

Nº. 72946-2-1  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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NANCY LOE  
Appellant/Cross-Respondent,

v.

BENSON VILLAGE ASSOCIATES, a Washington Corporation;  
CAPINITO & GOODWIN dba BENSON VILLAGE APARTMENTS I, a  
Washington Partnership; OLYNPIC MANAGEMENT COMPANY, a  
Washington Corporation; JOSEPH CARPINITO and JANE DOE  
CARPINITO, individually and as a marital community; and WILLIAM  
CARPINITO and JANE DOE CARPINITO, individually and as a marital  
community,

Respondents/Cross-Appellants.

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OPENING BRIEF OF APPELLANT

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Appeal from the Superior Court of King County,  
Cause No. 13-2-34157-3  
The Honorable Samuel, S. Chung, Presiding Judge

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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2015 AUG 31 PM 4:45

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A. ASSIGNMENT OF ERROR

The trial court abused its discretion in awarding monetary sanctions instead of denying Defendants' motion for a trial de novo.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court abuse its discretion in awarding monetary sanctions instead of denying Defendants' motion for a trial de novo where monetary sanctions were insufficient to support the purpose of the sanction?

C. STATEMENT OF THE CASE

**Factual and Procedural Background**

On November 28, 2010, around 2:30 p.m., Ms. Loe walked out of the office of the Benson Village Apartments and tripped on one of three small pumpkins placed in the walkway of the common area outside the office. RP 274, 313-314, 581, 849-851. Ms. Loe fell onto her right side and suffered a broken foot. RP 800-801, 803, 870. Ms. Loe was unable to get up after the fall and called for help. RP 581. Alena Enloe, an employee of Benson Village, and another tenant heard Ms. Loe and came outside to help her up. RP 313-314, 581-582, 855-856. Ms. Enloe and the other tenant helped Ms. Loe into a chair in the office where Ms. Loe remained and rested for roughly 30 minutes before limping to her apartment and applying ice to her foot. RP 366, 581-583.

On October 1, 2013, Ms. Loe filed the complaint against Defendants initiating this action. CP 1-5. Ms. Loe alleged that her injury

was caused by Defendants' negligence in placing the pumpkins in a common walkway of the apartments and thereby failed to maintain the premises of the apartments by keeping the common areas clean and safe. CP 1-5.

The case then proceeded to mandatory arbitration. CP 12.

On February 11, 2014, Plaintiff served Defendant Benson Village Associates with Plaintiff's First Requests for Production. CP 11. Plaintiff's Request for Production 5 states, "Please provide copies of any documents describing or referring to the system or routine of inspecting and/or maintaining the floors and/or walking surfaces of the area where this incident occurred." CP 11. Plaintiff's Request for Production 9 states, "Please produce any policies or procedures which refer to slip(s), fall(s), trip(s) and/or any other sort of injury of tenants and/or property invitees." CP 11-12.

On March 24, 2014, Defendant's provided Plaintiff with Defendant's Responses to Plaintiff's First Request for Production to Defendant Benson Village Associates. CP 12. Defendant's answer to Plaintiff's Request for Production 5 was, "No. This is a general walkway area. The area is inspected daily by the Office and Maintenance staff prior to the office opening and a few times throughout the day." CP 12.

Defendant's answer to Request for Production 9 was simply, "None." CP 12.

On April 1, 2014, Plaintiff requested by letter for Defendants to supplement Request for Production No. 5, indicating that Defendants' answer "There is none" was not sufficient and must be supplemented. CP 12.

On April 4, 2014, Defendants again claimed that there were no documents responsive to Plaintiff's Request for Production No. 5, stating, "I am puzzled why you believe our answer 'there is none' is not sufficient. Are you aware of there being documents regarding inspection and/or maintenance of the floors and/or walking surfaces for the area where the incident occurred that I am unaware of?" CP 12.

On August 5, 2014, all parties engaged in arbitration with Ms. Elizabeth Hanley. CP 12. During arbitration, Plaintiff's counsel called Benson Village's property manager, Ms. Tammy Franks, as a witness. CP 12. For the first time during Ms. Franks' trial testimony, and in a complete surprise to Plaintiff's counsel, the existence of written policies and procedures about reporting accidents and about maintaining common areas and walkways as safe spaces were identified. CP 12. Specifically, Ms. Franks testified that there were no policies about pumpkins but inferred there were policies about maintaining common areas and walkways. CP

12. This testimony was withheld from Plaintiff and the withholding of this testimony prejudiced Plaintiff in preparing for the arbitration. CP 12-13.

Despite the Defendants' improper and prejudicial discovery conduct, Plaintiff received a favorable arbitration award on August 19, 2014. CP 13.

On August 22, 2014, Defendants filed a Request for Trial De Novo and for Clerk to Seal the Arbitration Award. CP 13. This request for Trial De Novo resulted in an expedited trial date and a limited discovery window. CP 13. After the request for a trial de novo was filed, based on Ms. Franks' testimony, Plaintiff requested the Defendants' policies under Plaintiff's First Request for Production No. 5. CP 13.

On September 8, 2014, Defendant's provided Supplemental Responses to Plaintiff's Request for Production. CP 13. Defendants supplemented their answer to Plaintiff's Requests for Production Nos. 5 and 9 with copies of pages from Olympic Management Company's Operations Manual detailing the policies and procedures used by Olympic Management Co. with regards to keeping the grounds of the property safe and free from debris. CP 13. This policy was kept at the desk of Benson Village Apartments manger Tammy Franks. CP 13. This manual was used daily in the management of Benson Village Apartments. CP 13. Ms.

Franks met with Olympic Management Co. on a monthly basis to discuss how the Benson Village Apartments were managed. CP 13.

On September 11, 2014, Plaintiff's counsel served Defendant Benson Village Associates with Plaintiff's Second Request for Production and Interrogatories. CP 13. Plaintiff's Request for Production No. 3 states, "Please produce a complete copy of the preventative maintenance program developed and maintained by the maintenance supervisor from the time period November 2005 to November 2011." CP 13-14. Plaintiff's Request for Production No. 4 states, "Please produce the entire Operations Manual for Olympic Management Company, which was referenced in Defendants' Answers to Plaintiff's First Request for Production No. 5." CP 14.

On October 20, 2014, Defendant provided Plaintiff with Defendant's Responses to Plaintiff's Second Request for Production and Interrogatories to Defendant Benson Village Associates. CP 14. Defendant provided over 200 pages responsive to Request for Production No. 3 and over 400 pages responsive to Request for Production No. 4. CP 14.

On November 12, 2014, Plaintiff moved for sanctions to be imposed on Defendants for defense counsel's violation of CR 26(g). CP 10-20. Plaintiff argued that the proper sanction for Defendants' failure to

disclose the operations manual was denial of Defendants' motion for trial de novo, or, alternatively, awarding Plaintiff fees and costs for the arbitration proceedings. CP 16-19.

On December 9, 2014, Plaintiff's motion for discovery sanctions was granted. CP 259-261. The trial court found that

the subject of the Plaintiff's discovery and Request for Production was readily available to the Defendants. The attorney certification to the responses to interrogatories and requests for production was not made after reasonable inquiry and the initial responses were not consistent with the letter, spirit, and purpose of the rules...Defendants violated discovery rules by failing to timely and completely produce responsive documents to Plaintiffs' [sic] Request for Productions.

CP 260.

The trial court chose to sanction the Defendants by requiring the Defendants to pay Plaintiff's reasonable attorney's fees and costs for the arbitration, the total cost for the arbitration proceedings, the total amount of the arbitrator's fees and costs, and Plaintiff's attorney's fees and costs associated with bringing the motion for sanctions. CP 260-261. The trial court ultimately imposed sanctions in the amount of \$3,495.30. CP 377.

Defendants were granted a trial de novo and the jury returned a verdict finding defendants not liable for Ms. Loe's injuries. CP 304-307.

Ms. Loe filed her Notice of Appeal on January 9, 2015. CP 333-339.

D. ARGUMENT

**The trial court abused its discretion in choosing to award monetary sanctions only instead of denying Defendants' motion for a trial de novo where monetary sanctions were insufficient to support the purpose of the sanction.**

a. *Standard of review.*

A trial court's decisions on (1) whether sanctions for discovery violations are warranted and, (2) if sanctions are warranted, the nature and amount of such sanctions, are reviewed for abuse of discretion. *Idahosa v. King County*, 113 Wn. App. 930, 939, 55 P.3d 657 (2002) *review denied* 149 Wn.2d 1011, 69 P.3d 874 (2003), *citing Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 355, 858 P.2d 1054 (1993).

A trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds." *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002). A court's decision is manifestly unreasonable

if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*Id.*, 110 Wn. App. at 99, 38 P.3d 1040.

- b. *The proper sanction for Defendants' failure to disclose Olympic Management Company's Operations manual was denial of Defendant's Motion for Trial De Novo. Sanctioning an insurance company \$3500 does not serve the purposes of imposing discovery sanctions.*

The purpose of imposing discovery sanctions generally is to deter, to punish, to compensate, and to ensure that the wrongdoer does not profit from the wrong. *Fisons*, 122 Wn.2d at 355-356, 858 P.2d 1054. The trial court also has an interest in effectively managing its caseload, minimizing backlog, and conserving scarce judicial resources that justify the imposition of appropriate sanctions. *See Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 129, 896 P.2d 66 (1995), *review denied* 128 Wn.2d 1008, 910 P.2d 482 (1996).

A discovery sanction should be sufficient to further the goals of discovery and insure that there is no profit from the violation. *Washington Motorsports Ltd. Partnership v. Spokane Raceway Park, Inc.* 168 Wn.App. 710, 715, 282 P.3d 1107, (2012). How to sanction a person for a discovery violation is left to the discretion of the trial judge, who is to consider the least severe sanction necessary to support the purpose of the sanction. *Washington Motorsports Ltd. Partnership*, 168 Wn. App. at 715, 282 P.3d 1107.

A showing of intent is not required before sanctions may be imposed for discovery violations. *Carlson v. Lake Chelan Community*

*Hosp.*, 116 Wn. App. 718, 739, 75 P.3d 533 (2003). Even an inadvertent failure to disclose requested or required discovery information is enough to impose sanctions if there is a violation of the rule without a reasonable excuse. *Carlson*, 116 Wn. App. at 739, 75 P.3d 533. A motion to compel compliance with discovery rules is not a prerequisite to a sanctions motion. *Carlson*, 116 Wn. App. at 738, 75 P.3d 533.

When imposing a discovery sanction, the court should consider the wrongdoer's intent and whether the responding party failed to mitigate its damages. *Washington Motorsports Ltd. Partnership*, 168 Wn.App. at 715, 282 P.3d 1107.

Denying Defendants' Request for Trial De Novo was the appropriate sanction in this case. Defendants' failure to disclose Olympic Management's Operations Manual can be considered nothing but intentional. Plaintiff sued the Defendants for negligence in failing to maintain safe walking areas in its property. Evidence that Defendants failed to follow their own policies and procedures as contained in their own Operations Manual would have significantly strengthened Plaintiff's claims at arbitration. It is obvious that the Defendants' intent was to delay disclosing the Operations Manual in the hopes of obtaining a favorable arbitration award. It was only after the award was entered and Defendants had moved for a trial de novo that Defendants finally disclosed their

Operations Manual. Defendants obviously intentionally failed to disclose their Operations Manual and only did so after arbitrating in bad faith and receiving an unsatisfactory arbitration award. Even if the failure to disclose the Operations Manual was not intentional, there is no reasonable excuse for even the inadvertent failure by Defendants to disclose the manual.

Denial of Defendants' Request for trial De Novo was the appropriate discovery sanction in this case. Ordering an insurance company to pay \$3500 does not "deter, punish, or ensure that the wrongdoer does not profit from the wrong." An insurance company will see such a paltry sanction as a cost of doing business and will conclude that it can violate CR 26 with impunity. Ultimately, Defendants were able to avoid liability at trial. The Defendants should not have been permitted to profit from their discovery violation and should not have been permitted to add to the trial court's caseload by obtaining a trial after engaging in arbitration in bad faith.

The trial court abused its discretion in ordering \$3500 in sanctions for Defendants' discovery violations because such a de minimis sanction was "outside the range of acceptable choices, given the facts and the applicable legal standard." The Defendants' insurance company will not

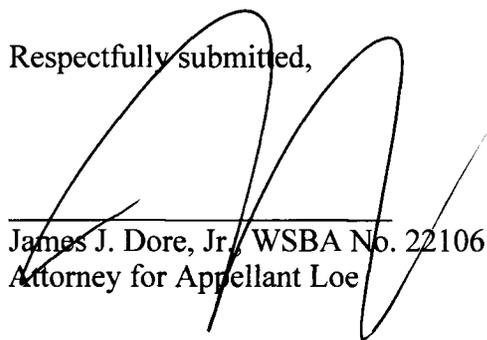
be deterred or punished in the least by such insignificant sanctions and ultimately did profit from its violation of the rules of discovery.

E. CONCLUSION

For the reasons stated above, this court should vacate the jury verdict in this case, vacate the trial court's order imposing sanctions, remand for imposition of the sanction of denial of Defendants' motion for trial de novo, and reinstatement of the arbitration award. No lesser sanction for Defendants' plain and blatant disregard for the rules of discovery will serve the purposes of imposing the sanction under the facts of this case. The least severe sanction that will support the purposes of deterring, punishing, and ensuring that Defendants' insurance company does not profit from its intentional discovery violation is denial of its motion for a trial de novo.

DATED this 31st day of August, 2015.

Respectfully submitted,



James J. Dore, Jr., WSBA No. 22106  
Attorney for Appellant Loe

**DECLARATION OF SERVICE**

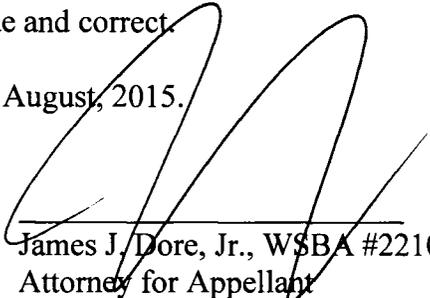
I declare that I served the foregoing MOTION TO EXTEND TIME TO FILE OPENING BRIEF and VERBATIM REPORT OF PROCEEDINGS on the attorneys below:

Marvin Lee  
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- Via Hand Delivery
- Via ABC Legal Messenger, hand delivered
- Via Email
- Via Fax
- Via U.S. Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed in this 31<sup>ST</sup> day of August, 2015.

  
\_\_\_\_\_  
James J. Dore, Jr., WSBA #22106  
Attorney for Appellant