

# WASHINGTON CASE UPDATE

## Discovery Violation Sanctions Should Be Least Severe Possible

case in point...

**From the Desk of Kyle D. Riley:** When a party fails to reasonably respond to discovery requests, the trial court can sanction the party. Generally, sanctions should be the least severe sanctions possible that will still ensure the wrongdoer does not profit from the wrong. Read on to see how the appellate courts may analyze whether sanctions are appropriately tailored to the violation.

**Claims Pointer:** In this case arising out of a slip-and-fall, the Court of Appeals upheld a trial court's sanctions granting attorney costs and fees. The case provides insight into how sanctions for discovery violations are handled by the courts. The case is a reminder that sanctions are possible even where a party believes it has properly complied with all discovery requests.

Loe v. Benson Village Associates, No. 72946-2-1, Washington Court of Appeals, Div. I (September 26, 2016) (unpublished)

Nancy Loe ("Loe") was a tenant in the Benson Village Apartments owned by Benson Village Associates ("Benson"). In November 2010, Loe fell in a common area outside Benson's office. She sued, alleging she tripped over small decorative pumpkins that were in the way.

In February 2014, Loe served Benson with requests for production, which included a request for documents describing procedures to maintain the safety of walkways and procedures to follow in the case of an accident. Benson did not provide any documents in response, instead indicating there were no such documents, even going so far as to question why Loe requested that Benson supplement its discovery responses.

The case proceeded to arbitration in August 2014. At the arbitration, one of Benson's resident managers testified that she had read an Operations Manual ("Manual") and would routinely look things up in it. She also testified that the manual, which contained instructions to property managers to inspect the grounds daily and keep an incident report log, had been in use at the time of Loe's accident.

Benson lost at arbitration and requested a trial de novo. Loe renewed her request for production based on the manager's testimony,

and months after arbitration, Benson produced excerpts of the Manual. Loe moved for the trial court to impose sanctions on Benson because it failed to produce the Manual earlier, specifically asking for both monetary sanctions and a denial of Benson's request for a trial de novo. The court granted the motion and ordered Benson to pay Loe's attorney fees and costs for attending the arbitration proceedings and bringing the motion for sanctions, totaling approximately \$3,500. However, the court refused to deny Benson's request for a trial de novo. At trial, Loe introduced the manual into evidence in an attempt to show that Benson failed to follow its own policies, but the jury returned a verdict for Benson. Both Benson and Loe appealed the sanctions ruling.

On appeal, Benson argued that the trial court abused its discretion by finding that its responses to Loe's requests for production violated Court Rule 26(g). That rule requires an attorney of record to sign a discovery response certifying he has read the response and, to the best of his knowledge, information, and belief formed after a reasonable inquiry it is 1) consistent with the discovery rules, 2) not interposed for any improper purpose, and 3) not unreasonable or unduly burdensome or expensive. An attorney cannot rely on subjective belief or good faith to avoid sanctions. Rather, discovery responses must be consistent with the letter, spirit, and purpose of the rules.

The Court of Appeals noted that the manual was responsive to Loe's discovery requests.



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The resident manager's testimony supported the trial court's finding that the manual was readily available to Benson, and in a negligence suit based on a plaintiff's fall, the defendant's policies for presenting slip-and-falls are both relevant and important. Moreover, the trial court determined that Benson's inquiry in response to Loe's requests for production was not reasonable. Thus, the trial court did not err in imposing sanctions.

Benson further argued that imposing monetary sanctions constituted an abuse of its discretion. Washington case law provides principles to guide a court's decision as to sanctions, including the instruction that the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. However, the sanction should not be so minimal as to undermine the purpose of discovery, and it should ensure the wrongdoer does not profit from the wrong. The trial court determined that monetary sanctions were the least severe sanction necessary. The Court of Appeals agreed, stating that the award appropriately punished Benson and might help deter future discovery violations.

For her part, Loe argued that only denying Benson's request for a trial de novo would prevent Benson from profiting from its violation. However, the Court of Appeals disagreed, noting that Loe did not have the Operations Manual at arbitration and prevailed, but Loe did have the Operations Manual at trial and lost. Thus, while the Operations Manual was relevant, it was not a "smoking gun." Moreover, the trial court did not find that Benson intentionally violated discovery rules or acted in bad faith. As such, there was no justification for a sanction as severe as denying Benson's request for a trial de novo. The trial court was affirmed.

**NOTE: This opinion has not been published. It is provided to demonstrate how the court approaches the issues involved in the case.**

**It cannot be cited as authority to a court of law.**

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