94503-9

No. 75017-8-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

WASHINGTON CAPITAL MORTGAGE, INC.,
a Washington corporation,

Respondent,

vs.

EVAN BARIAULT,

Petitioner,

and

BRAVERN BUSINESSES, LLC,

Defendant.

PETITION FOR REVIEW

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A. IDENTITY OF MOVING PARTY

Evan Bariault asks this Court to accept review of the Court of Appeals decision set forth in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its opinion terminating review on March 6, 2017. A copy is in the Appendix at pages A-1 through A-16. The Court denied Bariault's timely motion for reconsideration by an order entered on April 13, 2017. A copy is in the Appendix at A-17.

C. ISSUES PRESENTED FOR REVIEW

1. In making a reasonable inquiry as to the law and facts as required by CR 11 before an action may be filed in court, is an attorney required to contact the prospective defendant and the defendant's key witnesses as part of that inquiry?

2. In imposing CR 11 sanctions against an attorney, does a trial court violate that attorney's right to due process of law when it fails to conduct an evidentiary hearing on the attorney's alleged violations of the rule and then makes credibility decisions, not having taken actual evidence or heard from the attorney subject to such onerous sanctions?

D. STATEMENT OF THE CASE

Attorney Evan Bariault took on the representation of Ernie Whitaker, a minority business owner[1] who believed he had been deceived and had a substantial default judgment taken against him. Bariault

[1] Whitaker did business as Bravern Businesses LLC. This is distinct from the Bravern Residences, the locale for the business.

accepted Whitaker's case and filed a CR 60 motion to set aside the default judgment. He was later sanctioned under CR 11 for failing to undertake a reasonable investigation prior to filing.

Neither the trial court in its evaluation of the sanctions motion nor the Court of Appeals in its review evaluated Bariault's decision to file the CR 60 motion on the information Bariault possessed at the time the motion to set aside the default judgment was filed. Instead, both courts evaluated evidence developed much later. *At the time the motion was filed*, Bariault had the following information that led to his belief that Whitaker had not been properly served:

1. Whitaker never received a summons or complaint and signed a declaration swearing to that fact. CP 985-86.

2. Bariault investigated the motion for default and recognized that service was alleged to have been effectuated through the Secretary of State ("SOS"). CP 1063. Bariault reviewed the law and it was evident that a party must demonstrate reasonable diligence in trying to personally serve a business' registered agent before utilizing service through the State.

3. Bariault retrieved records from the SOS and uncovered the declaration of Dean Kalivas discussing his alleged efforts to personally serve Bravern through Whitaker as its registered agent. CP 1063. Washington Capital Mortgage ("Washington Capital") was required to file said declaration with the State prior to seeking service via the State. Nothing in the SOS records evidenced that Whitaker had been served, only that mailing had occurred.

4. The Kalivas declaration stated the Whitaker residence was in a public access building and Kalivas attempted service on Whitaker's residence multiple times. CP 291-92. Whitaker informed Bariault this was false, the building was private, and Kalivas could not have accessed Whitaker's unit.

5. Bariault contacted the Bravern to confirm Whitaker's contention regarding building access. CP 1064. Bariault spoke with Kathleen Beeby who confirmed the building was a secure access facility and process servers could not access individual units. Bariault later asked Beeby to memorialize this in a declaration. CP 1078-79.

6. As Bariault confirmed, the Kalivas declaration was false; thus, Bariault had a reasonable basis for believing that service was improper; Washington Capital had not met the prerequisite of establishing reasonable diligence through personal service prior to seeking service through the State. Indeed, in this case the prerequisite was bypassed through misrepresentations to the State. (Whether the misrepresentations were intentional or not, the prerequisite was not satisfied.)

7. Bariault then investigated Kalivas' history. CP 1064. He learned that Kalivas was disbarred in Virginia. He had engaged in the unauthorized practice of law in Washington on multiple occasions and was held in contempt on one occasion as a result. He was suspended from practice before the Internal Revenue Service. He had lied to a Pierce County Sheriff about being an attorney. He had previously forged signatures and engaged in racketeering activity. He had engaged in mail and wire fraud. This further solidified Bariault's belief that the Kalivas declaration regarding service was intentionally false.

8. Based on the above information, Bariault reasonably believed, after a reasonable inquiry, that judgment could be vacated under a theory of improper service or fraud/misrepresentation in obtaining the judgment.

After filing the motion to vacate Bariault discovered additional evidence supporting Whitaker's claim that he had never received process. Bariault investigated the actual certified mail service attempt made by the SOS based upon the falsified Kalivas declaration. He found that the evidence strongly suggested that the summons and complaint were erroneously delivered to the wrong unit in Whitaker's apartment building:

1. Knowing that the State did not keep certified mail receipts on file, as evidenced by the Woodley declaration, Bariault contacted the USPS and obtained the return receipt. CP 838-89, 976-79. The signature on the return receipt was not Whitaker's nor was the unit number on the receipt Whitaker's unit. CP 967, 979.

2. Bariault contacted the Bravern Residences attempting to speak with Beeby. She was not available so he spoke with Rebekka Gardner, Bravern's assistant manager. Gardner informed Bariault that while a concierge will sign for certified mail, the postal worker, not the concierge, places the mail in the resident's box. Gardner told Bariault that Bravern Residences had no ability to establish whether Whitaker received the mail from the State in his mailbox. Given that the return receipt had an incorrect unit number, the only sensible conclusion, based on Whitaker's testimony that he was not served, was that it was placed in the mail box of the unit listed on the return receipt rather than Whitaker's. CP 1083-85.

3. No evidence in the record suggests that any Bravern Residences employee would routinely have been asked to, or actually did, place the certified mail summons and complaint in Whitaker's box. Washington Capital's counsel testified he spoke with C. Williams, yet Williams did not refute Gardner's testimony. CP 1002-03.

The trial court and the Court of Appeals also ruled that Bariault did not adequately investigate the existence of an alleged joint venture between Whitaker and DLW, Washington Capital's assignor. While the joint venture was of interest on the underlying question of a potential fraud being perpetrated on Whitaker, it was not relevant to Bariault's pre-filing investigation of the specific issue of service of process. Nevertheless, Bariault had ample evidence upon which to believe Whitaker's claim that such joint venture existed:

1. Whitaker confirmed that he had entered into a joint venture agreement. Whitaker swore to the accuracy of the statement in a declaration. CP 40-42.

2. Whitaker produced a copy of the joint venture agreement that was consistent with his description of the contract. CP 114-21. Whitaker said he signed the agreement, but never received a fully executed copy. CP 1063. Bariault recognized from his dealings with Whitaker that he was not sophisticated in this type of deal.

3. Bariault next examined the default judgment pleadings. CP 1063. There he found admissions that DLW had indeed performed work on the project that was completely consistent with the agreement that Whitaker produced. CP 1-5.

4. Bariault also inquired of Whitaker as to whether there was any contract that would explain how DLW might have performed work on property Whitaker's business owned, *e.g.*, a traditional construction contract. Whitaker had none. Bariault then examined Washington Capital's pleadings associated with the alleged failure to pay and found no evidence of any alternative contract to explain the DLW work. CP 1-21.

5. Bariault also asked Whitaker if he had ever received any invoices for work performed by DLW on the property his business owned. Whitaker said he had not. Again, Bariault examined the pleadings and found no evidence that Whitaker's business had ever been invoiced for DLW's work on the property. The evidence comported perfectly with the agreement Whitaker produced, under which the business would contribute the property and DLW the improvements reflected in the joint venture. Through the entire course of proceedings at the trial level, Washington Capital never produced an alternative contract or a single invoice that they alleged had been sent to Whitaker's business in relation to the DLW work.

6. Bariault also investigated DLW, the purported joint venturer. He discovered that Kalivas, the same person who had signed the false declaration on file with the SOS, was a DLW director. CP 1064. He also discovered that Geri McNeil, DLW's president, was Kalivas' wife.

7. Bariault also consulted with the Burien Planning Department and Valley View Sewer District regarding improvements on the property and learned that Kalivas had appeared before the planning department claiming to represent Whitaker's business. CP 1063. The only connection Kalivas, a DLW director, would have possibly had with the business was through the joint venture, as Kalivas held no position within Whitaker's company.

8. Further, Bariault made a PRA request to the Burien Planning Department for its file related to the property. After some months, Bariault received the file related to the subject property. The file contained Whitaker's forged signature and contained notes establishing a meeting between the Department, Kalivas and Greenhalgh that had occurred without Whitaker's knowledge. This information confirmed the information previously learned from the department. Bariault attempted to present this information to the trial court but it was rejected. CP 1122-24.

The Court of Appeals was critical of Bariault's alleged failure to argue all nine elements of a fraud claim or present the false Kalivas declaration in the motion to vacate. Op. at 8-9. The record is to the contrary:

1. Bariault did not posit an affirmative fraud claim on behalf of Bravern against any plaintiff. CP 37. Bariault's use of the term was in support of his argument that Kalivas had filed an untrue declaration with the trial court in order to improperly obtain service of process through the SOS. In other words, the only evidence is that Bariault used the term in its common vein – that Kalivas had perpetrated a fraud (i.e., a misrepresentation) on the State and trial court by filing an untrue declaration, leading to the default judgment against Whitaker. The motion did not require an affirmative showing of the elements of the tort of fraud, it merely required that Bariault show evidence that Kalivas's declaration was, in fact, untrue.

2. Prior to filing the motion to vacate Bariault was well aware of the false Kalivas declaration that supported a claim under CR 60(b)(4). CP 287, 1064. Indeed, he discussed it with the Bravern Residences and provided a copy to Beeby who prepared a declaration based on Kalivas's false statements. CP 1078-79.

3. Washington Capital admitted that Kalivas's declaration was untrue by withdrawing it and submitting an amended declaration that contained statements diametrically opposite to the original claim of attempts at personal service at Whitaker's actual apartment unit. CP 476-82.

4. In reply to the motion to vacate, Bariault further elaborated on his claim under CR 60(b)(4) and why the Kalivas declaration served as a basis for that claim. CP 412-18.

5. Bariault's investigation uncovered substantial interrelation between DLW, Washington Capital, and the various principles and actors of the two companies.[2]

6. The evidence of collusion uncovered by Bariault's investigation was so substantial that Bariault met with King County Prosecutor Hugo Torres and Fraud Investigator, Linda Williamson. Both indicated that based on the objective evidence and significant investigation undertaken by Bariault that Whitaker and his business were likely the victim of fraud and forgery on multiple levels. CP 1064. Williamson began conducting her own investigation and only closed it after learning the key witness, Ernie Whitaker, had passed away. Bariault was also contacted by Special Agent Hillary Sallee of the FBI, who informed him that the FBI was investigating Kalivas regarding misdeeds related to the subject property, other properties and bankruptcy filings. CP 1068.

Notwithstanding this evidence of Bariault's investigation and factual knowledge at the time the CR 60 motion to set aside the default judgment was filed, the trial court sanctioned Bariault under CR 11 without conducting an evidentiary hearing.[3] That court entered extensive

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[2] Bariault's investigation of the involved entities and related individuals documented possible collusion. CP 415-17. Kalivas and Wilson, the director and treasurer of DLW were both shown to have been directors and/or incorporators of Washington Capital Mortgage. Srdan Nikolic, the individual who told Whitaker he needed an operating agreement worked for Greenhalgh, the real estate broker, and Washington Capital Mortgage. The signature on that operating agreement was copied and forged on documents with the Burien Planning Department. The person that notarized that forgery was Greenhalgh's ex-husband, Luciano Greenhalgh Giovanni. Further, Washington accepted a deed in lieu of foreclosure that was signed by Jon Krieg, claiming to be a member of Bravern. Krieg is a longtime friend of Kalivas. Indeed, a subsequent investigation has revealed DLW is now governed by Greenhalgh and Geri McNeil, with Kalivas as its registered agent.

[3] The trial court also erroneously entered sanctions against Whitaker. *See Stella Sales, Inc. v. Johnson*, 97 Wn. App. 11, 18–19, 985 P.2d 391, *review denied,* 139 Wn.2d 1012 (1999) (When a party dies after being served, the action survives under RCW

findings of fact without ever hearing from the parties whose credibility was at issue. The Court of Appeals, in making its decision, implicitly concluded that many of the "findings" were baseless, focusing only on a handful of them. That court emphasized in its opinion that Bariault was culpable for failing to interview witnesses[4] identified by Washington Capital, *the opposing party* to the motion to vacate. Op. at 6-7, 11.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

CR 11 exists to deter baseless filings and to curb abuses of the judicial system. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). It is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. *Id.* at 219-20.[5] While CR

4.20.050 but must be continued against the deceased party's representatives or successors in interest, and those substituted parties must be personally served.). Bariault informed the trial court of Whitaker's death and informed the court and opposing counsel that he did not represent Whitaker's estate and had been unable to make contact with Whitaker's family at the time the sanctions motion was filed. CP 1062. Here, Whitaker was deceased before Washington Capital even filed its motion, yet the trial court entered sanctions against Whitaker although neither his estate nor a successor in interest were ever substituted.

[4] Both witnesses, Gonzalez and McNeil, allegedly lived in California and Bariault had no mechanism to contact them pre-filing. Further, McNeil was the wife of Dean Kalivas and Bariault had no reason to trust her testimony. Even if their contentions differed from Bariault's clients, he was not required to believe them over his client or objective evidence.

> [5] Were vigorous advocacy to be chilled by the excessive use of sanctions, wrongs would go uncompensated. Attorneys, because of fear of sanctions, might turn down cases on behalf of individuals seeking to have the courts recognize new rights. They might also refuse to represent persons whose rights have been violated but whose claims are not likely to produce large damage awards. This is because attorneys would have to figure into their costs of doing business the

11 supports sanctions for at least three distinct reasons, *Miller v. Badgley*, 51 Wn. App. 285, 300, 753 P.2d 530, *review denied,* 111 Wn.2d 1007 (1988), the only basis for CR 11 sanctions here against Bariault was his alleged failure to conduct a reasonable pre-filing inquiry into the law and facts for the CR 60 motion.

This Court mandates an evaluation of the reasonableness of an attorney's pre-filing investigation under the objective standard of "'reasonableness under the circumstances.'" *Bryant*, 119 Wn.2d at 220. In making this determination, the courts may consider such factors as:

> [T]he time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether a signing attorney accepted a case from another member of the bar or forwarding attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim.[6]

Id. at 220-21.

In *Cascade Brigade v. Economic Development Board for Tacoma-Pierce County*, 61 Wn. App. 615, 811 P.2d 697 (1991), the Court of Appeals mentioned additional factors to be considered when determining

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risk of unjustified awards of sanctions.

Bryant, 119 Wn.2d at 220.

[6] Neither the trial court nor the Court of Appeals expressly addressed these factors. Whitaker's death, for example, made Bariault's position below exceedingly difficult.

the reasonableness of an attorney's pre-filing inquiry: "The knowledge that reasonably could have been acquired at the time the pleading was filed, the type of claim and the difficulty of acquiring sufficient information, which party has access to the relevant facts, and the significance of the claim in the pleading as a whole. *Id.* at 620.

(1) Bariault's Pre-Filing Investigation Was Factually and Legally Reasonable

This is not a case where an attorney filed a pleading without any inquiry or serious effort. Bariault made substantial inquiries, as noted *supra*. Moreover, he did not "blindly rely" on his client; he had substantial evidence to believe misbehavior on a broad scale had caused his client's loss and, most importantly, led to a default judgment being entered against his client. The facts, articulated *supra*, support the view that Whitaker was never served, that fraud, misrepresentation or, *at a minimum*, mistake led to the default judgment (because Washington Capital used a false declaration in its attempts to execute alternative service). The facts also *at least* arguably show that Whitaker's business entered into a joint venture with DLW. In spite of Bariault's extensive pre-filing investigation and supportive information gleaned in that investigation, the trial court and Division I inexplicably found Bariault's efforts were not just insufficient, but were so insufficient that he should

have realized there was no possible avenue to successfully argue that Whitaker was not properly served and that no joint venture existed. *See MacDonald v. Korum Ford*, 80 Wn. App. 877, 884, 912 P.2d 1052 (1996) (must be "patently clear" there is no chance of success). In effect, the lower courts here demanded a level of certainty with regard to a filing *nowhere* contemplated in this Court's jurisprudence.[7] Review is merited, as Division I's decision is inconsistent with this Court's precedent and that of the Court of Appeals.

On the issue of fraud, in particular, Bariault was not required to establish the nine elements of the tort of fraud under CR 60(b)(4), as the Court of Appeals seemingly concluded. Op. at 8-10. The statement that "Washington Capital was involved in an elaborate fraud" resulting in judgments against Bravern neither employed the legal definition of the tort of fraud nor did it constitute an affirmative claim of fraud on behalf of Bariault's client. The statement employed the layman's definition, meaning "an act of deceiving or misrepresenting."[8] The evidence supported that the Kalivas declaration was used to deceive or

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[7] On the question of service of process, Division I's opinion in *Asset Acceptance LLC v. Viet Tuan Nguyen*, ___ Wn. App. ___, 2017 WL 1163695 (2017) only documents how aggressively Washington courts act ordinarily in vacating a default judgment for improper service of process.

[8] https://www.merriam-webster.com/dictionary/fraud

misrepresent; Washington Capital subsequently admitted it was false. Even if the term "fraud" could be considered confusing, unartful drafting is not grounds for CR 11. *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107, 120, 791 P.2d 537 (1990), *aff'd*, 119 Wn.2d 210, 829 P.2d 1099 (1992). Misrepresentation or other misconduct are grounds for vacation of a judgment; the moving party need not prove all the elements of fraud to obtain relief under CR 60(b)(4).[9] Bariault had an objectively reasonable basis to assert a claim under CR 60(b)(4) and a reasonable factual inquiry supported it.

Only after Whitaker unexpectedly passed away, Washington Capital filed its motion for sanctions against Bariault and his client. This left Bariault no opportunity to confer with his client regarding the allegations contained in the sanctions motion and proposed findings. Bariault relied on a legal expert to assess his actions. The trial court and the Court of Appeals wholly *ignore* the expert declaration of Thomas Fitzpatrick, a renowned expert in legal ethics. CP 1177-83. Detailing

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[9] *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 825, 225 P.3d 280 (2009), *review denied*, 169 Wn.2d 1010 (2010) ("WSIPP need not have established the nine elements of common law fraud – although findings and conclusions for all nine elements would satisfy the rule, "'misrepresentation or other misconduct' would also justify vacation of the judgment under CR 60(b)(4)."); *see also*, *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371, 777 P.2d 1056, *review denied*, 113 Wn.2d 1029 (1989) (vacation under CR 60(b)(4) may be appropriate even if the misrepresentation was innocent or negligent rather than willful).

Bariault's investigation, Fitzpatrick opined that Bariault conducted a reasonable inquiry into the existence of a joint venture and the failed service attempt, and that he reached reasonable conclusions factually and legally supporting the pleadings. *See* Appendix at A-18 through A-24.

While ignoring Fitzpatrick's declaration, both courts accepted *at face value* the declarations of the very individuals that appeared to be in collusion and had deceived Whitaker, as supported by King County fraud investigators and the FBI. It is confounding how both courts favored the testimony of a disbarred attorney widely accused of fraud (Kalivas), along with his wife and cohorts, against a respected ethics expert (Fitzpatrick).

The Court of Appeals decision in this case cannot be squared with its ruling in a recent case involving the very same judge's imposition of CR 11 sanctions. In *Thomas v. Levasseur*, 189 Wn. App. 1041, 2015 WL 5010728 (2015), Thomas sued her parents over ownership of a Seattle condominium, alleging she contributed all funds for the purchase and maintenance of the property and that her parents should not be on the title. Discovery and a summary judgment hearing revealed that the allegations were false and Judge Julie Spector entered CR 11 sanctions against Thomas and her counsel. On appeal, Thomas' counsel argued sanctions were improper because the presentation of the factual errors preceded discovery and was the product of a reasonable inquiry by her counsel.

Finding that Judge Spector had applied the wrong standard, Division I agreed and reversed the sanction order, emphasizing that courts must apply an objective standard to evaluate the attorney's pre-filing investigation; courts must look to what counsel knew when the pleading was filed. *Id.* at *15-18. Noticeably absent from the *Thomas* opinion is any suggestion that counsel was required to contact the opposing party or its witnesses to determine the validity of her/his client's statements. While an attorney cannot rely solely upon her/his client's factual representations, it is also true that an attorney "is not obliged to disbelieve his client's factual allegations[.]" *Id.* at *16.

Just as Judge Spector's findings in *Thomas* were erroneous, the findings here fail to address what Bariault actually did and what he reasonably should have believed at the time he filed. Instead, the trial court leapt to conclusions about Whitaker's credibility[10] and made determinations regarding the ultimate merits of the claims of service and the joint venture. Division I then made the same error.

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[10] The trial court's findings that Whitaker was served rely entirely on his credibility, as no witness has provided any evidence establishing the summons and complaint were ever served on Whitaker personally or ended up in his mailbox. Further, the trial court's conclusion that no joint venture existed is based entirely on Whitaker's credibility weighed against that of McNeil. Division I's assertion that the trial court relied upon more than his credibility is erroneous. Sanctions are improper on this basis. *See Saldivar v. Momah*, 145 Wn. App. 365, 403, 186 P.3d 1117 (2008), *review denied*, 165 Wn.2d 1049 (2009).

Review is also merited under RAP 13.4(b)(4). First, this Court has not addressed the necessary pre-filing inquiry under CR 11 since cases like *Bryant* and *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994), cases decided more than 20 years ago.

Second, the Court of Appeals establishes an impossible standard for counsel to meet. Counsel must make a *reasonable* pre-filing inquiry. They are not required to know conclusively each and every possible aspect of their client's claim that only discovery will fully reveal. If, as the Court of Appeals seemingly concluded, such inquiry requires counsel to interview witnesses disclosed *in discovery*, op. at 10-14, or the opposing party,[11] this Court, in its overarching responsibility to regulate the practice of law, should say so, not an intermediate appellate court. Well-respected practitioners like Evan Bariault also should not suffer the sting of CR 11 sanctions without this Court decisively articulating the necessary legal standard. Practitioners need clear guidance from this Court as to what constitutes a reasonable pre-filing inquiry.

Finally, the Court of Appeals' opinion does serious damage to access to justice, chilling clients' access to representation. If counsel are guilty of a CR 11 violation because they do not know their client's case in

[11] The Court of Appeals faulted Bariault for failing to interview DLW representatives about the alleged joint venture. Op. at 6-7. The court seemingly believed an attorney's reasonable inquiry includes interviewing the opposing party in a case.

complete detail, what reasonable practitioner will take a difficult or cutting edge case? Access to justice should not be chilled by the standard enunciated by the Court of Appeals that an attorney must essentially get an opposing party or its witnesses to agree to his client's contentions before the lawyer can proceed without fear of sanctions.

(2) The Trial Court Erred in Failing to Hold an Evidentiary Hearing

The trial court's procedure in this case imposing sanctions against Bariault and his client was truly troubling. When the Court of Appeals states the trial court "weighed the evidence," op. at 5, that is truly an overstatement. That court never met Bariault or Whitaker. It never held a single hearing on sanctions to gauge their credibility. It never even heard oral argument on sanctions. It simply accepted *unquestioningly* Washington Capital's findings and conclusions as given to it. Br. of Appellant at 1, 24-26. Such a serious decision merited an opportunity for Bariault and his client to be heard, and the trial court should have assessed the parties' credibility after an evidentiary hearing.

Washington courts have routinely concluded that a trial court abuses its discretion in failing to hold an evidentiary hearing when affidavits present an issue of fact whose resolution requires a determination of witness credibility. *Carson v. Northstar Dev. Co.*, 62

Wn. App. 310, 315-16, 814 P.2d 217 (1991) (trial court abused its discretion by vacating the default judgment without holding an evidentiary hearing to resolve factual issues); *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994) (fact disputes can only be resolved by determining credibility, matter remanded for evidentiary hearing).

An evidentiary hearing is essential where the decision at stake involves witness credibility. *Crown Plaza v. Synapse Software*, 87 Wn. App. 495, 500-01, 962 P.2d 824 (1997) (disputes about the existence of an agreement are not properly decided on summary judgment because "[o]nly a factfinder can determine which of these statements is more credible, considering all of the evidence, including the unsigned written agreement and the reasonableness of the agreement.").

The Court of Appeals relied on *Northwick v. Long*, 192 Wn. App. 256, 267, 364 P.3d 1067 (2015) to support its holding that the trial court did not abuse its discretion by failing to conduct an evidentiary hearing. However, *Northwick* actually supports Bariault's argument.

Northwick sued Long over a car accident; he served Long by leaving the pleadings with his father at the father's address. *Id.* at 259. Long claimed insufficient service of process, supported by a declaration from his father stating that Long did not reside at that address, that the server did not ask if Long resided there, and that Long lived in Texas and

did not receive mail at the father's residence. *Id.* Northwick deposed the server who testified he went to Long's last known address, that Long's father said Long resided at the residence and that he would accept service for Long. *Id.* at 259-60. Long's counsel had the opportunity to cross-examine the process server at deposition. *Id.* at 266-67. The trial court also heard oral argument, although it denied the request for an evidentiary hearing. *Id.* at 260. On review, Division I held: "Although the trial court could have held an evidentiary hearing with live testimony, the trial court had discretion not do so." *Id.* at 267.[12]

Here, unlike Long in *Northwick*, (1) Whitaker submitted his own declaration; (2) Bariault had no opportunity to cross-examine any of Washington Capital's declarants, conduct depositions, or to conduct discovery; and (3) Bariault *did* challenge the veracity of Washington Capital's evidence. For example, Washington Capital did not file the Gonzalez and McNeil declarations, cited throughout the Court of Appeals' opinion, until two months after Whitaker died and after the trial court had issued the sanctions order.

The Court of Appeals' decision here cannot be squared with *Carson* or *Woodruff*. There is a split in decisional law on the issue of a

[12] The court compared *Northwick* to *Woodruff*, a case relied upon by Bariault, but in *Woodruff*, Division III reversed a denial of a motion to vacate where witness credibility on service of process was essential.

need for a hearing on the imposition of CR 11 sanctions. Review is merited. RAP 13.4(b)(2).

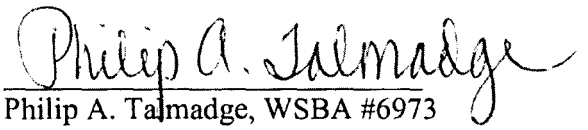
F. CONCLUSION

Allowing the sanctions imposed in this case to stand would completely deform CR 11, creating a requirement to effectively prove the merits of any matter before filing, a concept never adopted by this Court. Also Division I's treatment of the need for an evidentiary hearing in a case where witness credibility is at issue is inconsistent with decisions on the same issue.

This Court should grant review and reverse the trial court's CR 11 sanctions order.

DATED this 24th day of May, 2017.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WASHINGTON CAPITAL MORTGAGE, INC., Respondent, v. BRAVERN BUSINESSES, LLC, Defendant, and EVAN BARIAULT, Appellant.	No. 75017-8-I DIVISION ONE UNPUBLISHED FILED: March 6, 2017

Cox, J. – Evan Bariault, the attorney for defendant Bravern Businesses LLC, appeals the trial court's order and judgment sanctioning him. Because the trial court did not abuse its discretion in any respect, we affirm.

Ernie Whitaker formed Bravern Businesses LLC. Bravern claims to have entered into a joint venture agreement with DLW General Contractors Inc. to conduct a home remodel of investment property located at 12607 14th Avenue South, Burien, Washington. DLW provided labor, services, and materials to this property in the claimed amounts exceeding $137,800. These amounts were unpaid by Bravern, the claimed owner of the property. DLW recorded a claim of lien against this property. Thereafter, DLW assigned its claim of lien to Washington Capital Mortgage Inc.

On September 19, 2014, Dean Kalivas delivered to the Washington Secretary of State a copy of the summons and complaint for this action. On September 23, 2014, the Secretary of State's office sent, by certified mail, a copy of the summons and complaint to the last known address of one authorized to accept service for Bravern. The certified letter was delivered in Bellevue, Washington on September 25, 2014.

On October 30, 2014, Washington Capital commenced this action to foreclose the lien against the property owned by Bravern. It also sought and obtained an order of default and a default judgment against Bravern.

Almost a year later, Bravern moved to vacate the judgment. It alleged improper service and that "the action was created through acts of fraud, deception[,] and forgery" under CR 60(b)(4). The trial court denied the motion and Bravern's motion for reconsideration.

The trial court also concluded that Bariault violated CR 11 and awarded a judgment against him in the amount of $3,875 as reasonable attorney fees for this violation.

Bariault appeals.

SCOPE OF REVIEW

Bariault designates a number of orders in his notice of appeal. But his briefing is confined to the order and judgment imposing sanctions against him and the findings and conclusions supporting that order. Accordingly, we only consider these decisions of the trial court and consider appeal of the other matters abandoned.

CR 11 SANCTIONS

Bariault argues the trial court abused its discretion in imposing CR 11 sanctions. We disagree.

Under CR 11(a), any attorney signing a filing certifies:

> 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; [and] (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*** . . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, ***may*** impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.
> . . . .[1]

This rule requires that attorneys not submit "baseless" filings.[2] A filing is baseless when it is not "well grounded in fact" or "warranted by existing law or a good faith argument" for its alternation.[3] But the filing is not sanctionable merely because it is baseless. The trial court must also find that the filing attorney failed to "conduct a ***reasonable inquiry*** into [its] factual and legal bases."[4] Thus, CR 11 is "not intended to chill an attorney's enthusiasm or creativity in pursuing

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[1] (Emphasis added.)

[2] Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 219, 829 P.2d 1099 (1992).

[3] CR 11.

[4] Bryant, 119 Wn.2d at 220.

factual or legal theories."[5] It also "is not meant to act as a fee shifting mechanism."[6] That the filing does not prevail is not dispositive.[7]

The party seeking CR 11 sanctions bears the burden to prove they are appropriate.[8]

Washington courts objectively consider the reasonableness of an attorney's inquiry.[9] Courts "should inquire whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified."[10] In making this determination, courts may consider "'the time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, . . . the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim.'"[11] But "[a]n attorney's 'blind reliance' on a client . . . will seldom constitute a reasonable inquiry."[12]

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[5] Id. at 219.

[6] Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994).

[7] Bryant, 119 Wn.2d at 220.

[8] Biggs, 124 Wn.2d at 202.

[9] Bryant, 119 Wn.2d at 220.

[10] Id.

[11] Id. at 220-21 (quoting Miller v. Badgley, 51 Wn. App. 285, 301-02, 753 P.2d 530, 539 (1988)).

[12] MacDonald v. Korum Ford, 80 Wn. App. 877, 890, 912 P.2d 1052 (1996) (some alteration in original) (quoting Badgley, 51 Wn. App. at 302).

We review for abuse of discretion the trial court's imposition of sanctions.[13] A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.[14]

Since the trial court weighed the evidence, our review is limited to determining if substantial evidence supports the trial court's findings of fact.[15] If so, we then determine whether the findings support the conclusions of law and the judgment.[16] Substantial evidence is a quantum of evidence "sufficient to persuade a fair-minded person of the truth of the declared premise."[17]

Baseless Filing

Bariault argues that the trial court's findings regarding the allegations concerning the existence of a joint venture are erroneous. We disagree.

Bariault asserted in the motion to vacate the judgment that Bravern "entered into a Joint Venture Agreement . . . with DLW . . . ." In Finding of Fact 8, the trial court found that Bariault's assertion of the joint venture was baseless. It specifically found that Bariault "either knew or should have known that the

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[13] Biggs, 124 Wn.2d at 197.

[14] Cent. Puget Sound Reg'l Transit Auth. v. Airport Inv. Co., 186 Wn.2d 336, 350, 376 P.3d 372 (2016).

[15] Wixom v. Wixom, 190 Wn. App. 719, 724, 360 P.3d 960 (2015), review denied, 185 Wn.2d 1028 (2016).

[16] Id.

[17] In re Det. of H.N., 188 Wn. App. 744, 762, 355 P.3d 294 (2015), review denied, 185 Wn.2d 1005 (2016).

purported joint venture agreement between DLW and Bravern did not exist or that if it did exist, that it was not signed by both parties . . . ."

Carlos Gonzalez's and Geri McNeil's declarations provide substantial evidence to support the trial court's finding.

McNeil, DLW's president, testified by declaration that he never met or spoke "with anyone who identified himself as Ernie Whitaker; and that DLW . . . never had any business dealings with the Bravern Businesses LLC." Gonzalez, Whitaker's actual joint venture partner, also testified by declaration, stating he "never once heard [Whitaker] refer to DLW or to the fact that he had entered into any business arrangement with DLW." Given Gonzalez's "working relationship with DLW . . . , [he] d[id] not believe DLW had any type of business arrangement with Whitaker or Bravern."

The trial court also found that Bariault failed to reasonably inquire into the factual basis of this assertion. It specifically found: "in the exercise of reasonable investigative effort[,] he should have ascertained the joint venture [agreement] was not signed before asserting it in pleadings and alluded to it as being an enforceable agreement." Substantial evidence supports this finding.

Although Bariault claims "[i]t is unclear what further inquiry [he] could have undertaken," he could have determined from DLW representatives whether DLW entered into a joint venture with Whitaker. Bariault claims he "conducted an information search regarding Dean Kalivas [DLW's director/secretary], . . . Debra Wilson [DLW's registered agent and treasurer,] [and] Geri McNeil [DLW's president]." But the record fails to show he attempted to communicate with any

of these individuals or their attorneys to ascertain whether DLW entered into a joint venture with Whitaker.

In sum, the record shows that Bariault blindly relied on Whitaker's assertion of the existence of a joint venture with DLW and the unsigned agreement that Whitaker provided. This was an insufficient inquiry.

Substantial evidence supports the trial court's findings, and these findings support the trial court's conclusion that Bariault's allegations were baseless.

There is no substantial dispute whether existing law would have supported a properly supported allegation. But, on this record, the allegations were not properly investigated prefiling. The court correctly concluded that this "constitute[d] CR 11 violations." On this basis alone, sanctions were properly imposed.

Bariault argues that the trial court's findings are erroneous because his "prefiling investigation was reasonable and supported a view that the [joint venture] existed." Bariault relies on the following statements in his brief to support this argument:

> 1. Whitaker testified under oath that [Bravern] entered in to a joint venture with DLW and informed defense counsel of the same.
> 2. Whitaker provided defense counsel with an unsigned copy [of the alleged joint venture agreement] [and] stat[ed] he never received a final signed copy and thus did not possess one.
> 3. Whitaker informed defense counsel that he signed the joint venture agreements around March 2014. The joint venture [agreement] lists a date of March 25, 2014.
> 4. The unsigned DLW [joint venture agreement] provides that DLW was required to provide all capital and labor. Plaintiff's complaint admits that DLW did just that. . . . There was no evidence of a standard construction contract between DLW and [Bravern], no evidence of periodic invoicing by DLW, and accordingly no basis to believe that DLW's performance was

> anything other than pursuant to a joint venture with DLW providing precisely the service referenced in the alleged joint venture.[18]

These statements demonstrate Bariault's reliance on Whitaker's assertion of a joint venture with DLW and an unsigned copy of the joint venture agreement provided by Whitaker. But "[a]n attorney's 'blind reliance' on a client . . . will seldom constitute a reasonable inquiry."[19] Thus, this argument is unpersuasive.

Bariault also argues that the trial court improperly based its findings "upon a determination of Whitaker's credibility." Bariault correctly states that "it is improper to impose sanctions on an attorney based solely on the ultimate determination of his client's credibility."[20] But the record does not show that the court imposed these sanctions solely on this basis. Rather, the trial court found that Bariault failed to reasonably inquire into the factual basis of his assertion.

Fraud

Bariault also argues that the trial court's findings regarding the fraud allegation are erroneous. We again disagree.

Finding of Fact 9 provided the trial court's reason for imposing sanctions. The trial court found that Bariault's fraud claim under CR 60(b)(4) was baseless. According to the court, he "failed to allege a single fact demonstrating fraud in how [Washington Capital] obtained its default judgment." Substantial evidence supports this finding. Nothing in either the motion or the attached exhibits

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[18] Appellant's Opening Brief at 34.

[19] MacDonald, 80 Wn. App. at 890 (some alteration in original) (quoting Badgley, 51 Wn. App. at 302).

[20] Saldivar v. Momah, 145 Wn. App. 365, 403, 186 P.3d 1117 (2008).

describes how Washington Capital engaged in fraud to obtain the default judgment. Bariault did not explain this in the briefing on this matter.

Bariault argues that the motion was "premised upon plaintiff's effort to [serve] process through the secretary of state pursuant to a false declaration submitted by Kalivas." Bariault also argues that "[t]he facts surrounding the Kalivas declaration supported an objective belief that [the] judgment was obtained through fraud. This fraudulent conduct caused the entry of the judgment without proper notice . . . ."

This argument has no merit. The motion did not mention Kalivas's declaration regarding service of process. Bariault's brief even explains that he "made the tactical decision" not to mention the declaration in the motion.

In Finding of Fact 10, the trial court determined that Bariault made another baseless claim. It specifically found that he "failed to make reasonable inquiry into the required legal elements of his motion under CR 60(b)(4)." CR 60(b)(4) provides that "the court may relieve a party . . . from a final judgment, order, or proceeding for [f]raud . . . , misrepresentation or other misconduct of an adverse party."

The motion to set aside the default judgment states, in part, that "Washington Capital was involved in an elaborate fraud that resulted in multiple judgments being entered against [Bravern]." But there is nothing in the motion that explains this assertion. Specifically, there is no reference to the nine elements of fraud. And there is no explanation of what evidence supports any of these elements.

Additionally, Bariault's failure to explain the alleged "elaborate fraud" and his failure to explain the evidence to support the nine elements of fraud demonstrates his failure to reasonably inquire into factual and legal bases for this claim. Substantial evidence supports this finding.

We also note that Bariault does not assign error to Finding of Fact 17, which states:

> On October 12, 2015, and November 1, 2015, Huguenin (one of plaintiff's co-counsel) advised defense counsel of these violations. However, neither Bravern nor defense counsel modified their position with respect to the issues contained in the warning letters of plaintiff's counsel (Huguenin). Instead, defense counsel and Bravern proceeded with their faulty and improper assertions and declarations in direct violation of CR 11.[21]

Because Bariault does not challenge this finding of fact, it is a verity on appeal.[22]

Improper Service

Lastly, Bariault argues that substantial evidence does not support the trial court's findings of fact regarding the improper service allegation. We disagree.

This argument and the findings of fact at issue focus on one of Bariault's declarations. On December 2, 2015, Bravern filed a reply to its motion for reconsideration of the trial court's order denying the motion to vacate the judgment. That same day, Bariault filed his declaration, testifying he contacted the Unites States Postal Service to inquire about the tracking number and the mailing for the summons and complaint. He testified that the signature receipt

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[21] Clerk's Papers at 1159.

[22] See Mueller v. Wells, 185 Wn.2d 1, 9, 367 P.3d 580 (2016).

contained a signature by "'C. Williams'" and that the address listed contained suite number 2104, rather than Bravern's suite number 2205. Thus, Bariault testified that the summons and complaint were "delivered to the wrong address and [Bravern's] registered agent never received [them] via certified mail . . . ."

In Finding of Fact 21, the trial court determined that Bariault "averred that Whitaker had not been served with process by the Secretary of State." Finding of Fact 22 states:

> Defense counsel failed to inquire of witnesses propounded in Response to Reconsideration, viz. of Woodley, Beeby, Saffarini. Adequate factual inquiry would have disclosed the compelling evidence that the Secretary of State had properly served Whitaker with the Summons and Complaint in this case via certified mail. A reasonable factual investigation by defense counsel would have been inconsistent with defense counsel's assertion in his 12/2/15 declaration that service of the Summons and Complaint was sent to the wrong address. Defense counsel's failure to interview the above-named witnesses constituted an inadequate and unreasonable factual investigation and therefore, supports a continuing pattern of misconduct in this case. These violations are sanctionable under CR 11.[23]

Substantial evidence supports these findings despite the misstatement about the witnesses' named in the response to the reconsideration motion. Out of the three above named witnesses, only Shelly Woodley was identified "in response to Reconsideration." Washington Capital did not mention the "Saffarini" witness until two days after Bariault filed his declaration. And this witness's declaration was not filed until two days after Bariault filed his declaration.

Nevertheless, the record shows that Bariault knew of Kathleen Beeby prior to his filing of this declaration. Beeby is the senior community manager at the

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[23] Clerk's Papers at 1160.

Bravern Signature Residences, where Whitaker's personal and business suite is located. Bariault even obtained a declaration from Beeby in October 2015, prior to filing his motion for reconsideration. However, that declaration explains how occupants obtain access to the residences; it does not explain the procedure for receiving its residents' certified mail. Thus, the record does not show that Bariault reasonably inquired about Bravern Signature Residences' certified mail procedure and whether any of its residents, particularly Whitaker, received any certified mail on September 25, 2014.

Additionally, the record does not show that Bariault attempted to communicate with Woodley after receiving notice of this witness in Washington Capital's response. Woodley, a customer service supervisor at the Office of the Washington Secretary of State (OSOS), "handle[s] all requests for service of process" on businesses registered with the OSOS. Woodley explained the process for accepting service and confirmed that the certified letter in this case was delivered on September 25, 2014 in Bellevue, the city where the Bravern Signature Residences are located. Similarly to Beeby, the record does not show that Bariault attempted to communicate with Woodley to inquire about the service procedure or possible service on Whitaker.

More importantly, the record does not show that Bariault attempted communication with "'C. Williams,'" whom he listed in his declaration. Thus, the record shows that Bariault failed to inquire about this person's signature on the signature receipt and the possible service on Whitaker despite the incorrect suite number listed on the receipt.

These facts demonstrate that Bariault failed to reasonably inquire to determine whether the OSOS had properly served Whitaker with the summons and complaint by certified mail. Accordingly, he made no reasonable inquiry into the facts to support his testimony that the summons and complaint were "delivered to the wrong address and [Bravern's] registered agent never received [them] via certified mail . . . ."

Further, the record demonstrates that Bariault's assertion was baseless. The record does not show he verified that the summons and complaint were delivered to the wrong address and that Whitaker did not receive them. Bariault just makes this assumption based on the incorrect suite number listed on the signature receipt.

Substantial evidence supports the trial court's finding. This finding supports the trial court's conclusion that Bariault's actions "constitute[d] CR 11 violations."

Bariault argues that contacting Woodley would have been "futile" because she testified that the OSOS does not utilize return receipt cards as evidence of the service of process. He chose to contact the United States Postal Service instead, which he claims was "the most sensible, reasonable[,] and diligent approach."

This argument is unpersuasive. Even if a reasonable attorney in like circumstances believed contacting Woodley would be futile, Bariault fails to explain why he did not attempt to communicate with "'C. Williams.'" He also fails to explain the lack of evidence in the record showing a reasonable inquiry of

Beeby about the certified mail procedure and whether any of the residents of Bravern Signature Residences, especially Whitaker, received any certified mail on September 25, 2014. Thus, his reliance on Whitaker's testimony, and his inquiry into the postal service, fails to demonstrate a reasonable inquiry into the factual basis of his declaration.

Evidentiary Hearing

Bariault argues that the trial court abused its discretion by failing to conduct an evidentiary hearing. We disagree.

Trial courts have discretion to conduct evidentiary hearings if needed to "make a just determination of the outcome" of an issue raised by motion.[24]

Here, in the motion's statement of facts, Bariault asserted that Bravern "entered into a Joint Venture Agreement . . . with DLW . . . ." The motion also states that DLW filed a construction lien against Bravern, "its venture partner."

In Finding of Fact 8, the trial court determined that Bariault:

> either knew or should have known that the purported joint venture agreement between DLW and Bravern did not exist or that if it did exist, that it was not signed by both parties or in the exercise of reasonable investigative effort he should have ascertained the joint venture [agreement] was not signed before asserting it in pleadings and alluded to it as being an enforceable agreement. [Bariault's] failure to undertake reasonable investigative steps before pleading this critical fact has never been answered by counsel.[25]

The court further determined: "This failure to reasonably investigate the existence of a signed joint venture [agreement] in an attempt to overturn

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[24] See Northwick v. Long, 192 Wn. App. 256, 267, 364 P.3d 1067 (2015).

[25] Clerk's Papers at 1158.

Plaintiff's default judgment upon an improper legal theory is sanctionable under CR 11."

Bariault argues that the trial court "impermissibly resolved an immaterial disputed fact without an evidentiary hearing and then inexplicably awarded sanctions . . . ." It appears the "immaterial disputed fact" in this argument is the joint venture's existence. He further argues that the trial court, without any discovery, "perfunctorily held that no joint venture existed in spite of or by ignoring substantial evidence to the contrary."

Although the trial court could have conducted an evidentiary hearing to determine whether Whitaker entered into a joint venture with DLW, the court had discretion not to do so. Whitaker testified by declaration that Bravern "entered into a joint venture agreement with DLW . . . ." As previously stated, McNeil, DLW's president, testified by declaration that he never met or spoke "with anyone who identified himself as Ernie Whitaker; and that DLW . . . never had any business dealings with the Bravern Businesses LLC." Gonzalez, Whitaker's actual joint venture partner, also testified by declaration, stating he "never once heard [Whitaker] refer to DLW or to the fact that he had entered into any business arrangement with DLW." Given Gonzalez's "working relationship with DLW . . . , [he] d[id] not believe DLW had any type of business arrangement with Whitaker or Bravern."

Bariault fails to show why the trial court needed an evidentiary hearing to evaluate the witnesses' credibility in order to determine whether the joint venture existed. Further, Bariault did not request an evidentiary hearing until after the

trial court ruled against Bravern. The motion even states: "[A]n evidentiary hearing is not required."

In sum, an evidentiary hearing was not required to resolve the matters in dispute. The trial court was not required to conduct such a hearing under the circumstances of this case.

We affirm the order and judgment imposing sanctions.

Cox, J.

WE CONCUR:

Dwyer, J.

Becker, J.

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

WASHINGTON CAPITAL MORTGAGE, INC., Respondent, v. BRAVERN BUSINESSES, LLC, Defendant, and EVAN BARIAULT, Appellant.	No. 75017-8-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Evan Bariault, has moved for reconsideration of the opinion filed in this case on March 6, 2017. The court having considered the motion has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 13th day of April 2017.

For the Court:

Cox, J.

Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

WASHINGTON CAPITAL MORTGAGE INC., a Washington Corporation, Plaintiff, vs. BRAVERN BUSINESSES LLC, a Washington Limited Liability Corporation, Defendants.	No. 14-2-29631-2 SEA DECLARATION OF THOMAS M. FITZPATRICK IN SUPPORT OF DEFENDANT'S MOTION FOR RECONSIDERATION

I, Thomas M. Fitzpatrick, declare and state as follows:

1. I am over the age of 18, competent to be a witness, and personally knowledgeable about the facts in this declaration.

Personal Background and Expertise

2. I am an attorney licensed to practice in Illinois in 1976 and Washington since 1979. I am a member of the firm of Talmadge/Fitzpatrick/Tribe PLLC, and have been with the firm for approximately ten years. My practice has an emphasis in professional responsibility with a substantial amount of my practice being related to lawyer or judicial professional responsibility issues, including sanctions and Rule 11. Currently my practice includes representing lawyers and judges in disciplinary proceedings, advising lawyers and law firms regarding ethical issues, representing lawyers and law firms in litigation and on appeal in cases that involve professional responsibility issues, sanctions, attorney fees, and serving as an expert

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witness. I have been an expert on professional responsibility matters for both plaintiffs and defendants in cases in both state and federal court, and have served as a standard of care witness.

3. I have practiced in the area of professional responsibility for over twenty five years, with the amount of time devoted to this area of practice changing over the years. I was in private practice with relatively large Seattle law firms for approximately twenty years, and practiced in the professional responsibility area there, as well as giving advice on ethical issues to firm lawyers. In approximately 1999, I joined the Snohomish County Prosecuting Attorney's Office as the assistant chief of the civil division responsible for civil litigation and employment. During the five years I served in that position, I also provided professional responsibility advice and representation within the office.

4. In addition to practicing in the professional responsibility area, I also teach. I was the professional responsibility lecturer for students taking the Washington State Bar Exam for twenty years. I wrote and edited the professional responsibility materials for the BarBri bar review course in Washington. I am an adjunct professor teaching professional responsibility at Seattle University School of Law. I am a frequent continuing legal education speaker in the ethics area. I have served as an ethics lecturer for the American Bar Association, the King County Bar Association, the Washington State Bar Association, the Snohomish County Bar Association, the Snohomish Chapter of Washington Women Lawyers, the Snohomish County Prosecuting Attorney's Office, the Appellate Judges Association, the Superior Court Judges Association, and the District and Municipal Judges Association, and for a private CLE provider. I have lectured at the National Judicial College.

5. I served in the House of Delegates of the American Bar Association for twenty six years, including five years as the King County Bar Association delegate. The House of

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Delegates adopts the Model Rules of Professional Conduct, and any amendments to the Model Rules. The Washington Rules of Professional Conduct ("RPC") are based upon the ABA Model Rules. I served in the House and on the ABA Board of Governors when the current version of the Model RPC was adopted. Washington later used that version to amend its RPC in 2006. That version is currently in force in Washington.

6. I have served on the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professional Discipline, and two ABA commissions, one of which wrote the current version of the Model Code of Judicial Conduct, and the other wrote the Model Rules of Judicial Discipline. I served on the Task Force appointed by the Washington Supreme Court to review and recommend any changes to the Washington Code of Judicial Conduct. The Task Force recommendations were acted upon by the Washington Supreme Court which has now adopted a new Washington Code of Judicial Conduct. I served as a member of the ABA Standing Committee on Lawyer Professional Liability. I am a Fellow of the ABA Center for Professional Responsibility and previously chaired the Policy Implementation Committee of the ABA Center for Professional Responsibility. I currently serve on its Continuing Education Committee.

7. While my practice has an emphasis in professional responsibility, the bulk of my career has been spent as a civil litigator, and I continue to have a practice involved with litigation as well as appeals. During my forty years as a lawyer, I have handled a large variety of litigation, including personal injury, commercial, employment, fiduciary, governmental, and professional liability. My practice has always involved commercial litigation, representing both plaintiffs and defendants. I spent many years handling construction related claims. As the assistant chief of the civil division of the Snohomish County Prosecuting Attorney's Office, I personally handled

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civil litigation, including construction claims, for the County and supervised a staff of lawyers also handling civil litigation. Based upon my education, training, and nearly four decades as a lawyer, I have learned how a reasonably prudent litigator would handle civil litigation in Washington State and what a reasonably prudent litigator would do in making an inquiry reasonable under the circumstances to determine if a pleading is well grounded in fact.

Facts

8. In forming the opinions expressed in this declaration, I reviewed Defendant's Motion for Reconsideration, the Findings of Fact and Conclusions of Law entered by the Court on February 8, 2016, other relevant pleadings contained in the record, and I spoke with Mr. Bariault about the history of the litigation, what inquiries he made, and what evidence was in the record. The materials reviewed and information obtained are of the type and quality an expert may rely upon as the basis for an opinion. Any opinions stated are made to a reasonable degree of legal certainty.

9. Based upon the information available to me at the time of this declaration, the following facts are significant:

A. Mr. Bariault's client, Mr. Whitaker ("Whitaker") testified under oath that Bravern Businesses LLC ('BB") entered into a joint venture with DLW General Contractors ("DLW").

B. Whitaker provided Bariault with an unsigned copy of the joint venture agreement stating he never received a final signed copy and thus did not possess one. The fact there was a joint venture agreement gives credence to Whitaker's claim there was a joint venture.

C. Whitaker informed Bariault that he signed the joint venture agreement around March 2014. The joint venture agreement lists a date of March 25, 2014, further evidencing the claim of the client.

D. If there was a signed copy of the joint venture agreement, it should have been able of being obtained through the discovery process of a lawsuit.

E. The unsigned DLW-BB joint venture provides that DLW was required to provide all capital and labor associated with the project. The complaint of the plaintiff admits that DLW did provide the capital and labor, commensurate with the joint venture agreement and the assertions of Whitaker. Further, it is standard practice in the construction industry that a

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contractor would have a construction contract if the arrangement is to proceed on a standard basis. No evidence of such a contract has been adduced to date. It is also standard that contractors want to be paid as the work progresses. There was no evidence adduced from DLW that it engaged in routine invoicing which is what should be expected if there was a standard contractor/builder arrangement. The *absence* of a construction contract and regular invoicing suggests the arrangement was something else which supports Whitaker's claim this was a joint venture arrangement.

F. It is not clear to me why the issue relative to whether or not there was a joint venture relates to a service of process issue which was before the Court.

G. Bariault's client swore under oath he was not served with a summons and complaint in this matter via certified mail from the Secretary of State's Office. This is a classic case of looking into whether there is evidence to support a client's claim that he or she did not receive something. Bariault reviewed the evidence from the Secretary of State's Office that it had served his client. Bariault then made further inquiry to determine if the client's claim could be supported. He obtained a certified mail receipt from the U.S. Postal Service. The receipt contained an incorrect unit number for his client. Bariault also obtained testimony from the residence manager where the client resided that a building concierge will sign for certified mail, but that the postal carrier then places it in the provided mail boxes. Because the mail receipt demonstrates that an incorrect unit number was used, it is entirely possible, probably plausible, that the summons and complaint was placed in the wrong mail box and never reached its intended destination. This lends credence to the client's assertion that the summons and complaint was not received. It is also not clear what additional inquiry Bariault could have made to determine what occurred.

H. Dean Kalivas filed a declaration with the Secretary of State that contained false information. Kalivas later admitted the declaration was false, contending it was the result of a "typographical omission." This admission occurred after Bariault argued the false Kalivas declaration demonstrated the plaintiff used false information to bypass the reasonable diligence requirements of RCW 25.15.025. Bariault corroborated the information contained in the Kalivas declaration was false by contacting the residence manager where his client resided and obtaining her declaration on the matter,[1] lending credence to the theory of fraud under CR 60(b)(4).

Discussion

10. Applicable Law. I am informed the applicable law relating to this matter is that of the State of Washington. I cite to various legal authorities not for the purpose of rendering a legal opinion, but for the context of my opinions below.

11. CR 11 was adopted "to deter baseless filings and to curb abuses of the judicial system."

[1] Bariault informed me the residence manager's declaration was never filed because Kalivas admitted facts in his declaration were false, making her testimony contradicting said facts unnecessary.

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Bryant v. Joseph Tree, Inc., 119 Wn. 2d 210, 219, 829 P. 2d 1099 (1992). The burden is on the moving party to justify the request for sanctions. *Biggs v. Vail,* 124 Wn. 2d 193, 202, 876 P. 2d 448 (1994). CR 11 is violated in any one of three ways in the case law. An attorney must (1) conduct a reasonable inquiry into the facts supporting the paper; (2) conduct a reasonable inquiry into the law to ensure that a pleading filed is warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law; and (3) avoid filing the pleading for any improper purpose, such as delay, harassment or increasing the costs of litigation. *Miller v. Badgley,* 51 Wn. App. 475, 482-83, 945 P. 2d 1149 (1997). CR 11 was intended to inhibit the "shoot-first-and-ask-questions later" approach to the practice of law. *Watson v. Maier,* 64 Wn. App, 889, 898, 827 P. 2d 311, rev. den. 120 Wn. 2d 1015 (1992).

12. Washington courts apply an objective standard for the basis for the pleading in law and fact to evaluate compliance with CR 11. *Bryant* at 220. In making the evaluation in the context of the objective standard, the courts are to consider an array of factors in assessing the reasonableness of counsel's inquiry:

> The time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether a signing attorney accepted a case from another member of the bar or forwarding attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim. *Miller* at 302.

13. Counsel is entitled to rely upon his client for factual information. The Rule only prohibits "blind reliance," especially in cases where there is additional information that could be obtained with reasonable inquiry that does not support the client's factual claims. *In re Guardianship of Lasky,* 54 Wn. App. 841, 854 P. 2d 695 (1989).

14. Opinions. This is obviously not a situation of "blind reliance" on a client. Bariault was entitled to rely upon his client's sworn testimony that he had signed a joint venture agreement but did not have a signed copy. A reasonably prudent lawyer would give credence to

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the client's claim in light of corroborating evidence that the dates matched up as to when such an agreement was ostensibly signed, the plaintiff admitted DLW did the work contemplated by the joint venture agreement, documentation did not support a standard owner/builder relationship including the lack of a construction contract and regular invoicing. By ascertaining this information, Bariault made a reasonable inquiry to support the allegation that there was a joint venture.

15. Bariault's inquiry into what the certified mail receipt actually contained regarding the recipient's address, that the unit number was incorrect, and that the concierge would sign for certified mail but the mail carrier would place the mail into the box for the designated unit was reasonable. A reasonable prudent lawyer under these circumstances could conclude that the client's assertion that the summons and complaint was not received by certified mail was true.

16. Bariault conducted a reasonable investigation by obtaining the Kalivas declaration from the Office of the Secretary of State and discovering that it contained false information. The subsequent admission by Kalivas that the declaration was false demonstrates the appropriateness of the inquiries and conclusion of Bariault as to the credibility of Kalivas. The fact that Kalivas filed an incorrect or false declaration filed with an official government office could lead a reasonably prudent lawyer to conclude that a claim of fraud as a basis for relief under CR 60(b)(4) was appropriately pled and factually supported.

I swear the foregoing to be true under penalty of perjury under the laws of the State of Washington.

Executed at Seattle, Washington, this 17th day of February, 2016.

Thomas M. Fitzpatrick, WSBA #8894

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DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals Cause No. 75017-8-I to the following:

Theron A. Buck
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Original E-filed with:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 12, 2017 at Seattle, Washington.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

May 12, 2017 - 2:22 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	75017-8
Appellate Court Case Title:	Washington Capital Mortgage Inc., Res. v. Evan Bariault, App.
Superior Court Case Number:	14-2-29631-2

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