



200703210133

Skagit County Auditor

3/21/2007 Page

1 of

18 3:25PM

Document Title:

Notice

Reference Number :

Grantor(s):

☐ additional grantor names on page ____

1. White, Warren

2.

Grantee(s):

☐ additional grantee names on page ____

1. Public

2.

Abbreviated legal description:

☐ full legal on page(s) ____

Lots 10-14 BLK 138 Dewey Beach

Assessor Parcel / Tax ID Number:

☐ additional tax parcel number(s) on page ____

P73175

Warren White
P.O. Box 1090
LaConner, WA. 98257

To Whom It May Concern.

Statement for recording in Skagit County

Property Dewey Beach Block 138 Lots 12-14 P73175.

Property Dewey Beach Block 138 Lots 5 10-11 P73173

Property Dewey Beach Block 105 Lots 1 -14 P73129

Property Dewey Beach Block 98 Lots 1 -14 P731114

Statement Warren William White

My name is Warren William White, I bought the property that is listed as Dewey Beach Block number 138 lots 10 to 14 in 1977. Later I bought lot number 5 adjoining this property.

I have own said property since that time.

I am expressing my rights as guaranteed by the U. S. Constitution. Such rights as to petition the government for a redress of grievances. The right of the people to be secure in their persons, effects and property, and nothing shall be seized except by a writ describing what is to be seized. That no person shall be deprived of life, liberty, or property without the due process of law. Further no private property shall be confiscated for public use unless just compensation is paid. In matters where more than \$20 is concerned the right of trial by jury is to be perserved And the right of the people to retain the power not given to the government, (by the constitution) or the state is reserved to the people. I being one of the people, claim my rights.



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Due to a street vacation in the 1990's I acquired the adjoining streets next to my property. So did my neighbors. Lewis Moser Paul Savenchenko, and David Ovenell.

One neighbor Mr. Lewis Moser (P73129) (P73114) began to have an interest in my property because he wanted access to his property through my property.

Mr. Moser also began to see the price appreciation that his land was worth if he had mine. Or how little it was worth if the county allowed him to do nothing with it.

In the initial days of our discussion I told him that he would have to do it the old fashion way and buy what he wanted from me or trade me something of value that I would accept. He refused. The most that he offered was a equal size of the land that he wanted from me to use as an access for his land in Block 105. I felt in no way would this compensate me for my loss of privacy and the increase in traffic and such through my yard.

Mr. Moser refused to use the other access to his property via a Mr. Jeff Erickson property. He seemed more intent on using my land and funneling the corresponding traffic past me. To this I was and am still opposed!

So in July 2000 Mr. Moser suited me in the court of Skagit County.

In one of these hearing that transpired, Judge Susan Cook issued an order to me to give access to Moser that sounded more like confiscating my land and giving it to Mr. Moser than an just an easement that Mr. Moser was pursuing. That order is part of the public record.



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First, this hearing happened at a time I was not present. Nor was I informed of the hearing. I was not living at the property but in Idaho. Second I was I was in St. Louis Mo. as a condition of my work. I never appeared to the hearing because I was never notified of the hearing. Judge Susan Cook accepted that a notice could be sent to my property address in Washington while I was in fact living in Idaho and that this was in her mind was sufficient notification of the court hearing.

After the fact, I found out about Judge Cook's ruling and set out to over turn it. I ask Judge Susan Cook to reconsider her ruling. I told her as an airline captain I make mistakes all the time. The quicker that I notice the mistake and correct it, the better it is for everyone. I noted that I did not think that she knew the circumstance, and if knew that I was not notified, she would reconsider her position. She refused.

Apparently Judge Cook consider being a judge completely different than an airline captain, in that she could never make a mistake. I believing that my rights had been violated and that her ruling was in error. I appealed Judge Susan Cook's ruling to the higher level, the Court of Appeals of State of Washington.

The Court of Appeals of State of Washington. ruled in my favor and agreed that Judge Cook had imposed the most severe ruling on me without giving her reasons and stating them on the record. (A violation of my own due process of law)

The Court of Appeals of State of Washington. ruled in my favor, which I consider to over turn the earlier rulings of Judge Susan Cook. The reason that I had spent my money and time to take the case to The Court of Appeals of State of Washington. was to over turn Judge Cook's rulings..



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Enclosed for the record is The Court of Appeals of State of Washington's certified copy..

For the record I consider that my property is as it always been, mine or the property owner of the described property. It boundaries include portions of vacated Lincoln street, 5th street and 1/2 of the alley from lot 11 to lot 14 or all of the alley between lot 10 and lot 5.

I have the same property right as others in Skagit County. I do not agree that my neighbor can have my property for his use at the exclusion of my rights, just because it add more value to his land.. I believe that The Court of Appeals of State of Washtington. has a higher voice, that Judge's Susan Cook.

My position has been from the very beginning, that this is my land. I bought it. I paid for it. I paid taxes on it for years. If some one wants it then they have to buy it from me or trade what I will accept. They might be able to use it, but subject to what I might want. This is the same position that I have had from the very beginning. It took many years and thousands of dollars in court cost and attorney fees to be exactly where we started.

The property is still mine or the current owner of the said property as passed by title from me to another and so on.. I think that both me and the property is still protected by the rights laid out in our Constitution, and detailed in this letter for the record.

For the record.

Warren William White

Warren William White

Dated March 21 2007.

MARCH 21, 2007



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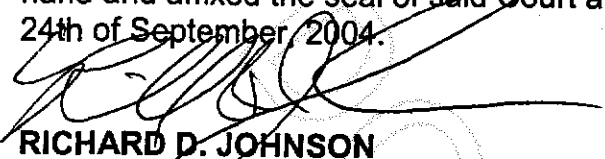
No. 52180-2-I

Pursuant to RAP 14.4, costs in the amount of \$1,052.87 are awarded against judgment debtor LEWIS A. MOSER and PATRICIA A. MOSER and in favor of judgment creditor WARREN WHITE and JANE DOE WHITE.

c: Daniel C. Wershow
William Reed Allen
Hon, Susan K. Cook



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 24th of September, 2004.


RICHARD D. JOHNSON

Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.



A majority of the panel has determined that the opinion will not be published in the Washington Appellate reports but will be filed for public record pursuant to RCW 2.06.040. IT IS SO ORDERED

Thurman Cox

CERTIFIED COPY

FILE
IN CLERK'S OFFICE
COURT OF APPEALS
STATE OF WASHINGTON-DIVISION 1
DATE AUG 09 2004
Thurman Cox
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LEWIS A. MOSER and PATRICIA A.
MOSER, husband and wife, and JOHN G.
SARGENT and MARJORIE J. SARGENT,
husband and wife, and DAVID P.
OVENELL,

Respondents,

v.

WARREN WILLIAM WHITE, individually,
and WARREN WILLIAM WHITE and
JANE DOE WHITE, and the marital
community composed thereof and all other
persons or parties, known or unknown,
claiming any right, title or interest to the
property at issue as described in the
Complaint filed in this cause.

Appellants.

NO. 52180-2-1

DIVISION ONE

UNPUBLISHED OPINION

FILED

AUG 09 2004

KENNEDY, J. — Lewis Moser filed suit to obtain a road easement over land belonging to Warren White. White failed to appear for his deposition scheduled for September 26, 2002. Moser filed a motion for sanctions under CR 37(d) and CR 37(b) including a request for default judgment. White denied that he had been properly served with notice of the deposition. The trial court found that White had received proper notice and granted default judgment to Moser based on CR 37(b). White filed a motion to set aside the default judgment, and the trial court denied the motion. Moser then filed a motion to reconsider, which was also denied. White appeals. We reverse and remand because the trial court failed to enter findings of fact.



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discovery violation substantially prejudiced Moser and whether a lesser sanction would have been appropriate.

FACTS

On July 26, 2000, Lewis Moser filed suit to obtain a road easement over land belonging to his neighbor Warren White. A stipulated order was entered on November 9, 2000, in which the parties agreed not to interfere with each other's use and enjoyment of the property during the pendency of Moser's claim. Twenty months later, Moser scheduled a deposition for White for September 26, 2002. The notice informed White that if he failed to appear, he would be liable for attorney fees of at least \$500 to the other party. White failed to appear for this deposition. White also failed to appear for a CR 26(i) discovery conference scheduled by Moser for October 7, 2001, to discuss why he had failed to appear for his deposition.

On October 23, 2002, Moser filed a motion for sanctions against White for his failure to appear, citing CR 37(d) and CR 37(b). The motion suggested several possible sanctions against White, including refusing to allow White to oppose the claims and defenses, prohibiting White from introducing evidence, rendering a default judgment against White, requiring White to pay Moser's attorney fees and costs incurred in conjunction with the scheduled deposition, or for an order requiring White to appear to have his deposition taken within 15 days. White did not defend against the motion.

On November 8, 2002, the trial court entered an order finding that White had received proper notice of the deposition. It also found that White had failed to appear and that Moser had incurred attorney fees and costs due to White's failure to appear. The court then stated, "An order of default should be granted against Defendant White, as authorized by CR37(b)(2)." The court granted



ordered White to pay reasonable attorney fees and costs in the amount of \$2,163.83. Based on the default order, the trial court later entered a judgment on December 6, 2002, granting Moser an easement on White's property, quieting title in the easement and prohibiting White from interfering with Moser's use of the easement.

On February 3, 2003, White filed a motion to set aside the judgment. He asserted that he had been out of state on his job as an airline pilot when notice of the deposition was mailed to his address. White stated that he had not returned until January 21, 2003, after the motion for default judgment had been granted. White asked the court to find that his failure to appear at the deposition was excusable neglect and to vacate the judgment. White also pointed out that because no discovery order had been entered against him, he had not willfully violated a discovery order. White claimed that since no trial date had been set, there was little prejudice to Moser. White asserted that he was now in the state and available to provide the information needed. The trial court denied White's motion to vacate.

White then filed a motion to reconsider. White's attorney asserted that White had provided new documentation that established that he was absent from Washington from August 31, 2002, through October 2002. Moser argued that this additional evidence did not establish excusable neglect. Moser asserted that White had made little attempt to contact him regarding a deposition date and was absent for four months without making arrangements for postponement of the proceedings. Moser attached copies of letters written to White in July and August, 2002, which requested resolution of the dispute and inquired about a date for a deposition. The court denied White's motion for reconsideration in a letter ruling dated March 12, 2003, stating that although White was out of state during crucial times in the litigation, the court



any case law supporting the proposition that a party establishes 'excusable neglect' by showing that he rendered himself incommunicado." Clerk's Papers at 115.

White appeals.

DISCUSSION

I. No Failure to Comply with Discovery Order

White argues on appeal that the trial court erred in granting default judgment to Moser because White did not fail to comply with a discovery order. Moser counters that a trial court is not required to enter a discovery order before it imposes sanctions for failure to comply with discovery requests.

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.3d 781 (1990); Smith v. Behr Process Corp., 113 Wn. App. 306, 324, 54 P.3d 665 (2002). This court will not disturb such rulings absent a clear showing that such discretion was manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Burnet, 131 Wn.2d at 494, citing Associated Mortgage Investors v. G.P. Kent Constr. Co., Inc., 15 Wn. App. 223, 229, 548 P.2d 558 (1976).

The trial court cited CR 37(b)(2) as authority for granting default judgment against White. According to its terms, this rule applies to a party's failure to comply with a discovery order. See, e.g., Burnet, 131 Wn.2d at 494; Smith, 113 Wn. App. at 324-25. The record does not show that any discovery order was entered here. However, many of the sanctions available under CR 37(b) are also available when a party fails to attend his or her own deposition. CR 37(d) specifically provides that a court may sanction a party who fails to attend his or her own deposition



CR37(b)(2)(A), (B) or (C), including "rendering a judgment by default against the disobedient party." CR 37(d); CR 37(b)(2)(C).

Although the trial court had not entered a discovery order, it had broad discretion to sanction White for failure to attend his deposition and the rules allowed it to use sanctions contained in CR 37(b)(2) to punish such failure. Thus, the court did not abuse its discretion by failing to first issue a discovery order prior to sanctioning White or by failing to thereafter cite CR 37(d) as the basis for the sanctions. See Pamelin Indus., Inc. v. Sheen-U.S.A., Inc., 95 Wn.2d 398, 401-02, 622 P.2d 1270 (1981) (where defendant failed to produce answers to interrogatories, plaintiff's motion for sanctions which cited CR 37(b), rather than CR 37(d) which specified sanctions for failure to produce answers, was properly granted even though no motion compelling discovery had been ordered, because CR 37(d) authorized sanctions under CR 37(b)).

II. Default Judgment

White alternatively argues that even if the court sanctioned him for his failure to attend his deposition, pursuant to CR 37(d), it was still required to enter written findings that established that his failure was willful, that no lesser sanction would have sufficed, and that his action prejudiced the opposing party. White is correct.

Because a default judgment raises due process concerns, the trial court must first find that a party willfully violated the discovery rules and that there was substantial prejudice to the opposing party. Burnet, 131 Wn.2d at 495; Snedigar, 114 Wn.2d at 169; Smith, 113 Wn. App. at 325. The finding of a willful violation of discovery rules is required prior to imposing a sanction even when a witness, rather than a party, misses a scheduled deposition. Stolz v. McKowen, 14 Wn. App. 808, 809-10, 545 P.2d 584 (1976). Further, where default judgment is granted a



must state on the record that the violation was willful, that it substantially prejudiced the opposing party, and that no lesser sanction would have sufficed. Snedigar, 114 Wn.2d at 169-70.

Moser argues that White did not argue to the trial court in his motion to set aside the judgment or in his motion for reconsideration that the court was required to enter findings and conclusions on these factors. Thus, Moser asserts that White cannot assert this error on appeal. Moser also asserts that it was clear from the court's order granting default judgment that it considered the factors that White claims are necessary prior to entry of a default judgment. Both of these assertions are in error.

An issue not briefed or argued to the trial court will not be considered on appeal. State v. Riley, 121 Wn.2d 22, 30, 846 P.2d 1365 (1993). But White asserted below, in both of his post-judgment motions, that his failure to attend the deposition was not willful, but was excusable neglect. White also asserted that there was little prejudice to the opposing party because no trial date had yet been set, and that he was willing to provide the information requested by Moser. While White did not specifically ask the court to enter findings on the various factors required prior to the entry of default, the entire thrust of White's argument was that default judgments are not favored unless the action was willful and prejudiced the opposing party.

Further, a party may raise for the first time on appeal a manifest error affecting a constitutional right. RAP 2.5. Constitutional due process limits the grant of default judgments as sanctions for discovery violations; denial of due process may exist in cases where the sanction is imposed as summary punishment for refusal to obey a court's discovery order. Associated Mortgage, 15 Wn. App. at 227-28 (finding no due process violation where trial court allowed defendants se



with discovery orders and granted default only after defendants did not respond). See also, Burnet, 131 Wn.2d at 495; Snedigar, 114 Wn.2d at 169; Smith, 113 Wn. App. at 325. To the extent that White asserts that the trial court abused its discretion in summarily entering default judgment without proper due process considerations such as consideration of an order to compel discovery or entry of findings of fact on willfulness, prejudice, and the availability of lesser sanctions, he has presented a manifest error affecting a constitutional right.

White's failure to specifically request the trial court to enter findings does not bar his appeal. Further, where the trial court's orders do not contain the findings necessary to support a default judgment—willfulness, prejudice, and whether a lesser sanction would have sufficed—we are required to remand the case for appropriate findings. Snedigar, 114 Wn.2d at 170 (where trial court erroneously found party "willfully" violated discovery rules, and failed to state whether the violation prejudiced the opposing party, the Supreme Court remanded the case to the trial court for further findings after determination of whether the violation was willful or prejudicial).

A. Willful Violation

A party "willfully" violates discovery rules when he or she does so without a reasonable excuse. Snedigar, 114 Wn.2d at 169. "A party's disregard of a court order without reasonable excuse or justification is deemed willful." Smith, 113 Wn. App. at 327, quoting Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002). Thus, the trial court was required to consider whether White had a reasonable excuse for failing to appear at his deposition and enter findings on this issue. The court's original order only states that White received proper notice of the deposition and failed to appear. The order does not



was willful. However, after receiving White's motion for reconsideration, the court entered a letter ruling on March 12, 2003, that White's evidence that he was out of state and rendered himself incommunicado did not establish excusable neglect sufficient to grant his motion to set aside the judgment based on CR 60. Thus, the court entered findings that no reasonable excuse existed for White's failure to appear at the deposition.

B. Substantial Prejudice

Prior to entry of default against White as a sanction for discovery violations, the trial court was also required to find that the violation substantially prejudiced Moser. The appellate court in Smith agreed that the trial court properly made findings of prejudice where the defendant in a class action defied several discovery orders and withheld information that would have helped the plaintiffs establish their theory of causation. Smith, 113 Wn. App. at 325-26. The trial court in Peterson v. Cuff, 72 Wn. App. 596, 865 P.2d 555 (1994) granted defendants a default judgment against a plaintiff who failed several times to appear for depositions and then ignored court orders to attend rescheduled depositions, finding that "[p]laintiff's conduct substantially prejudices the defendants' ability to prepare for trial[.]" Peterson, 72 Wn. App. at 599. The Court of Appeals agreed that the trial court had properly found prejudice on the record and had not abused its discretion in granting the defendants default judgment. Peterson, 72 Wn. App. at 601-02.

Moser asserts that White's own motion for reconsideration, in which he stated that damages could not be determined because no trial was yet set, establishes that the court considered prejudice to Moser. However, in contrast to the trial courts in Smith and Peterson, there is no indication that the trial court



White's failure to appear at his deposition substantially prejudiced Moser's case. There is also little indication in the record that White's actions prejudiced Moser in any significant degree.

C. Lesser Sanction

As discussed above, where the severest sanction of default judgment is granted for discovery violations, the court must also discuss on the record whether a lesser sanction would have sufficed. Snedigar, 114 Wn.2d at 169-70. 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. Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993). It is an abuse of discretion for a trial court to impose a severe sanction without having first considered, on the record, a less severe sanction that could have advanced the purposes of discovery and compensated the aggrieved party for the effects of the discovery violations. Burnet, 131 Wn.2d at 497.

Although Moser asked in the alternative for sanctions other than default judgment, the trial court did not consider, on the record, the adequacy of a lesser sanction than default judgment. Thus, it was an abuse of discretion for the trial court to have granted the most severe sanction. White did not violate a discovery order. Although he failed to appear at a deposition, there is little if any indication of substantial prejudice in this record and his post-judgment motions indicated his willingness to provide Moser with any information he requested.

In sum, because the trial court failed to enter findings on the record of prejudice to Moser from White's discovery violation and whether a lesser sanction would have sufficed, the court abused its discretion in granting d



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remand for consideration of these factors on this same record and, if the trial court is still of a mind to grant a default judgment for entry of clear findings of fact regarding substantial prejudice to Moser and why a lesser sanction, for example an order requiring White to appear for his deposition, to comply with future reasonable discovery requests, and to pay Moser a reasonable attorney fee, would not suffice.

Reversed and remanded for further proceedings in light of this opinion.

Sennedy, J.

WE CONCUR:

Appelwick, J.

Becker, J.



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UNOFFICIAL DOCUMENT

Certificate of the Clerk of the Court of Appeals
of the State of Washington, Division I, at
Seattle, Washington. The above is a true and
correct copy of original instrument which is
on file of record in this court. Done this

21st day of March 2007

Richard D. Johnson, Clerk

By [Signature], Deputy



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Skagit County Auditor

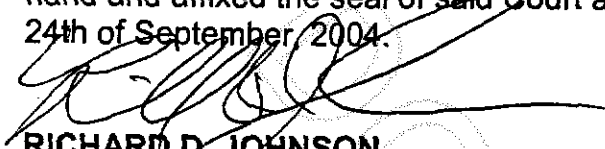
No. 52180-2-I

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c: Daniel C. Wershow
William Reed Allen
Hon, Susan K. Cook



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 24th of September, 2004.


RICHARD D. JOHNSON

Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

