Supreme Court No: 893795

Court of Appeals No. 300609-III
(Consolidated With 300935)

IN THE SUPREME COURT OF
OF THE STATE OF WASHINGTON

JAMES W. AASEBY and JUDY D. AASEBY,

Petitioners

v.

WILLIAM VUE,

Defendant,

J. SCOTT MILLER Individually

and Formerly of the LAW FIRM OF MILLER, DEVLIN, McLEAN & WEAVER, P.S. (dissolved)

Respondents

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENT

The only remaining respondent is J. Scott Miller formerly of the law firm, Miller, Devlin, McLean & Weaver, P.S., which was retained by Allstate Insurance to represent the defendants. That firm was dissolved after the underlying case was dismissed in 2004 and before the Order Vacating Dismissal was entered in 2005.

The trial court also initially imposed sanctions on (a) defendant William Vue and (b) his attorneys Patrick McMahon and David Force from the Wenatchee law firm of Carlson, McMahon & Sealby, PLLC, (who were hired by Allstate Insurance to replace Miller, Devlin, McLean & Weaver, P.S.), and (c) J. Scott Miller and Crystal Spielman of the law firm Miller, Devlin, McLean and Weaver, P.S.

Sanctions were subsequently vacated against Vue, Spielman, McMahon and Force, and plaintiffs' eventually pursued sanctions against only attorney Miller.

II. COURT OF APPEALS DECISION

The unpublished decision in this matter is *Aaseby v. Vue*, 2013 WL 4773896 (Wn. App. Div. 3, 2013).

III. RESTATED ISSUES PRESENTED FOR REVIEW

1. Did attorney Miller communicate with defendants in preparing an Answer to the Complaint?
2. Should attorney Miller be liable for discovery responses prepared by attorney Spielman?
3. Could the plaintiffs' Farmers Insurance litigation been avoided by Miller?
4. Did payment of the judgment render Miller's appeal moot?
5. Did Miller misrepresent the law regarding supersedeas bonds?
6. Was the motion to dismiss Plaintiffs' Cross Appeal frivolous and in violation of RAP 18.9?

Respondent does not seek review of issues not raised in the plaintiffs' petition for review.

IV. COUNTER STATEMENT OF THE CASE

Plaintiffs' Statement of the Case is inaccurate and misrepresents the facts. Further, contrary to plaintiffs' argument, there are no issues of substantial public interest and the decision by the Court of Appeals does not conflict with this Court's prior decisions.

The case originally arose from a vehicle collision in Spokane County on Oct. 201, 2000. As the Court of Appeals noted, the Mr. Aaseby was aware of the Farmers Insurance policy because of information given to him at the scene[1]. In fact, he contacted Farmers, received a claim number, and later received notice that the claim had been denied[2]. He did not,

[1] CP 157-161.
[2] CP 80-85, and CP 88-90 [deposition at p. 25:25-27:1]).

however, share this information with defense counsel until after the underlying case was settled for policy limits and dismissed.

It is undisputed that Allstate insured the vehicle Mr. Vue was driving. It is also undisputed that Allstate retained Miller, Devlin, McLean & Weaver, P.S. as defense counsel. Finally it is undisputed that Mr. Vue did not disclose the Farmers policy to defense counsel until after the case had been settled and dismissed.

In short, it is undisputed that the Farmers Insurance policy was not disclosed during discovery because defense counsel had no knowledge it existed, and there was no information that would have prompted an investigation regarding that policy. Mr. Aaseby did, however, provide the Farmers Insurance information to his attorney, Michael Delay before settling the underlying case for Allstate's policy limits. CP 708:19-22 and CP 1133-1134. Mr. Delay has never explained why he did not question the defendants' interrogatory

responses that did not include information about the Farmers policy[3].

Plaintiffs' Complaint contained allegations that misrepresented the family relationships among the Vues. Before it was filed, defense counsel provided all defendants with a copy of the draft Answer to the Complaint, however none of the defendants corrected the plaintiffs' misrepresentations[4]. The error, however, was harmless because the Complaint contained no allegations against either the legal owner or the registered owner of the vehicle. The only allegations of wrongdoing were against the driver, William Vue.

Allegations regarding discovery responses should not be directed at attorney Miller because it is undisputed that attorney Spielman was solely responsible for answering he had

[3] Trial judge Robert Austin noted that attorney Delay knew about the Farmers Insurance policy from the beginning of the litigation. CP 708:19-21.
[4] CP 80-85 at ¶7 and CP 153-155 at ¶4.

interrogatories. It is undisputed that those interrogatories were signed only by attorney Crystal Spielman[5] (WSBA #34194).

This was a simple case that was resolved after minimal discovery. The parties exchanged interrogatories, and defense counsel deposed Mr. Aaseby. The case settled for Allstate's policy limits. The Aasebys then settled their UM/UIM claims with their own insurance company, Grange, which involved minimal discovery and resulted in payment of policy limits.

Plaintiffs then attempted to pursue the Farmers Insurance policy. Vue's failure to include information about that policy in the discovery responses was not only understandable, it clearly was harmless. First, Mr. Aaseby and his attorney had full knowledge of that policy from the beginning of the case. And second, it was determined definitively that there was no coverage under that policy, therefore nondisclosure was

[5] The trial court was advised that Ms. Spielman was admitted to the in November, 2003, but worked at MDM&W for 2 ½ years first as a law clerk, then as a Rule 9 Intern since the summer after her first year at Gonzaga University School of Law.

irrelevant and immaterial[6]. See unpublished decision, *Farmers Insur. Co. v. Vue & Aaseby*, 151 Wn.App. 1005 (Table), 2009 WL 1941991 (Wn.App. Div. 3, 2009), pet. for rev. den., 167 Wn.2d 1015, 200 P.3d 209 (2009).

V. ARGUMENT

This Court is well aware review is granted under RAP 13.4(b) in very limited circumstances:

(1) Where the Court of Appeals decision conflicts with a Supreme Court decision or a decision by another Court of Appeals.

a. However, there is no such conflict here.

(2) When a significant constitutional question is presented.

a. The plaintiffs do not assert such a claim here.

[6] As the Court of Appeals observed, the original trial court judge assigned to this case, Robert Austin, specifically stated at CP 169 "[I]f there is coverage, then all these other issues fall into place. If there isn't coverage, then I think the matter is pretty much at an end."

(3) When the petition presents an issue of substantial public interest.

a. The issue here involved a one-time occurrence, and is not of substantial public interest.

The litmus test for this Court considering whether to accept review under RAP 13.4(b) is quite similar to the test applied by the Court of Appeals under RAP 12.3(e) when determining if a decision should be published. Here, the Court of Appeals correctly concluded that there was no basis to publish the decision. Plaintiffs failed to challenge that determination.

Issue 1 - Did attorney Miller communicate with defendants in preparing an Answer to the Complaint?

Plaintiffs' claim that there was a "complete lack of contact" with defendants is obviously mere hyperbole. There were multiple contacts with all defendants. Further, there is substantial evidence in the record that reasonable inquiry and due diligence was made.

First, it is important to separate issues involving the interrogatory responses from the Answer to the Complaint, because attorney Miller did not participate in answering the discovery, therefore he is not responsible for the content of the responses. The record clearly shows that all discovery responses were prepared solely by attorney Spielman, there is no evidence whatsoever to show that Miller was asked to review or approve those responses.

It is undisputed that Miller had no personal knowledge that the admission in the Answer incorrectly identified the family relationship between William Vue (the driver) and Vilay and Agnes Vue[7]. The Court of Appeals indicated that because of information provided to attorney Spielman and/or her paralegal, Miller violated CR 11 based on "implied knowledge," even though that information was never transmitted to him.

[7] The Complaint incorrectly identified them as William's parents, but they were actually his siblings.

As the Court of Appeals ruled, CR 11 sanctions are not warranted in this instance because the error was inadvertent and not egregious.

By admitting the truth of plaintiffs' allegations the case did not become more complex. The Complaint contained no allegations against the legal owner or the registered owner of the vehicle, and no allegations of fault against either Vilay or Agnes Vue. Therefore the family relationship issue did not impede or even affect the litigation.

Issue 2 - Should attorney Miller be liable for discovery responses prepared by attorney Spielman?

The record clearly shows that all discovery responses were prepared solely by attorney Spielman, there is no evidence whatsoever to show that Miller was asked to review or approve those responses.

The language of CR 26(g) closely restricts application of the rule:

> "If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response or objection is made, or both, an appropriate sanction ..." CR 26(g) (emphasis added).

The rule makes no mention of imposing sanctions against another member of the firm in which the attorney answering discovery is employed.

As the Court of Appeals noted, William Vue stated he thought his brother, Vilay, was the registered owner of the car and, therefore, believed the interrogatory answer to be correct. This matched the information provided by Allstate Insurance.

Additionally, the Court of Appeals concluded that information about the Farmers policy was known to everyone except attorney Miller.

> "We conclude that the trial court erred by sanctioning Mr. Miller for this conduct. First, in responding to the interrogatory and request for production regarding insurance coverage, Mr. Miller conducted a reasonable inquiry under the circumstances before certifying the discovery request. Mr. Miller sent the interrogatories to Mr. Vue, Agnes, and Vilay and asked them to review the

> questions. Mr. Vue, who was the only party to respond, was interviewed by Mr. Miller's office. Mr. Vue admitted that he did not tell Mr. Miller about another insurance policy even though he told Mr. Aaseby at the accident of the Farmers policy. Mr. Vue later justified withholding the information because he did not think he was covered. Additionally, neither Allstate nor the Aasebys informed Mr, Miller about another policy, although it appears both parties knew of the policy and were in contact with Mr. Miller. In sum, after conducting a reasonable inquiry, Mr. Miller had no knowledge of the Farmers policy and answered the interrogatory appropriately." (Court of Appeals Decision at p. 17-18) (emphasis added).

Quite simply, it is impossible to know what one does not know. Because the existence of the Farmers policy was never disclosed to attorney Miller, there was no reason to conduct additional inquiry. It is also axiomatic that since attorney Delay did know about the policy, it would have been appropriate for him to disclose that knowledge when the interrogatory responses were received, instead of waiting to raise the issue until one year after the case had been settled and dismissed.

Issue 3 - Could the plaintiffs' Farmers Insurance litigation been avoided by Miller?

The short answer is, of course, "no." Plaintiff Aaseby knew about the Farmers policy three years before suit was filed in the underlying case, because he had filed a claim with Farmers based on the information provided at the accident scene. Farmers denied the claim then, and when the issue was raised again by attorney Delay following the Grange Insurance UM/UIM settlement, it was denied again.

Even if defense counsel had known about the Farmers policy and disclosed it in discovery responses, the claim would have been denied. There is nothing about the discovery response that caused Farmers to deny the claim. Therefore, plaintiff's fruitless litigation against Farmers[8] was not affected by the discovery response[9].

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[8] *Farmers Ins. Co. of Washington v. Vue,* 151 Wn.App. 1005 (Table), 2009 WL 1941991 (Wash.App. Div. 3), pet. for review den., 167 Wash.2d 1015, 220 P.3d 209 (2009).

[9] At p. 16 the Petition for Review, plaintiffs argue that attorney King's unsupported claim was uncontroverted. In reality, the trial court declined attorney Miller's request for an evidentiary hearing on that and other related issues. CP 239-253 (Brief), CP 254 (Motion), and CP 256 (Trial Minutes.)

Issue 4 - Did payment of the judgment render Miller's appeal moot?

This is a particularly curious issue, because it was never raised until now, and also is clearly contrary to decided law.

Issues not raised in the Court of Appeals are waived. *Pappas v. Hershberger,* 85 Wn.2d 152, 530 P.2d 642 (1975); *Douglas v. Freeman*, 117 Wn.2d 242, 814 P.2d 1160 (1991).

Payment of a judgment does not impede the right to appeal, as shown in RAP 12.8 which reads in relevant part:

> "If a party has **voluntarily** or involuntarily partially or wholly **satisfied** a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution." (emphasis added)

Therefore, voluntarily (or involuntarily) paying a judgment does not waive the right to appeal.

Issue 5 - Did Miller misrepresent the law regarding supersedeas bonds?

It is truly surprising that plaintiffs' counsel fails to understand the purpose of a supersedeas bond. The sole purpose

of that bond is to prevent the plaintiff from executing on a judgment, but in return, the plaintiff is provided protection from the delay because the bond guarantees payment of the judgment if defendant's appeal is unsuccessful. The bond simply does not apply when the judgment has been paid. The cases cited to both the trial court and the Court of Appeals are clear on this.

Issue 6 - Was the motion to dismiss Plaintiffs' Cross Appeal frivolous and in violation of RAP 18.9?

This issue was fully briefed and clearly considered by the Court of Appeals. Although the motion to modify was denied, legitimate issues were involved. The fact that the Commissioner referred the matter to the appellate panel clearly shows the panel denied plaintiffs' motion for terms by implication.

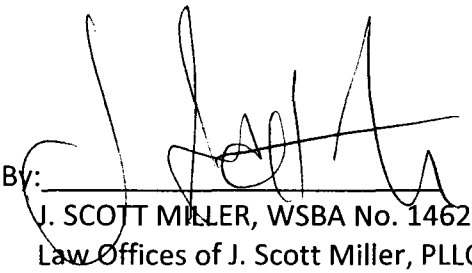
Contrary to plaintiffs incessant requests for sanctions, terms, fees, etc. the court should award attorney Miller attorney fees arising from continually being required to address frivolous issues raised by plaintiffs' counsel.

VI. Conclusion

The plaintiff's petition should be denied.

1. The litigation was protracted due solely to plaintiffs' counsel.
2. An appeal is not rendered moot by paying a judgment. RAP 12.8.
3. Attorney fees were denied at the Court of Appeals.
4. Costs are awardable to attorney Miller, as respondent, not to petitioners.

Respectfully submitted this 29th day of October, 2013.



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CERTIFICATE OF SERVICE

I declare, pursuant to RCW 9A.72.085 and under penalty of perjury under the laws of the State of Washington, on October 29, 2013, that a true and correct copy of the foregoing was duly served on all parties entitled to service by the method listed below, addressed as follows:

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