No. 80922-4

J.M. JOHNSON, J. (dissenting)—Hyundai Motor America objected to Jesse Magan a's sweeping discovery requests when they were made in 2000 and 2001. Five years later, and as a second trial[1] was approaching, Magan a finally moved the trial court to compel production. The trial court so ordered, and Hyundai produced voluminous discovery that Magan a claimed could not be analyzed before trial. Magan a then requested a default judgment as sanction. The trial court granted default, allowing Magan a to avoid a jury trial and a decision on the merits, and this court affirms. Because even these circumstances found here are not so extreme as to justify negating the jury trial right protected by the Washington Constitution, I dissent.

Our constitution expressly provides, "The right of trial by jury shall remain inviolate." Wash. Const. art. I, § 21. Further, this court has held, "

[1] A verdict from the first trial was reversed by the Court of Appeals and remanded.

"'[i]t is the policy of the law that controversies be determined on the merits rather than by default.'"" *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007) (alteration in original) (quoting *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979) (quoting *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960))). Given the reverence our state constitution gives to the jury trial right and the important policy of deciding cases on the merits, due process of law demands that a jury trial be allowed to proceed to conclusion on the merits unless such extreme prejudice has occurred that renders a trial on the merits no longer possible. *See Smith v. Behr Process Corp.*, 113 Wn. App. 306, 325-27, 54 P.3d 665 (2002). Thus, an unjustified denial of the jury trial right implicates due process considerations of both the Washington and United States Constitutions. Wash. Const. art. I, § 3; U.S. Const. amend. XIV, § 1.

To avoid unconstitutional violations of the jury trial right and due process, a default judgment imposed as a discovery sanction may be granted only in a case clearly showing (1) a party *willfully* or deliberately violated the discovery rules and orders, (2) the opposing party was *substantially prejudiced* in its ability to prepare for trial, and (3) the trial court explicitly

considered *lesser sanctions*, which could be tailored to adequately deter, punish, compensate, and educate. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); *Wash. State Physicians Ins. Exchange & Ass'n v. Fisons Corp*., 122 Wn.2d 299, 858 P.2d 1054 (1993). Trial court findings regarding discovery sanctions are reviewed for abuse of discretion. *Fisons*, 122 Wn.2d at 338. Discretion is abused if "the trial court relies on unsupported facts or applies the wrong legal standard," or if the court "'adopts a view 'that no reasonable person would take.'"" *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990))).

The three-part *Burnet* test is conjunctive and discrete, not disjunctive nor cumulative. Thus, a strong showing of one prong may *not* satisfy insufficient proof of the others. Given the record before us, a reasonable court could conclude that Hyundai willfully violated the discovery rules. However, *willfulness* is only one prong. The *substantial prejudice* and *lesser sanctions* prongs are not established on this record. Allowing *willfulness* alone to satisfy all three prongs is violative of the test in *Burnet* and therefore

an abuse of discretion.

Substantial Prejudice

Magan a makes two prejudice arguments: (1) Magan a did not have sufficient time to review the voluminous discovery Hyundai ultimately produced, and (2) Hyundai's conduct may have caused some evidence to become stale, impeding Magan a from presenting his claims to a jury. These arguments are not established by the facts.

A. Time Restraint

Magan a's counsel waited nearly five years until approximately three months before trial to move to compel production (of documents requested previously in an extremely broad request for production). When the trial court granted his motion to compel, Magan a argued there was insufficient time to investigate the discovery produced before trial. In light of the nature of Magan a's broad discovery request, and the delay of Magan a's motion to compel until three months before trial, counsel's claim of prejudice because of the amount of discovery produced is unpersuasive.

Magan a's early discovery requests to Hyundai, a worldwide corporation, included the production of "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*." Clerk's Papers (CP) at 3728 (emphasis added). Thus, the request covered millions of Hyundai vehicles manufactured over multiple decades. Hyundai's consistent objections to the scope of these requests put Magan a on notice that Hyundai was not providing all possibly responsive documents.[2] Undoubtedly, Magan a's counsel knew that a motion to compel production would either result in a large volume of documents or have been limited by the court.

The timing of the 2005 motion to compel also undermines Magan a's argument. Magan a filed his complaint in February 2000 and discovery was first sent in 2000 and 2001. A first trial was held with substantial evidence. Due to Magan a's improper use of an expert witness, and the trial court's error in admitting that evidence, the verdict was reversed by the Court of Appeals.

Magan a knew on May 23, 2005, that the retrial was set for January

[2] This surely does not excuse the fact that Hyundai should have sought a protective order against the scope of Magan a's requests for production.

17, 2006, yet waited until October 27, 2005, to move to compel. Magan a's counsel had Hyundai's responses and yet waited nearly five years until the second trial was approaching to move to compel. If Hyundai's failure to produce Magan a's requested discovery was a violation of discovery rules, then Hyundai may be sanctioned. But the ultimate sanction of default judgment should not be inflicted on a party where the opposing party waited years to move to compel, especially when the opposing party had notice of the extent of the discovery requests.[3]

B. Staleness

Despite claiming that they lacked time to review Hyundai's discovery production or investigate, Magan a's counsel also argues that this discovery contains invaluable evidence that has become stale. These arguments are contradictory: one cannot know that evidence has gone stale without conducting an investigation and analysis.

Magan a's claim of staleness appears to be based on only two facts: Magan a's unsuccessful attempts to locate accident victims identified in the discovery and one witness' testimony that she no longer retained the seat

[3] The extent of pretrial tactics is unusual here. By handing Magan a a jury-free victory, this court is not establishing a broad precedent that legal gamesmanship will be rewarded.

back from her Hyundai accident. These facts do not support a finding of extreme prejudice under the appropriate standard of review.

Magan a's personal attempts to locate parties identified in the discovery production by mere phone calls are insufficient to justify his claim that evidence has gone stale. Magan a is represented by sophisticated attorneys who have experience locating witnesses. Magan a himself, not his attorneys or their support staff, attempted to locate these parties, and only by phone. His attorneys had specifically instructed Magan a to search for the individuals, yet did not undertake investigation themselves.[4] Unsuccessful phone calls made by Magan a are an insufficient basis under evidentiary standards to find that witnesses cannot be found.

Ms. Holcomb's testimony also does not justify a finding of prejudice. Ms. Holcomb's accident facts were far different. She was struck from behind while driving a 1992 Hyundai Scoop. Verbatim Report of Proceedings (Jan. 17, 2006) at 105. Ms. Holcomb was in the driver's seat; there was no passenger; Ms. Holcomb's car was not moving when it was hit nor did it spin

[4] Magan a was "asked to conduct [an] investigation" by his attorneys and conducted this investigation "on [his] attorney's behalf." Verbatim Report of Proceedings (Jan. 17, 2006) at 90. Magan a was unable to locate some individuals involved in old accidents. Others did not remember enough information. There is no evidence that they would have remembered more helpful information had they been questioned earlier in this litigation.

or flip; her air bag did not deploy. *Id*. at 98-111. Ms. Holcomb's seat back was damaged in the accident, and though she kept the seat for several years, she lost it at some point. *Id*. Despite explicitly basing its findings of fact in part on Ms. Holcomb's testimony, the trial court could not find that the loss of Ms. Holcomb's seat actually prejudiced Magan a.

Burnet requires actual, not speculative, prejudice to invoke CR 37(b)(2)'s "harsher" penalties. Insufficient time to investigate discovery materials, without more, only justifies speculation that prejudice may occur. That is insufficient under *Burnet* to justify abrogating the jury right.

A finding that actual, substantial prejudice has been shown is not supported by the facts here if considered under the proper legal standard. The trial court's finding of substantial prejudice is thus an abuse of discretion.

Lesser Sanctions Were Appropriate

Lesser sanctions could protect the right to have a jury decide the case on the merits. We have declared that "the court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery," namely to deter, punish, compensate, and educate. *Burnet*, 131 Wn.2d at 495-

96; *see also Fisons*, 122 Wn.2d at 355-56. If necessary, courts may impose more than one type of sanction for a discovery violation. Here, a combination of lesser sanctions would have adequately served the *Fisons* purposes. The trial court rejected a combination of lesser sanctions and instead imposed the harshest sanction, denying the constitutional right to a jury trial.

The trial court rejected a continuance, stating that this would reward Hyundai, which had sought a trial continuance. The court also noted that a continuance would mean added costs.[5]

However, a continuance would largely remedy the prejudice Magan a argues. More time would allow further investigation of the discovery. Also, Magan a's monetary concerns are clearly addressable by monetary sanctions in the form of litigation costs, as well as an advance against a potential damages award for immediate medical costs, an option suggested or agreed to by Hyundai.

The trial court rejected a monetary sanction, stating that Hyundai is a multibillion dollar corporation and that money "would not in any way address

[5] This concern exists in part because counsel asked improper questions to an expert witness at the first trial and then compounded the error by opposing a curative jury instruction.

the prejudice to the plaintiff or to the judicial system." CP at 5333. Money is the heart of Magan a's case, and substantial fines could affect Hyundai and its litigation strategies. Arriving at the proper monetary sanction is undoubtedly more difficult than ordering a default judgment, but "difficulty of determination" is not one of the *Fisons*-enumerated purposes of sanctions.

The trial court also rejected the alternative that accident records produced by Hyundai be treated as admissions of those substantially similar accidents. The court thought that this would equate to a default judgment. However, if a continuance were granted, the parties could properly analyze whether any evidence had gone stale due to Hyundai's discovery violations. Where evidence had gone stale, that evidence could be admitted as proof of any incident substantially similar to that of Magan a's.[6] This course would preserve the jury trial right.

The trial court's error here was in failing to fully consider numerous available lesser sanctions other than default. This was an abuse of discretion. A combination of a continuance, monetary sanctions, and admitting any

[6] Evidence that went stale after Magan a's initial discovery requests but before Hyundai actually produced is clearly distinct from evidence that had gone stale before Magan a made any requests for production. Taking evidence from the latter category as admitted is clearly a "harsh" remedy within the meaning of *Burnet* and should only be allowed in the most extreme of circumstances.

evidence that had become stale *after* Hyundai should have produced would not be a reward to Hyundai. The court could have fashioned an appropriate vehicle to deter, punish, compensate, and educate, while still preserving the jury trial.

Conclusion

This is a nearly unique case of discovery violations. The problem was worsened by error at the first trial, leading to reversal by the Court of Appeals and remand. However, the right to a jury trial is enshrined in our state constitution and may be set aside as a sanction only in the most extreme circumstances, when discovery violations are willful, the violations substantially prejudice a party's ability to proceed to trial, *and* no lesser sanctions can be devised. Because all three requirements are not met in this case, and a (second) jury trial could have been provided, as our constitution guarantees, I respectfully dissent.

AUTHOR:
Justice James M. Johnson

WE CONCUR:
Chief Justice Gerry L. Alexander