NO. 30093-5-III

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

JAMES W. AASEBY, et. al.,

Respondent,

v.

WILLIAM VUE, et. al,

Defendants,

J. SCOTT MILLER and the Law Firm of Miller, Devlin & McLean, P.S.,
Appellants

APPELLANT'S OPENING BRIEF

J. SCOTT MILLER, WSBA #14620
Appellant
201 W. North River Drive, Suite 500
Spokane, WA 99201-2266
(509) 327-5591

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I. Introduction

This is an appeal on the very narrow issue of whether the trial court properly imposed sanctions on defendant's prior attorney, and if sanctions are appropriate, whether the amount was proper. There are, unfortunately, literally thousands of pages in the court file. Fortunately, however, very few of them pertain to this appeal.

The underlying case was made unnecessarily complicated by plaintiff's attorney. And, contrary to the plaintiff's designation of clerk's papers, this appeal does not require review of voluminous documents. The majority of time in this case has been spent by plaintiffs' attorney's desperate attempts to divert the court's attention away from the fact the alleged problems were the result of his own failures and errors.

Despite a succession of motions, affidavits, duplicate filings, and irrelevant documents, the matter at issue in this appeal limited to the sole question of the judgment of sanctions imposed against attorney Miller who was not a party to the case, and was not afforded due process.

II. Assignments of Error

a. **Assignment of Error No. 1.** The trial court failed to conduct evidentiary hearing before issuing findings of fact

and conclusions of law and judgment of sanctions thereby violating attorney J. Scott Miller's due process rights.

b. **Assignment of Error No. 2.** The trial court failed to properly consider lesser sanctions before imposing sanctions against attorney J. Scott Miller.

c. **Assignment of Error No. 3.** The trial court failed to recognize the culpability of plaintiffs' counsel in his failure or refusal to notify defense counsel of alleged errors in discovery responses regarding possible other insurance.

d. **Assignment of Error No. 4.** The trial court failed to properly calculate sanctions by incorrectly including time spent by plaintiffs' attorney on matters not resulting from sanctionable acts or omissions by attorney J. Scott Miller.

e. **Assignment of Error No. 5.** The trial court improperly imposed sanctions on attorney J. Scott Miller for allegedly negligent acts/omissions by attorney Crystal Spielman and/or defendant William Vue regarding family relationships of the defendants, existence of other insurance, and/or ownership of the vehicle operated by William Vue.

III. Statement of the Case

a. Procedural Background

A Summons and Complaint in the underlying case was filed 10/16/2003 (CP 1-6), and an Answer with Affirmative Defenses was filed by defendant Vues on 01/05/2004 (CP 7-10). Following discovery the matter was settled for Allstate's policy limits[1] and the case dismissed with prejudice with prejudice on 06/24/02004 (CP11-12).

Aasebys' attorney obtained an Order to Show Cause on 06/22/2005 (CP 13) after claiming that discovery responses provided by defendants[2] failed to disclose a Farmers Insurance policy that may have been available. An Order vacating the dismissal was entered by Judge Austin on 07/01/2005 (CP 19-21). Prior to entry of the vacation order, Vues' former defense counsel (appellant Miller) withdrew and a Notice of Substitution of Counsel was entered on 06/28/2005 (CP 17-18)[3].

The record shows that cross motions were heard on 12/16/2005 and that the court took those matters under advisement. (CP 27). Judge Austin

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[1] Allstate insured the vehicle being operated by William Vue and owned by Vilay Vue.
[2] The discovery responses were prepared by and signed by William Vue, and the attorney attestation clause was signed by attorney Crystal Spielman (WSBA 34194).
[3] It is important to note that after Miller's firm withdrew from defending Vues, and McMahon's firm filed a notice of substitution, Miller never filed any pleadings on behalf of any named defendant, and that all pleadings filed by Miller after June 2006 were filed solely on his own behalf.

subsequently issued two letters on 02/21/2006, one addressing a motion to intervene filed by Farmers Insurance (CP 29-31) and the other addressing sanctions sought by the plaintiffs (CP 32-37). Those letters were used as the basis for plaintiff's Motion for Findings of Fact and Conclusions of Law seeking to have sanctions imposed against both of defendants' attorneys, Miller and Spielman (CP 78). The court heard argument on 06/23/2006 but declined to sign the plaintiffs' proposed findings and conclusions. (CP 681-715). And, in fact, no order was ever entered following that hearing. (CP 93).

At a hearing on 08/25/2006 Judge Austin ordered counsel for both parties jointly to initiate a declaratory judgment action to resolve the question of whether there had been an additional insurance policy available to defendants that had not been disclosed in discovery before the case was settled and dismissed with prejudice. (CP 168-173, and CP 171 ll.20-25). He also noted that "*If there isn't coverage, then I think the matter is pretty much at an end.*" (CP 169 ll. 22-24).

The record shows that following a variety of motions, Judge Austin entered a Stay Order in the underlying case on 02/13/2007 pending outcome of the DJA. Miller was not noticed or included in any of the motions.

It appears that the parties did not comply with Judge Austin's order to initiate a declaratory judgment action. Instead, Farmers Insurance filed a DJA. So for the next several years plaintiffs' attorney redirected his efforts to a series of unsuccessful attempts to prove that the Farmers Insurance policy provided coverage for the accident at issue in the underlying case.

On June 1, 2007 Judge Leveque granted Farmers' motion for summary judgment finding there was no coverage under that insurance policy (CP 122-123) which was upheld by this court in an unpublished opinion on July 9, 2009, and the Washington Supreme Court denied review. (*Farmers Ins. Co. v. Vue*, 151 Wash. App. 1005, 2009 WL 1941991, *rev. den.* 167 Wn.2d 1015 (2009).

Judge Austin retired in 2008 while the Farmers Insurance DJA was pending. In October, 2010 Judge Linda Tompkins was assigned to preside over the underlying case. There were a series of orders entered regarding case scheduling between October, 2010 and March, 2011. However little else of significance pertaining to this appeal occurred until 03/04/2011 when plaintiff's attorney suddenly served a motion for sanctions against Miller (CP 124-125)[4].

[4] This was time since June 2006 that Miller had been served with any pleadings, and the first time there was any document filed indicating he still had a connection to the underlying case.

Of particular note, however, is the motion filed by Defendant March 22, 2006 to file a Supplemental Answer (CP 38-44) that was intended to correct inadvertent (and harmless) errors in the original Answer regarding (1) the family relationship between the named defendants, and (2) clarifying ownership of the car. Instead of embracing this attempt to clarify the record, plaintiffs' attorney vigorously resisted the motion.

On April 24, 2006 attorney Delay filed a Declaration (CP 45-48) to which he attached a letter he received June 29, 2005 in which attorney McMahon clarified both the vehicle ownership issue and the defendants' family relationship before the 07/01/2005 show cause hearing at which the judgment was vacated. (CP 47-48).

It is clear, therefore, that before the order vacating the dismissal with prejudice was entered in July, 2005 (CP 19-21), plaintiffs' attorney had all the information he now claims was not available until he spent countless hours for which he seeks sanctions.

After the motion filed in March, 2011the procedural history and pleadings become confusing, probably because plaintiff's counsel was trying to juggle three separate and unrelated matters: the first was the trial in the

underlying case[5], the second was a request for sanctions asserted against Miller[6], and the third was a succession of motions against the defendants' attorneys that substituted for Miller[7] when the Order of Dismissal was vacated in 2004. Unfortunately, the motions and related pleadings are not clearly delineated in the docket, and even when reading the pleadings it is clear that plaintiffs' counsel conflated many of the issues[8].

Judge Austin's retirement is a watershed event in this case. Judge Tompkins incorrectly thought that she was merely memorializing Judge Austin's prior rulings. But the record clearly shows no such rulings were ever made, and the subsequent orders and judgments are improper.

The following procedural events occurring after Judge Tompkins took over the file are significant with respect to the sole issue of sanctions involved in the pending appeal:

Plaintiff's Motion for Sanctions March 4, 2011. Plaintiffs filed a motion for judgment for sanctions after no mention of the subject since Judge Austin refused to sign plaintiff's proposed findings and conclusions in

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[5] Because the case originally had been settled for Allstate's policy limits and dismissed with prejudice, there had been no trial. By convincing Judge Austin in 2004 to vacate the dismissal the case was put back on the trial docket.
[6] For alleged acts and omissions prior to the case being settled and dismissed with prejudice.
[7] Law firm of Carlson, McMahon & Sealby, PLLC and attorneys Patrick McManon (WSBA 18809) and David Force (WSBA 29997).
[8] Whether this was intentional or the result of inattention is still undetermined.

June, 2006. The matter was addressed in a series of hearings beginning March 4, 2011 and concluding with a hearing on June 23, 2011.

1. Plaintiff's motion for judgment for sanctions dated 03/04/2011 (CP 124-125)
    a. Memorandum in support with exhibits (CP 95-123)
    b. Proposed Findings and Conclusions (CP 126-144)
2. Miller's Objection to Plaintiff's Motion dated 03/17/2011 (CP 145)
    a. Memorandum of Authorities (CP 146-152)
    b. Declaration of Miller with exhibits (CP 153-177)
    c. Declaration of Lisa Mittleider with exhibits (CP 191-204)
    d. Second Declaration of Miller with exhibits (CP 205-215)
3. Miller's Motion for Evidentiary Hearing dated 03/31/2011 (CP 254)
    a. Memorandum of Authorities (CP 239-253)
4. Hearing on Plaintiff's motion for judgment on sanctions imposed on Miller at which Judge Tompkins purportedly "recognizes Judge Austin's decision of December 15, 2005." (CP 255)[9].
5. Affidavit of Delay dated May 20, 2011in support of imposing sanctions[10]. (CP 257-279).

[9] There is no document in the court's record to indicate Judge Austin's decision on December 15, 2005. The Courtroom Minutes from that date indicate Judge Austin took the cross motions for summary judgment under advisement. (CP 27).

6. Declaration of attorney Peter Witherspoon (WSBA 7956)[11] dated 05/24/2011 objecting to court rule violations by attorney Delay by disregarding filing deadlines for pleadings associated with requests for sanctions.
7. Memorandum of J. Scott Miller Relating to Reasonableness Hearing dated 05/26/2011 (CP 283-290).
8. Affidavit of Delay dated 06/14/2011 requesting additional costs as sanctions with exhibits. CP 313-312).
9. Proposed findings and conclusions dated 05/20/2011 signed by Judge Tompkins and filed 06/16/2011, granting the plaintiffs' motion for sanctions filed 03/04/2011. (CP 340-373).
    a. Courtroom Minutes dated 06/16/2011 (CP 388).
    b. Transcript of the hearing held 06/16/2011. (CP 552-587)
10. Plaintiff's 06/23/2011 response to Witherspoon's 06/23/2011 letter, with attachments.(CP 389-393).
11. Transcript of hearing on 06/23/2011 for presentment of judgment. (CP 641-677).

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[10] The declaration includes time Delay claimed for sanctions against both Miller and his firm as well as against McMahon and his firm.

[11] Witherspoon represented Miller from 03/18/2011 (CP 217) until 06/28/2011 (CP 404-405). After Witherspoon withdrew Miller filed a limited notice of appearance (pro se) on 07/11/2011. (CP 545).

12. Judgment Summary against J. Scott Miller and the law firm of Miller, Devlin, McLean & Weaver, P.S.[12] in the amount of $46,285.27 dated 06/23/2011. (CP 398-400).

Miller's Motion for Reconsideration of Judgment Awarding Sanctions 06/23/2011. After the judgment was entered awarding sanctions[13] Miller filed a Motion for Reconsideration[14] of the court's award of judgment for sanctions dated 06/23/2011. (CP 394).

a. Declaration of Miller dated 07/08/2011 (CP 523-530).
b. Memorandum of authorities dated 07/08/2011. (CP531-544).

13. Miller's motion to allow oral argument on motion for reconsideration dated 07/11/2011. (CP 550-551).
    a. Miller's declaration in support of oral argument on motion for reconsideration. (CP 547-549)
14. Miller's motion dated 07/14/2011 to strike plaintiff's memorandum in response to motion for reconsideration. (CP 591)

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[12] The law firm was dissolved in 2009.

[13] Which was, the record shows, for time the plaintiff's attorney claims to have spent gathering the same information contained in attorney McMahon's letter dated 06/25/2005 (CP 47-48).

[14] This motion was subsequently granted September 16, 2011, and the trial court subsequently entered various additional pleadings which are also at issue in this appeal and are discussed below.

a. Brief in support. (CP 592-595)

b. Miller's declaration. (CP 596-599),

Trial court ordered June 2006 hearing transcribed. At the reconsideration hearing on July 14, 2011 Judge Tompkins finally realized plaintiffs' attorney had been misleading her regarding Judge Austin's prior decisions, and ordered Miller to have the hearing from 06/23/2005 transcribed. In the interim, she ordered that the judgments for sanctions would be "suspended" and, therefore, unenforceable, until she had an opportunity to review Judge Austin's actual ruling.

15. Order dated 07/14/2011 "suspending" all judgments for sanctions pending review of the June 2006 hearing with Judge Austin. (CP 589).

    a. Transcript of oral ruling at 07/14/2011 hearing. (CP 716-726)[15].

    b. Courtroom Minutes. (CP 590).

First appeal notice filed following June 2006 judgment. However, there seemed to be no provision in the court rules that determined whether the deadline for filing an appeal was affected by an order "suspending"

[15] Judge Tompkins made a statement during the hearing that is critically important to at least one aspect of this appeal. She asserted that determining who was the registered owner of the vehicle driven by William Vue would determine liability, but legal ownership would not affect liability. (CP 716-726 at CP 718 ll.13-15).

enforcement of a judgment. Therefore the judgment awarding sanctions that had been entered (CP 398-400) was deemed to be final and Miller filed a notice of appeal pursuant to RAP 5.1[16].

16. Notice of Appeal with attachments dated 07/19/2011. (CP 600-610).

Although Judge Austin's court reporter had also retired, she was able to provide a transcript from the hearing on June 23, 2006 in which Judge Austin declined to sign plaintiff's proposed findings of fact and conclusions of law that purported to impose sanctions[17].

17. Transcript of June 23, 2006 hearing before Judge Austin – transcript filed on 07/28/2011. (CP 681-715).

The trial court's letter ruling addressing June 2006 hearing transcript. After reviewing the transcript Judge Tompkins issued a letter ruling dated 08/01/2011 stating in part, "*This Transcript casts doubt on the finality of the two earlier written memo decisions of Judge Austin*[18] *which have been the foundation for this court's rulings to date. It also underscores the*

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[16] Plaintiffs did not file a notice of cross appeal.
[17] The version proposed by the plaintiffs in 2006 included sanctions against defendant William Vue and attorneys J. Scott Miller and Crystal Spielman. Subsequent iterations of the same proposed findings and conclusions asked for sanctions against different individuals and entities.
[18] CP 29-31 [regarding Farmers Insurance motion to intervene] and CP 32-37 [regarding requested sanctions against defendants Vue, the former law firm of Miller, Devlin, McLean & Weaver, P.S. as well as attorneys Spielman and Miller, individually.]

importance of the question of whether the sanctions issue is or is not necessarily linked to the dismissal vacation/liability issues." (CP 727-728).

Additional briefing filed regarding Miller's Motion for Reconsideration. Judge Tompkins letter opinion also set a hearing date of 09/16/2011 to address the issues raised by the June 23, 2006 transcript. The parties filed various briefs on the subject.

18. Defendant Vue's memorandum of authorities dated 09/02/2011. (CP 729-735).
19. Miller's memorandum of authorities dated 09/02/2011. (CP 737-742).
20. Plaintiff's Memorandum dated 09/09/2011 with exhibits. (CP 743-770).
21. Defendant Vue's reply memorandum dated 09/14/2011. (CP 771-774).
22. Miller's reply brief dated 09/14/2011. (CP 776-784).

September 16, 2011 hearing on Motion for Reconsideration. Judge Tomkins acknowledged that the entire matter should have been concluded

with attorney McMahon's June 29, 2005 letter[19]. (CP 816-820). She also recognized that the confusion originated with the plaintiffs' attorney's incorrect designation of the Vue's family relationship. (CP 817, ll. 11-20_.

23. Courtroom Minutes from Evidentiary Hearing on 09/16/2011. (CP 785)
24. Hearing transcript. (CP 786-820).
25. Findings of fact and conclusions of law, dated 10/14/2011, drafted by Judge Tompkins imposing sanctions of reasonable attorney fees through June 29, 2005 in the amount of $22,550 dated 10/14/2011. (CP 822-827)
26. Judgment summary[20] solely against "J. Scott Miller of Miller, Devlin & McLean, P.S." dated 10/14/2011. (CP 828-829)

Miller's Motion for Reconsideration of the October Judgment.

Following entry of the second judgment in October, 2011 the parties filed additional briefing regarding the revised award of sanctions.

27. Miller's motion for reconsideration and objection to calculation of attorney fees dated 10/25/2011. (CP 843).

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[19] CP 47-48

[20] After realizing the trial court had entered only a judgment summary but no judgment, plaintiffs filed a motion for entry of judgment dated 11/04/2011. (CP 850) with memorandum of authorities with attachments. (CP 851-667).

a. Memorandum of authorities. (CP 844-847)

b. Miller declaration. (CP 848-849).

28. Court's 10/25/2011 letter acknowledging Miller's motion for reconsideration of findings and conclusions and judgment summary dated 10/14/2011, and setting briefing schedule. (CP 842).

29. Miller reply brief in support of reconsideration dated 11/14/2011. (CP 925-929).

30. Court's order on reconsideration dated 11/22/2011 "*to clarify the court's decision.*" (CP 931-935).

31. Amended Judgment Summary and Judgment dated 11/22/2011 . (CP 936-938)

Motion to vacate June judgments filed 11/08/2011. Although the court had entered amended findings and conclusions, the June judgments were still "suspended." Therefore it was necessary for the trial court to vacate those judgments. The hearing was held 11/10/2011 (while the motion for reconsideration was pending).

32. Miller notice of joinder and motion to vacate judgment. (CP 868).

a. Objection and motion to strike plaintiff's untimely motion to enter judgment.(CP 869)

b. Brief in support. (CP 917-920).

c. Order dated 11/10/2011 vacating June, 2011 judgment against Miller and Former law firm of Miller, Devlin McLean and Weaver, P.S.

d. Courtroom Minutes dated 11/10/2011

e. Order dated 11/10/2011 granting motion for order vacating judgment.

Appeal from 11/22/2011 Amended Judgment. Miller filed the second notice of appeal following the trial court's 11/22/2011 entry of the order on reconsideration (CP 931-935) and amended judgment (CP 936-938).

33. Notice of Appeal dated 12/22/2011 with attachments. (CP 939-949).

Miller's RAP 7.2(e) motion. Subsequent to filing the Notice of Appeal in December, 2011 it became apparent that all the substantive actions taken by Judge Tompkins after July 19, 2011 were potentially void because of Miller's pending appeal on dating back to 07/19/2011. Consequently on 02/03/2012 this court entered a Commissioner's Ruling granted Miller's

motion filed pursuant to RAP 7.2(e)[21], thereby authorizing *nunc pro tunc* the following actions taken by the trial court:

a. 07/14/2011 Order suspending judgment. (CP 589)

b. 10/14/2011 Findings and Conclusions. (CP 822-827)

c. 10/14/2011 Judgment summary. (CP 828-829)

d. 11/10/11 Order vacating June judgment[22]. (CP 922)

e. 11/10/2011 Order granting motion to vacate judgment. (CP 923-924)[23]

f. 11/22/2011 Order on reconsideration. (CP 931-935)

g. Amended judgment summary and judgment against J. Scott Miller individually and the [dissolved] law firm of Miller, Devlin, McLean & Weaver, P.S. (CP 936-938)

b. Facts

The underlying case arose from a collision between two vehicles that occurred October 20, 2000. Plaintiff James Aaseby was driving westbound

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[21] This motion was joined by Vue's attorneys David Force and Patrick McMahon and their law firm of Carlson, McMahon & Sealby, PLLC. It was not joined by plaintiffs or their attorney.

[22] This pertained only to the judgment against Miller and the former law firm of Miller, Devlin, McLean and Weaver, P.S.

[23] This pertained only to the judgment against attorneys Force and McMahon and their law firm.

with his wife in a 1991 Chevrolet when William Vue pulled out of a parking lot driveway in a 1983 Honda and struck on the passenger side of the Aaseby vehicle. (CP 3-6 and CP 7-10).

The Complaint named as defendants "*William Vue, a single person, and Vilay and Agnes Vue, husband and wife*"[24] and asserted that Vilay and Agnes were the registered owners of the vehicle operated by William.

James Aaseby testified at his deposition that at the scene of the accident William Vue gave him a card indicating the vehicle was insured by Farmers (CP157-161), but he was able to determine within a few days that Farmers did not provide coverage for the accident. (CP 80-85 and CP 88-90, at deposition p. 25 l. 25 – p. 27 l. 1).

Defendants originally were represented by Miller, Devlin, McLean & Weaver, P.S.. (CP 7-10). The law firm was retained by Allstate through the insurance policy issued to Vilay and Agnes Vue who were identified on the policy as husband and wife. (CP 80-85 at ¶2). The proposed Answer to the Complaint admitted the allegation in the Complaint that Vilay and Agnes were husband and wife, and was sent to the defendants

[24] Although the Complaint did name Vilay and Agnes Vue, there were no allegations of fault or causation against them. They were subsequently dismissed.

who did not indicate their family relationship was different than what was asserted in the Complaint. (CP 80-85 at ¶7 and CP 153-155 at ¶4).

Plaintiffs submitted interrogatories to defendants which were sent to the defendants for review and correction. (CP 191-204). William Vue testified that he believed Vilay Vue was the registered owner of the Honda he was driving. (CP 24-26 at ¶7). He also testified that he reviewed the interrogatory answers and believed there was no insurance available to provide coverage in the accident other than the Allstate policy. CP 24-26 at ¶¶ 9-10-11).

Prior to the June 2004 Order of Dismissal (CP 11-12) was no notice to any defendant or attorney that Farmers Insurance may also have provided coverage. (CP 153-155). Other than the information James Aaseby obtained at the scene of the accident which indicated Farmers did not have coverage, the first time any question regarding Farmers was in October, 2004 which was several months after the case had been dismissed with prejudice. (CP 91-92). On the other hand, plaintiff's counsel produced documentation that indicates Aaseby provided him with the Farmers Insurance policy information before suit was filed. (CP 212)[25].

[25] Judge Austin noted that attorney Delay knew about the Farmers Insurance policy from the beginning. (CP 708, ll. 19-21).

Plaintiff submitted interrogatories to the defendants which were transmitted on 11/05/2003 to William, Vilay and Agnes Vue answers. (CP 163-164). William Vue signed the interrogatory answers 12/03/2003 and on 12/22/2003 attorney Crystal Spielman (WSBA 34194) certified the responses pursuant to CR 26 (CP 204 and CP 80-85 at ¶5).

The case was settled for Allstate's policy limits ($25,000) and dismissed with prejudice y stipulated order on 06/22/2004. (CP 11-12).

Plaintiffs subsequently pursued a claim for Underinsured Motorists Insurance (UIM) and Personal Injury Protection (PIP) coverage under their own Grange Insurance policy and received $110,000 policy limits. (CP 80-85 at ¶11 and CP 91-92).

In the course of settling the UIM/PIP claims with Grange Insurance, plaintiffs' attorney Delay apparently concluded that the Farmers Insurance policy was potentially significant.

After receiving plaintiffs' motion to vacate the dismissal it appeared the original defense attorneys could become witnesses, so a notice of intent to withdraw was filed and served (CP 14-15) to which plaintiffs' attorney filed an objection (CP16). Consequently, a notice of substitution was filed and served. (CP 17-18).

Apparently substantial motion practice followed during the next several months. Judge Austin's two letters (CP 29-31 and CP 32-37) were issued after a hearing in which Miller was not given an opportunity to be heard. (CP 80-85 at ¶16). After reviewing the affidavits and other materials submitted, Judge Austin refused to sign the findings and conclusions imposing sanctions submitted by plaintiffs' attorney. (CP 681-915).

After Judge Austin retired in 2008 Judge Tompkins was assigned to the file. She apparently believed that Judge Austin had already held evidentiary hearings and she had only to implement the findings he had made previously. (CP 255 and CP 330, ll. 3-5). Unfortunately, it took several motions and a close review of the transcript from the 06/23/2006 hearing (CP 681-715) to realize she was mistaken.

Judge Tompkins first entered a judgment for sanctions (CP 398-400), then suspended it (CP 589)[26], and after reading the 06/23/2006 transcript[27] entered new findings and conclusions and judgment summary (CP 822-827 and CP 828-829) which were subsequently amended and an amended judgment entered (CP 931-935 and CP 936-938) from which this appeal has been taken.

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[26] The June, 2011 judgment was eventually vacated. CP

[27] 06/23/2006 transcript (CP 681-715).

In summary:

- ✓ Miller was retained by Allstate to represent the Vues.
- ✓ Before the case was settled and dismissed no information was provided by the Vues or plaintiffs' attorney Mike Delay that
    - o (a) the Answer was incorrect in admitting allegations in the Complaint, or
    - o (b) that interrogatory responses were incomplete. The case was settled for Allstate's policy limits in June 2004.
- ✓ After plaintiffs settled their UIM and PIP claims attorney Delay had the stipulated judgment and dismissal vacated.
- ✓ Within a few days he was notified about the correct vehicle ownership and family relationships among the defendants which resolved the issue of the Answer to the Complaint.
- ✓ Farmers Insurance was found to have properly denied coverage, which Judge Austin had previously indicated would resolve the issue of whether the interrogatory responses were correct[28].

[28] "If there isn't coverage, then I think the matter is pretty much at an end." (CP 181, ll. 22-23).

IV. Argument

A. Discovery Sanctions Were Improper

A trial court must articulate on the record its reasons for imposing discovery sanctions. *Burnet v. Spokane Ambulance*, 131 Wn.3d 484, 933 P.2d 1036 (1997). The reasons must be on the record at the time the sanctions are imposed, and cannot be added to later using the benefit of hindsight. *Blair v. Ta-Seattle East*, 171 Wn.2d 342, 254 P.3d 797 (2011).

Certainly, a trial court has broad discretion regarding imposing sanctions for discovery violations. *Phillips v. Richmond*, 59 Wn.2d 571, 369 P.2d 299 (1962). And it is true that sanctions can be appropriate even for non-willful or unintentional violations. *Physician's Insur. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993).

However, it must be clear from the record that the court considered a lesser sanction, and whether the violation was willful or deliberate, or if it prejudiced the opposing party's ability to prepare for trial. *Snedigar v. Hodderson*, 53 Wn.App. 476, 768 P.2d 1 (1989), *rev'd in part*, 114 Wn.2d 153, 786 P.2d 781 (1990).

The sanctions in this case were based on allegations that CR 11 was violated. However, that rule requires that "[b]oth practitioners and judges

who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible. Without such notice, CR 11 sanctions are unwarranted." *Biggs v. Vail*, 124 Wn. 2d. 193, 198, 876 P.2d 448 (1994).

The *Biggs* court relied on *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 224, 829 P.2d 1099 (1992). The court noted in Bryant that CR 11 sanctions cannot be considered without affording due process rights. Additionally, to determine whether an attorney complied with discovery rules the court must consider all of the surrounding circumstances including the importance of the evidence and the ability of the proposing party to formulate a response or comply with the request. *Panorama Village Homeowners Ass'n v. Golden Rule Roofing,* 102 Wn.App. 422, 10 P.3d 417 (2000).

Judge Austin's letters (CP 29-31 and CP 32-37) were both issued without notice to defendant's former attorneys, and there was no opportunity to comment or submit evidence before they were published. Consequently, when Judge Austin was asked to enter findings and conclusions based on those letters he refused. (CP 861-714). Therefore, it is clear those letters cannot be deemed to be orders, or even indicative of his final thoughts on the matter. Since it is clear from the record that there was no opportunity

to participate in the proceedings that led up to the letters, it is equally clear there was no due process afforded.

In this case, Miller was told by Allstate that William Vue was a permissive driver, and that the vehicle was owned by Vilay and Agnes Vue, husband and wife. The Complaint made the same allegations. And although it named Agnes and Vilay, there were no claims they were liable in any way for the accident or damages. Since the Vues did not correct the errors in the Complaint and the insurance policy, there was no way for Miller to have known that he was required to challenge those facts.

For purposes of CR 11 sanctions the question is whether a reasonable attorney in similar circumstances could believe his actions were justified factually and legally. *Skimming v Boxer*, 119 Wn.App. 748, 82 P.3d 707 (2004). Here the plaintiff has offered no evidence upon which the trial court could conclude Miller acted unreasonably under the circumstances. This is particular true since plaintiff argues for sanctions based on the fact defendants admitted what he alleged!

With respect to CR 26, the court is required to consider all surrounding circumstances and determine whether the attorney complied with that rule, and again only the least severe sanction. *Carlson v. Lake Chelan Community Hosp.*, 116 Wn. App. 718, 75 P.3d 533 (2003). Further, the

court should consider the intent of the alleged wrongdoer, and the other's party's failure to mitigate. *Id.*

Sanctions must be limited to the amount expended in response to actionable conduct. *Manteufel v. Safeco*, 117 Wn. App. 168, 68 P.3d 1093 (2003). Sanctions are supposed to serve as a deterrent, not as a fee shifting mechanism. *Just Dirt, Inc., v. Knight Excavating, Inc*. 138 Wn. App. 409, 157 P.3d 431 (2007). Yet that is exactly what the trial court did in this case. Reading the transcripts from the various hearings (particularly the last ones) it is apparent that the sanctions were calculated on the basis of fees plaintiffs' attorney allegedly charged his clients.

William Vue admitted that he gave inaccurate information that was incorporated into the discovery responses (CP 24-26), and plaintiffs have failed to provide any rational basis on which the court could conclude Miller was expected to intuitively determine that the responses were inaccurate. Similarly, the Answer to plaintiffs' Complaint included admissions that were consistent with the information from Allstate and which the defendants did not correct despite being provided a copy of the pleading and asked for their input.

Ultimately, of course, the family relationship between William, Vilay and Anges was irrelevant because the allegations of fault were directed solely

at William. Ownership and/or registration of the Honda is a mere red herring.

B. Any Errors Were Caused By Plaintiffs' Attorney or the Result of Failure to Mitigate

It is critically important to note that the errors were caused by attorney Delay's own failures and inaccuracies. He had his clients' information indicating there was a Farmers Insurance policy, but he failed or refused to disclose this information to defendants' attorneys even after receiving interrogatory answers he knew were probably incomplete.

Most importantly, of course, is that the trial court calculated sanctions based on the mistaken belief that plaintiffs incurred costs pointlessly pursuing a DJA against Farmers Insurance. In truth, it would not have mattered whether that DJA was filed before or after the underlying case was dismissed because there never was coverage.

Of course, the alleged failure to disclose the Farmers Insurance policy is harmless error because plaintiffs' and their attorney had prior knowledge of it. But even if they had not been told about that policy on the day of the accident there was nothing that defendants or their attorney did or failed to do that affected the fact there was no coverage. In short, the acts and

omissions alleged against defendants did not affect the Farmers Insurance coverage issue.

Additionally, on March 22, 2006 defendant's new attorneys tried to file an Answer correcting the errors claimed by plaintiffs (CP 38-44). Plaintiffs', however, vigorously resisted that attempt even though it corrected the relationship of the Vue family members, which plaintiff had claimed was so severe as to warrant sanctions. Plaintiffs never did adequately explain why a correction was inappropriate after arguing that failure to correct the error was sanctionable, except that it would defeat the argument that sanctions were appropriate. (CP 45-48).

C. Amount of Sanctions is Excessive

Finally, the sanctions awarded are grossly inflated. After the underlying case was dismissed the plaintiffs pursued their UIM and PIP claims and collected policy limits of $110,000.00. They were not prejudiced in that endeavor by anything the defendants or their attorneys did or failed to do. During the UIM/PIP claim process the Farmers Insurance policy became an issue. Plaintiffs' attorney used that issue as leverage to get the dismissal order vacated. But almost immediately he received the McMahon letter disclosing all the information about Vues' family relationship (CP 47-48).

So it should have been apparent to the trial court that by June 29, 2005 plaintiffs had been fully informed about the Vues' family relationships. All of the time spent after that point was little more than an attorney trying to construct a basis for seeking sanctions because nothing done after that date was in the least bit relevant to issues that generated thousands of pages of pleadings and filings over the next 6 years.

D. Scope of Review.

The appellate court in this case is, for all intents and purposes, reviewing a summary judgment. The trial court did not allow an evidentiary hearing, cross examination of witnesses, or take testimony before entering judgment against Miller. The record is replete with request for due process, but the court failed and refused to recognize the importance of the issue.

It seems clear, that the trial court abused its discretion in awarding sanctions. Therefore the court on appeal should reverse and vacate the award of sanctions.

In this particular instance, the appellate court is, for all intents and purposes, reviewing the same type of record that would be brought up after summary judgment. And, of course, an appellate court reviewing a

summary judgment engages in the same inquiry as the trial court. *Landberg v. Carlson*, 108 Wn. App. 749, 757, 33 P.3d 406 (2010).

It is undeniable that the trial court assumed that Judge Austin's two letters (CP 29-31 and CP 32-37) were the functional equivalent of orders. But when the 06/23/2006 transcript revealed that there had been no due process and, therefore, no final order was ever entered, the approach remained unchanged.

This court's review of the case should result in an order reversing the trial court and an order to require that the judgment be vacated.

E. Attorney Fees

RAP 18.1 provides that a party seeking reasonable attorney fees and costs must include the request in the brief on appeal.

The plaintiffs' attorney has engaged in misrepresentations and frivolous claims with allegations that created a moving target consisting of only smoke and mirrors.

There was no lawsuit filed against Miller, the only action was a claim for sanctions. Therefore, since the only action was a frivolous claim for sanctions, RCW 4.84.185 should be applied to award attorney fees for plaintiffs' baseless claims. Similarly, the actions by plaintiffs' attorney

were in violation of CR 11. An award of reasonable attorney fees on appeal is appropriate.

Plaintiffs have filed multiple findings of fact and conclusions of all, all of which are essentially identical except for the identity of the victims the plaintiffs want to pay sanctions.

a. June 16, 2006 (CP 59 – 77) requested judgment against William and attorney Crystal Spielman and attorney J. Scott Miller.
b. March 4, 2011 (CP 126-144) requested judgment against William Vue and J. Scott Miller (who was vicariously liable for acts and omissions of Crystal Spielman.)
c. June 16, 2011 (CP 340-373 actually did enter judgment against William Vue, J. Scott Miller, the law firm of Miller, Devlin, McLean & Weaver, P.S., Patrick McMahon, David Force, and Carlson, McMahon & Sealby, PLLC.

After reading the transcript from Judge Austin's hearing on 06/23/2006 the trial court scrapped the findings and conclusions proffered by plaintiffs' attorney and drafted her own, including the following conclusions of law:

B. "Plaintiff's counsel was also in a position to investigate further the initial information about Farmers insurance prior to settlement, and all counsel could have cleared up any ambiguity through the proper exercise of further detailed discovery requests and responses.

C. Plaintiff's counsel failed to advise the court that Judge Austin declined to enter plaintiffs' proffered findings and conclusions at the June 23, 2006 hearing. Plaintiffs' 2011 arguments referring solely to the letter decisions needlessly protracted a just determination of sanctions and the legal effect of the release and settlement.

D. The original stipulation and dismissal was based on a valid agreement between the parties to resolve the matter through maximum liability limits. As the subsequent declaratory action bore out, there was no excess liability recovery available to the plaintiffs."

Therefore, it seems clearly apparent that this entire tempest in a teapot was solely the result of plaintiffs' attorney's misrepresentations, misstatements, and dissembling.

d. Court's Findings of Fact, Conclusions of Law and Order dated 10/14/2011 (CP 822-827)

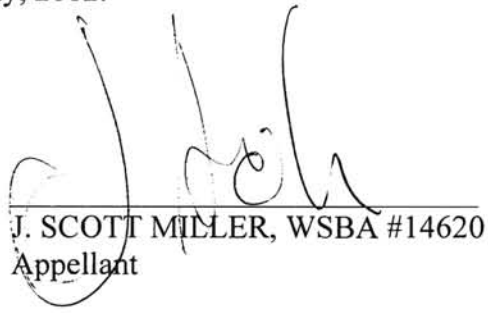
But, once again, the pleadings contained fatal errors and needed further attention. So additional revisions were made.

e. Court's Order on Reconsideration with revisions to the findings and conclusions dated 11/22/2011 (CP 931-935).

V. Conclusion

Attorney J. Scott Miller respectfully requests that Division III Court of Appeals reverse the trial court and vacate the findings of fact, conclusions of law, and judgment imposing sanctions.

DATED this 8th day of May, 2012.



By: _____
J. SCOTT MILLER, WSBA #14620
Appellant