuance on account of their previous actions, Magana withdrew his motion to amend his complaint. RP (Jan. 13, 2006) at 62.

¶94 Moreover, the trial court also considered imposing other lesser sanctions; but ultimately, it rejected each in favor of a default judgment. CP at 5332-35. The trial court explained why it did not impose a financial sanction as follows:

67. **Monetary Fine.** A monetary fine is a sanction considered by this Court. It would in some sense address the costs that have been incurred in connection with these proceedings regarding discovery violations and could serve the purposes of punishment and the other purposes of sanctions. It is very difficult to know what monetary amount would be appropriate in such case. Hyundai is a multi-billion dollar corporation. This is documented in Exhibit 23 to Peter O'Neil's declaration.

68. A monetary sanction would not in any way address the prejudice to the plaintiff or to the judicial system. Much of the OSI seat back failure evidence is irretrievable at this point, and there is no way that [*69] it can be adequately addressed by either the experts or by the Court or by a jury if it were to review it. A monetary fine would do nothing to serve the search for truth and justice, which is the purpose of this Court. The Court rejects this as an adequate sanction.

CP at 5332-33. Essentially, the trial court found that a monetary fine would not rectify Hyundai's the wrong; instead, it would simply set a price on it.⁴⁴

44 I also note that Hyundai did not assign error to or challenge the damages award after the first trial, even though the damages award was for over eight million dollars. *Magana*, 123 Wn. App. at 313-14. It is hard to imagine Hyundai being concerned about any financial sanction if it was not concerned about a damages award for over eight million dollars. Otherwise, any financial sanction less than eight million, which was the result of the default judgment in this case, would simply encourage Hyundai to embrace its tactics of evasion and delay.

¶95 And we have agreed that a financial sanction may not always be a sufficient sanction, considering the nature of the discovery violation and the surrounding circumstances. In *Behr*, we relied on the trial court's explanation that [*70] a financial sanction "punishes the defendant to some extent, but it doesn't determine the plaintiffs' damages. It doesn't do anything to resolve the reason the plaintiffs came to court in the first place." *Behr*, 113 Wn. App. at 329 (quotations omitted); see also *Gammon*, 38 Wn. App. at 282 ("Far from insuring that a wrongdoer not profit from his wrong, minimal terms would simply encourage litigants to embrace tactics of evasion and delay.").⁴⁵

45 See also *G-K Props. v. Redevelopment Agency of City of San Jose*, 577 F.2d 645, 647 (9th Cir. 1978), wherein the Ninth Circuit Court of Appeals relied on the district court in noting that "to impose a fine would merely 'introduce into litigation a sporting chance theory encouraging parties to withhold vital information from the other side with the hope that the withholding may not be discovered and, if so, that it would only result in a fine.'"

¶96 The trial court also explained why it did not impose other sanctions as follows:

70. Other Sanctions Short of Default. There are cases in which a number of other sanctions have been appropriate to the particular facts of the case. The Court ultimately determined that neither party was suggesting that other [*71] remedies would be particularly appropriate or workable in this case. ... There are no counterclaims in this case and many issues, such as the allegation of contributory fault by plaintiff, were already decided and affirmed by the Court of Appeals. The Court has analyzed whether it might be appropriate to admit into evidence the OSIs in some manner or to admit some of them. Proceeding to trial as scheduled would be highly prejudiced by the admission of some or all of the evidence which has now been disclosed. It would be difficult to discuss this evidence. Plaintiff has not had the time to develop it; it cannot be developed as to many of the facts and circumstances involved in OSIs of seat back failures. Hyundai has asserted the defendant should have the opportunity to challenge those OSIs, to conduct discovery and, at the very least, to examine the facts of those OSIs, and to address this newly disclosed information. Ultimately both plaintiffs and defendants agreed that admitting OSI evidence without examination or challenge would not be a workable or appropriate remedy in this case. ... It is therefore not an adequate or workable sanction.

CP at 5333-34.

¶97 Again, I agree with the [*72] trial court that these other sanctions are not an appropriate remedy. ⁴⁶ At the evidentiary hearing, Magana's counsel dismissed the feasibility of simply admitting into evidence all or some of the OSIs, arguing that "[the] experts do not have adequate time to prepare and analyze and testify about these OSIs. They come in, sure, but then what? An expert can't really analyze them in relationship to the accident in this case, doesn't have time." RP (Jan. 19, 2006) at 41. Magana's counsel continued, "Only Hyundai's version of events is available." RP (Jan. 19, 2006) at 41. Finally, Magana's counsel emphasized, "So, these only show Hyundai's version of events, essentially are their Hyundai documents, not documents we could independently obtain. That's not going to be available to this jury, even if you tell them these facts are established." RP (Jan. 19, 2006) at 42.

46 The imposition of a lesser sanction would merely add to the frustration and delay. See *Mulroe v. Angerman*, 492 N.E.2d 1077, 1079 (Ind. Ct. App. 1986).

¶98 And even Hyundai's counsel argued against simply admitting into evidence all or some of the OSIs. RP (Jan. 19, 2006) at 87-88, 92. Hyundai's counsel argued, "Let's take this [*73] again. All OSIs go into evidence? All OSIs? Were there *Rule 403* risks involved here? You're willing to let all of these in, ... where they make no attempt to demonstrate--and we didn't hide these facts from them about, you know, engineering facts." RP (Jan. 19, 2006) at 87. Hyundai's counsel continued:

Let's take their theory of the gold standard seriously. If this is the gold standard, you guarantee an unfair trial. You guarantee it. The risk of confusion isn't a risk any more. It's guaranteed. I don't see how they can be managed. ... We don't get to challenge foundation or anything else.

If that can't work, they say no defense cross-examination argument or ability to contradict OSI evidence or seat back test evidence. And they say the Court is to instruct the jury that Hyundai violated its discovery obligations by withholding OSI documents? Stop. What has that got to do with the gold standard?

RP (Jan. 19, 2006) at 87-88. Finally, Hyundai's counsel clearly stated, "I think admitting this massive OSI evidence is a guarantee that the problems under *Evidence Rule 403* are going to occur. It's tantamount to a default, Your Honor. Admitting all the OSI evidence is tantamount to a default. [*74] We might as well skip the trial." RP (Jan. 19, 2006) at 92.

¶99 Here, the trial court "tasted the flavor" of the litigation and its decision not to impose these other sanctions is fully supported by the record. *See Burnet, 131 Wn.2d at 509* (Talmadge, J., dissenting) (quotations and citation omitted). "As the trial court properly set forth its reasons on the record and those reasons are neither unreasonable nor untenable, its decision to grant the default judgment was within its broad discretion." *Behr, 113 Wn. App. at 330* (emphasis added). I note:

Trial courts are on the front lines of our civil justice system, dealing with sometimes recalcitrant attorneys and the myriad considerations of prosecuting a case. The trial courts develop intimate knowledge of cases from such involvement and they should be permitted to manage the discovery process. We should not disturb such management unless the record indicates the trial court has clearly abused its discretion.

Burnet, 131 Wn.2d at 512 (Talmadge, J., dissenting).

¶100 Furthermore, the Supreme Court has warned against substituting our judgment for that of the trial court:

There is a natural tendency on the part of reviewing courts, properly employing [*75] the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.

But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think *Rule 37* contemplates they should feel to flout other discovery orders of other district courts.

NHL, 427 U.S. at 642-43.

¶101 Finally, I note that:

Too [*76] often, cases in which trial court judges exercise firm case management are reversed by this Court or other appellate courts. Unfortunately, the majority opinion sends the message to trial court judges that this Court gives only lip service to strong case management by trial judges. This Court should instead send a resounding message to trial courts, lawyers, and parties: we do not condone "obstreperous" conduct of counsel, we support firm case management by Washington's trial judges, and we will not permit litigation to languish forever in our courts.

Burnet, 131 Wn. App. at 513 (Talmadge, J., dissenting).

¶102 Therefore, based on the egregious nature of Hyundai's willful and evasive tactics in responding to Magana's discovery requests, I would find that the trial court was well within its discretion to grant the default judgment. Thus, I would affirm the default judgment.

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FILED

FEB 15 2006

JoAnne McBride, Clerk, Clark Co.

Hon. Barbara D. Johnson

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

<p>JESSE MAGAÑA,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>HYUNDAI MOTOR AMERICA; HYUNDAI MOTOR COMPANY; and RICKY and ANGELA SMITH, husband and wife,</p> <p style="text-align: center;">Defendants.</p>	<p>NO. 00-2-00553-2</p> <p>FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: DEFAULT JUDGMENT</p>
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Pursuant to various motions filed by the parties and based upon the pleadings of record, identified herein, and the evidentiary hearing which this Court held on January 17, 18, 19 and 20, 2006, the Court hereby makes the following Findings of Fact and Conclusions of Law in granting the plaintiff's motion for default judgment against the Hyundai defendants.

FINDINGS OF FACT

I. Procedural History and Materials Reviewed

1. This Court has presided over this case on a pre-assigned basis since filing of the Complaint on February 8, 2000, with the first order entered on February 22, 2000. The Court

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: DEFAULT JUDGMENT - 1

1 presided over all pre-trial hearings and trial in June-July 2002. This Court also presided over all
2 hearings since remand from the Court of Appeals by Amended Mandate received April 11, 2005.

3 2. The Court is familiar with the facts of this accident, with the proof adduced by the
4 plaintiff in support of his liability and causation and damages case, with the defenses offered by
5 the defendants, and with the testimony of all of the witnesses who testified in the first trial. The
6 record is extensive, the Superior Court file consisting at this time of 22 volumes over 600
7 pleadings, plus several hundred exhibits.

8 3. The Court reviewed pleadings, heard oral argument and conducted an evidentiary
9 hearing on Plaintiff's Motion for Sanctions Pursuant to CR 37(b) and (d) concerning discovery
10 violations alleged by the plaintiff to have been committed by the Hyundai defendants in this
11 case.

12 4. In particular, the Court has read and reviewed the following pleadings, declarations
13 and exhibits in making these Findings of Fact and Conclusions of Law:

- | | | | |
|----|---|---|-----------------|
| 14 | A | Motion To Compel Discovery of Other Similar Incidents from
Defendants Hyundai Motor Company ("HMC") and Hyundai Motor
15 America ("HMA") and Certification of Counsel re: Compliance
Conference
16 Declaration of Paul Whelan
Declaration of Stephen Syson | Filed: 10-27-05 |
| 17 | B | Hyundai Motor America and Hyundai Motor Company's Opposition
to Plaintiff's Motion To Compel
18 Declaration of Jeffrey Austin
Declaration of David Blaisdell | 11-2-05 |
| 19 | C | Plaintiff's Reply to Defendants Hyundai Motor America and Hyundai
20 Motor Company's Opposition to Plaintiff's Motion To Compel
Discovery of Other Similar Incidents
21 Declaration of Alisa Brodkowitz | Filed: 11-4-05 |
| 22 | D | Hyundai Letter re Proposed Order | Dated 11-9-05 |
| 23 | E | Order Shortening Time and authorizing Plaintiff's Motion to Enter
Order Hearing (Proposed) | 11-10-05 |

24 FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: DEFAULT JUDGMENT - 2

- 1 F Plaintiff's Letter concerning Entry of a Discovery Order Dated: 11-14-05
Filed: 11-18-05
- 2 G Hyundai's Letter Response Dated: 11-16-05
- 3 H Order Granting Plaintiff's Motion to Compel Defendant Discovery of
4 Other Similar Incidents From Defendant Hyundai Motor Company and
Hyundai Motor America Granted: 11-18-05
- 5 I Defendants Hyundai Motor America and Hyundai Motor Company's
6 Motion for Relief From November 18, 2005 Order Granting Plaintiff's
Motion to Compel 12-1-05
- 7 J Plaintiff's Opposition to Hyundai's Motion for Relief From the Court's
8 Order Compelling Production of Other Similar Incidents 12-14-05
- 9 K Motion To Compel Defendant Hyundai's Testimony on Other
10 Incidents
11 Declaration of Peter O'Neil Filed: 12-21-05
- 12 L Defendants Hyundai Motor America and Hyundai Motor Company's
13 Opposition to Plaintiff's Motion to Compel filed December 20, 2005
14 Declaration of Jeffrey D. Austin in Support of Opposition to Plaintiff's
15 Motions to Compel filed December 20, 2005 12-28-05
- 16 M Plaintiff's Reply -- Motion to Compel Defendant Hyundai's
17 Testimony on Other Incidents Filed 12-29-05
- 18 N Order Granting Plaintiff's Motion to Compel Defendant Hyundai's
19 Testimony on Other Incidents Granted: 12-30-05
- 20 O Plaintiff's Motion For Sanctions Pursuant To CR 37(b) and (d) Filed: 12-23-05
21 Memorandum In Support Of Motion For Sanctions Pursuant to CR 37
22 Declaration of Paul W. Whelan In Support of Motion for Sanctions for
Discovery Abuse
23 Declaration Peter O'Neil in Support of Motion for Sanctions
24 Declaration of Lawrence Baron Regarding Other Similar Incidents
Declaration of Justice Robert Utter in Support of Plaintiff's Motion for
Imposition of Sanctions
Declaration of Thomas J. Greenan in Support of Plaintiff's Motion for
Sanctions
Declaration of Joseph Lawson Burton, M.D.
Declaration of Stephen Syson
- P Memorandum of Hyundai Motor America and Hyundai Motor
Company in Opposition to Plaintiff's Motion for Sanctions 1-6-06
Declaration of Jeffrey D. Austin in Opposition to Motion for Sanctions
Declaration of Heather K. Cavanaugh in Opposition to Motion for
Sanctions
Declaration of Michael B. King in Opposition to Motion for Sanctions
Declaration of David D. Swartling in Opposition to Motion for
Sanctions

FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: DEFAULT JUDGMENT - 3

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Declaration of Philip A. Talmadge in Opposition to Motion for Sanctions
Declaration of William E. Stewart in Opposition to Motion for Sanctions
Declaration of David Blaisdell in Opposition to Motion for Sanctions
Declaration of Thomas M. Bullion in Opposition to Motion for Sanctions
Declaration of Thomas N. Vanderford in Opposition to Motion for Sanctions

Q Plaintiff's Reply Brief in Support of Motion for Sanctions Filed: 1-11-06
Reply Declaration of Peter O'Neil Re: Plaintiff's Motion for Sanctions
Reply Declaration of Alisa Brodkowitz in Support of Plaintiff's Motion for Sanctions
Reply Declaration of Rita T. Williams

R Plaintiff's Motion And Memorandum To Convene Evidentiary Hearing (Including Witnesses) Re Plaintiff's Motions For Sanctions Pursuant To CR 37 Filed 1-6-06
Declaration of Michael E. Withey in Support of Plaintiff's Motion to Convene Evidentiary Hearing

S Hyundai Motor America and Hyundai Motor Company's Opposition to Plaintiff's Motion to Convene Evidentiary Hearing Re Motion for Sanctions 1-11-06

T Plaintiff's Reply Re: Motion to Convene Evidentiary Hearing Filed: 1-12-06

5. This Court presided over the evidentiary hearing into the sanctions issue from January 17 – 20, 2006, considered all of the pleadings and declarations set forth in the preceding paragraph and heard the following live witnesses who testified at the hearing:

- Jerry Greenan
- Larry Baron
- Nikki Holcomb
- Jesse Magaña
- David Swartling
- Thomas Vanderford

FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: DEFAULT JUDGMENT - 4

1 **II. Discovery Sought and Responded To by Hyundai Demonstrates Numerous**
2 **Violations of Discovery Obligations by Hyundai**

3 6. In his sanctions motion, plaintiff alleges a number of discovery violations which are
4 summarized in a handout provided to the Court during closing argument and made a part of the
5 record. (Exh. 48) The Court finds the violations alleged by plaintiff on this chart have been
6 proven and that the roadblocks placed by defendants on the plaintiff's right to obtain discovery
7 were real. These violations have occurred over a period of time beginning in May of 2000 and
8 continued through the hearing with respect to the *Acevedo* claim. Although finding all the
9 violations alleged have been proven, and the totality of the circumstances is a factor, the most
10 serious violations, upon which the court primarily bases the imposition of sanctions, are those
11 violations specifically discussed herein.

12 7. The first discovery violation involves requests for production and interrogatories
13 which were propounded by the plaintiff and responded to by the defendants.

14 8. In Request for Production No. 20, the plaintiff asked: "Pursuant to Civil Rule 34
15 attach or produce, according to the above instructions, copies of any and all documents including
16 but not limited to complaints, answers, police reports, photographs, depositions or other
17 documents relating to complaints, notices, claims, lawsuits or incidents of alleged seat back
18 failure on Hyundai products for the years 1980 to present."

19 9. The following response was made and certified as truthful by Mr. Austin on behalf
20 of Hyundai Motor America. "HMA objects to Request No. 20 on the grounds it is overly broad
21 and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving
22 said objections, HMA further responds that there have been no personal injury or fatality
23 lawsuits or claims in connection with or involving the seat or seat back of the Hyundai Accent
24 model years 1995 to 1999."

FINDINGS OF FACT AND CONCLUSIONS OF LAW
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1 10. In Interrogatory No. 12 the question was asked: "Identify with name and model
2 number, all Hyundai vehicles that used the same or substantially similar right front seat as the
3 1996 Hyundai Accent."

4 11. The defendants' answer was: "The 1995 to 99 model year Hyundai Accent used
5 the same or substantially similar right front seat as the 1996 Hyundai Accent. No other Hyundai
6 model automobiles used the same or substantially similar design for the right front seat as the
7 1996 Hyundai Accent."

8 12. The response of Hyundai Motor America to Request For Production No. 20 was
9 false. There were a substantial number of seat back failure claims and incidents that were
10 reported to Hyundai involving the Accent model year 1995 to 1999 and other Hyundai vehicles.
11 The legal department of Hyundai was involved in these reports and claims. They should have
12 been produced.

13 13. The answers to RFP 20 and Interrogatory No. 12 were also evasive and misleading.
14 Hyundai's responses attempted to reframe the issue and unilaterally narrow the discovery sought.
15 Defense counsel withheld discoverable documents and sought no clarification or reformulation
16 of his request from plaintiff's counsel and did not seek a protective order under CR 37(a). Only
17 after plaintiff's counsel demonstrated to the Hyundai defendants that the Elantra seat was
18 identical did the defendants concede a similarity.

19 14. At the time the answer to RFP 20 was made by Hyundai Motor America, the
20 Martinez (Exhs. 5 and 31) and McQuary (Exhs. 6 and 32) claims were outstanding, involved
21 years 1995-1999 Hyundai Accents, and had already been reported to Hyundai and its legal
22 department. The Salizar claim (Exh. 30) was identified as an Accent on the claim document.
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FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: DEFAULT JUDGMENT - 6

1 The Martinez, McQuary and Salizar claims were not provided to plaintiff by Hyundai Motor
2 America and should have been.

3 15. After the answer to RFP 20 in May of 2000, an answer that was not accurate,
4 Hyundai failed to supplement (as is their obligation under CR 26) the answer regarding the
5 following seat back failure claims that were brought to Hyundai's attention after the initial
6 answer of RFP 20: Wagner (Exh. 36), Bobbitt (Exh. 37), Pockrus (Exh. 38), Powell (Exh. 39)
7 and Whittiker (Exh. 40). Each of these claims involved alleged seat back failures in the Hyundai
8 Accent model years 1995-1999. All were reported to Hyundai prior to trial in June 2002, with
9 the exception of Whittiker, which was reported in July, 2002. None were provided to plaintiff
10 when they became known to Hyundai. These other incidents and accompanying documentation
11 should have been provided because these reports directly contradicted Hyundai's prior answer
12 that there were no such claims.

13 16. Another discovery violation is related to Interrogatory No. 12 to Hyundai Motor
14 America and No. 11 to Hyundai Motor Company. These interrogatories asked Hyundai Motor
15 America and Hyundai Motor Company to identify other Hyundai seats that were substantially
16 similar to the 1996 Accent seat. The Elantra seat was a substantially similar seat to the Accent,
17 but Hyundai did not identify it as such in 2000 or 2001. As a result, the answer to Request For
18 Production No. 20 is misleading; the answer should have as well included the Elantra as well as
19 the Accent.

20 17. After remand from the Court of Appeals, plaintiff requested defendants update their
21 discovery responses by letter dated September 13, 2005. (O'Neil Decl., Exh. 6). In response, an
22 October 25, 2005 letter by Mr. Austin provides as follows: "I am enclosing two claims relating
23 to seat back failures. The first is a complaint filed in July of 2002, referred to as the Bobbit
24

FINDINGS OF FACT AND CONCLUSIONS OF LAW
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1 complaint. The second is correspondence dated September 8, 2000, regarding a claim of
2 Matthew Dowling. The complaint letter makes reference to a 1985 Hyundai Excel. In fact, the
3 claim involved an Elantra and apparently involved a driver's seat. Other than the claim of Mr.
4 Magana, these are the only seat back failure claims relating to either the 1995 Hyundai Accent or
5 the 1992 to 1995 Hyundai Elantra." O'Neil Decl., Exh. 7.

6 18. These answers were simply false. Numerous claims were received that now reveal
7 that the answers given by the defendants related to seat back OSIs were false. Note: the term
8 "OSIs" refers to other similar incidents. This is a term commonly used in products liability
9 litigation, and appears throughout the record and these findings.

10 19. Hyundai defendants acknowledge at least two discovery violations, including the
11 failure to provide plaintiff the sled test result and failure to produce the *Acevedo* claim, an
12 excerpt of which is attached as Exhibit 2 to the O'Neil declaration, despite a November 18, 2005
13 Order compelling its production.

14 20. With respect to the answer to RFP 20 set forth above in paragraph 10, Hyundai has
15 not affirmatively acknowledged the answer denying there were any "claims" was false.
16 However, Hyundai has not presented any factual or legal basis for the court to conclude the
17 answer was correct, or incorrect due to some reasonable excuse.

18 21. As explanation of the response, during the sanctions hearing Hyundai submitted the
19 Proposed Stipulation Concerning Hyundai's Response to Plaintiff's Request for Production No.
20 20 (Clerk's document #612A). It states as follows: "In responding to this RFP, Hyundai
21 directed a diligent search for all legal complaints (lawsuits) and all attorney demand letters
22 (claims) in connection with or involving the seat or seat back of the Hyundai Accent, model
23 years 1995 to 1999, with the intention that any such legal complaints or attorney demand letters
24

FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: DEFAULT JUDGMENT - 8

1 would be produced to plaintiff. Because no such legal complaints or attorney demand letters
2 were found, HMA answered by stating there were none." This pleading appears to indicate
3 Hyundai's response that there were no "claims" was intended to refer only to attorney demand
4 letters, although this limitation was not stated or otherwise disclosed to plaintiff.

5 22. In response to questions at the hearing, Hyundai's corporate counsel Thomas
6 Vanderford explained the search for documents in response to plaintiff's RFP 20 was limited to
7 the records of the Hyundai legal department. He stated no effort was made to search beyond the
8 legal department, as this would have taken an extensive computer search.

9 23. Mr. Vanderford is not admitted to practice law in the State of Washington. He is
10 admitted *pro hac vice* in this case. When asked if he had read the *Washington States Physicians*
11 *Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993) (*Fisons*) decision, Mr.
12 Vanderford indicated "parts of it." In *Parks v. Hyundai Motor America, Inc.*, 258 Ga.App. 876,
13 575 S.E.2d 673 (Ga. Court of Appeals 2002), a case in which Mr. Vanderford represented
14 Hyundai at the trial court, Hyundai's response to discovery requests was found to be inadequate.
15 After the case was remanded by the appellate court, a motion to compel was granted and
16 Hyundai produced over 36 responsive OSIs. (Declaration of Rita Williams) The similarity of
17 circumstances of the *Parks* case, Mr. Vanderford's testimony and the inadequate production of
18 documents in this case, indicate a pattern of lack compliance with discovery obligations as
19 required under Washington law.

20 24. There is no legal basis for limiting a search for documents in response to a
21 discovery request to those documents available in the corporate legal department. This would be
22 the equivalent of limiting the response in *Smith v. Behr Process Corp.*, 113 Wn.App. 306, 54
23
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FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: DEFAULT JUDGMENT - 9

1 P.3d 665 (2002) to a search for chemical tests which were on record in the corporate legal office,
2 without disclosing that the search was so limited.

3 25. Additionally, the record is clear the legal department at Hyundai worked closely
4 with the Consumer Affairs Department with respect to customer complaints and claims,
5 including product liability claims. The vehicle owners' manual directed customers to call the
6 Consumer Affairs number. As discussed in more detail in Section III, in some instances, after
7 receiving the call, the Consumer Affairs Department referred the claim to the legal department,
8 which directed an investigation of the claim and/or provided direction to Consumer Affairs
9 regarding the claim. In cases included in the record, a form denial letter, which was clearly
10 developed by legal counsel, was sent to the customer.

11 26. Mr. Vanderford testified no record was maintained in the legal office of this
12 activity. As head of the products liability section, he was familiar with this process and
13 supervised attorneys involved in this process. A search limited to the corporate legal office,
14 which did not seek or disclose records from claims which originated with the Consumer Affairs
15 Department, even though many of the claims involved the legal department, was not a diligent
16 search.

17 27. Hyundai had the obligation not only to diligently and in good faith respond to
18 discovery efforts, but to maintain a document retrieval system that would enable the corporation
19 to respond to plaintiff's requests. Hyundai is a sophisticated multinational corporation,
20 experienced in litigation. A search of computer records for documents requested by plaintiff,
21 even if voluminous in nature, is standard operating practice of attorneys practicing in the
22 products liability field. In fact, Hyundai did not object to the request as burdensome. The false
23 answer to RFP 20 was without reasonable excuse or explanation.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: DEFAULT JUDGMENT - 10

1 28. As noted in paragraph 19 above, Hyundai acknowledges failing to produce
2 documents concerning the *Acevedo* claim. These documents had not been produced by the time
3 of the sanctions hearing. Mr. Vanderford explained this failure of production by stating he did
4 not personally handle the case, and although aware of it, did not recall the allegations included a
5 seat back claim. The *Acevedo* claim is a filed lawsuit which included allegations of collapse of
6 the driver's seat back, with injuries to the child seated behind the driver (O'Neil Decl., Exh. 2).
7 This case is highly relevant to plaintiff's claim.

8 29. Failure to produce the *Acevedo* claim is a discovery violation, conceded by
9 Hyundai. However, the significance of the failure of production goes beyond failure to produce
10 a responsive claim. The testimony of Mr. Vanderford that it was not produced because he did
11 not recall the seat back claim, indicates production of discovery by Hyundai, at least in part,
12 depended on the personal recollection of the attorney litigating the case. This is clearly not an
13 adequate document retrieval system. The court concludes failure to produce the *Acevedo* claim
14 casts doubt on whether all responsive documents have been produced.

15 30. Hyundai relied extensively during the hearing and in argument on a theory that an
16 agreement had been reached between counsel in which plaintiff abandoned the request for
17 disclosure of seatback failures prior to trial. Hyundai's argument is based upon correspondence
18 and the declaration of Mr. Austin. This argument does not explain the original responses, but
19 seeks to explain Hyundai's conduct after July of 2001.

20 31. It is common for attorneys to correspond and "meet and confer" regarding
21 discovery requests (Testimony of David Swartling). CR 26 (i) requires counsel to confer prior to
22 bringing motions to the court regarding discovery. Counsel in this case did confer and
23
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FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: DEFAULT JUDGMENT - 11

1 correspond regarding discovery issues. The parties disagree, however, as to whether there was
2 an agreement as argued by Hyundai.

3 32. In his letter of April 26 of 2001, Mr. O'Neil (O'Neil Declaration, Exh. 4) reiterated
4 the plaintiff's request for additional information on seat back OSIs (other similar incidents). The
5 letter states: "Request for Production No. 20 and 21 ask for documents relating to other
6 incidents where people have been injured by seat back collapse or by the airbag in a Hyundai
7 vehicle. Hyundai's response seeks to rewrite the request so that it applies only to people who
8 were injured in a manner identical to Mr. Magana. That is not Hyundai's prerogative, and the
9 request should be answered as written." *Id.*

10 33. Mr. Austin, in his Declaration, asserts that he responded to Mr. O'Neil's April 26,
11 2001 letter by letter dated July 11, 2001.

12 34. Mr. Austin states in his declaration (paragraph 20) that it was his "understanding"
13 that Mr. O'Neil was no longer pursuing documents relating to seatback failures in his letter. But
14 his declaration does not state that Mr. O'Neil and he had even discussed this "understanding", let
15 alone that Mr. O'Neil had agreed to it. Moreover, the very next paragraph (21) in his declaration
16 states that he had memorialized his "understanding" reached with Mr. O'Neil in his letter of July
17 11, 2001. This letter did not memorialize any such understanding; it is silent on whether any
18 agreement or understanding (that Mr. O'Neil was no longer seeking documents related to seat
19 back failures) was ever reached. Furthermore, Mr. O'Neil, in his declaration, flatly denied
20 having reached any such agreement or understanding to forego discovery of seatback OSIs.

21 35. Based upon this Court's review of all the available evidence, the Court finds
22 Hyundai's claim of an agreement to take the seat back OSI issue "off the table" is not persuasive.
23 The Court concludes there was no such agreement. Taking into account the false premises
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FINDINGS OF FACT AND CONCLUSIONS OF LAW
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1 created by the defendants' initial discovery responses, the Court finds there was no abandonment
2 by Plaintiff of the pursuit of discovery with respect to seat back failures at any time. The fact the
3 plaintiff focused on certain discovery issues does not indicate in an affirmative manner that the
4 plaintiff ever abandoned his request for obtaining evidence of other seat back failures. It would
5 be unreasonable, and not supported by the totality of the evidence, to conclude Plaintiff
6 abandoned the issue of seatback failure which was the central issue of the trial.

7 36. If truthful and complete answers had been provided by defendants, the OSI
8 materials that are now before the Court would have led to substantial additional questions and a
9 significant amount of additional discovery.

10 **III. The Seat Back Failure Reports Are Claims and Went to the Heart of Plaintiff's Case**

11 37. Although not argued at the conclusion of the hearing, Hyundai may be asserting the
12 OSI evidence of seat back failures which was not disclosed by Hyundai until late 2005 and early
13 2006 were not "claims." As noted above in paragraphs 22 - 23, Hyundai indicated the response
14 of "no claims" actually meant no attorney demand letters which were maintained in the records
15 of the Hyundai legal department. There is no support in the record that such a limited definition
16 of "claims" was a reasonable or good faith response to plaintiff's discovery requests.

17 38. Steve Johnson, Hyundai manager of engineering and design analysis, testified as
18 Hyundai's CR 30(b)(6) designee. Mr. Johnson testified as follows: A: "Let me define a claim.
19 That's if the customer sends in the additional information from the document request package,
20 that information is reviewed typically by an attorney... Q: At any rate, the attorneys take a look
21 at this data when somebody makes a claim for an injury? A: When they make a claim, yes."

22 Deposition of Steve Johnson, Exh. 3, at p. 34 -35.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
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1 39. David Swartling, witness for Hyundai, testified regarding his definition of a claim.
2 Mr. Swartling testified a claim occurs when a consumer or person is injured or has a problem,
3 and the person, either on his own behalf or through a lawyer, states the problem and makes a
4 demand, requests a remedy. (A verbatim transcript is not yet available, although the Court has
5 reviewed the video record.)

6 40. **Martinez Claim.** Exhibits 5 and 31 set forth the Martinez claim. This was a claim
7 involving a 1995 Accent, based on an accident which occurred in February of 1998. Exhibit 31
8 consists of 37 pages of material that were not provided in response to Request for Production No.
9 20. It includes a demand letter (50053246). These materials were forwarded to the legal
10 department (50053144). The Hyundai summary refers to receiving a response back from the
11 legal department, stating that this claim was to be handled in a specific manner (50053145).
12 According to Mr. Steve Johnson and Mr. Swartling this was, by any sense of the term, a claim.
13 The claim alleges that the seats failed (50053143), the car was a total loss (50053145). Mr.
14 Martinez had a passenger. The materials include photos of the failed seat (50053273). Clearly
15 this information, which was not disclosed from May of 2000 until January 6, 2006, was material
16 and significant to the issues in the case.

17 41. **McQuary Claim.** Exhibits 6 and 32 are the McQuary claim which had been made
18 to Hyundai Motor in March of 1998. Exhibit 32 consists of 21 pages of material. It includes
19 photos of the collapsed seat (50053281-91). The language "claim" is used throughout the
20 materials. Again, there is reference to the legal department (50053147). Quoting from this
21 exhibit: "Received response from legal on PIR (Preliminary Investigation Report) legal
22 department needs. Additional information from customer to complete evaluation" (50053147).
23 A PIR was performed in this case. *Id.* The PIR was defined by Mr. Johnson in his deposition (at
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FINDINGS OF FACT AND CONCLUSIONS OF LAW
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1 p. 34). It is a document that is sent out at the direction of an attorney to an investigator to
2 investigate a vehicle. Again this was clearly a claim. A remedy was requested by Mr. McQuary
3 and Hyundai legal department was involved.

4 42. Martinez and McQuary are just two of the claims involved; they are claims that
5 were wrongfully and willfully not provided in Hyundai's initial response of May 2000.

6 43. **Wagner Claim.** Further information that was not provided because Hyundai
7 willfully failed to supplement their initial responses to RFP 20, includes the Wagner claim (Exh.
8 36). Exhibit 36 consists of 8 pages including color photographs of seats (50048162). The
9 Hyundai legal department was involved; a PIR (preliminary investigative report) was performed
10 (50048158). The claimant indicates that both front seats reclined backwards (50048157). The
11 file includes a letter (50053170), a form of which is in Exhibit 8 to this hearing (50053300).
12 This letter is a form letter sent by Hyundai to claimants in claims involving the collapse of a
13 seatback. It states, "Thank you for your recent correspondence. We have thoroughly reviewed
14 your comments and indeed regret the circumstances you have experienced. Based upon
15 information provided in severe rear impacts, such as this one, seats are designed to provide ride-
16 down to the occupants. If seats were rigid, severe injuries could result during this accident. The
17 seats deform rearwards during the crash providing ride-down, as they were designed to do. We
18 apologize for any inconvenience this situation may have caused. We do need to advise you, this
19 is Hyundai's final decision in this matter. Should you have any concerns that you want to
20 discuss with us, please feel free to write or call our consumer assistance center. We have your
21 comments on file in our office and appreciate your taking the time to write to us." (50053170)
22 The legal department informed the Consumer Affairs of their decision regarding the claim
23 (50048158).

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
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1 44. Hyundai developed a form letter to respond to claims of seatback failure, as sent in
2 the Wagner claim. Various versions of this form letter appear in a number of the materials which
3 were provided to the Court. This Court finds it difficult to imagine the contents of any document
4 which would more directly relate to the issues in this case than this form letter, particularly with
5 respect to a failure to warn claim plaintiff may have added. Form letters are developed when
6 there are enough claims or requests that the same or similar language can be used in responding
7 to such requests. In fact, in one of the claims (Exh. 8, the claim of Penelope Trudeau), not only
8 did the customer receive a version of the form letter, she also received an article Automotive
9 Seat Design Concepts for Occupant Protection, authored by David Blaisdell, defendants'
10 identified expert in this case (50053301-11). This is relevant material that was available in
11 Hyundai's files and should have been produced.

12 45. With respect to the issue of whether these are "claims," the use of the specific
13 terminology is not necessary or determinative. However, it is noteworthy that in many of the
14 seat back OSI records the term "claim" is used by both the people in Hyundai consumer affairs
15 and the letters that are sent to the customers. The letters refer to such wording as, "we must deny
16 this claim" (see Exhs. 8, 5005330). The advice from the legal department, as noted in the
17 consumer affairs division, often refers to the denial -- it says "deny claim" Exh. 34 (50048156)
18 The claimant him or herself often uses the term "claim" as in, "I filed a claim." Exh. 9
19 (5053185).

20 46. Harper Claim. Exhibit 9, which involves a 1995 Accent, the Harper claim,
21 includes 55 pages of material. The materials include documentation that Hyundai told the
22 customer that the customer should retain the seat and that failing to do so could expose her to
23 claims for spoliation of evidence (50053187). It would be unreasonable to conclude that
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FINDINGS OF FACT AND CONCLUSIONS OF LAW
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1 someone in consumer affairs would have advised the claimant of a concern about spoliation of
2 evidence without the advice of an attorney. Again the letter says "must deny this claim." *Id.*
3 This customer, Harper, was very concerned about this claim. She attached a number of
4 additional materials. In fact, there was a supporting document from a fireman who observed the
5 location of people in the vehicle and the failure of the seat (50053193), a circumstance strikingly
6 similar to this case. Again, in light of the facts of this case, these documents went to the heart of
7 the plaintiff's claim.

8 47. The foregoing are but a few examples of discoverable material which was not
9 provided. There were many others. Each of the cases cited above in paragraphs 38 to 47 involve
10 a Hyundai Accent for the model years 1995-1999. HMA specifically and falsely denied there
11 were any seat back failure claims for these models.

12 48. **Urice Claim.** The Urice claim, at Exhibit 34, is a 29-page document which
13 involved a Hyundai Elantra, which Hyundai eventually conceded had a similar seat to the
14 Accent. This claim was not disclosed in Mr. Austin's October 25th of 2005 letter, which was
15 intended by its terms to include both the Accent and the Elantra. The Urice claim includes the
16 following information: The claim that the driver's seat failed causing injury not only to the
17 driver, but her son who was seated in the back seat (50048155). The passenger seat also failed,
18 according to her information. *Id.* Again the legal department was involved, a PIR was ordered
19 and information was received on June 22nd of 2000, received from LCAAR, which is the
20 acronym referring to the legal department, stating "deny claim" (50048156). It states that the
21 customer should be told that the seats were designed to perform that way. *Id.*

22 49. Since the Urice case involved both a passenger and a person in the back seat, these
23 claims are highly material to the issues in the case. The legal department clearly knew of these
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FINDINGS OF FACT AND CONCLUSIONS OF LAW
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1 claims. The legal department was actively involved in the claims. The legal department knew
2 they were claims by any definition including that of Hyundai's CR 30(b)(6) managing agent,
3 Steven Johnson. The word "claims" appears frequently in the records. The directions from the
4 legal department were, quote, "deny claim." A letter was sent to the customer which did, in fact,
5 deny the claim (50053172). Hyundai knew the claim had been made regarding the collapse of
6 seat backs in Accent vehicles and Elantra vehicles; and as ultimately came out, in many other
7 vehicles as well.

8 50. With respect to the question of whether there were willful violations, the Court
9 looked to the definition in *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 54 P.3d 665 (2002).
10 The definition is "without reasonable excuse." The Court is also cognizant of the difficult role of
11 the Court in this matter. The *Fisons* case comments: "We recognize that the issue of imposition
12 of sanctions upon attorneys is a difficult and disagreeable task for a trial judge. It is a necessary
13 one if our system is to remain accessible and responsible."

14 51. There is a clear record in this case that establishes that Hyundai's discovery
15 violations were made without reasonable excuse.

16 52. Hyundai and its legal department knew that there had been customer complaints
17 and claims of incidents of seat back failure. Defendant knew that these happened in the Accent
18 and Elantra, as well as other vehicles. Some of these complaints had been litigated. Most
19 involved personal injuries. It was the duty of Hyundai to establish an adequate system to
20 respond to discovery requests. Hyundai failed to establish such a system and failed to respond
21 accurately to discovery requests. Hyundai unreasonably limited its search, and failed to
22 supplement those answers that were incorrect.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
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1 53. The Court finds that the violations were without reasonable excuse and were
2 willful. In fact, because these violations involved directly false misrepresentations, these
3 violations were egregious.

4 **IV. Prejudice to Plaintiff and the Administration of Justice Is Manifest**

5 54. All parties acknowledged agreement with the principles stated by Justice Robert
6 Utter in his Declaration in Support of Plaintiff's Motion for Imposition of Sanctions:

7 Discovery abuse strikes at the heart of the judicial system. When a party wrongfully fails
8 to produce documents sought in discovery, that party interferes with the judicial system's
9 ability to engage in the truth-seeking process. Discovery abuse unfairly hampers the
10 presentation of the other party's claim, violates the jury's role and prevents an impartial
11 decision on the merits. Public institutions are set up to protect and safeguard the public.
12 They cannot tolerate fraud because it is inconsistent with the good order of society and
13 unbalances the truth seeking process. Wrongdoing such as this is not just directed against
14 a single litigant, but undermines all public institutions.

15 Utter Decl., at p.2.

16 55. Reasonable opportunity to conduct discovery is a fundamental part of due process
17 of law. If disclosed in the 2000 to 2001 time frame, the information regarding other seat back
18 failures in Hyundai vehicles would have been investigated and further evidence would have been
19 developed by plaintiff. It would have been shared with, analyzed and discussed by plaintiff's
20 experts, and used in cross-examination of defendants' experts. Plaintiff would have had the
21 opportunity to contact witnesses and to preserve evidence and would have done so. Such
22 evidence included the seats that would have been preserved both by witnesses (such as Ms. Nikki
23 Holcomb who kept her seat until 2001 or later, but lost it thereafter). Customers were even
24 directed by Hyundai to retain their seat in some of these cases. The plaintiff would most likely
have added a failure-to-warn cause of action to his complaint in light of the evidence that
Hyundai had knowledge of other seat back failures. Both experts Larry Baron (for plaintiff) and
David Swartling (for defendant) testified to the amount of work it takes to investigate and

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1 prepare OSI evidence for trial. They testified that, in general, OSI evidence strengthens the
2 plaintiff's case and undermines the defense's case. It is relevant on issues of notice to Hyundai
3 of a defect, the existence of the defect itself, and causation.

4 56. Hyundai attorney Thomas Bullion indicated the critical importance of evidence of
5 other similar incidents to a plaintiff's case in closing argument in another case:

6 This is a real important point, I think in this case. He's not just saying that this -
7 Ms. Brewster's Hyundai was defective, he's saying that every one of these
8 200,000 Hyundai Accents out there that have this same design are defective. But
9 did he bring you a single - did Mr. Russell, did Mr. Syson bring you a single
10 accident where somebody else has claimed a defect in this seat? Not one. If there
11 was anything out there, if there was a problem with this design, with the design,
12 this is elementary in these lawsuits, people bring in other claims where people
13 have claimed they are defective, and they say, see here, there is a problem with
14 the design. But he didn't do that, he can't. There is not any others because this is
15 such an incredibly severe collision.

16 Closing argument of Thomas Bullion III in *Brewster v. Hyundai*. Exh. 49.

17 57. The issues in this case not only concerned the failure of the passenger seat back and
18 restraint system, but also who was seated where in the vehicle. Plaintiff's case relies upon the
19 theory that plaintiff was seated in the front passenger seat, which is disputed by defendant
20 Hyundai. In addressing these issues, the parties called occupant kinematics experts. These
21 experts relied upon all information that was available, including information as to injuries to
22 plaintiff and passenger Angela Smith.

23 58. Information that is now disclosed in the exhibits for the sanctions hearing includes
24 information regarding injuries to passengers that would have been relevant to this issue.
Significantly, this information bears directly upon the occupant kinematics issue, which is
essential to the plaintiff's case. Information regarding injuries directly relates to expert opinions
in the case.

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1 59. The product liability issue is central to the case and has been addressed earlier in
2 terms of seat back failures. Information now disclosed is highly relevant to this issue.

3 60. This Court has determined plaintiff is severely prejudiced in going into a second
4 trial. All agree that it is very difficult if not impossible to adequately investigate and develop the
5 OSI information at this late date. Mr. Baron and Mr. Swartling both so testified. A significant
6 time for follow-up discovery, including against Hyundai, would have been necessary. Even if
7 this time were now available, evidence has been lost and much of the information is stale.

8 61. As noted by Judge Foscoe in the transcript of decision in *Smith v. Behr Process*
9 *Corp.*, plaintiff has been prejudiced in settlement negotiations. The materials now disclosed
10 strengthen plaintiff's case and weaken Hyundai's defenses, significant factors in settlement.
11 Resolution of cases through settlement is a significant aspect of the court system. O'Neil Decl.,
12 Ex 22 at p. 7 - 8.

13 62. These discovery violations have a significant negative impact on the administration
14 of justice. It would be the duty of the Court to make a vigorous and thorough review of OSI
15 evidence in order to consider how it is admitted in trial, if at all, and how it can be referred to by
16 expert witnesses. Parties would have the opportunity to discuss this evidence with their experts
17 and develop information to argue these issues before the Court. The Court would do its best with
18 all of the available information to determine whether or not this information would be properly
19 before the jury. It is virtually impossible for the Court to conduct that type of vigorous inquiry
20 with respect to any incidents that now are so old that witnesses cannot be contacted, evidence
21 cannot be obtained, and plaintiff has not had the opportunity to investigate these OSIs.

22 63. There has been substantial prejudice to the plaintiff in the failure to disclose this
23 information as earlier requested.

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1 64. The Court concludes that the observations of Judge Foscoe in *Smith v. Behr*
2 *Process Corp.* are applicable here:

3 "I conclude that the discovery violations complained of suppressed evidence that was
4 relevant because it goes to the heart of plaintiff's claims and it supports them. It's
5 relevant in that it goes to the heart of defenses raised by Behr because it undermines
6 them. The discovery violations here prevented the plaintiffs from doing what the law
7 allows them to do and that's to follow up on leads from developed facts. They were off
8 in one direction when they should have been working in another, and the only reason they
9 didn't know - the only reasons is is that they didn't know the other existed."

10 113 Wn.App. at 325.

11 **V. Sanctions**

12 65. When the Court finds discovery violations, it is necessary that the Court impose
13 appropriate sanctions. It would be error for the Court to not impose sanctions. It would be error
14 for the Court to impose inadequate sanctions. The issue of seat back failure is at the absolute
15 center of this case and the heart of plaintiff's claims.

16 66. It is the function of the Court to thoroughly examine all of the possible sanctions
17 that could be imposed and to determine what is appropriate. Prior to argument, the court
18 specifically requested counsel address the issue of what sanctions would be appropriate. A chart
19 was provided by plaintiffs (Exh. 48), setting forth a range of possible sanctions, which was
20 helpful in examination of this issue. The only sanction suggested by defendant was a
21 continuance. The purpose of sanctions is to deter, punish, compensate, educate and insure that
22 the wrongdoer does not profit from the wrong.

23 67. **Monetary Fine.** A monetary fine is a sanction considered by this Court. It would
24 in some sense address the costs that have been incurred in connection with these proceedings
regarding discovery violations and could serve the purposes of punishment and the other
purposes of sanctions. It is very difficult to know what monetary amount would be appropriate

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1 in such case. Hyundai is a multi-billion dollar corporation. This is documented in Exhibit 23 to
2 Peter O'Neil's declaration.

3 68. A monetary sanction would not in any way address the prejudice to the plaintiff or
4 to the judicial system. Much of the OSI seat back failure evidence is irretrievable at this point,
5 and there is no way that it can be adequately addressed by either the experts or by the Court or by
6 a jury if it were to review it. A monetary fine would do nothing to serve the search for truth and
7 justice, which is the purpose of this Court. The Court rejects this as an adequate sanction.

8 69. **Continuance.** The second possible sanction, which was the sole sanction proposed
9 by defendants, is a continuance. Sanctions for discovery violations are not intended to reward
10 the party who has committed the violations. Defendant Hyundai has sought a continuance in this
11 case previously, which has been denied by the Court. The motion for a continuance would not
12 remedy the staleness of the evidence in question; it would not remedy the difficulty of the Court
13 in addressing these issues; it would involve further substantial costs to the parties in terms of
14 analyzing the evidence with respect to their experts; it would involve substantial duplication of
15 effort which had previously had been done in preparation and re-preparation for this trial. A
16 continuance would only exacerbate that situation. It would not benefit the plaintiff, it would
17 benefit the defendant. Therefore, a continuance is not an appropriate remedy.

18 70. **Other Sanctions Short of Default.** There are cases in which a number of other
19 sanctions have been appropriate to the particular facts of the case. The Court ultimately
20 determined that neither party was suggesting that other remedies would be particularly
21 appropriate or workable in this case. The striking of counterclaims is a remedy provided in CR
22 37(b). There are no counterclaims in this case and many issues, such as the allegation of
23 contributory fault by plaintiff, were already decided and affirmed by the Court of Appeals. The
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1 Court has analyzed whether it might be appropriate to admit into evidence the OSIs in some
2 manner or to admit some of them. Proceeding to trial as scheduled would be highly prejudiced
3 by the admission of some or all of the evidence which has now been disclosed. It would be
4 difficult to discuss this evidence. Plaintiff has not had the time to develop it; it cannot be
5 developed as to many of the facts and circumstances involved in OSIs of seat back failures.
6 Hyundai has asserted the defendant should have the opportunity to challenge those OSIs, to
7 conduct discovery and, at the very least, to examine the facts of those OSIs, and to address this
8 newly disclosed information. Ultimately both plaintiffs and defendants agreed that admitting
9 OSI evidence without examination or challenge would not be a workable or appropriate remedy
10 in this case. Defense counsel Mr. King admitted in closing argument that taking the facts of the
11 OSI seat back failures as established, one remedy referred to in CR 37, would be the same as or
12 tantamount to ordering default judgment. The Court accepts this argument and agrees. It is
13 therefore not an adequate or workable sanction.

14 71. **Default Judgment.** Following trial of this matter, the jury found plaintiff's
15 damages to be \$8,064,055.00. In determining which sanction to apply the Court took into
16 account that a default judgment would result in a reinstatement of this prior substantial verdict.
17 The remedy of default is not dependent upon the amount of potential verdict or in this case,
18 actual damages verdict. However, it is a factor the Court does not set aside or disregard in
19 considering what sanction is appropriate.

20 72. In *Smith v. Behr, supra*, the court affirmed the default judgment sanction, quoting
21 from the trial court:

22 When you consider the willfulness of the violation, it's the only appropriate exercise of
23 discretion when you consider the centrality of the suppressed information, when you
24 consider its interim nature, and that to follow up on it would require time, time that could
have been allowed had it been disclosed when it should have been.

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1 Default is the only viable exercise of discretion when you consider the multiple, again,
2 serious prejudice that this has caused to the plaintiffs, and when you consider the impacts
3 of the violations on this Trial Court, and on the administration of Justice.

4 73. This Court reaches the same conclusion. The plaintiff and the trial process is so
5 prejudiced that the only appropriate remedy, having carefully considered all of the lesser
6 sanctions, is to grant the relief which is requested by the plaintiffs, and that is to enter a default
7 judgment against Hyundai.

8 74. **Attorneys Fees and Costs.** The Court will award to the Plaintiff the fees and costs
9 occasioned by the discovery violations herein in an amount to be determined at a later hearing.
10 The plaintiff's counsel shall prepare a petition for fees and costs for the court to review in setting
11 the amount of such award.

11 CONCLUSIONS OF LAW

12 1. In determining which discovery sanction to apply to this case the Court relied
13 upon CR 37 and CR 26.

14 CR 37(d) provides:

15 (d) Failure of Party to Attend at Own Deposition or Serve Answers to
16 Interrogatories or Respond to Request for Production or Inspection. If a party or
17 an officer, director, or managing agent of a party or a person designated under
18 rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the
19 officer who is to take his or her deposition, after being served with a proper
20 notice, or (2) to serve answers or objections to interrogatories submitted under
21 rule 33, after proper service of the interrogatories, or (3) to serve a written
22 response to a request for production of documents or inspection submitted under
23 rule 34, after proper service of the request, the court in which the action is
24 pending on motion may make such orders in regard to the failure as are just, and
among others it may take any action authorized under sections (A), (B), and (C)
of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the
court shall require the party failing to act or the attorney advising the party or both
to pay the reasonable expenses, including attorney fees, caused by the failure,
unless the court finds that the failure was substantially justified or that other
circumstances make an award of expenses unjust.

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1 The failure to act described in this subsection may not be excused on the ground
2 that the discovery sought is objectionable unless the party failing to act has
3 applied for a protective order as provided by rule 26(c). For purposes of this
4 section, an evasive or misleading answer is to be treated as a failure to answer.

5 2. CR 37(b)(2) provides for the following sanctions at the discretion of the trial
6 judge:

7 (A) An order that the matters regarding which the order was made or any other
8 designated fact shall be taken to be established for the purposes of the action in
9 accordance with the claim of the party obtaining the order;

10 (B) An order refusing to allow the disobedient party to support or oppose
11 designated claims or defenses, or prohibiting him from introducing designated
12 matters in evidence;

13 (C) An order striking out pleadings or parts thereof, or staying further
14 proceedings until the order is obeyed, or dismissing the action or proceedings or
15 any part thereof, or rendering the judgment by default against the disobedient
16 party;

17 (D) In lieu of any of the foregoing orders or in addition thereto, an order treating
18 as contempt of court the failure to obey any orders except an order to submit to
19 physical or mental examination.

20 3. The Court relied upon the following cases, including the holdings explicitly set forth
21 below, in its ruling on discovery violations and appropriate sanctions:

22 A. *Washington States Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d
23 299, 343-345, 858 P.2d 1054 (1993) (*Fisons*):

24 (1) [A] motion to compel compliance with the rules is not a prerequisite to a
sanctions motion. *Fisons* at 345.

(2) The requirement of CR 26(g) to make "reasonable inquiry" in response to
a discovery request is an "objective standard," not based solely upon
subjective belief or good faith. *Fisons* at 343.

(3) In determining whether an attorney has complied with the rule, the court
should consider all of the surrounding circumstances, the importance of
the evidence to its proponent, and the ability of the opposing party to
formulate a response or to comply with the request. *Id.*

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(4) Discovery responses and objections must not be interposed to cause "unnecessary delay" or increase the costs of litigation. *Id.*

(5) "[I]ntent need not be shown before sanctions are imposed." *Id.* at 345.

(6) "The sanction should insure that the wrongdoer does not profit from the wrong...The purpose of sanctions orders are to deter, to punish, to compensate and to educate." *Id.* at 356.

B. *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 324, 325 54 P.3d 665 (2002).

(1) "When the trial court selects one of the "harsher remedies" under CR 37(b), it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed, and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial." *Id.* at 325.

(2) "[A]s a default judgment for discovery violations raises due process concerns, the court must first find willfulness and substantial prejudice." *Id.*

(3) It is a party's "responsibility to set up a workable discovery system." *Id.* at 328.

(4) "Due process is satisfied, however, if, before entering a default judgment or dismissing a claim or defense, the trial court concludes that there was a willful or deliberate refusal to obey a discovery order, which refusal substantially prejudices the opponent's ability to prepare for trial." *Id.* at 330.

C. *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 82 P.3d 1223 (2004).

(1) A violation of the discovery rules is willful if it is done without reasonable excuse.

D. *Gammon v. Clark Equipment Co.*, 38 Wn. App. 274, 686 P.2d 1102 (1984)

(1) A "de minimis sanction in a case such as this would plainly undermine the purpose of discovery." *Id.* at 282.

4. The Court concludes that Hyundai and its counsel committed numerous discovery violations, which were willful, deliberate, direct and egregious. CR 37, CR 26.

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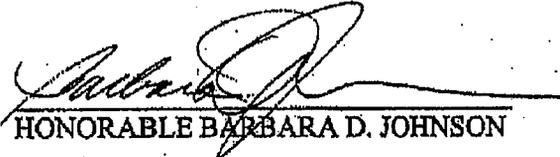
1. 5. The Court concludes that defendant's failure to produce information regarding
2 the *Acevedo* complaint was willful and violated this Court's order of November 18, 2005, and
3 raises concerns about whether all responsive documents have been produced.

4 6. The Court concludes that these discovery violations caused substantial prejudice
5 to Plaintiff and to the judicial system.

6 7. The Court concludes based upon the Findings of Fact set forth above, and after
7 considering all of the lesser sanctions described in CR 37, that only the entry of default is an
8 appropriate sanction; that no other sanction is both workable and serves the purposes and goals
9 of sanctions being imposed.

10 8. The Motion for Default Judgment is GRANTED; judgment for Plaintiff and
11 against the Hyundai defendants will be entered.

12 DONE IN OPEN COURT this 15th day of February, 2006.

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15 HONORABLE BARBARA D. JOHNSON
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