IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JADA AMY, individually and as Guardian ad litem for and on behalf of I.O.A., a minor, D.M.A., a minor, and V.M.G., a minor, Respondent, v. KMART OF WASHINGTON LLC, d/b/a KMART STORE #3413, a Washington corporation, Appellant.	)	No. 62312-5-I (Consolidated with No. 62511-0-I) DIVISION ONE PUBLISHED IN PART FILED: December 28, 2009

Cox, J. — Does a court have authority to hear a motion to compel discovery or a motion for sanctions either in the absence of a CR 26(i) certification or where the certification is allegedly defective? We hold that a court has authority to hear such motions, subject to the exercise of its sound discretion. Because the trial court in this case properly exercised its discretion both to hear the motions and to impose sanctions, we affirm the orders imposing sanctions. However, we reverse the court's decision to grant a new trial.

The facts are not in substantial dispute. In February 2004, Jada Amy slipped and fell on her right side in a puddle of liquids in a women's restroom

located in a Kmart of Washington, LLC (Kmart) store. Amy did not report any pain to the Kmart assistant manager who responded to the incident immediately following her fall.

Two days after her fall Amy visited an emergency room complaining of moderate pain in her back, neck, right hip, and right arm. She received further medical treatment over the course of the next two years.

In February 2007, Amy commenced this personal injury action against Kmart. In March 2007, Amy propounded interrogatories to Kmart, including Interrogatory 30, requesting information regarding changes to the bathroom following the accident. In its responses in June and August 2007, Kmart indicated it would provide information once located. In June 2008, Kmart first supplied information indicating that the scene of the accident was remodeled sometime in 2004. At the time of this response, trial had been scheduled for August 11, 2008 since February 2007.

On July 19, 2008, Amy moved to compel and to supplement discovery. On July, 29, 2008, Amy moved for sanctions. The trial court granted both motions and imposed $10,000 in discovery sanctions against Kmart for its inexcusably late discovery responses about the bathroom remodel. Thereafter, the court also entered its order together with its findings and conclusions awarding reasonable attorney fees and costs totaling $25,627.44 in addition to the previous award of $10,000 in sanctions. Thus, discovery violation sanctions totaled $35,627.44.

At trial, the jury awarded Amy damages of $5,217.24. She moved for a new trial, claiming the damages were inadequate. The trial court granted the motion.

Kmart appeals.

DISCOVERY SANCTIONS

Kmart argues that the trial court erred by sanctioning its conduct. Its arguments are not meritorious.

Authority to Hear Discovery Motions

Kmart first argues that the trial court did not have authority to hear Amy's motion for sanctions because she failed to comply strictly with CR 26(i). We hold that a court has authority to determine whether it shall hear a motion for sanctions notwithstanding allegedly deficient compliance with a CR 26(i) certification.

Kmart's threshold assertion is that we review de novo "Whether a CR 26(i) Certification ***Sufficiently Conferred Jurisdiction*** on the Trial Court to Entertain a Sanction Motion and Whether the Trial Court Had Authority to Award Sanctions."[1] This misstates the proper inquiry.

"Subject matter jurisdiction is 'the authority of the court to hear and determine the class of actions to which the case belongs.'"[2] Washington courts

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[1] (Emphasis added.)

[2] In re Guardianship of Wells, 150 Wn. App. 491, 499, 208 P.3d 1126 (2009) (quoting In re Adoption of Buehl, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976)).

lack subject matter jurisdiction only in compelling circumstances because they are courts of general jurisdiction.[3] "The question of subject matter jurisdiction is a question of law that we review de novo."[4]

The civil rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."[5] Our supreme court has further provided that courts should interpret the civil rules in a manner "that advances the underlying purpose of the rules, which is to reach a just determination in every action."[6]

The primary purposes of CR 26(i) are to minimize the use of judicial resources during discovery and to encourage professional courtesy between counsel.[7] "CR 26(i) should be read as *permitting* a trial court to not consider a motion to compel discovery unless counsel have conferred and the movant has certified that fact. CR 26(i) should not be read as *prohibiting* a trial court from

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[3] Id.

[4] Id. (citing Somers v. Snohomish County, 105 Wn. App. 937, 941, 21 P.3d 1165 (2001); In re Marriage of Thurston, 92 Wn. App. 494, 497, 963 P.2d 947 (1998), review denied, 137 Wn.2d 1023 (1999)).

[5] CR 1.

[6] Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

[7] 4 Karl B. Tegland, Washington Practice: Rules Practice CR 26 at 12-13 (4th ed. Supp. 2001) (CR 26(i) intended "to reduce the number of discovery controversies brought before the courts for adjudication" and "to encourage professional courtesy between attorneys."); Case v. Dundom, 115 Wn. App. 199, 204, 58 P.3d 919 (2002) (stating that the rule is designed "to facilitate non-judicial solutions to discovery problems by requiring a conference before a court order.").

exercising its discretion to waive a conference and certification if, under the particular circumstances, that will fairly and sensibly streamline the progress of the case."[8]

Here, the threshold question is whether CR 26(i) implicates the trial court's "authority," which we read to mean its subject matter jurisdiction. The rule states:

> The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. . . . Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.[9]

Kmart's argument that the court lacked the authority (jurisdiction) to hear the motions is premised on the faulty assumption that subject matter jurisdiction is at issue in applying CR 26(i). This court rule does not implicate subject matter jurisdiction.

There is simply no persuasive support for the proposition that the trial court did not have subject matter jurisdiction to hear either this personal injury action or the two discovery motions at issue. For example, there is nothing in the text of CR 26(i) to suggest that the court was divested of ***jurisdiction*** to hear the motions. Moreover, there is nothing in this record to suggest that any

[8] Case, 115 Wn. App. at 205 (Morgan, J., dissenting).

[9] This rule is substantially similar to King County Local Rule (KCLR) 37(e), which states, "the court will not entertain any motion or objection with respect to Civil Rules 26 through 37, unless it affirmatively appears that counsel have met and conferred with respect thereto."

"compelling circumstances" existed in this case to divest the trial court of its subject matter jurisdiction to hear these motions. Accordingly, we conclude that the court had jurisdiction to hear the motions. Whether it was proper to hear the motions under the circumstances of this case is not a question of jurisdiction.

Kmart relies on a Division Two line of cases holding that trial courts lack authority to hear these discovery motions absent strict compliance with CR 26(i).[10] But failure to comply with this court rule has nothing to do with subject matter jurisdiction.[11] Rather, a failure to comply strictly with the requirements of CR 26(i) raises the question of whether and to what extent a procedural irregularity may affect a court's ability to reach the merits of a discovery motion.

Standard of Review

The next question is what standard of review should apply to our determination of whether the trial court properly heard the two discovery motions in this case. Kmart urges us to apply a de novo standard of review. Amy contends that an abuse of discretion standard is more appropriate. We agree with Amy.

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[10] Rudolph v. Empirical Research Sys., 107 Wn. App. 861, 866, 28 P.3d 813 (2001) (in a dispute over discovery, defendant's motion was captioned a motion to compel discovery but actually sought discovery sanctions); Case, 115 Wn. App. at 203; Clarke v. State Attorney General's Office, 133 Wn. App. 767, 779-80, 138 P.3d 144 (2006).

[11] Federal cases interpreting the parallel federal rule, FRCP 37(a)(2), do not mention the discovery conference being a jurisdictional requirement. See Ross v. Citifinancial, Inc., 203 F.R.D. 239 (S.D. Miss. 2001); Reidy v. Runyon, 169 F.R.D. 486 (E.D.N.Y. 1997); Imperial Chemicals Industries, PLC v. Barr Laboratories, Inc., 126 F.R.D. 467 (S.D.N.Y. 1989); and Burton v. R.J. Reynolds Tobacco Co., 203 F.R.D. 624 (D.Kan. 2001).

We start with the observation that CR 1 directs that the civil rules are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action." Likewise, our supreme court has stated that courts are to interpret the rules to advance their underlying purpose, which is to reach a just determination in every action.[12] Determining what is "speedy and inexpensive" for purposes of CR 1 in a particular case is a discretionary decision because it is based on the facts of that particular case.

We are also guided by the well-recognized rule, announced by our supreme court in the Fisons[13] case, "that the proper standard to apply in reviewing sanctions decisions is the abuse of discretion standard."[14] In explaining its rationale for reaching that conclusion, the court stated that this standard recognizes that deference is owed to the judicial actor who is 'better positioned than another to decide the issue in question.'[15] That court rejected application of the de novo standard of review, observing that to apply such a standard could thwart the purpose of giving trial courts wide latitude and discretion to determine what sanctions are appropriate.[16]

We conclude that similar reasoning applies to whether a court should

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[12] Burnet, 131 Wn.2d at 494.

[13] Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993).

[14] Id.

[15] Id. at 339.

[16] Id.

hear discovery motions where strict compliance with CR 26(i) is lacking. We see no persuasive distinction between the rationale for permitting the trial court to exercise its discretion to decide a discovery motion and permitting the trial court to also exercise its discretion whether to hear a discovery motion. In both cases it is the judicial actor who is "better positioned than another to decide the issue in question."[17]

For these reasons, we conclude that the proper standard of review to apply to a trial court's decision to hear a discovery motion in the absence of strict compliance with CR 26(i) is whether the decision is manifestly unreasonable or based on untenable grounds.[18] A court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law.[19]

Kmart relies on the same Division Two cases that hold that a court has no jurisdiction to hear a discovery motion without a CR 26(i) certification for the conclusion that such a decision should be reviewed de novo.[20] We also disagree with that conclusion in those cases.

In Case v. Dundom,[21] a divided Division Two panel held that the language of CR 26(i) is mandatory, not permissive, and that the trial court's

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[17] Id.

[18] Id.

[19] Id.

[20] Rudolph, 107 Wn. App. at 866.

[21] 115 Wn. App. 199, 58 P.3d 919 (2002).

decision to hear a CR 37 motion is subject to de novo review.[22] Reaffirming a rule first articulated in Rudolph v. Empirical Research Sys., Inc.,[23] which is also a Division Two case, the court held that the trial court lacked discretion to hear a CR 37 motion.[24]

Judge Morgan dissented.[25] According to him, "CR 26(i) should be read as *permitting* a trial court to not consider a motion to compel discovery unless counsel have conferred and the movant has certified that fact. CR 26(i) should not be read as *prohibiting* a trial court from exercising its discretion to waive a conference and certification if, under the particular circumstances, that will fairly and sensibly streamline the progress of the case."[26] In short, "the rule should be a shield that protects the court from becoming involved in half-baked discovery disputes, not a sword for the discovery violator to wield against the court."[27]

Judge Morgan responded to the statutory construction principle on which the majority relied for its holding by noting that Federal Rule of Civil Procedure (FRCP) 37(a),[28] which serves a similar purpose to CR 26(i), also contains

[22] Id. at 202.

[23] 107 Wn. App. 861, 28 P.3d 813 (2001).

[24] Case, 115 Wn. App. at 204.

[25] Id.

[26] Id. at 205.

[27] Id.

[28] FRCP 37(a)(1) ("***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. ***The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make***

mandatory language, but that most federal courts do not apply the rule in that fashion.[29] He went on to provide a hypothetical illustrating why a mandatory approach to the rule made no sense:

> Suppose that Party A brings a motion to compel discovery against Party B. Party A fails to certify that a discovery conference has occurred. The court chooses to believe that a conference would do no good, and to waive the requirements of CR 26(i). The court finds that Party B has violated the discovery rules, so it imposes sanctions against Party B. Party B appeals, arguing that the court lacked authority to impose sanctions in the absence of a conference and certification.
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> To agree with Party B is to turn CR 26(i) on its head. The rule's purpose is to *assist* the court in policing discovery, not to *impede* the court in policing discovery. The court may enforce it or waive it, and neither party should be allowed to object. Its mandatory language gives notice to the parties that the court has discretion not to consider a motion to compel in the absence of a conference and certification, but its mandatory language does not eliminate the court's discretion to manage discovery proceedings in a fair and expeditious way.[30]

We agree with Judge Morgan. To allow a losing party in a discovery motion to object to a court's ruling on the basis that the prevailing party did not strictly comply with CR 26(i) undermines the efficient use of often scarce judicial resources. A trial judge is in the best position to determine whether and to what extent to get involved in discovery disputes in a particular case. Moreover, as we have already concluded, whether to hear a motion in the absence of strict

disclosure or discovery in an effort to obtain it without court action." (emphasis added)).

[29] Case, 115 Wn. App. at 205-06 (citing Ross, 203 F.R.D. 239; Reidy, 169 F.R.D. 486; Imperial Chemicals Industries, 126 F.R.D. 467).

[30] Id. at 206.

compliance with CR 26(i) has nothing to do with the jurisdiction of the court. In sum, we conclude that a decision to hear a discovery motion is a discretionary determination, which should be reviewed on the basis of whether the decision is manifestly unreasonable or based on untenable grounds.[31]

Motion to Compel Discovery

Kmart next argues that the court erred by deciding that it could hear the motion to compel and to supplement discovery because Amy's CR 26(i) certification was allegedly defective. We hold that the trial court correctly exercised its discretion to hear this motion.

In March 2007, approximately one month after commencing this action, Amy propounded interrogatories to Kmart. Interrogatory 30 sought information about changes to the accident scene subsequent to her February 2004 slip and fall. Kmart did not move for a protective order and responded in June 2007 that "it would produce responsive information." In August 2007, Kmart supplemented its prior response by "continuing to offer any information once located."[32]

Over a year after Amy propounded Interrogatory 30, Kmart provided "substantive responsive information" for the first time.[33] The information indicated that the scene of the accident was remodeled sometime in 2004.[34] At

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[31] In re Marriage of Littlefield, 133 Wn.2d at 39, 47, 940 P.2d 1362 (1997).

[32] Amended Opening Brief of Appellant at 10.

[33] Id.

[34] Clerk's Papers at 190-99.

the time of this response, Amy's expert had already completed preparation for trial, which had been scheduled for August 11, 2008 since February 2007. The parties had also participated in an unsuccessful mediation. There was no apparent justification for the late production of this 2004 material.

On July 19, 2008, Amy moved to compel and supplement discovery.[35] On July 29, 2008, Amy also moved for sanctions based on Kmart's failure to provide timely information in response to the March 2007 interrogatories. Kmart responded to both motions. But nowhere in its response did Kmart either object to the form of the CR 26(i) certification that accompanied Amy's motion to compel and to supplement discovery or assert that the court lacked authority to hear that motion. The trial court granted Amy's motion to compel and to supplement discovery, stating in relevant part in its Order Granting Plaintiffs Motion to Compel and Supplement Discovery and for Costs:

> 1. Plaintiff's attorney certifies that he has met and conferred with defense counsel pursuant to CR 26(i) and King County Local Rule 37(e). This is a prerequisite to the plaintiff / or any party bringing a motion to compel and sanctions. Actually, the plaintiff's attorney does not certify that he has 'met' with the defense attorney. However, ***because the defense has not objected to this requirement being met*** and that the attorneys are over 100 miles apart[,] ***the court deems this requirement waived.***
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> 2. [Citing <u>Fisons</u> and King County Local Rule 37(d).]

[35] Amy's motion stated that she "complied with CR 26(i) and KCLR 37(e) and (f) by conferring with [Kmart's] counsel in an attempt to resolve the discovery issues presented by this motion." In addition, Amy's counsel included a sworn declaration in support of the Motion to Compel, attesting that "on July 15, 2008, I conducted a Rule 26 conference with defense counsel." Attached to the declaration was an e-mail from defense counsel dated July 16, 2008, referencing a "Rule 26 conference" that had taken place the prior day.

> Interrogatories and Requests for Production[.] Answers that object, such as 'Object as to form, vague, unduly burdensome, not calculated to lead to the discovery of relevant facts, work product,' etc. are of no consequence unless the objecting party seeks a protective order consistent with CR 37(d) – a party may not withhold discoverable materials. The court will impose sanctions if the party has not sought a protective order.
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> 3. ***Defendant's late disclosures are not excusable and have cost The Plaintiffs [sic] time and money.*** e.g. expert costs, attorneys fees [sic] and mediation costs. Plaintiffs' are to submit a motion and cost bill for expert costs and attorney fees associated with expert and the filing of this motion to compel/sanctions. Defendants may respond to the plaintiffs' motion and costs. ***In addition to any costs, attorneys fees allowed in that motion[,] the defendant is sanctioned $10,000.00 for the late discovery.***[36]

The trial court did not demonstrate an erroneous view of CR 26(i) by deciding to hear this discovery motion. Kmart argues that Amy's CR 26(i) certification is facially deficient. Specifically, Kmart claims that the certification does not indicate that the CR 26(i) conference was in person or by telephone, and does not indicate that the conference addressed the motion, as opposed to the underlying discovery dispute. For the following reasons, we reject this assertion.

First, Kmart's disclosure of important information on the eve of discovery cutoff, where that information appears to have been in Kmart's files since 2004, required the court's prompt attention. Postponing the hearing of the motion due to an allegedly defective certification would have unnecessarily delayed resolution of this important issue, increased the expenses to the parties, and

[36] Clerk's Papers at 1446-447(emphasis added).

wasted court time. It would also have been extremely prejudicial to Amy in her preparation for trial. In fact, Kmart challenged the conclusions of Amy's trial expert based on the fact that "there is nothing in [the report] that confirms that the bathroom he tested in 2007 was the same as it existed on the night of [Amy's] fall."[37] The court's decision to hear this motion to compel and to supplement discovery was well within the proper exercise of its discretion.

Second, Kmart failed to argue in its written response to the motion that the CR 26(i) certification was deficient.[38] Rather, Kmart raised the argument in its motion for reconsideration of this sanctions order. As the trial court correctly stated in its Order Denying Defendant's Motion for Reconsideration of Order Dated July 29, 2008, Granting Plaintiffs' Motion to Compel and Supplement Discovery and For Costs, "[Amy] did certify that the parties had conferred and that certification was not objected to by [Kmart]."[39]

Third, even if Kmart had objected to the lack of strict compliance, it fails to identify any prejudice from the court hearing the motion. In our view, there was no prejudice to Kmart.

Motion for Sanctions

[37] Clerk's Papers at 1696.

[38] At oral argument in this appeal, Kmart claimed that it raised this CR 26(i) issue in its response and in an accompanying declaration. It cites Clerk's Papers 491 and 497-498 for support. Having reviewed these portions of the record, we conclude that they do not cite CR 26(i). Moreover, nowhere in these portions of the record does Kmart claim that the trial court lacked authority to hear the motion or assert that Amy's certification was deficient.

[39] Clerk's Papers at 1444.

Kmart next argues that the court was not authorized to hear the motion for sanctions because it was not accompanied by a CR 26(i) certification. We disagree.

We first consider a preliminary matter, proper construction of the rule. CR26(i) provides as follows:

> **Motions; Conference of Counsel Required.** The court will not entertain ***any motion or objection with respect to rules 26 through 37*** unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.[40]

Amy argues that the above language, particularly the last sentence of the rule, limits the certification requirement to motions for "an order to compel or obtain protection." A commentator has indicated that this language makes the scope of the rule unclear.[41]

Notwithstanding the language on which Amy relies, we conclude that the

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[40] (Emphasis added.)

[41] See 3A Karl B. Tegland, Washington Practice, Rules Practice CR 37 at 789-90 (5th ed.) ("[It] is not entirely clear whether the meet-and-confer requirement applies to a motion for sanctions, after the opposing party has allegedly resisted discovery without good cause. . . . The language of CR 26(i) suggests that the requirement applies only to a motion to compel, or a motion for a protective order. . . . Thus, cautious practitioners will want to comply with the meet-and-confer rule even when requesting discovery sanctions.").

better reading of the rule is to give effect to all of its sentences. Court rules are interpreted under the rules of interpretation of statutes.[42] Where a statute is unambiguous, we read the statute as a whole and must give effect to all of its language.[43]

The first sentence clearly indicates that this procedural rule applies to "***any motion or objection with respect to rules 26 through 37***."[44] The third sentence of the rule is consistent with the view that the rule applies to all motions or objections regarding rules 26 through 37, not just motions to compel or to obtain a protective order.

Moreover, a reading that limits the certification requirement to motions to compel discovery or to obtain a protective order is inconsistent with the purpose of the rule. As stated in the Case dissent, "[T]he rule should be a shield that protects the court from becoming involved in half-baked discovery disputes, not a sword for the discovery violator to wield against the court."[45]

Discovery disputes are not limited to motions for orders to compel or for protective orders. We conclude that CR 26(i) is applicable to any motion or objection with respect to CR 26 through 37.

The question here is whether CR 26(i) barred the trial court from hearing

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[42] State v. George, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007).

[43] Dot Foods, Inc. v. Washington Dept. of Revenue, 166 Wn.2d 912, 919, 215 P.3d 185 (2009).

[44] (Emphasis added.)

[45] 115 Wn. App. at 205 (Morgan, J., dissenting).

the motion for sanctions in this case. We conclude that it did not.

We have already explained that failure to strictly comply with the procedural provision of CR 26(i) does not divest the court of jurisdiction to hear discovery motions. Likewise, we have explained that a court has discretion to decide whether to hear a motion even where the moving party has failed to strictly comply with the rule. There is no reason to conclude that the absence of the required CR 26(i) certification, by itself, precluded the trial court in this case from hearing this motion for sanctions. We so hold.[46]

Kmart takes a different view, relying on the line of Division Two cases that we have already discussed in this opinion. We decline to apply the rationale of those cases here for the reasons we have already explained. The trial court's decision to hear this motion for sanctions was well within the proper exercise of its discretion.

Amount of Sanctions

Kmart next claims that the trial court abused its discretion by awarding a total of $35,627.44 in sanctions for discovery violations. We disagree.

CR 37(a)(4), permits the award of reasonable expenses of a motion to compel discovery:

> If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion . . . ***to pay to the moving party the reasonable expenses incurred in obtaining the order***, including attorney fees, unless the court finds that the opposition to the motion was

[46] In any event, due to the uncertainty over the scope of application of CR 26(i), the absence of a certification with the motion for sanctions in this case was not prejudicial to Kmart.

> substantially justified or that other circumstances make an award of expenses unjust.[47]

Moreover, CR 37(d) provides:

> If a party . . . fails . . . (2) to serve answers or objections to interrogatories submitted under rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for production of documents or inspection submitted under rule 34, after proper service of the request, ***the court in which the action is 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.
>
> The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 26(c). ***For purposes of this section, an evasive or misleading answer is to be treated as a failure to answer***.[48]

We review an order imposing sanctions for abuse of discretion.[49]

Here, the court imposed $10,000 in sanctions for late discovery "in addition to any costs [and] attorney fees allowed." Thereafter, the court also entered its order and findings and conclusions, awarding reasonable attorney fees and costs totaling $25,627.44 in addition to the $10,000 in sanctions. Thus, sanctions totaled $35,627.44 for the discovery violations.

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[47] (Emphasis added.)

[48] (Emphasis added.)

[49] Fisons, 122 Wn.2d at 338-39.

Kmart challenges the $10,000 segment of the award, claiming that it is beyond the scope of CR 37(a). Kmart also claims the fees and costs that the court awarded are excessive. We disagree with both contentions.

The imposition of $10,000 in sanctions for the unexplained delay in providing discovery was a proper exercise of the court's discretion. "The purposes of sanctions orders are ***to deter, to punish, to compensate and to educate***."[50] Courts are permitted to impose discovery sanctions in order to deter egregious conduct. The plain language of CR 37 permits the court to impose sanctions that may include provisions beyond the mere reasonable expenses of the motion.

Here, Kmart chose to provide late disclosure of material information just prior to trial, with no explanation of why the information—in Kmart's possession since 2004—was not immediately provided in response to the March 2007 interrogatory. Having made that choice, it should have come as no surprise that the trial court imposed monetary sanctions, a lesser sanction than Amy's request.

Under CR 37(d), courts may impose discovery sanctions that range from exclusion of evidence to granting a default judgment when a party fails to respond to interrogatories and requests for production. For example, under CR 37(b)(2)(C), the trial court may sanction a party by dismissing the action or proceeding, or by rendering a default judgment in favor of the moving party.

[50] Fisons, 122 Wn.2d at 356 (emphasis added).

This is precisely what Amy requested in her Motion for Sanctions, Including Default Judgment or, in the Alternative, Striking Defendant's Answer and Response. The court considered Amy's request for sanctions in the form of a default judgment. But "in light of the purpose to deter, to punish, to compensate, and to educate," the court determined that the default judgment was a harsh sanction and that a compensation award to Amy was more appropriate.[51] The sanctions were proper under CR 37, and we reject Kmart's overly narrow reading of the scope of the trial court's power to deal with the discovery abuse in this case.

Kmart also argues that the imposition of $10,000 in sanctions was manifestly unreasonable. "A trial court abuses its discretion if it exercises its discretion on untenable ground or for untenable reasons, or if the discretionary act is manifestly unreasonable."[52] In deciding whether the trial court abused its discretion, this court is mindful of the purpose of discovery sanctions, which is to deter abuses of the judicial system.[53]

In July 2007, after receiving Kmart's initial response to her first set of interrogatories, Amy presented Kmart with a request to conduct a CR 34 inspection of the bathroom. Included was a request to conduct testing of the

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[51] Clerk's Papers at 1440.

[52] In re Estate of Palmer, 145 Wn. App. 249, 259-60, 187 P.3d 758 (2008).

[53] Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994); Fisons, 122 Wn.2d at 356.

restroom floor. Amy subsequently hired Dr. Gary Sloan, a human factors expert to conduct testing of the Kmart bathroom during the fall of 2007. On June 13, 2008, seven days before the discovery cutoff date and after Amy had used Dr. Sloan's report to support her motion for summary judgment on liability, Kmart provided Amy with a third supplemental response to her first set of interrogatories indicating that the restroom had been substantially remodeled in the spring of 2004.

Kmart proceeded to argue in its response to Amy's motion for partial summary judgment that there was a "significant problem with Dr. Sloan's report: there is nothing in it that confirms that the bathroom as he tested it in 2007 was the same as it existed on the night of [Amy's] fall. Until that is established to a jury, his report . . . is useless."[54]

Given this record, the amount of $10,000 was not unjust or manifestly unreasonable. Kmart fails in its burden to show otherwise.

Relying on a footnote in Biggs v. Vail,[55] Kmart also argues that the $10,000 sanction violates the doctrine prohibiting fee shifting. In Biggs, the supreme court urged trial courts to ***consider*** directing payment of a sanctions award to a "particular court fund or court related fund" to avoid fee shifting.[56] But we do not read that language to prohibit the award of sanctions to a litigant, as

[54] Clerk's Papers at 1696.

[55] 124 Wn.2d 193, 876 P.2d 448 (1994).

[56] Id. at 202 n.3.

CR 37 clearly allows. In any event, we see no abuse of discretion in the trial court's decision in this case to award sanctions to Amy.

Kmart also argues that the trial court abused its discretion by awarding Amy the amount of fees and costs that it did. We again disagree.

Pursuant to Mahler v. Szucs[57] and other case authority, Amy provided documentation to the court regarding her requested costs and fees. The trial court considered that material, Kmart's objections, and discounted some of the requested fees. The court then entered its findings and conclusions to support the award of fees and costs. We hold that the trial court did not abuse its discretion in awarding the amount of fees and costs that it did.

The parties presented arguments centered on CR 37. But we may affirm on any basis supported by the record, whether or not the trial court considered that basis.[58] CR 26(g) provides an additional basis to affirm the trial court's decisions in this case.

CR 26(g) provides as follows:

> Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of the attorney . . . constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a ***reasonable inquiry*** it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive,

[57] 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

[58] State v. Carter, 74 Wn. App. 320, 324 n.2, 875 P.2d 1 (1994).

> given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. . . .
>
> If a certification is made in violation of the rule, the court, upon motion or ***upon its own initiative***, ***shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction***, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.[59]

Under this rule, an attorney must certify in his or her discovery response that he or she made a "***reasonable inquiry***" into the existence of the requested material.[60] If the attorney certifies a discovery response in violation of that rule, the court may, ***upon its own initiative,*** impose upon the party on whose behalf the response was made an appropriate sanction including an order to pay the amount of the reasonable expenses incurred because of the violation.[61]

A "reasonable inquiry" is judged by an objective standard.[62] The purpose of CR 26(g) is to deter discovery abuses, which include delaying tactics, procedural harassment, and mounting legal costs.[63]

Here, Kmart responded to Amy's Interrogatory 30 twice in 2007, stating first that "it would produce responsive information" and that it would continue "to offer any information once located." Yet Kmart failed, without explanation, to

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[59] (Emphasis added.)

[60] CR 26(g) (emphasis added).

[61] Id.

[62] Fisons, 122 Wn.2d at 343.

[63] Id. at 341.

provide the requested materials, which existed in 2004, until shortly before trial. This was over a year after the interrogatory was propounded. This highly relevant material had been in Kmart's possession since 2004, well before Amy commenced this lawsuit in February 2007.[64] Yet Kmart failed to provide the materials until the eve of trial.

In light of these undisputed facts, the certifications arising from counsel's signatures on Kmart's 2007 discovery responses appear to violate subsections (g)(1) and (g)(2) of the rule.[65] It was not an abuse of discretion for the trial court to impose sanctions against Kmart based on this violation of CR 26(g).

To summarize, we conclude that the trial court properly exercised its discretion both in its decision to award sanctions and the determination of the amount of sanctions.

We affirm the orders imposing discovery sanctions on Kmart.

The balance of this opinion has no precedential value. Accordingly, pursuant to RCW 2.06.040, it shall not be published.

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[64] Clerk's Papers at 190-99.

[65] CR 26(g) provides in part: The signature of the attorney . . . constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

NEW TRIAL MOTION

Kmart also argues that the trial court abused its discretion by granting Amy's motion for a new trial where the trial court had granted Amy $5,217.24 in special damages, but no general damages.[66] We agree.

A trial court may order a new trial pursuant to CR (CR) 59(a) for the following reasons:

> (5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;
>
> (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision . . . or
>
> (9) That substantial justice has not been done.[67]

In Palmer v. Jensen,[68] the court discussed the standard of review that applies to a trial court's decision to grant a new trial under CR 59(a).

> Determination of the amount of damages is within the province of the jury, and courts are reluctant to interfere with a jury's damage award when fairly made. Denial of a new trial on grounds of inadequate damages will be reversed only where the trial court abuses its discretion. A much stronger showing of abuse of discretion will be required to set aside an order granting a new trial than an order denying one because the denial of a new trial 'concludes [the parties'] rights.'
>
> Where the proponent of a new trial argues the verdict was not based upon the evidence, appellate courts will look to the record to determine whether there was sufficient evidence to support the verdict. Where sufficient evidence exists to support the verdict, it is an abuse of discretion to grant a new trial.

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[66] A different judge heard the new trial motion.

[67] CR 59(a)(5), (7), (9).

[68] 132 Wn.2d 193, 937 P.2d 597 (1997).

> Conversely, it is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence.[69]

We review challenged findings of fact for substantial evidence.[70]

The court must view the evidence in the light most favorable to the nonmoving party.[71]

"Alleged passion or prejudice on the part of the jury is not grounds for granting a new trial under CR 59(a)(5) unless the record indicates that the verdict was not within the range of proven damages."[72]

Here, Amy slipped and fell in the bathroom of Kmart's store on February 25, 2004. A Kmart witness testified at trial that Amy did not report any pain at that time.

She visited an emergency room on March 2, 2004, indicating mild right hip pain. The next day, Amy went to the South Tacoma Medical Center for a follow-up visit. During that visit, Amy complained of hip and elbow pain, and pain in the sacral area and along the iliac crest. Amy visited South Tacoma Medical Center two more times, on April 13, 2004, and again on May 17, 2004, complaining of persisting hip pain, and buttock, groin, and back pain. Amy received a number of prescriptions for pain medication as a result of these visits.

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[69] Id. at 197-98 (internal citations omitted).

[70] In re Marriage of Bernard, 165 Wn.2d 895, 903, 204 P.3d 907 (2009).

[71] Gestson v. Scott, 116 Wn. App. 616, 622, 67 P.3d 496 (2003).

[72] Id. at 621.

In June 2004, Amy began to visit Dr. Christopher Schmitt, a family practice doctor, at Group Health. In August 2004, Dr. Schmitt referred Amy to Dr. Arne Anderson, who specializes in neck and back pain. Dr. Anderson treated Amy four times between October 2004 and March 2006 for pain in her neck, back, and coccyx, before returning her to Dr. Schmitt's care.

During the course of her medical treatment following the fall, Amy underwent a series of X-rays, MRIs, and bone scans. These all resulted in normal findings.

Amy also fell in her home on August 6, 2005 and again on September 14, 2005.

In July 2008, the trial court granted Amy's motion for partial summary judgment on the issue of liability. In August 2008, the court ruled on her second summary judgment motion, ordering Kmart to pay Amy $5,217.24 to cover her special damages through May 25, 2004, four months after her fall. The trial court denied Amy's request for additional medical expenses incurred after May 25, 2004.

Amy went to trial, seeking additional special damages for medical expenses incurred after May 25, 2004, and general damages. She did not testify at trial. The jury limited its award to the $5,217.24 in special damages the court had previously awarded and declined to award any further special damages or general damages. The trial court granted Amy's motion for new trial on the damages issue. The question is whether the trial court abused its

discretion by granting a new trial on this record.

The trial court articulated its reasons for granting Amy a new trial. Among them were that the award of $0 in general damages was so inadequate that it must have been the result of passion or prejudice, no reasonable inference from the evidence justified the jury's decision, and substantial justice was not done.

The facts that the trial court cited to support its reasons include that Amy claimed permanent personal injuries; that special damages were awarded for medical expenses incurred during the four-month period following the accident; that medical testimony regarding Amy's elbow and hip contusion evidence an impact on her quality of life and activities; that the medical expenses awarded were reasonable and necessary; that Amy's medical records showed subjective complaints of pain that were consistent with objective physical examinations; and that Amy's counsel argued that the jury should award general damages and additional special damages.

The trial court also included in the findings of fact that Kmart disputed the nature and extent of Plaintiff's injuries; that Kmart presented no testimony and no medical expert to counter or rebut this evidence; and that Kmart argued that the jury should not award any additional damages to Amy.

Kmart principally relies on two cases from other divisions of this court. Each decision was based on the supreme court's decision in Palmer.

In Lopez v. Salgado-Guadarama,[73] the court of appeals affirmed the

[73] 130 Wn. App. 87, 122 P.3d 733 (2005).

district court's decision not to grant Lopez a new trial after the jury awarded him only special damages.[74] At trial, Lopez claimed that he sustained a shoulder injury as a result of being rear-ended by Salgado-Guadarama.[75] However, Salgado-Guadarama contested this with expert medical testimony that Lopez had in fact only suffered a shoulder contusion, not worthy of the extended medical treatment that he received.[76] The court also noted that Lopez's credibility had been called into question.[77] The court held that "[g]iven the evidence, the jury was entitled to conclude that the plaintiff incurred reasonable medical expenses as a result of the accident, while at the same time concluding he failed to carry his burden of proving general damages."[78]

In Gestson v. Scott,[79] the jury awarded Gestson only special damages in a personal injury suit arising out of a car accident. The court of appeals reversed the trial court's grant of a new trial, stating that "[a] jury may award special damages and no general damages when 'the record would support a verdict omitting general damages.'"[80] Although Gestson presented evidence, including medical testimony, supporting her claim that the car accident caused

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[74] Id. at 90-91.

[75] Id. at 89-91.

[76] Id. at 90-91.

[77] Id.

[78] Id. at 93.

[79] 116 Wn. App. 616, 67 P.3d 496 (2003).

[80] Id. at 620 (citing Palmer, 132 Wn.2d at 202).

her neck injury, Scott's evidence and cross examination raised doubts as to the causal connection between the accident and the injury.[81] Based on this evidence, the court concluded that the jury could have properly disregarded the opinions of Gestson's experts and that the jury's award of only special damages was within the range of proven damages.[82]

In Palmer v. Jensen,[83] a mother and son were injured in a car accident.[84] At the conclusion of their trial, the jury awarded Palmer and her son $8,414.89 and $34 respectively in special damages, and no general damages.[85] Palmer moved for a new trial and the trial court denied her motion.[86] The court of appeals affirmed.[87]

On review, the supreme court noted that "[a]lthough there is no per se rule that general damages must be awarded to every plaintiff who sustains an injury, a plaintiff who substantiates her pain and suffering with evidence is entitled to general damages."[88] With regard to the son, the court concluded that because his injuries were minimal and required little medical attention, the jury

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[81] Id. at 623.

[82] Id. at 624-25.

[83] 132 Wn.2d 193, 937 P.2d 597 (1997).

[84] Id. at 195.

[85] Id.

[86] Id. at 196.

[87] Id.

[88] Id. at 201.

could reasonably conclude that he was not entitled to general damages for pain and suffering.[89] With regard to the mother, the court reached the opposite conclusion. Palmer substantiated her claim of pain and suffering with uncontested evidence of continued pain more than two years after the accident. The court found that Palmer was entitled to general damages.[90]

The question for this court under these cases is whether Amy substantiated her claim for general damages sustained during the four month period following her fall in the Kmart bathroom. We conclude that she did not.

Gestson and Lopez shed light on the factors that may be relevant in determining whether Amy established undisputed general damages which are beyond legitimate controversy. Did the opposing party present evidence disputing Amy's version of the facts? Did the opposing party call Amy's credibility into question? Could the jury reasonably have concluded that Amy incurred medical expenses as a result of the fall, while at the same time concluding that she failed to carry her burden of proving general damages?

Amy provided little evidence to substantiate her claim for general damages for pain and suffering. She did not testify on her own behalf. She did not present testimony from any of the medical professionals who treated her in the four months immediately after her fall. Though her daughter Inkera testified, she did not testify regarding her mother's injuries or pain and suffering in the

[89] Id. at 202.

[90] Id. at 203.

four months immediately following her fall.

Amy presented the medical records from her initial emergency room visits and subsequent medical treatment.[91] The medical records indicate that Amy was in mild to moderate pain during the week after her accident and that she continued to have some pain for another four months.[92] The records include no narrative description of the nature or extent of her pain and offer only minimal notes regarding its impact on her quality of life and activity level.

Amy also presented the testimony of Dr. Schmitt and Dr. Anderson regarding their opinions of her injuries and the cause of her injuries. Neither Dr. Schmitt nor Dr. Anderson treated Amy in the first four months after her fall. Dr. Schmitt treated Amy for the first time in June 2004. He continued to see Amy through August, when he referred her to Dr. Anderson. Dr. Anderson treated Amy four times from October 2004 through March 2006. At trial, both Dr. Anderson and Dr. Schmitt testified primarily to Amy's physical condition after May 25, 2004. In addition, Dr. Anderson reviewed Amy's medical records from the period immediately following her fall and opined that he believed that 100 percent of Amy's medical expenses through September 2004 were a result of the fall. Neither Dr. Anderson nor Dr. Schmitt could testify to the quantity or quality of pain that Amy experienced in the first four months after her fall or any other non-economic impacts from the fall.

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[91] See Clerk's Papers at 1381-1406; 1417-1419.

[92] Id.

The evidence Amy did present regarding her claim of general damages for the four months immediately following her injury was disputed by Kmart. Kmart's witness Linda Sonnett testified that directly after her fall, Amy did not complain of any pain and that Amy exited the Kmart without assistance. Kmart's expert medical witness, Dr. Joan Sullivan, opined that the only injuries proximately caused by Amy's fall were contusions to her right elbow and hip that would have normally resolved within six weeks' time. Dr. Sullivan also testified that there was no objective evidence to support ongoing symptoms of pain, given that all of Amy's X-rays, MRIs, and bone scans were normal. In addition, Dr. Sullivan questioned Amy's characterization of her level of pain. Based on this evidence, the trial court's finding that Kmart presented no testimony and no medical evidence to counter or rebut Amy's claims of general damages is not supported by substantial evidence.

There is no dispute that Amy suffered an injury as a result of her fall in the Kmart bathroom. However, the evidence is in conflict as to the seriousness of the injury. Amy did not testify. The only evidence she did present to substantiate her claim for general damages were her medical records and the testimony of doctors who did not begin to treat her until after the period for which she was awarded special damages. The jury was entitled to find that Amy failed to substantiate pain and suffering for general damages.

We also note that the jury was instructed to consider both special and general damages in determining the amount of money required to reasonably

compensate Amy. The jury instructions stated:

> The burden of proving damages rests with the party claiming them and it is for you to determine whether any particular element has been proved by a preponderance of the evidence. ***Your award must be based upon evidence and not upon speculation, guess or conjecture***.
>
> ***In determining an award for pain, suffering, or disability, the law requires a reasonable basis for your computation***.[93]

Based on this instruction and the conflicting evidence regarding pain and suffering, the jury was entitled to decide that no general damages were awardable in this case. The trial court did not properly exercise its discretion in setting aside this verdict.

Because the jury's award was within the range of proven damages given the conflicting medical testimony regarding the nature and quantity of Amy's pain, the damages are not so inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice.[94]

Neither was Amy denied substantial justice. She had an opportunity to present her case and failed to meet her burden to prove general damages for the four-month period following her fall. This is not a miscarriage of justice.

Because of our resolution of the new trial issue on the grounds discussed, we need not reach the other arguments on this issue. We reverse the order granting a new trial.

We affirm the orders imposing discovery sanctions on Kmart.

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[93] Clerk's Papers at 1155-156 (emphasis added).

[94] CR 59(a)(5); Gestson, 116 Wn. App. at 620.

Cox, J.

WE CONCUR:

Dwyer, A.C.J.

Appelwick, J.