No. 91002-2

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Plaintiff–Appellee,

v.

LUCAS JAMES MERRILL

Defendant–Appellant,

SUPERIOR COURT No. 09-1-041904
SPOKANE COUNTY
HONORABLE MARYANN C. MORENO

MOTION FOR DISCRETIONARY REVIEW

Jeffry K. Finer
Attorney for Petitioner Matthew Harget
West 35 Main • Suite 300
Spokane, WA 99201
509 464-7611

A. IDENTITY OF PETITIONER

Matthew Harget, counsel for the defendant James Merrill asks this court to accept review of the final decision identified in Part B of this motion and reprinted at Appendix 3.

B. DECISION BELOW

Attorney Harget seeks discretionary review of the decision published at ___ Wn. App. ___, 335 P.3d 444 (Div. 3, 2014) 2014 WL 4160130, originally filed on August 21, 2014, as an unpublished decision, amended on October 2, 2014 to grant the State's motion to publish. The Court of Appeals denied reconsideration on October 2, 2014. Included in the Appendix, in chronological order are the following:

Appendix 1 – the original Court of Appeals unpublished decision (*Merrill I*) 171 Wn.App. 1028, 2012 WL 5458414;

Appendix 2 – lower court's ruling on remand.

Appendix 3 – the second published decision (*Merrill II*) 335 P.3d 444 (Div. 3, 2014) 2014 WL 4160130;

Appendix 4 – the order denying reconsideration; and

Appendix 5 – RCW 7.69.030 and .050.

C. ISSUES PRESENTED FOR REVIEW

This case arises from sanctions imposed against a public defender who twice contacted victims of a violent crime 16 months after the victims had given notice of their desire — under RCW 7.69.030(10) — to submit to interviews only in the presence of a victim advocate.

Petitioner Harget raises the following issues:

1. In a matter of first impression involving the court's inherent authority to sanction, should counsel's good faith be measured (a) by the facts and the circumstances at the time he acted or (b) by subsequent "law of the case" determinations?
2. Whether a finding of bad faith under the court's inherent authority applies to a facial violation of RCW 7.69030(10) when the attorney acted under the explicit direction of two supervisors who advised him to contact victims solely in order to prepare the attorney's defense to pending sanctions?

D. STATEMENT OF THE CASE

The respondent is a 20-year veteran public defender assigned to represent Lucas Merrill. Merrill faced seven charges for firing a weapon at an occupied residence. Appendix 1, slip op. at 2. The victims elected to exercise rights under

chapter 7.69 by signing a Notice of Victim's Intent to Rely on RCW 7.69.030(10). This statute requires that — upon notice — a victim may require that a victim's advocate be present for "any prosecution or defense interviews." Appendix 1, slip op. at 2. CP 1-2, 61. The provision is neutrally framed, neither favoring prosecution nor defense. On November 18, 2009, the victims signed a prosecution-prepared document entitled "Notice of Victim's Intent to Rely on RCW 7.69.030(10)". CP 61; CP 11-14.[1] A copy of four such notices were provided to defense counsel Matthew Harget on November 18, 2009. CP 61.

On April 7, 2011, after the trial court warned counsel that there would be no more continuances and, after last minute plea negotiations broke down, Attorney Harget telephoned two of the adult victims regarding the possibility of further negotiations. Appendix 1, slip op. at 3. Harget did not arrange the phone conference through the victim's advocate office housed within the Prosecutor's office — as required by the demand served 16 months previously — and no advocate was present. Appendix 1, slip op. at 3. Harget immediately disclosed to the State the fact of his April 7 contact with the two alleged victims; the State responded that the contact was being reviewed as a violation of law. CP 16 (email dated April 7 at 5:21p.m.); CP 29:25 to 30:18.

The State communicated with Attorney Harget and threatened sanctions for his alleged violation of RCW 7.69.030(10). CP 15. In response, Attorney Harget was reassigned off the case and advised by his supervisor Scott Mason (and supervisor Doug Boe) to contact the same victims in order to rebut claims by the State. CP 79. On May 13, 2011, Attorney Harget placed a second call to one of the adult victims in response to the State's threat to seek sanctions against him for the April contact. CP 79:21 to 80:10; CP 49-51. It is uncontested that the second call was solely for the purpose of Harget's responding to the sanctions threat. CP 43; Appendix 1, slip op. at 3.

The State filed its formal motion on May 24, 2011 asking for sanctions against Harget "for the [first] April 7, 2011 contact." CP 62.

Attorney Harget opposed the motion, arguing, *inter alia*, that the April 7 contact was made after an eleventh-hour collapse of plea discussions on the eve of the final pretrial hearing. CP 20. Harget noted that the trial court had previously ruled that there would be no further continuances in the case. CP 26:16-19.

The trial court granted the State's motion for sanctions. CP 61-64. Attorney Harget sought relief from judgment on July 22, 2011. CP 65, 66-68. The trial court denied the motion on August 11, 2011. CP 88.

On July 28, 2011, Attorney Harget appealed the Memorandum Decision imposing sanctions. CP 82-87. The trial court entered a final order, *nunc pro tunc*, on September 19, 2011. CP 89-96.

The Court of Appeals reversed and remanded on November 8, 2012, (Appendix 1) and directed the lower court to enter findings and conclusions regarding the safe-harbor provisions in RCW 7.69.030(10) and whether Attorney Harget's conduct constituted bad faith under the statute.

Following the hearing on March 8, 2013, the lower court entered a two-page Memorandum Opinion on Remand. Appendix 2. The trial court held that Harget was acting within the safe-harbor when he contacted the victims on the first occasion in April. While stating that Harget had options and noting its criticism of his decisions, the lower court held that Harget's first contact occurred under circumstances supporting the safe-harbor exception. Appendix 2. The court further held, however, that the *second* contact in May was a violation of the statute.

> It is difficult to accept by any stretch of the imagination that after learning that the Gertlars did not want contact with him without the victim advocate and that the state was seeking sanctions for his previous contact, that Mr. Harget could possibly believe that it would be acceptable to ignore the statute and its requirements.

Appendix 2. The court further stated, "It is difficult to fathom why Mr. Harget would contact the Gertlars for the second time, knowing their position." CP 43.

The court re-imposed the sanction for the second contact under 7.69.030, stating that while Harget may not have intended to harm the victims, "the integrity of the justice system depends in part upon all its members to protect the rights not only of the accused but of the victims as well." CP 43. The trial court noted that the second contact was not excused under the safe harbor provision of RCW 7.69.030 and that Harget's contact of the victims, despite knowing their wishes and rights, was inappropriate and improper, amounting to bad faith. Appendix 3, slip op. at 6.

Harget again appealed to Division III. That court upheld the sanction for the second telephone contact. Appendix 3. The court noted that Harget's second contact required the presence of a victim's advocate and that Harget already knew that the state was seeking sanctions for the first contact. The court rejected the argument that Harget made the second contact in reliance on his supervisors' advice and held that there was substantial evidence to support the finding of bad faith. Appendix 3, slip op. at 8.

Harget also argued that it was reasonable for him to have believed in May, 2010, that he was allowed to telephone the victims if the contact was for the purpose of defending himself on the pending sanctions motions (as opposed to advocate for his client). The court rejected this argument under the doctrine of "law of the case" holding that the court was "not free to decide anew whether

RCW 7.69.030 applies to contact with crime victims to gain information to defend oneself from charges of misconduct." Appendix 3, slip op. at 8-9. The court determined that it was bound by the doctrine. Appendix 3, slip op. at 9.

Reconsideration was denied on October 2, 2014. Appendix 4. This timely motion followed.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE FACTS AND LAW AS THEY EXIST AT THE TIME OF THE MATTER UNDER CONSIDERATION SHOULD GUIDE THE DETERMINATION OF COUNSEL'S GOOD FAITH AND "LAW OF THE CASE" SHOULD NOT APPLY RETROACTIVELY TO GOOD FAITH RULINGS

The reliance placed on "law of the case" by the lower court in this sanction proceeding is one of profound importance to the delicate balance between prosecutor and defense counsel, and it raises a matter of substantial public interest that should be resolved by the Supreme Court. The logic used by the court below turns "good faith" into a guessing game where counsel is bound to gauge *in advance* whether a statute requiring a victim advocate's presence at interviews applies to all contacts — even contacts not related to the facts of the alleged offense.

There are three reasons this was error, each one touching upon an important matter of public policy and affecting the balance between the defense and prosecution functions.

1. As Attorney Harget acted *before* the rule was announced in *Merrill I* (namely that all contacts are "interviews" under the statute), the existence of the rule *after* Mr. Harget made his second call is not a proper measure of whether he acted in accordance with the requirements of good faith.
2. There are exceptions to the doctrine, as set forth in *Roberson v. Perez*, 156 Wn.2d 33 (2005) (upholding intermediate court's discretionary decision to not apply the doctrine). The lower court's ruling erroneously assumed that it had no authority to review these exceptions. Thus the decision in Harget II is in conflict with a decision by the Supreme Court.
3. The question of good faith turns not on whether a rule was violated, but upon the reasons motivating the actor at the time. Sanctions under the court's inherent powers are essentially punitive and are reserved for intentional, unjustified, and knowing violations.

Washington State applies the doctrine of law of the case based upon two sources: appellate procedural rules and common law. *Roberson v. Perez*, 156 Wn.2d 33, 41 (2005). The doctrine has exceptions. First, the Rules of Appellate

Procedure permits a party to challenge the doctrine where justice would best be served. RAP 2.5(c)(2)). Second, where the prior rule is clearly erroneous and works a manifest injustice upon a party, common law holds that a party may challenge application of the doctrine. This exception to the doctrine "assures that an appellate court is not obligated to perpetuate its own error."[2] *Roberson v. Perez*, at 42. Third, applying the doctrine in a particular set of facts is discretionary, *State v. Schwab*, 163 Wn2d 664, 674 (2008). Here, the Court erroneously believed it had no discretion to revisit the expansion of the statute to cover Harget's call in his own defense: "We are not free to decide anew whether RCW 7.69.030 applied to contacts with crime victims to gain information to defend oneself from charges of misconduct." Slip Op. at 8.

When Attorney Harget followed the directives of his supervisors to re-contact the Gertlars in May, 2011, he did not have the benefit of the Court of Appeals' ruling that the second contact was equivalent to an "interview" for the purpose of the statute. Slip Op. at 4, citing 2012 WL 5458414 at 3. What he had at the time of his second telephone call was the following: a hearsay declaration from the victim's advocate alleging complaints by the Gertlars that contradicted what

[2] *Roberson's* third rationale for suspending the doctrine — an intervening change in the law — is not applicable to this appeal.

Harget personally knew to have occurred; the text of the statute, including the safe harbor language in subsection 10; the support of his supervisors; and a pending sanctions motion by opposing counsel.

Law of the case, applied properly, only forecloses Harget's argument that the second contact was not an "interview" under RCW 7.69.030(10) — it should not foreclose an argument regarding Mr. Harget's good faith *at the time he made the second call*. The lower court's initial ruling in 2012 did not state that the second contact was bad faith or incapable of supporting a good faith justification. Terminating the remand's analysis with the conclusion that law of the case foreclosed further consideration of Attorney Harget's second contact — which the Court has acknowledged was *solely* for the purpose of defending the sanctions complaint against him — is a misapplication of the doctrine.

The impact of this published decision is grave: substituting later events for what was known and reasonably believed at the time of an act distorts the good faith inquiry and, in this context, destabilizes the delicate balance between prosecution and defense functions.

II. IN ATTORNEY SANCTION CASES, THE COURT'S INHERENT POWER IS USED PUNITIVELY — IT SHOULD BE HELD TO A HIGHER EVIDENTIARY STANDARD SO THAT PROPER ADVOCACY IS NOT UNDULY CHILLED

This petition raises a matter of substantial public interest that should be resolved by the Supreme Court, namely, the propriety of (a) the lower court's rejection of Harget's reliance upon his own supervisors' instructions and (b) the fact that Harget was responding not on behalf of his client or in pursuit of matters relating to the criminal allegations, but in his own defense to a pending sanctions motion.

Here the Court of Appeals deferred to the lower court's findings without consideration of the unique position of the trial court in the sanctions setting. Sanctions imposed under the court's inherent power are punitive in nature and should be proven by clear and convincing evidence. *Shepherd v. Am. Broad. Co.*, Inc., 62 F.3d 1469, 1476–78 (D.C.Cir.1995). Further,

> a court's inherent powers are not broad, but limited. These powers are "shielded from direct democratic control," so they are necessarily "limited," and "not ... ready at an imperial hand," and must be exercised only with "restraint and discretion." Id. at 42; *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764, (1980). This is particularly true in cases where the court is

"accuser, fact finder, and sentencing judge all in one." *In re Peters*, 642 F.3d 381, 384 (2d Cir.2011).

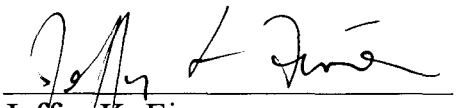
Dennings v. Clearwire Corporation, ___ F.3d ___, (WD Wash. 2013), WL 3892818. *See State v. Gassman*, 175 Wn.2d 208, 211 (2012) (Washington State follows federal case law regarding inherent authority to sanction counsel).

Further, in cases in which the good faith of an official actor is in question, the United States Supreme Court has noted that reliance upon a supervisor is a pertinent factor. Reliance on a supervisor supports the view that the actor could have held a reasonable belief that the course of action was supported by the facts and the law. See, *Messerschmidt v. Millender*, 132 S.Ct. 1235, 1248-50 (2012). In *Messerschmidt*, the Court held that qualified immunity was appropriate where a state actor, among other steps, consulted and followed the advice of a superior. *Messerschmidt* is sound policy, which the lower court misapplied: imposing a penalty against an actor for following the advice of his or her supervisor — as plaintiffs attempted in *Messerschmidt* — has minimal deterrence value. What miniscule value there may be in punishing a line-attorney for following his supervisors' advice is overwhelmed by the erosion and chilling of a defender's obligations to the defense function.

F. CONCLUSION

This court should accept review of each issue raised in Part C, for the reasons indicated in Part E.

DATED THIS 31st day of October, 2014.



Jeffry K. Finer
WSBA No. 14610
Counsel for Petitioner Harget

CERTIFICATE OF SERVICE

I, Danette Lanet, certify that on the 31 day of October, 2014, I caused a true and correct copy of the foregoing *Motion for Discretionary Review* to be served, via USPS on the following:

Stephen Garvin
Spokane County Prosecuting Attorney
1100 W. Mallon
Spokane, WA 99260

Dated this 31 day of October, 2014.

Danette Lanet

Danette Lanet

APPENDIX 1

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

STATE OF WASHINGTON, Respondent,	)	No. 30110-9-III
v.	)	UNPUBLISHED OPINION
LUCAS J. MERRILL, Appellant.	)	

Sweeney, J. — The trial judge has inherent authority to sanction a lawyer for conduct that interferes with the trial proceedings. The judge, however, must first find that the lawyer acted in bad faith. Here, the court sanctioned a lawyer for contacting the victims of a violent crime, despite the victims' written notice that they wanted an advocate present during any interview, pursuant to RCW 7.69.030(10). The lawyer was served with a copy of this notice. The court found that the lawyer disregarded the notice and contacted the victims. The lawyer admitted that he contacted the witnesses without a witness advocate present but claims he did so because he had to, given the exigencies of

the case. The court made no finding on whether the contact was justified under the statute or by the exigencies of the case, nor did the court enter a finding on whether or not the lawyer acted in bad faith. We then remand for further proceedings.

FACTS

Matthew Harget is a lawyer. He represented Lucus Merrill. Mr. Merrill was charged with assaulting members of the Gertlar family. The victims of Mr. Merrill's crimes elected to exercise rights granted by chapter 7.69 RCW ("Rights of victims, survivors and witnesses"). They signed a "Notice of Victim's Intent to Rely on RCW 7.69.030(10)." It provided, "Victim in the above case[] exercises the right to have an advocate present at any prosecution or defense interviews, in accordance with RCW 7.69.030(10), and demands contact, interview or correspondence be arranged through the Victim/Witness Office of the Spokane County Prosecutor's Office." Clerk's Papers (CP) at 10. A copy was served on Mr. Harget.

Mr. Harget and the prosecutor assigned to the case, Stephen Garvin, began negotiating a plea agreement. A pretrial hearing was scheduled for April 8 and trial was scheduled for April 18. As of April 7, the parties had not come to an agreement on a key provision. Mr. Harget did not know whether the Gertlars supported a plea agreement and he believed that no more continuances would be granted.

On April 7, Mr. Harget called Karen and Jay Gertlar to talk to them about the plea agreement. According to Mr. Harget, he introduced himself as Mr. Merrill's attorney and they discussed the plea agreement for several minutes.

Mr. Harget then reported the discussion to Mr. Garvin. Mr. Garvin responded that he would talk to his superiors about sanctions for Mr. Harget's contact. On May 13, 2011, Mr. Harget called the Gertlars again, this time to prepare to defend against the State's motion for sanctions. The State moved to sanction Mr. Harget for "willful discovery misconduct" and violating RCW 7.69.030(10) with the April 7, 2011, phone call. CP at 4.

Mr. Harget filed several declarations in response and explained that he did not believe that the notice filed by the Gertlars limited his ability to speak to victims because defense counsel has a right to speak to witnesses and that the witnesses do not "belong" to one side or another. He also said that he thought Mr. Garvin would speak to the Gertlars about the plea agreement, but did not know whether Mr. Garvin had actually spoken to them. And he did not know whether the Gertlars supported the plea agreement. He also said that, based on some e-mails from the State, he did not know whether the State intended to move forward with a plea agreement or go to trial.

The State filed the declaration of Lori Sheeley. Ms. Sheeley is a Victim/Witness

Advocate at the Spokane County Prosecutor's Office. She recounted several conversations she had with Ms. Gertlar about Ms. Gertlar's and her husband's phone calls with Mr. Harget. Ms. Gertlar told her that she did not know that Mr. Harget was Mr. Merrill's attorney, that she would not have spoken to him had she known who he was, and that Mr. Harget "pestere[d]" her until her husband finally hung up on him. CP at 53-54. Mr. Harget disputes this.

The court granted the motion for sanctions, relying on both its inherent authority to control litigation and chapter 7.69 RCW. It found:

- "Mr. Harget, in refusing to recognize [the Gertlars'] right, violated the purpose of the statute by engaging in the type of conduct the statute was designed to prohibit."
- "By his declaration filed in this matter, Mr. Harget admits that he disregarded the statute and the protections set forth therein."
- "Mr. Harget was aware that the victims desired the presence of an advocate for any interviews."
- "He made no attempt to seek court intervention prior to contact with the victims."
- "If he was unsure or unclear on their position after the first contact, it soon thereafter became crystal clear. Through no stretch of the imagination was he justified in contacting them a second time without the presence of the advocate."
- "Mr. Harget disregarded [the RCW 7.69.030(10)] right."

CP at 63. The judge concluded that "the state is mandated to protect victims' rights and to offer them the mechanism to invoke their right to have an advocate present" and

invoked her common law authority to impose sanctions. CP at 63. She ordered Mr. Harget to pay $100 to charity and participate in a one-hour ethics CLE about victims' rights within 60 days. CP at 63. Mr. Harget appeals the court's sanctions.

DISCUSSION

We review a trial court's decision to impose sanctions for abuse of discretion. *State v. Gassman*, 175 Wn.2d 208, 210, 283 P.3d 1113 (2012). A trial judge certainly has the inherent authority to sanction lawyers for improper conduct during the course of litigation, but that generally requires a showing of "bad faith." *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058 (2000). Trial courts are, however, encouraged to make an explicit finding of bad faith before imposing such sanctions. *Gassman*, 175 Wn.2d at 211. We will nonetheless uphold sanctions when the trial court made a finding equivalent to a finding of bad faith. *See S.H.*, 102 Wn. App. at 475-76 (citing *Wilson v. Henkle*, 45 Wn. App. 162, 175, 724 P.2d 1069 (1986) (holding that a finding of "inappropriate and improper" is tantamount to a finding of bad faith); *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 136 (2d Cir. 1998) (concluding that finding of acting in conscious disregard of discovery obligations amounted to finding of bad faith)). Bad faith is "[d]ishonesty of belief or purpose." Black's Law Dictionary 149 (8th ed. 2004).

The judge here imposed sanctions because defense counsel disregarded the Gertlars' RCW 7.69.030(10) right to have an advocate present at defense interviews. And she did so based on her "inherent authority" to control litigation. CP at 63. Mr. Harget readily admits that he contacted the victims, despite their notice, but he says his contact is sanctioned by what he calls the "safe harbor" provisions of RCW 7.69.030(10). It provides that "[t]his subsection applies if practical and if the presence of the crime victim advocate or support person does not cause any unnecessary delay in the investigation or prosecution of the case." RCW 7.69.030(10).

Mr. Harget argues that the presence of an advocate was impractical and might well have resulted in a delay. The State responds that there is no showing of any exigency that would have made the presence of a victim's advocate impractical. There are no findings here on appeal one way or the other on this question and it is a question that is unique to the particular circumstances of these trial proceedings.

And there is no finding that Mr. Harget acted in bad faith. The court's finding that "Mr. Harget disregarded [the Gertlars'] right" is arguably equivalent to a finding of bad faith. *See S.H.*, 102 Wn. App. at 475-76. But the court could not properly find that Mr. Harget "disregarded" the Gertlars' right without considering RCW 7.69.030(10)'s safe harbor. If the trial court concludes that the safe harbor did not apply, then it can consider

whether Mr. Harget acted in bad faith. That very fact specific conclusion would turn on the notices Mr. Harget received, the timing of his contacts, the trial and hearing dates, the purpose for Mr. Harget's contacts, and whether Mr. Harget relied in good faith on the safe harbor.

Mr. Harget also argues that the court should have considered whether his contact with the Gertlars amounted to an "interview." Br. of Appellant at 14-15. A crime victim has the right to have an advocate or support person present at "prosecutorial or defense *interviews*." RCW 7.69.030(10) (emphasis added). From this, Mr. Harget argues that the statute only applies to specific types of communication between victims and defense counsel. He says that an interview is investigatory and that his phone calls were not. He also says that the statute made no distinction between an interview and calling a victim to discuss a settlement and that the court should have explored whether any distinctions existed.

"Interview" means "a meeting face to face," "a private conversation," or "a formal meeting for consultation." Webster's Third New International Dictionary 1183-84 (1993). These definitions encompass both face-to-face interviews for investigatory purposes and private over-the-phone conversations. The court correctly concluded that Mr. Harget's contact was an interview. Mr. Harget's suggested distinction is at least

hypertechnical and would at most ignore the purpose of the statute to protect and support victims of violent crime. And Mr. Harget's second telephone visit with the Gertlars about the potential sanctions is still contact with victims who do not want to be contacted without a victim's advocate present. And it amounts to contact by the lawyer, Mr. Harget, who represents, and continues to represent, the defendant accused of assaulting these victims.

In sum, Mr. Harget raised the question of what he describes as "safe harbor" provisions of RCW 7.69.030(10) and the court should pass on whether he relied on that language in good faith. *See S.H.*, 102 Wn. App. at 475. And, of course, the court must make a finding that Mr. Harget did or did not act in bad faith before imposing a sanction.

We remand for further proceedings.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Sweeney, J.

WE CONCUR:

Siddoway, A.C.J.

_____

Brown, J.

APPENDIX 2

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

STATE OF WASHINGTON, Plaintiff, vs. LUCAS J. MERRILL, Defendant.	NO. 09-1-04190-4 COA NO. 30110-9-III **MEMORANDUM OPINION ON REMAND**

This matter is before the court pursuant to remand from the Court of Appeals on the issue of whether or not the "safe harbor" provisions of RCW 7.69.030(10) were relied upon by Mr. Harget in good faith, and further, for this court to make a specific finding of bad faith. On March 8, 2013, the court heard argument on the above matters.

Mr. Harget claims that it was not practical to comply with the statute in that time was of the essence. In support, he provides copies of electronic communications (emails) between himself and Deputy Prosecutor Garvin to portray the lack of communication that existed between the lawyers in terms of resolving the case. It was Mr. Harget's goal to obtain the best resolution he could for his client, which, in his mind, was getting Mr. Merrill into the Veteran's Court Program. Understanding that Mr. Merrill could not enter Veteran's Court as charged, Mr. Harget sought out Prosecutor Steve Tucker, who gave his approval for reduced charges conditioned upon the Gertlars' acquiescence. Mr. Garvin's unresponsiveness to Mr. Harget created a dilemma; in order to avoid the impending trial on significant charges, the day before the pretrial conference Mr. Harget contacted the Gertlars to investigate their position on resolving their case with a negotiation for Veteran's Court. In hindsight, it would have been

prudent for Mr. Harget to first obtain the consent of the Gertlars to speak with him without the victim advocate. Another option would have been to contact the victim advocate prior to phoning the Gertlars. However, given the exigencies of the situation, the impending pretrial conference, the admonishment from the court that there would be no further continuances, and the lack of responsiveness by Mr. Garvin, I cannot say that Mr. Harget's decision to contact them directly was not practical. Thus, I cannot find that in this instance he acted in bad faith.

However, Mr. Harget chose to contact the Gertlars again. He was not careless, nor does he claim this was an oversight. He phoned them purposefully, in an attempt to defend himself from the threat of sanctions for unwanted prior contact. This second contact was with knowledge that the Gertlars had voiced complaints to the state. This second contact was not prompted by any motivation for resolution of the criminal case, and there is no proof or showing of impracticality under the statute. It is difficult to accept by any stretch of the imagination that after learning that the Gertlars did not want contact with him without the victim advocate and that the state was seeking sanctions for his previous contact, that Mr. Harget could possibly believe that it would be acceptable to ignore the statute and its requirements. It is apparent that Mr. Harget takes the position that he has the right to contact witnesses and determine for himself if the witnesses want to speak to him without an advocate. While this may be true, there is no indication that he ever asked that question of the Gertlars.

Again, it is difficult to fathom why Mr. Harget would contact the Gertlars for the second time, knowing their position. Mr. Harget presented no evidence that his second contact was made pursuant to the "safe harbor" provisions of RCW 7.69.030 or that he relied on such. Mr. Harget was aware that the Gertlars wanted be interviewed with the victim advocate. Mr. Harget ignored their wishes and their rights pursuant to the statute. His actions were inappropriate and improper, and thus, in bad faith.

The court's duty under RCW 7.69.030 is to protect the rights of victims. "Sanctions may be appropriate if an act affects 'the integrity of the court and, if left unchecked, would encourage future abuses.'" *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058 (2000). While Mr. Harget may not have intended to harm the Gertlars by his actions, the integrity of the justice system depends in part upon all its members to protect the rights not only of the accused but the victims as well. The sanctions previously imposed shall remain in effect.

Dated this 10th day of May, 2013.

Judge Maryann Moreno

Judge Maryann Moreno
1116 West Broadway
Spokane, Washington 99260

APPENDIX 3

FILED
OCTOBER 2, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	**No. 31722-6-III**
Respondent,	
v.	**ORDER GRANTING MOTIONS TO PUBLISH**
LUCAS J. MERRILL,	
Defendant.	

The court has considered the third party motions to publish the court's opinion of August 21, 2014, and the record and file herein, and is of the opinion the motions to publish should be granted. Therefore,

IT IS ORDERED the motions to publish are granted. The opinion filed by the court on August 21, 2014, shall be modified on page 1 to designate it is a published opinion and on page 10 by deletion of the following language:

> A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

DATED: October 2, 2014

PANEL: Judges Lawrence-Berrey, Brown, and Fearing

FOR THE COURT:

LAUREL H. SIDDOWAY
CHIEF JUDGE

FILED
AUGUST 21, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 31722-6-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
LUCAS J. MERRILL,	)	
	)	
Defendant.	)	

LAWRENCE-BERREY, J. — This appeal of attorney sanctions is before us again after remand. In 2011, the trial court sanctioned defense attorney Matthew Harget for twice contacting crime victims without a victim/witness advocate present. The victims of Mr. Harget's client exercised their rights under RCW 7.69.030(10) to have an advocate present at any prosecution or defense interview. Mr. Harget appealed and this court remanded for the trial court to determine whether Mr. Harget's contact fell under the safe harbor provisions of RCW 7.69.030(10). This court also determined that the court failed to make a finding on bad faith, and this finding was needed before sanctions could be imposed. On remand in 2013, the trial court found that Mr. Harget's first contact with the Gertlars was not made in bad faith. However, the court found that Mr. Harget's second

contact was made in bad faith because he contacted the Gertlars despite knowing of their opposition. The court upheld the sanctions. Mr. Harget appeals. He challenges the trial court's finding of bad faith. We affirm.

FACTS

Mr. Harget is an attorney who represented Lucas Merrill.[1] Mr. Merrill was charged with assaulting members of the Gertlar family. The Gertlar family signed a "'Notice of Victim's Intent to Rely on RCW 7.69.030(10).'" *State v. Merrill*, noted at 171 Wn. App. 1028, 2012 WL 5458414 at *1. Through the document, the Gertlars exercised their right to have a victim's advocate present at any prosecution or defense interviews and demanded that any contact, interview, or correspondence be arranged through the victim/witness office of the Spokane County Prosecutor's Office.

Mr. Harget and the prosecutor assigned to the case, Stephen Garvin, began negotiating a plea agreement. A pretrial hearing was scheduled for April 8, 2011, and trial was scheduled for April 18. As of April 7, the parties had not come to an agreement on a key provision. Mr. Harget did not know whether the Gertlars supported a plea agreement. Furthermore, Mr. Harget believed that no more continuances would be granted.

[1] The facts are taken from *State v. Merrill*, noted at 171 Wn. App. 1028, 2012 WL

On April 7, Mr. Harget called Karen and Jay Gertlar to talk to them about the plea agreement. According to Mr. Harget, he introduced himself as Mr. Merrill's attorney, and they discussed the plea agreement for several minutes.

Mr. Harget then reported the discussion to Mr. Garvin. Mr. Garvin responded that he would talk to his supervisors about sanctions for Mr. Harget's contact.

On May 13, Mr. Harget called the Gertlars again. This time Mr. Harget made contact so he could prepare his defense on the State's motion for sanctions. The State moved to sanction Mr. Harget for "willful discovery misconduct" and for violating RCW 7.69.030(10) with the April 7, 2011 telephone call to the Gertlars.

Mr. Harget filed several declarations in response and explained that he did not believe that the notice filed by the Gertlars limited his ability to speak to victims because defense counsel has a right to speak to witnesses and that the witnesses do not belong to one side or the other. He also said that he thought Mr. Garvin would speak to the Gertlars about the plea agreement. However, he did not know whether Mr. Garvin had actually spoken to them or whether they supported the plea agreement. Mr. Harget said that based on some e-mails, he did not know whether the State intended to move forward with the plea or go to trial.

5458414 (*Merrill* I).

The State filed the declaration of victim/witness advocate, Lori Sheeley. Ms. Sheeley recounted several conversations that she had with Ms. Gertlar about the Gertlars' conversation with Mr. Harget. Ms. Gertlar said that she did not know that Mr. Harget was Mr. Merrill's attorney, that she would not have spoken to him had she known who he was, and that Mr. Harget pestered her until her husband finally hung up on him. Mr. Harget disputes this.

The trial court granted the motion for sanctions, relying on both its inherent authority to control litigation and chapter 7.69 RCW. Essentially, the court found that Mr. Harget failed to recognize the Gertlars' rights by engaging in the type of conduct that RCW 7.69.030(10) prohibits. And that if Mr. Harget was unsure of the Gertlars' position after the first contact, he became aware of their position and was not justified in contacting them the second time without the victim's advocate. The court ordered Mr. Harget to pay $100 to charity and participate in a one-hour ethics class about victim's rights.

Mr. Harget appealed the sanctions. *Merrill*, 2012 WL 5458414. This court concluded that the first and second contact were both interviews that fell within the provisions of RCW 7.69.030(10). *Merrill*, 2012 WL 5458414 at *3. However, this court determined that further proceedings were necessary in the case because the trial court

failed to consider whether Mr. Harget relied on the "safe harbor" provisions of RCW 7.69.030(10) when contacting the Gertlars. *Merrill*, 2012 WL 5458414 at *4. The safe harbor provision as argued by Mr. Harget allowed contact with the victims if the presence of the advocate is impractical and results in delay. *Id.* at *3. This court also found that the trial court was required to make a finding of bad faith before imposing the sanction and remanded the issues to the trial court. *Id.* at *4.

On remand, the trial court found that Mr. Harget's first contact with the Gertlars was not in bad faith. The court considered the exigencies of the situation, the impending pretrial conference, the court's unwillingness to grant any further continuances, and the lack of responsiveness from the prosecutor.

However, for the second contact, the court found that Mr. Harget acted in bad faith when he chose to purposefully telephone the Gertlars in an attempt to defend himself from the threat of sanctions for the unwanted prior contact. The court also found that this second contact was made with knowledge that the Gertlars complained to the State. The court continued, "It is difficult to accept by any stretch of the imagination that after learning that the Gertlars did not want contact with him without the victim advocate and that the state was seeking sanctions for his previous contact, that Mr. Harget could possibly believe that it would be acceptable to ignore the statute and its requirements."

Clerk's Papers at 43. The court also determined that the second contact was not excused under the safe harbor provision of RCW 7.69.030.

The court concluded that Mr. Harget's contact of the Gertlars, despite knowing their wishes and rights, was inappropriate and improper. This amounted to bad faith. The court ordered the sanctions to remain in effect. Mr. Harget appeals.

ANALYSIS

We review a trial court's decision to impose sanctions for an abuse of discretion. *State v. Gassman*, 175 Wn.2d 208, 210, 283 P.3d 1113 (2012). This court defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. *Fisher Props., Inc. v. Arden–Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

A trial court has the inherent authority to sanction lawyers for improper conduct during the course of litigation, but that generally requires a showing of "bad faith." *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058 (2000). The court is encouraged to make an explicit finding of bad faith before imposing such sanctions. *Gassman*, 175 Wn.2d at

211. "Sanctions may be appropriate if an act affects 'the integrity of the court and, [if] left unchecked, would encourage future abuses.'" *S.H.*, 102 Wn. App. at 475 (quoting *Gonzales v. Surgidev Corp.*, 120 N.M. 151, 157, 899 P.2d 594 (1995)).

When invoked, violent crime victims have the right to have a victim advocate present during any interview by defense or prosecution. RCW 7.69.030(10). However, the right given by the statute "applies if practical and if the presence of the crime victim advocate or support person does not cause any unnecessary delay in the investigation or prosecution of the case." *Id.*

Here, the trial court did not abuse its discretion in sanctioning Mr. Harget for his second contact with the Gertlars. The trial court found that Mr. Harget's second contact was made in bad faith. In support of this finding, the court noted that Mr. Harget contacted the Gertlars a second time even though he knew that contact was not allowed without the victim advocate and that the State was seeking sanctions on the first contact. The court acknowledged that Mr. Harget's position was that he had the right to contact witnesses and determine for himself if they wanted to speak to him without an advocate. However, the court noted that there was no indication that he ever asked this question to the Gertlars.

Mr. Harget contends that the trial court ignored his arguments, particularly that he was acting under the advice of his supervisors and that he thought that contact was allowed to address his defense of the pending motion. He contends that his reasonable reliance on his supervisors and his belief shows that he was not acting in bad faith.

We will not reverse the trial court's order based on this contention. Mr. Harget presented these arguments to the trial court. The trial court rejected Mr. Harget's reliance on his belief that he could contact the witnesses directly. While the trial court did not expressly reject Mr. Harget's reliance on his supervisor's advice, this is not enough to overturn the ruling of the trial court. The trial court reviewed the evidence and made credibility determinations. The court found that Mr. Harget knowingly contacted the victims despite the pending motion for sanctions for the very same conduct. The finding of bad faith is supported by substantial evidence.

Mr. Harget argues that his contact with the Gertlars the second time was not in bad faith because of his and his office's interpretation that RCW 7.69.030 does not extend to interviews with regard to attorney sanctions. He impliedly argues that his interpretation is a reasonable interpretation. We are not free to decide anew whether RCW 7.69.030 applies to contact with crime victims to gain information to defend oneself from charges of misconduct. In *Merrill* I, this court held that such conduct violates the statute. *See*

2012 WL 5458414. The law of the case doctrine binds us to this ruling. The law of the case doctrine provides that an appellate holding enunciating a principle of law must be followed in subsequent stages of the same litigation. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). Under the law of the case doctrine, an appellate court will generally refuse to consider issues that were decided in a prior appeal. *Folsom v. County of Spokane*, 111 Wn.2d 256, 263-64, 759 P.2d 1196 (1988). In turn, the trial court found Mr. Harget's second contact to be in bad faith. We are bound by this finding of fact. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959); *Burien Motors, Inc. v. Balch*, 9 Wn. App. 573, 576, 513 P.2d 582 (1973). This finding of bad faith necessarily implies that Mr. Harget's interpretation of the statute is not reasonable.

The trial court did not abuse its discretion when it imposed sanctions on Mr. Harget.

We affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Brown, A.C.J.

Fearing, J.

APPENDIX 4

FILED
OCTOBER 2, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 31722-6-III**
	)	
Respondent,	)	
	)	
v.	)	**ORDER DENYING**
	)	**MOTION FOR**
LUCAS J. MERRILL,	)	**RECONSIDERATION**
	)	
Defendant.	)	

The court has considered Mathew Harget's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of August 21, 2014, is hereby denied.

DATED: October 2, 2014

PANEL: Judges Lawrence-Berrey, Brown and Fearing

FOR THE COURT:

LAUREL H. SIDDOWAY
CHIEF JUDGE

APPENDIX 5

APPENDIX 5

7.69.030. Rights of victims, survivors, and witnesses.

There shall be a reasonable effort made to ensure that victims, survivors of victims, and witnesses of crimes have the following rights, which apply to any criminal court and/or juvenile court proceeding:

(1) With respect to victims of violent or sex crimes, to receive, at the time of reporting the crime to law enforcement officials, a written statement of the rights of crime victims as provided in this chapter. The written statement shall include the name, address, and telephone number of a county or local crime victim/witness program, if such a crime victim/witness program exists in the county;

(2) To be informed by local law enforcement agencies or the prosecuting attorney of the final disposition of the case in which the victim, survivor, or witness is involved;

(3) To be notified by the party who issued the subpoena that a court proceeding to which they have been subpoenaed will not occur as scheduled, in order to save the person an unnecessary trip to court;

(4) To receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available;

(5) To be informed of the procedure to be followed to apply for and receive any witness fees to which they are entitled;

(6) To be provided, whenever practical, a secure waiting area during court proceedings that does not require them to be in close proximity to defendants and families or friends of defendants;

(7) To have any stolen or other personal property expeditiously returned by law enforcement agencies or the superior court when no longer needed as evidence. When feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, and property of which ownership is disputed, shall be photographed and returned to the owner within ten days of being taken;

(8) To be provided with appropriate employer intercession services to ensure that employers of victims, survivors of victims, and witnesses of crime will cooperate with the criminal justice process in order to minimize an employee's loss of pay and other benefits resulting from court appearance;

(9) To access to immediate medical assistance and not to be detained for an unreasonable length of time by a law enforcement agency before having such assistance administered. However, an employee of the law enforcement agency may, if necessary, accompany the person to a medical facility to question the person about the criminal incident if the questioning does not hinder the administration of medical assistance;

(10) With respect to victims of violent and sex crimes, to have a crime victim advocate from a crime victim/witness program, or any other support person of the victim's choosing, present at any prosecutorial or defense interviews with the victim, and at any judicial proceedings related to criminal acts committed against the victim. This subsection applies if practical and if the presence of the crime victim advocate or support person does not cause any unnecessary delay in the investigation or prosecution of the case. The role of the crime victim advocate is to provide emotional support to the crime victim;

(11) With respect to victims and survivors of victims, to be physically present in court during trial, or if subpoenaed to testify, to be scheduled as early as practical in the proceedings in order to be physically present during trial after testifying and not to be excluded solely because they have testified;

(12) With respect to victims and survivors of victims, to be informed by the prosecuting attorney of the date, time, and place of the trial and of the sentencing hearing for felony convictions upon request by a victim or survivor;

(13) To submit a victim impact statement or report to the court, with the assistance of the prosecuting attorney if requested, which shall be included in all presentence reports and permanently included in the files and records accompanying the offender committed to the custody of a state agency or institution;

(14) With respect to victims and survivors of victims, to present a statement personally or by representation, at the sentencing hearing for felony convictions;

(15) With respect to victims and survivors of victims, to entry of an order of restitution by the court in all felony cases, even when the offender is sentenced to confinement, unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment; and

(16) With respect to victims and survivors of victims, to present a statement in person, via audio or videotape, in writing or by representation at any hearing conducted regarding an application for pardon or commutation of sentence.

Paragraph 7.69.050 - Construction of chapter - Other remedies or defenses

Nothing contained in this chapter may be construed to provide grounds for
error in favor of a criminal defendant in a criminal proceeding, nor may anything in this chapter be construed to grant a new cause of action or remedy against the state, its political subdivisions, law enforcement agencies, or prosecuting attorneys. **The failure of a person to make a reasonable effort to ensure that victims, survivors, and witnesses under this chapter have the rights enumerated in RCW 7.69.030 shall not result in civil liability against that person.** This chapter does not limit other civil remedies or defenses of the offender or the victim or survivors of the victim.