100456-7
No. 54347-8-II

IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

DOMINICK BYRD,

Plaintiff - Appellant,

v.

ALETTA HORTON *et al*,

Defendants - Appellees.

PETITION FOR REVIEW

FILED ON BEHALF OF PLAINTIFF-APPELLANT DOMINICK BYRD

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A. IDENTITY OF PETITIONER

Petitioner Dominick Byrd [and aggrieved party Richard Simpson, WSBA #53162], asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Division II of the Court of Appeals issued an unpublished decision in Cause No. 54347-8-II on November 9, 2021; Byrd moved to publish the opinion on November 15, 2021. That motion is undecided at this time. A copy of the decision is in the Appendix at pages A-1 through 3. Byrd requests review of the Court of Appeals, Division II, in *Dominick Byrd, Appellant v. Aletta Horton et al., Respondents*, No. 54347-8-II, which affirmed the trial court's issuance of $25,000 sanction against Byrd's attorney [Simpson] for injured plaintiff Byrd's inability to post a $500,000 supersedeas bond; issuance of $5,000 sanction against Simpson for "lying before the tribunal" despite no lie; granting of Defendant Horton's CR 2A Motion to Compel Settlement; and dismissal with prejudice a complaint against two separate and identifiable parties, Aletta Horton and MBK Housing LLC.

C. ISSUES PRESENTED FOR REVIEW

1. Is review appropriate where the decision to sanction a lawyer under Civil Rule 11 for "lying before the tribunal" is upheld when (i) the lawyer did not lie before the tribunal; (ii) opposing counsel for defendant *did* lie before the tribunal and there is demonstrable proof of several deceptions; (iii) the sanctioned attorney took action warranted by existing law or a good faith argument for the extension of existing law,

aimed at reducing any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation under codified law at RCW 4.22.060; and (iv) the attorney did not violate the black letter of Civil Rule 11?

2. Is review appropriate where the decision to sanction a lawyer for his injured plaintiff client's inability to post a "defendant" or supersedeas bond is upheld when that decision is in conflict with RAP 8.4 and RCW 19.72.020, not to mention common sense?

3. Is review appropriate where the trial court's decision to enforce a CR 2A Motion to Compel Settlement is upheld or ignored when (i) CR 2A motions are to be treated in the same manner as motions for summary judgment and are to be viewed in the light most favorable to the nonmoving party; (ii) there are genuine issues of material fact to the underlying agreement, including named released parties that defendant's counsel inserted prior to presentation at the behest and influence of their third-party, non-litigant employer insurance company?

4. Is review appropriate where the trial court's decision to dismiss with prejudice in its entirety a case against both an insured individual as agent and a rental housing company owned and operated by that same individual as principal when no consideration for dismissal had been provided by the rental housing company, in contradiction to *Pickett v. Stephens-Nelsen, Inc.*, 43 Wn. App. 326, 717 P.2d 277 (Wash. Ct. App. 1986)?

D. STATEMENT OF THE CASE

On October 17, 2017, Dominick Byrd suffered third degree burns requiring skin grafts covering approximately 30% of his body due to a house fire that originated in a vacant room within a rental property owned and operated by agent Aletta Horton and principal MBK Housing LLC. MBK Housing LLC is a Washington State company that owns and operates a number of residential rental properties throughout Tacoma, Washington, including the house where the negligent fire occurred. By all reasonable inferences, (i) the fire originated at an electrical outlet in the vacant room; (ii) some or all prior electrical work had been modified by Aletta Horton, her family members, or one of her other companies as general contractor; and (iii) the vacant room lacked a smoke alarm.

Prior to filing Byrd's complaint, Byrd's attorney sent a demand letter to adjuster Jamee Griffin at Safeco Insurance, Horton's insurer, demanding monetary settlement in exchange for a release of all claims against Horton. Upon rejection of this demand, Byrd's attorney at Simpson Law PLLC (i) notified Horton's assigned defense attorneys at Preg O'Donnell & Gillett that Mr. Byrd's damages, due to the permanent injuries he sustained, including a $400,000 hospital bill, exceeded the amount of Horton's insurance proceeds under the liability portion of her policy; and (ii) demanded from Horton the proceeds from the policy ($500,000) and an assignment of rights under her insurance policy along with a stipulated agreement for a reasonable amount beyond policy limits, pursuant to existing law, all to avoid a lawsuit against Horton, their client. Despite this being in Horton's best interest, Horton's attorneys pressed for litigation. In an initial

phone conversation with Jeff Daly, Horton's defense counsel, he plainly stated, "I don't know why they [referring to Safeco] don't just waive policy limits." Under established insurance law, it is insurance defense who makes the call to the insurance adjuster whether to settle or litigate, thus Daly presumably took a risk at litigation rather than encourage settlement early on. Following months of futile and useless efforts and settlement demands, each time demanding policy limits, Byrd filed his complaint in Superior Court on September 18, 2018. After filing, attorneys for Safeco Insurance contacted Byrd's attorney and became involved, illegally, in negotiations. Six months after filing his complaint, Horton's attorneys finally agreed to pay the policy limits, and Byrd agreed to release the named insured, Aletta Horton, from the suit. Although Safeco was not a party to this underlying suit, it intervened in the terms of the settlement agreement between Horton and Byrd and inserted itself, Safeco, and MBK Housing LLC as released parties. Byrd had no intention of releasing Safeco or MBK Housing LLC, yet Horton's attorneys appeared at the exchange of the check with an altered contract, one that released MBK and Horton's insurer (again, even though Horton's attorneys did not represent Safeco).

With Horton's contribution in hand, her limited financial ability to satisfy a judgment greater than this amount, and Byrd's excessive damages, Byrd moved for a "reasonableness hearing" pursuant to RCW 4.22.060 to reduce unnecessary delay and to reduce the needless increase in the cost of litigation. Existing case law supported this motion and Simpson signed on Byrd's behalf. Even though this arrangement ultimately helped Horton, her attorneys moved for a CR 2A Motion to Enforce Settlement at the

same time as the reasonableness hearing. Given Safeco's interference with the contract between Horton and Byrd, Byrd presented material facts to the trial court that the contract was either unenforceable by the court or that Horton's attorneys had presented a counteroffer to Byrd's demand. The trial court failed to view the CR2A Motion in the light most favorable to the nonmoving party, Mr. Byrd, and ultimately sided with Horton's defense team. The trial court then sanctioned Simpson $5,000.00 for "lying before the tribunal", payable to Preg, O'Donnell & Gillett, despite no falsification of the truth. Coincidently, $5,000.00 is the standard copay for liability insurance suits under many policies. Simpson informed the trial court judge that he would never lie before the court and also presented evidence of opposing counsel deliberately lying, but the trial court did not budge. Instead, the trial court stated that Simpson could appeal the entire case.

Upon an initial attempt at an appeal, Horton's defense attorneys sought a supersedeas bond requirement, otherwise known as a defendant's bond, and successfully obtained an order from the trial court stating that Byrd must post a $500,000.00 bond with the court in order to move forward with his appeal. After only a matter of several days, when Mr. Byrd had only been in initial negotiations with sureties and banking institutes, following the judge's orders, Horton's defense attorneys moved for deficient bond and demanded sanctions. At the next hearing, despite providing evidence that Mr. Byrd, as plaintiff, made efforts to obtain a half a million dollar defendant's bond, the trial court sanctioned Simpson $25,000.00 for failure to post a bond.

Byrd's initial appeal in the Court of Appeals Division II, Cause No. 53216-6, had been dismissed and mandated back to the Superior Court. Some months following this dismissal, the same trial court judge who issued the $5,000.00 and $25,000.00 sanctions against Simpson refused to reconsider the issuing of these sanctions and instead stated that an arrest warrant would be issued against Simpson if he failed to pay the total amount of $30,000.00, despite violations of due process requirements and the appealable nature of sanctions.

After a second appeal to Court of Appeals Division II, for the sanctions, the Court of Appeals dismissed Simpson's appeal and thus he and Byrd, as both aggrieved parties, seek review by the Supreme Court for this grave and unusual miscarriage of justice.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

STANDARD OF REVIEW

Decisions either denying or granting sanctions, under CR 11 or for discovery abuse, are generally reviewed for abuse of discretion.[1]

Given the nature of the issues presented by Mr. Byrd, together with the factual pattern of this particular case, Mr. Byrd asks the Court to review all issues *de novo*.

I. Issue #1: "Lying Before the Tribunal"

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.[2] A trial court would necessarily abuse its

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[1] *See Wash. State Physicians Ins. Exch. Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993), *citing Cooter Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 L.Ed.2d 359, 110 S.Ct. 2447 (1990).

[2] *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 315, 822 P.2d 271 (1992); *Watson v. Maier*, 64 Wn. App. 889, 896, 827 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992).

discretion if it based its ruling on an erroneous view of the law.[3] Civil Rule 11 explicitly provides that "the signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is well grounded in fact;

(2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;" *See* CR 11.

Important in the analysis of the CR 11 sanctions against Simpson for "lying before the tribunal", then, is an objective determination that Simpson moved for a "reasonableness hearing" under RCW 4.22.060, under existing legislative and judicial law, and not for any improper purpose. Even if the trial court judge mis-categorized "Rule 11" sanctions with "lying before the tribunal" sanctions, Simpson is adamant that he presented no lie before the tribunal, and is willing to testify to this statement under oath and under penalty of perjury. The presumptive purposes of RCW 4.22.060, a legislative law, and "reasonableness hearings", a legal proceeding, are to relieve the courts from the burdens of excessive litigation and to resolve conflicts in the easiest means possible. The Washington State Supreme Court has addressed this issue in numerous instances, establishing that an insurer which defends its insured under a reservation of right to contest coverage has an enhanced fiduciary obligation to act in

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[3] *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn. 2d 299, 339 (Wash. 1993), *citing Cooter Gell*, 496 U.S. at 405.

good faith toward its insured.[4] In meeting its enhanced obligation of fairness when providing for the defense of its insured under a reservation of rights, an insurer must thoroughly investigate the cause of the incident being litigated and the nature and severity of the plaintiff's injuries; retain competent defense counsel who understands that the insured is *his only client (emphasis added)*; and refrain from exhibiting a greater concern for its monetary interest than for the insured's financial risk. *Tank*, 105 Wn. 2d 381 (Wash. 1986). Without delving into the rich history of RCW 4.22.060 and stipulated judgments, the Supreme Court has created clear guidelines and precedence establishing the nature of the relationship between the insurer, insured, and insurance defense. As insurance defense, Preg O'Donnell & Gillett clearly engaged in behavior and actions that demonstrated a greater concern for the monetary interests of their employer over that of their "*only client*" Aletta Horton by pressing for Mr. Byrd to sue Ms. Horton rather than settle on terms that might benefit Horton. Due to the obvious conflict of interest in the case at hand, it makes no sense neither in hindsight nor even today that Horton's attorneys would object or fight a scenario that would either avoid a lawsuit against its client or resolve the conflict against their client sooner rather than later. In the case at hand, Byrd recited the law in great efforts to Horton's attorneys and yet they remained influenced by their employer insurance company. After nearly a year of asking for Horton's liability policy limits (not to mention property damage amounts), insurance defense and insurer attorneys finally handed over a check for the full amount of the policy proceeds in exchange for a full and final release of "the insured" (a statement

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[4] *See Tank v. State Farm*, 105 Wn. 2d 381 (Wash. 1986).

Jeffry Daly for Preg O'Donnell acknowledged in open court). MBK Housing LLC is not an insured party. For obvious but unethical reasons, the insurer had to approve their settlement agreement and John Silk, attorney for Safeco, with a separate law firm, made a decision to pay out the $500,000.00, which is presumably Horton's own assets as the policyholder. Her attorneys, then, violated their ethical duty to their own client, violated the rule of law, and deceived everyone involved in litigation even prior to Byrd's filing of his complaint. It is entirely predictable, given legal precedence, as well as common sense, that a lawyer representing a catastrophically injured plaintiff with third degree burns requiring skin grafts would move the court to reach an amount that might reasonably compensate him and avoid further legal recourse against a defendant highly unable to compensate Mr. Byrd fully for the injuries he sustained and she caused. And yet, Horton's attorneys fought the simple agreement, pushed for further litigation, and sought to compel settlement. As will be discussed below, these attorneys went so far as to appear at Simpson's office with check in hand but with an entirely altered agreement, one that released both Safeco and MBK Housing from liability. Mr. Byrd did not include these terms in the agreement, but instead Silk at the firm Wilson Smith Cochran and Dickerson, lawyer(s) for the insurer (not a party to the present suit), inserted these terms into the agreement between Horton and Byrd. This information is presented as a foundation for the abuse of discretion standard that applies to the initial sanctions imposed against Simpson for "lying before the tribunal."

Here, a Judge, as a State actor, issued sanctions for "lying before *the tribunal*" (emphasis added) in the amount of $5,000 payable to Preg O'Donnell & Gillett.

These sanctions, though issued without proper due process requirements, *should* presumably be paid to the State, and not to the opposing law firm in the underlying litigated matter. Otherwise, this has the potential to create an enormous conflict of interest, an abhorrent concept to the legal system, and in addition amounts to State-enforced extortion when the same trial judge threatens to issue an arrest warrant for failure to pay sanctions absent meeting due process requirements.

Examination of decades of legal disputes concerning the reservation of rights defense and the inherent conflict this arrangement creates demonstrates that it is apparent that Horton's attorneys lied, or had every incentive to lie, before the tribunal. Mr. Byrd, sleeping at the time of the fire, had no reason to lie and neither did his attorney, who simply sought to follow the law. Even if the plaintiff's lawyer is found to have been deserving of sanctions for following the law and representing his client the best that he possibly could, then it stands that any award of sanctions should not be paid to opposing counsel, but rather to the State. By issuing sanctions payable to the defense legal team, the legal system would enable these attorneys to continue litigating the matter at the expense of the plaintiff's chosen law firm. They are bankrolled by an insurance company (an extremely well-funded one at that). It cannot serve justice well if State-endorsed sanctions directed at a plaintiff's lawyer are payable to the firm defending a "client" and not looking out for her best interests, and looking only to be paid themselves through unnecessary sanction practice.

Finally, Mr. Byrd has still only obtained the policy limits, the exact same amount he had sought since pre-filing of the complaint. In other words, no harm no foul. What

possible reason could the plaintiff's lawyer have to lie under circumstances of clear liability, severe damages, and limited resources of the defendant? The defense team, employed by the insurer, has many millions of reasons to lie. In fact, during this litigation, plaintiff's lawyer submitted at least two separate instances in which the defense counsel had deliberately lied before the tribunal. Clearly, with demonstrable proof, the Horton's attorneys lied under oath and yet received no sanctions. There is no proof that the plaintiff's lawyer provided false information, because there is none.

II. Issue #2: "Failure to Post Supersedeas Bond"

Again, a trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds and would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.[5] Revised Code of Washington 19.72.020 plainly states that "whenever any bond or recognizance is required, or permitted, by law to be made, given or filed…no attorney-at-law, sheriff, clerk of any court of record, or other officer of such court, shall be permitted to become such surety." *Id*. Rules of Appellate Procedure 8.4(a) further provides that "a party may not act as a surety." *Id*. A court-ordered sanction against a plaintiff attorney for his client's inability to post a defendant's bond is perhaps the most obvious abuse of discretion as simultaneously unreasonable and based on an erroneous view of the law, particularly when the plaintiff attorney plainly offered in open court to return the original check (i.e. the $500,000 check) and he himself is legally barred from posting bond for a client/litigant. The natural consequences of

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[5] *See Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 315, 822 P.2d 271 (1992); *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn. 2d 299, 339 (Wash. 1993), *citing Cooter Gell*, 496 U.S. at 405.

failing to post a bond would amount to termination of an appeal, which indeed happened, and not *additional* costs to the plaintiff or his attorney. This arguably amounts to obstruction of justice at the State level. In Court, on the record, plaintiff's lawyer Simpson offered to return the "settlement" check at the initial CR2A hearing. This information alone should be sufficient to reverse the sanctions for failure to post bond. On that same day, June 21, 2019, unfamiliar with appeal bonds, lawyer for the plaintiff reached out to defense counsel with a proposed or draft bond, via e-mail, payable to Safeco Insurance Company of America and to Liberty Mutual, the issuers of the check, and not to the defendant Horton. Despite this small but admittedly misguided effort, these attorneys stated on the record that the plaintiff's lawyer had "filed" the bond, including this attempted draft bond as an attachment to their motion seeking additional sanctions for a deficient bond. This amounts to an additional lie before the tribunal.

After this, informing opposing counsel that the plaintiff's lawyer would be on vacation the week following the hearing, Horton and her defense team moved for a deficient bond hearing for the week after, despite the plaintiff's lawyer having been out of town, unavailable, and not having "filed" anything with the Court, in order for the bond to be deficient. On July 26, 2019, Horton and her defense team again moved for CR 11 sanctions, inapplicable in this matter, and the Court ordered that the plaintiff's (and his attorney this time, it appeared) be sanctioned $25,000 for his failure to post a bond in seeking an appeal. Now, the appeal would have cost Mr. Byrd $525,000. This is unreasonable. Nor does it make sense that the plaintiff's lawyer is sanctioned for failure to post a bond, given the rule that a law firm may not post bond for its own client

anyway. *See* RCW 19.72.020. Simpson Law PLLC, the firm representing Mr. Byrd in the above-referenced matter, never purported to act as surety before the court. In contrast, at the hearing on July 26, 2019, plaintiff's lawyer offered to show financial-related documents demonstrating Mr. Byrd's efforts in obtaining a bond from a separate, accredited financial institution, but the Court chose not to view those documents. Instead, the Court issued additional sanctions in the amount of $25,000. Even under Washington's contempt laws, the maximum amount of sanctions that a Court may impose on a defendant found guilty of contempt is $5,000. *See* RCW 7.21.040(5). The violation of RCW 7.21.040 is twofold, as under section (2)(c) [and (d)] "a judge making a request pursuant to this subsection shall be disqualified from presiding at the trial." The trial court's imposition of an exorbitant $25,000 sanction against Simpson for Byrd's inability to post supersedeas bond is egregious and an abuse of discretion for its contrariness to the law in several respects, that it exceeds the $5,000 maximum available at law, puts the burden of the bond on the litigating attorney, and the judge acts as judge, jury and executioner for his own absurd sanctions. The Supreme Court is wise to reverse and strike this specific imposition of sanctions against Simpson for what appear to be obvious reasons.

III. Issue #3: CR 2A Motion to Compel Settlement

The Court of Appeals refused to review the trial court's erroneous application of the law with regard to the Defendant's CR2A Motion to Compel Settlement. Where a party moves to enforce a CR 2A agreement based on declarations or affidavits, a trial

court should proceed as if considering a motion for summary judgment.[6] If the nonmoving party raises a genuine issue of material fact, a trial court abuses its discretion if it enforces the agreement without first resolving such issues following an evidentiary hearing.[7] The Washington State Supreme Court has held that a litigant does not waive his right to appeal by accepting a settlement check and that the trial court erred when it implied and enforced additional terms that were not agreed to by the parties.[8]

CR 2A applies when (1) the agreement was made by the parties or their attorneys "in respect to the proceedings in a cause," and (2) the purport of the agreement is disputed.[9] An agreement is disputed under this rule if there is a genuine dispute over either the existence or a material term of the agreement.[10] "The moving party has the burden to prove there are no genuine disputes regarding the agreement's existence or material terms.[11] The court must view the evidence in the light most favorable to the nonmoving party and decide whether reasonable minds could reach but one conclusion.[12]

Similar to the cases above, particularly *Condon*, Byrd accepted the policy limits check, did not waive his right to appeal, and the trial court erred when it implied and enforced additional terms that were not agreed to by the parties. *Id*. This is an especially

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[6] *Brinkerhoff v. Campbell*, 99 Wn. App. 692, at 696-97 (citing *In re Marriage of Ferree*, 71 Wn. App. 35, 43, 856 P.2d 706 (1993); *In re Patterson*, 93 Wn. App. 579, 584, 969 P.2d 1106 (1999)).

[7] *Id*. at 697.

[8] *See Condon v. Condon*, 298 P.3d 86, 177 Wash.2d 150 (2013).

[9] *Ferree*, 71 Wn. App. at 39.

[10] *Patterson*, 93 Wn. App. at 583.

[11] *Id*. (emphasis added).

[12] *Brinkerhoff*, 99 Wn. App. at 697 (citing *Ferree*, 71 Wn. App. at 44).

suitable argument to the $25,000 sanctions above for failure to post supersedeas bond, an onerous requirement of a litigant who suffered such grave injuries and is aimed at thwarting Byrd's right to an appeal.

"When the injured party released both the principal and agent from liability, but the agent did not participate in the settlement agreement, the agent was not thereby discharged from liability to the principal for contribution or indemnity."[13] Where principal and agent were codefendants in [an] action, settlement with agent did not also release principal, where court determined that the agent would be unable to compensate fully the plaintiff.[14]

Under 4.22.070 (1) "In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to *every* entity which caused the claimant's damages…" *See* 4.22.070(1) RCW. The Washington Supreme Court in its *Clark v. Pacificorp* decision laid to rest any argument that the RCW 4.22.070 is equivocal on this point or that the trier of fact's duty of fault allocation can be construed narrowly:

> The language of RCW 4.22.070(1) is clear and unambiguous: "the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant' damages." (Italics ours.) "Shall" is presumed mandatory. Reserving the question to a trier of fact prevents manipulation by any one of the parties. We hold that…RCW 4.22.070 require(s) a trier of fact to determine the percentage of total fault attributable to every entity which caused plaintiff's damages.

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[13] *See Kirk v. Moe*, 114 Wn.2d 550, 789 P.2d 84 (Wash. 1990).

[14] *See Pickett v. Stephens-Nelsen, Inc.*, 43 Wn. App. 326, 717 P.2d 277 (Wash. Ct. App. 1986) (emphasis added).

Accordingly, the mandatory language of Subsection (1) plainly commands the allocation of fault to all responsible entities, embracing all nonparties, and including those potential defendants inadvertently or intentionally omitted from the lawsuit by the plaintiff.[15] In the case at hand, the trial court erroneously included MBK Housing in the release agreement, the City of Tacoma is omitted as a party defendant, and the trial court refused to entertain classifying Mr. Byrd as a first-party litigant against the insurer despite sound arguments. Other parties omitted include Horton's marital community.

The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. *See* 4.22.070 (1) RCW. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant… *See id*. Judgment shall be entered against each defendant **except those who have been released by the claimant**… *See id (emphasis added)*. The liability of each defendant shall be several only and shall not be joint except: (a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party; (b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimant's total damages. *Id*. (2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant,

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[15] *See Clark v. Pacificorp*, 118 Wash. 2d 167, 822 P.2d 162 (1991) (emphasis added).

and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060. *See* 4.22.070(2) RCW.

A limited liability company (LLC) is a legally recognized business entity distinct from its members. *See* Chapter 25.15 RCW *et seq*.

Although Mr. Byrd scheduled a "Reasonableness Hearing" before the trial court, demonstrating his most reasonable, patient, and best efforts to settle this matter, a hearing which would have benefited Preg, O'Donnell & Gillett's primary client, Aletta Horton, her defense attorneys instead chose to fight this hearing and immediately schedule a CR 2A Motion to Compel Settlement on the same day Mr. Byrd scheduled a "reasonableness hearing". Although the Washington State Supreme Court has ruled that the same summary judgment standard applies where there is a dispute of material fact regarding a defense to the enforcement of a settlement agreement, presumably including a similar 28-day notice period, the trial court chose to hear from the defense on their motion, and refused to hear from Mr. Byrd in his motion for a reasonableness hearing, despite the fact that Mr. Byrd had moved first and had not been afforded the 28-day period to address defendant's motion. Under very odd circumstances, rather than settle on an agreement that would benefit their own client by limiting her contribution to the insurance proceeds and assigning her rights under her insurance contract over to Mr. Byrd so that he might be able to recover significantly more from a multibillion dollar insurer instead, Ms. Horton's defense team fought tooth and nail to prevent a reasonableness hearing from occurring, and the lead defense attorney made statements that his own client could file for bankruptcy, mimicking a statement made by the insurer's attorney, although decisions in Washington Courts state otherwise.

It is in Mr. Byrd's interest to continue to seek recovery from MBK Housing LLC and Aletta Horton (or her insurer) for its negligence, given that Horton's policy proceeds are barely enough to cover his medical expenses and last him for the remainder of his days, taking into consideration the economic uncertainties of a potentially long life without the ability to work. However, Mr. Byrd offered to limit ***both*** Horton's and MBK Housing LLC's contribution to Ms. Horton's liability insurance policy limits, as long as she agreed to an assignment of rights of her insurance contract over to Mr. Byrd, and also agreed that his damages far exceeded the limits of the policy proceeds. For bewildering reasons, rather than settle on terms that would be very beneficial to the individual insured, Ms. Horton, her defense team, hired by her insurance company, has chosen to fight Mr. Byrd's appeal rather than settle on terms which would protect their client(s). Defense counsel further stated in its initial motion to terminate review that "despite both entities being identified as Released Parties in the Settlement Agreement he had drafted," referring to Plaintiff's counsel, even though defense counsel had appeared at the meeting, without their client and with a contract that had been materially altered by the insurer in this matter, including adding MBK Housing LLC and Horton's insurer as released parties, to the agreement. To state the obvious, Mr. Byrd would not appeal a decision had he named only one party in his complaint. These underlying facts provide reasons why Mr. Byrd [as well as Mr. Simpson] seek review de novo.

Contrary to the statements of the defendants, this case is not an unusual one. The facts are plain and the law is clear. Aletta Horton, an individual, paid premiums on an insurance policy covering <u>one</u> of the several homes she operates as rentals under the company name, MBK Housing LLC, a Washington Limited Liability Company, formed

in December 2010 (a decade prior to this litigation). These are legally separate parties and entities, each with their own legal identities and potential for liability, with the abilities to sue and be sued. Mr. Byrd, severely injured by and through the negligence of **all** parties in this case, has always been reasonable and also requested a jury, which is in the record. He opted to settle with the policyholder, Aletta Horton in this case, but sought to settle directly with Ms. Horton and seek a jury determination on damages with the remaining tortfeasor, MBK, due to his lifelong injuries, or offer a settlement for both parties and instead pursue a lawsuit against Horton's insurer to end all litigation fully and finally between these two primary defendants. Clearly, the insurer, a nonparty to this suit, has had a demonstrable and significant influence in this case.

Mr. Byrd, a resident at the house where the fire occurred, had also been employed as a resident manager at that particular house. As such, he would have been employed by and through MBK. At the time of the fire, Mr. Byrd was not employed as a resident manager, but a resident manager had been employed and working there. *See* Affidavit of Matthew Schoonover. MBK Housing LLC also retained a general (operational) manager by the name of "Dave". Further, Aletta Horton formed yet another legal entity, Full Scope Property Support LLC, under the laws of the State of Washington, on November 26, 2018, during the pendency of this action, perhaps attempting to retroactively absolve herself of personal liability through one of her *several* limited liability companies. This action arguably amounts to criminal fraud, which her insurance defense attorneys could have prevented early on.

According to Keeton, "it is unreasonable for an insurer to both have the advantage of controlling the litigation (through an attorney selected, instructed, and paid by the

company) and the right to thereafter contest liability. The potential for "overreaching" in such circumstances is sufficiently significant to justify the imposition of a limited choice upon the insurer that precludes such conduct. Thus, whenever a significant conflict of interests is present, there is a compelling case for suspending the insurer's control of the defense unless the insurer surrenders its right to subsequently raise the matter that produced the conflict of interests."[16]

Mr. Byrd seeks an appeal of a trial court decision terminating this current action, with prejudice, thus he is appealing as of right. He argues on appeal that (i) MBK Housing LLC should not have been released in the agreement; (ii) that he had no intention of indemnifying Ms. Horton's insurer, either Safeco or Liberty; (iii) that a CR 2A Motion to Compel Settlement should be viewed in the same strict manner as a motion for summary judgment and viewed in the light most favorable to Mr. Byrd's cause; and/or (iv) that this matter can be settled at a higher court pursuant to RAP 5.5(b).

IV. Issue #4: Absence of Settlement with Liable Party MBK Housing LLC

The decision conflicts with prior rulings, under *Waite v. Morisette*, 68 Wn. App. 521, 843 P.2d 1121 (Wash. Ct. App. 1993), and legislative statutes, under RCW 4.22.040, 4.22.050, and 4.22.060, requiring that joint and several liability, as modified by the 1981 provisions (including RCW 4.22.060), continues to apply where defendants act in concert, a person acts as an agent or servant of a party, or a claimant is not at fault. *See* similar analysis *supra*. An RCW 4.22.060 settlement arrangement is nothing novel. *See Bird v. Best Plumbing Grp., LLC*, 161 Wn. App. 510 (finding that the hearing to determine the reasonableness of the settlement under Wash. Rev. Code § 4.22.060 was an

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[16] *See* Keeton and Widiss' Insurance Law, Student Ed., 1988, at pages 856, 857.

equitable proceeding with no right to trial by jury and the trial court properly exercised its discretion in determining reasonableness); *See also Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992) (nonsettling defendant found liable for fault-free plaintiff's injuries was not entitled to credit or offset for amounts paid by settling defendant; jury award of $8,000,000 for 50-year old burn victim found reasonable on appeal).

Mr. Byrd sued both Horton in her individual capacity as landlord to this house, as well as MBK as employer/operator, because both parties are liable to him for his injuries. Dismissing MBK from the lawsuit, or rather including it within a blanket settlement agreement, and dismissing the suit with prejudice, substantially limits Mr. Byrd's ability to seek adequate remedy, neglects the entirety of corporation law, and at the same time benefits two negligent, liable parties as well as a multi-billion dollar insurance company. It is undeniably more believable that the invisible hand of the insurance company and that insurance defense counsel, with a long history across the nation of making decisions in conflict of interest against insured clients and directly addressed in the Rules of Professional Conduct, have and are taking actions that cause undue delay, rather than the injured plaintiff in this case. *See generally* RPC 1.7, 3.2.

Finally, Safeco offered the liability policy limits in exchange for a full and final release of its insured, Aletta Horton, who is specifically named in the policy. No where, in any of this documentation, or within any of the several letters sent to Safeco, is there any mention of MBK Housing LLC. Every *single* letter sent from plaintiff to Safeco Insurance Company of America clearly stated Aletta Horton as the individual insured and never made any mention whatsoever of MBK Housing LLC. Mr. Byrd's intentions had

all along been a release of Horton and Horton alone. As both defendants violated the Residential Landlord Tenant Act, and Safeco insured the premises, it is also apparent that Byrd is entitled to the full amount of that policy regardless of the merits of his appeal.

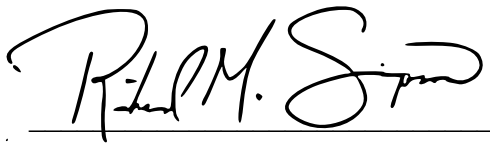
F. CONCLUSION

Based on the trial court's abuse of discretion in issuing excessive and unfounded sanctions against plaintiff's attorney, its erroneous application of the law, and the aforementioned analysis of the law, the Court should grant review.

Mr. Byrd, in seeking review, ultimately asks the Washington State Supreme Court for resolution on what has always been a strait-forward case. His simple request is for the Court to either (i) remand this case to trial court solely for a jury determination on damages, recognizing Horton's liability to Byrd for his injuries; or (ii) direct and induce a judicial settlement conference either at the Appellate [Pursuant to Rules of Appellate Procedure 5.5(b)] or at the Trial level (*id*.). If the Supreme Court will grant a judicial settlement, Mr. Byrd, for his troubles and unnecessary trauma, asks that the Court order Liberty Mutual and/or Safeco Insurance Company to pay him $100,000,000.00 as a full and final settlement for this case once and for all.

This document contains 4,959 words, excluding the parts of the document exempted from the word count by RAP 18.17.

December 8, 2021

Respectfully submitted, 

Richard M. Simpson,
Attorney for Petitioner,
WSBA# 53162

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

November 9, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DOMINICK BYRD, Appellant, v. ALETTA HORTON and MBK HOUSING, LLC, Respondents, and RICHARD SIMPSON, an attorney, Appellant.	No. 54347-8-II UNPUBLISHED OPINION

CRUSER, J. – Dominick Byrd brought a negligence suit against his landlord, Aletta Horton, and MBK Housing, LLC. Eventually, the case settled. Following the settlement agreement, Byrd challenged the settlement; the trial court compelled the settlement and dismissed the case. Byrd appealed, and his appeal was dismissed with prejudice. Ruling Dismissing Appeal, *Byrd v. Horton*, No. 53216-6-II, at 2 (Wash. Ct. App. Sept. 23, 2019).

The trial court also sanctioned Byrd's attorney, Richard Simpson, multiple times for his conduct during Byrd's case. Simpson refused to pay the sanctions, and the trial court held that

Simpson was in contempt of court. Simpson appeals the court's contempt order and the underlying sanctions.[1]

We decline to consider Simpson's appeal.

RAP 10.3

Simpson asserts that the trial court erred in imposing sanctions against him and holding him in contempt of court.[2]

RAP 10.3(a)(6) directs each party to supply in its brief, "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." Furthermore, "[p]assing treatment of an issue or lack of reasoned argument" does not merit our consideration. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998). Simpson fails to provide this court with *any* argument in his opening brief regarding the sanctions or the contempt order, and Simpson fails to provide any citations to the record or to legal authority.[3]

[1] When a lawyer is sanctioned by the trial court, the lawyer becomes a party to the action and may appeal the sanction as an aggrieved party. *Breda v. B.P.O. Elks Lake City 1800 So-620*, 120 Wn. App. 351, 353, 90 P.3d 1079 (2004).

[2] Simpson also suggests that the sanctions may be enforceable against Byrd or could result in an economic loss to Byrd. The trial court was very clear in its orders that both sanctions are against *Simpson only*. Byrd is not responsible for paying the sanctions against Simpson.

[3] In his reply brief, Simpson addresses the sanctions and contempt order, but he still fails to meet the requirements of RAP 10.3(a)(6) because he does not provide any citations to the record or legal authority. Furthermore, we do not consider arguments made for the first time in a reply brief. *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App 52, 78 n.20, 322 P.3d 6 (2014).

Therefore, we decline to consider whether the trial court erred in imposing sanctions or in holding Simpson in contempt of court.[4]

CONCLUSION

We dismiss this appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, J.

We concur:

MAXA, J.

LEE, C.J.

[4] In his brief, Simpson raises multiple issues on Byrd's behalf that we decline to consider because those arguments are not properly before this court. The notice of appeal in this case is limited to the orders imposing sanctions, and the contempt order, against *Simpson*. This appeal has nothing to do with Mr. Byrd or his underlying tort action. Nor could Byrd have appealed the contempt order because he was not aggrieved by the court's contempt order. RAP 3.1; *Breda*, 120 Wn. App. at 353. Furthermore, Simpson provides no argument why a contempt order against Simpson is grounds for Byrd to circumvent our previous dismissal of Byrd's appeal with prejudice. *Elliot Bay Adjustment Co., Inc. v. Dacumos*, 200 Wn. App. 208, 213, 401 P.3d 473 (2017) ("A dismissal with prejudice constitutes a final judgment on the merits.").

SUPREME COURT OF THE STATE OF WASHINGTON

Dominick BYRD, an individual, Plaintiff-Appellant, v. Aletta HORTON, an individual, and MBK HOUSING LLC, a Washington State Limited Liability Company, Defendants-Respondents.	)	No.: 54347-8-II DECLARATION OF SERVICE

I do certify that on the 8th day of December, 2021, I caused to be delivered the Petition for Review by method indicated below and addressed to the following:

Jeffrey Daly: jdaly@pregodonell.com
Stephanie Ballard: sballard@pregodonell.com
Amber Hazelquist: ahazelquist@pregodonell.com
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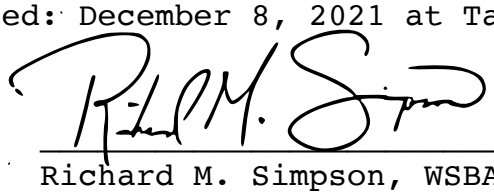
Seattle, Washington 98164

By: [X] E-mail

I CERTIFY under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated: December 8, 2021 at Tacoma, Washington



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SIMPSON LAW PLLC

December 08, 2021 - 2:55 PM

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