HONORABLE TATEASHA DAVIS
Trial Date: March 3, 2025
Hearing Date: January 17, 2025

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

JOLENE R. KOTZERKE, individually as the surviving spouse and as Executor for the Estate of STEVEN D. KOTZERKE, deceased, Plaintiff, v. 3M COMPANY, et al. Defendants.	No. 23-2-05287-6 PLAINTIFF'S SECOND MOTION REQUESTING CR 37 SANCTIONS FOR ASBESTOS CORPORATION LIMITED'S VIOLATION OF COURT ORDER

I. RELIEF REQUESTED

Plaintiff JOLENE R. KOTZERKE, individually as the surviving spouse and as Executor for the Estate of STEVEN D. KOTZERKE, deceased, respectfully regretfully again request that this Court find Defendant Asbestos Corporation Limited (ACL) and now, its counsel, Mark Tuvim, in contempt under CR 37(b)(2)(C) for its continued violation of this Court's June 27, 2024 Order Granting Plaintiff's Motion to Compel ACL's further deposition and for sanctions under CR 37(b)(2), along with the Court's December 9, 2024 Order Granting Plaintiff's Motion for Sanctions.[1]

[1] Declaration of Sarah E. Gilson (Gilson Dec.), Ex. 1, Order Granting Plaintiff's Motion Requesting CR 37 Sanctions for Asbestos Corporation Limited's Violation of Court Order.

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On December 17, 2024, Mr. Tuvim informed Plaintiffs in unequivocal terms that, notwithstanding the Court of Appeal's decision rejecting ACL's QBCRA objections, and this Court's prior contempt Order, ACL would not comply and produce the documents and witness at issue.

The Court has given ACL and its counsel repeated opportunities to act in accordance with Washington law and this Court's authority. ACL's actions and Mr. Tuvim's continued representation of ACL while acting in contempt of this Court's authority must be penalized.

ACL's Answer must be struck, and default judgment entered. Moreover, Mr. Tuvim must be sanctioned—he is an officer of the Court and has had every opportunity to withdraw as counsel, as the law and Rules of Professional Conduct require, when directed by this client to purposefully and intentionally disregard this Court's orders. Instead, he and his firm have elected to defy Washington Court authority and the orders of this court, rendering Mr. Tuvim and Gordon Rees complicit in that contempt.

II. STATEMENT OF FACTS

The Court is extremely familiar with the lengthy procedural history concerning the discovery at issue here, dating back months, before this Court, before the Discovery Special Master and before the Court of Appeal. On December 9, 2024, this Court issued an Order to ACL finding it in contempt of Court and compelling it to produce documents on or before January 15, 2025, and a witness by January 31, 2025.[2] The Court further imposed a monetary sanction of $2000 per business day until the deposition of ACL was completed.

[2] Ex. 1.

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On December 17, 2024, Counsel for ACL Mark Tuvim notified Plaintiffs in writing that his client, notwithstanding the Court of Appeal's denial of its Motion for Consideration,[3] would not comply with this Court's Sanctions Order.[4]

III. STATEMENT OF THE ISSUE

Whether the Court should find ACL in further contempt of court and finally impose terminating sanctions, namely the entering of default judgment pursuant to CR 37 (b)(2)(C), where ACL has willfully violated the Court's repeated unequivocal orders to produce its witness for a complete and substantive deposition?

Whether the Court should find counsel for ACL, Mark Tuvim and Gordon Rees in contempt of court and impose monetary sanctions, where counsel has willingly enabled and participated in ACL's representation while (1) directing ACL or (2) being directed by ACL to act contrary to the Code of Civil Procedure and counsel's duties to the Court?

IV. EVIDENCE RELIED UPON

This Motion is based on the Declaration of Sarah E. Gilson, with attached Exhibits, as well as the pleadings and papers already on file in this case.

V. AUTHORITIES & ARGUMENT

A. Ultimate Sanctions Against ACL Are Necessary.

Trial courts are given wide latitude in determining what sanctions are appropriate.[5] The purposes of sanctions are to deter, to punish, to compensate, and to educate.[6] The discovery

[3] Court of Appeal Order Denying ACL Motion for Discretionary Review, attached as Ex. 2.
[4] December 17, 2024 Letter from Mark Tuvim, attached as Ex. 3.
[5] *Fisons*, 122 Wn.2d at 355.
[6] *Id.* at 356.

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sanction should be proportional to the discovery violation and the circumstances of the case[7] and should "insure that the wrongdoer does not profit from the wrong."[8]

Washington courts have determined that "A party's disregard of a court order without reasonable excuse or justification is deemed willful."[9] Furthermore, the courts emphasize "[t]he concept that a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning in modern trials".[10] The aim of the discovery rules is to "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[11] To ensure cooperation of the parties, the drafters "wisely included a provision authorizing the trial court to impose sanctions for unjustified or unexplained resistance to discovery."[12] Under CR 37(b)(2), the trial court has broad authority to impose sanctions for failure to comply with a court order relating to discovery.[13] The rule gives the court broad discretion to enter "such orders in regard to the failure as are just."[14] Sanctions include "an order treating as contempt of court the failure to obey any orders" and, under CR 37(b)(2)(C), an order "striking out pleadings" and "rendering default judgment against the disobedient party."[15]

Before imposing "one of the harsher remedies allowable under CR 37(b)" (holding defendant in contempt), the *Burnet* holding and its progeny indicate that the trial court "must explicitly consider whether a lesser sanction would probably suffice, whether the violation at

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[7] *Magaña*, 167 Wn.2d at 590 (citing *Burnet*, 131 Wn.2d at 496–97).
[8] *Fisons*, 122 Wn.2d at 355–56 (footnote omitted).
[9] *Magaña*, 167 Wn.2d at 584 (quoting *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 686–87 (2002).
[10] *Washington State Physicians Inc. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 342 (1993).
[11] *Id.* (quoting *Gammon v. Clark Equipment Co.*, 38 Wn. App. 274 (1984)).
[12] *Id.* at 342.
[13] Ende, 15A Handbook on Civil Procedure, § 56.1 (2018–19 ed.).
[14] CR 37(b)(2).
[15] CR 37(b)(2)(C).

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issue was willful or deliberate, and whether the violation substantially prejudiced the opponent's ability to prepare for trial.[16] The sanction must not be so minimal that it undermines the purpose of discovery, and sanctions need to be severe enough to deter attorneys and others from participating in the same kind of conduct in the future.[17]

In this instance, ACL has already been found in contempt of Court and directed to produce documents and a witness, along with the second imposition of monetary sanctions in this case against it. ACL and its counsel have informed Plaintiffs via letter dated December 18, 2024, that

> Notwithstanding the rulings in the Kotzerke case by the trial court and Court of Appeals Commissioner with respect to the application of the QBCRA here, ACL has concluded that it cannot and will not violate its home law without risking civil and criminal penalties. Accordingly, ACL will not produce a witness to testify further on the topics specified in the CR 30(b)(6) deposition notice, and will not produce the documents Plaintiff demands therein.[18]

None of the sanctions previously imposed by this Court, including the recent monetary sanction of $2000 per business day, have had any impact on ACL's decision to comply with Washington discovery laws. It is subject to this Court's jurisdiction, has appealed to the authority of the Court throughout this case when it seeks to benefit therefore, and now explicitly and without compunction, states it will never do as Ordered. There is no other remedy but to strike its Answer and enter default.

B. **<u>Sanctions Against ACL's Counsel Of Record Are Justified.</u>**

Fisons is a 1993 case central to the availability and application of sanctions orders in this State and it involved the imposition of sanctions against both a party *and* its counsel. In *Fisons*, the defendant drug company and its counsel withheld from discovery critical documents revealing

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[16] *Jones v. City of Seattle*, 179 Wn.2d 322, 338 (2013) (citing *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494 (1997)).
[17] *Fisons*, 122 Wn.2d at 356.
[18] December 17, 2024 Letter from Mark Tuvim, attached as Ex. 3.

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its awareness of the subject drug's toxicity. After a copy of one of those documents was anonymously mailed to the plaintiff, the Court directed the immediate production of all documents referencing the drug. Within 24 hours, counsel for the drug company produced 10,000 documents, all of which had been in its possession. The Court noted that (1) Rule 26 imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purpose of the Rule and (2) Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. Citing the Amendment to the Federal Rules of Civil Procedure, the Court concluded that the very premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor.[19] The Court of Appeal rejected the argument made by the drug company's counsel that "they were just doing their job, that is, they were vigorously representing their clients", holding the following:

> [V]igorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate. The lawyer's duty to place his client's interests ahead of all others presupposes that the lawyer will live with the rules that govern the system. Unlike the polemicist haranguing the public from his soapbox in the park, the lawyer enjoys the privilege of a professional license that entitles him to entry into the justice system to represent his client, and in doing so, to pursue his profession and earn his living. He is subject to the correlative obligation to comply with the rules and to conduct himself in a manner consistent with the proper functioning of that system.[20]

How to sanction a person responsible for the violation of a Court Order is left to the discretion of the trial judge, who must consider if the sanction is sufficient to ensure that there is no profit from the violation.[21] While "the issue of imposition of sanctions upon attorneys is a

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[19] *Fisons,* 122 Wn. 2d at 342.

[20] *Id.* at 354–55, citing Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181, 184 (1985).

[21] *Id.* at 356.

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difficult and disagreeable task for a trial judge, it is a necessary one if our system is to remain accessible and responsible. Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense."[22]

Courts have found, since *Fisons*, that sanctioning counsel for a repeated violation of discovery orders by their clients is appropriate.[23] In *Washington Motorsports*, the Court rejected counsel's argument that he was faced with an impossible dilemma between the orders of the Court and the forthright desire of his client to avoid criminal prosecution (*as is alleged here*). The Court found that the client's "continued contempt for court orders did not create a true ethical dilemma for counsel, let alone justify counsel's behavior. The ends did not justify the means." After the client's continuous refusal to abide by discovery orders and sanctions orders:

> Counsel at that point had the clear answer to the purported dilemma-his client was not concerned enough about the problem to live up to his own obligations to the court. Instead, his client wanted to continue to resist the court's authority, but also seek the court's mercy by having it rescind its orders. Given his client's refusal to act in his own self-interest, we simply do not understand why counsel thought he had to do so, let alone why he was justified in certifying an inadequate response.[24]

Like counsel in *Washington Motorsports*, counsel for ACL "had the options of encouraging his client to comply […] or, […] if they would not, of withdrawing from the representation rather than commit contempt."[25]

As briefed extensively in the prior Motion for Contempt heard and granted by this Court, ACL has a history of directing its counsel of record to disregard their duties to the Courts in which they practice as officers, including making improper claims of privilege and disregarding

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[22] *Id.* at 355.

[23] *See*, *e.g.*, *Washington Motorsports Ltd. P'ship v. Spokane Raceway Park, Inc*., 168 Wn. App. 710, 717 (2012): "Sanctioning counsel for the second violation would appear to be the only rational response left to the trial court."

[24] *Washington Motorsports*, 168 Wn. App. at 717–18.

[25] *See*, *e.g.*, *In re of Rapid Settlements, Ltd's*, 189 Wn. App. 584, 603 (2015).

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sanctions orders nationwide. Mr. Tuvim is licensed in this state, and as such as a duty to the Courts of Washington State that must take precedent. He swore an Oath, which states as its first tenet to abide by the laws of the State of Washington, to maintain the respect due to the courts of justice and Judicial Officers of this State, and maintain no cause or suit which is unjust.[26]

If his client directs him to flaunt Court Orders and ignore the laws of discovery, he should withdraw as counsel of record as directed by the Rules of Professional Conduct: "a lawyer shall […] withdraw from the representation of a client if the representation will result in violation of the Rules of Professional Conduct or other law."[27] Instead, Mr. Tuvim and Gordon & Rees elect to continue to benefit from representing ACL, while disregarding these fundamental obligations to the judiciary and the Bar. The consequence for this complicity with ACL's contempt is to be likewise held in contempt. There is no other means of discouraging counsel from taking such action other than the threat of monetary sanctions and an Order of contempt and the consequence that brings. Plaintiffs ask this Court to issue an Order which imposes monetary sanctions against ACL's counsel of record for its continued contempt of Court, including for Plaintiffs' costs and fees associated with this Motion, with Plaintiffs' continued and wasted efforts to obtain discovery and discovery compliance from ACL, all of which were perpetuated by Mr. Tuvim and Gordon & Rees since the outset of this discovery over 10 months ago.

VI. CONCLUSION

For the foregoing reasons, Plaintiff asks this Court to GRANT this Motion and strike ACL's Answer, entering default against it. Plaintiff asks this Court to issue a further Order

[26] Washington Admission and Practice Rule 5 Oath of Attorneys
[27] Washington Rule of Professional Conduct 1.16(a)

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imposing monetary sanctions against ACL's Counsel of Record for all costs and fees related to this discovery dispute to date.

DATED this 23rd day of December, 2024.

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