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

REPLY BRIEF OF APPELLANT/CROSS RESPONDENT MILLER

J. SCOTT MILLER, WSBA #14620
Appellant/Cross Respondent
201 W. North River Drive, Suite 500
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Court Rules:

State Statutes:

I. APPELLANT'S REPLY AND LEGAL AUTHORITIES IN SUPPORT OF APPEAL

A. Respondents' Brief Fails to Address Assignments of Error

Appellant's Opening Brief was filed 05/08/2012. Respondents/Cross-Appellant's brief was filed 0/06/2012, but addresses only the issues raised in the Cross-Appeal; there is no response (or even mention) of the assignments of error in Appellant's Brief.

Although many of the basic issues are common to both the appeal and the cross appeal, there are distinct differences which merit individual consideration. Unfortunately, the plaintiffs have failed to make any attempt to address the different issues in the Cross-Appeal brief. Consequently, the court is left with the unenviable task of separating the wheat from the chaff without the benefit of input from the plaintiffs.

B. Failure to Address Assignments of Error Is Waiver

The issues raised in the plaintiffs Cross-Appeal are not identical to the five Assignments of Error addressed Appellant's Opening brief. Therefore, this court should

consider those issue admitted. And, of course, as clearly stated in RAP 10.3(c), those issues cannot be addressed for the first time in a Reply brief. *Blankenship v. Kaldor*, 114 Wn.App. 312, 320, 57 P.3d 1095 (2002).

> "An issue raised and argued for the first time in a reply brief is too late to warrant consideration."

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 811, 828 P.2d 549 (1992).

Appellant's assignments of error address the following issues:

> Appellant's Assignment of Error No. 1- The violation of due process by the trial court's failure to conduct evidentiary hearing before issuing findings of fact and conclusion of law and judgment imposing sanctions against attorney Miller.
>
> Plaintiff's brief does not address this issue. Therefore, this court is respectfully requested to rule in favor of appellant.
>
> Appellant's Assignment of Error No.2 – The trial court failed to consider lesser sanctions as required by law.

Plaintiff's brief does not address this issue. Therefore, this court is respectfully requested to rule in favor of appellant.

Appellant's Assignment of Error No. 3 – The trial court failed to recognize attorney Delay's own culpability in the alleged wrongdoing.

Plaintiff's brief does not address attorney Delay's lack of clean hands. Therefore, this court is respectfully requested to rule in favor of appellant.

Appellant's Assignment of Error No. 4 – The trial court incorrectly calculated the time spent by plaintiff's attorney on matters actually associated with correcting the alleged sanctionable conduct.

Plaintiff's Cross-Appeal brief does not address this issue. Therefore, this court is respectfully requested to rule in favor of appellant.

Appellant's Assignment of Error No. 5 – The trial court improperly imposed sanctions on attorney Miller for acts and omissions by attorney Spielman.

Plaintiff's brief does not directly address this issue, but contains misrepresentations and false implications

regarding it. Therefore, this court is respectfully requested to rule in favor of appellant.

RAP 10.3(b) applies to this situation:

> (b) **Brief of Respondent**. The brief of respondent should conform to section (a) and answer the brief of appellant or petitioner. ... (emphasis added)

If the respondent elects not to respond to one or more of issues raised in appellant's assignments of error the appellate court is entitled to make its decision solely upon the arguments and records presented by the appellant. *Adams v. Dept. of Labor & Indus.*, 128 Wn.2d 224, 228-229, 905 P.2d 1220 (1995)[1].

The plaintiff's Cross-Appeal brief in this case does not attempt respond to Appellant's Brief, it merely launches into the issues plaintiffs would prefer that this court address. Apparently the plaintiff's attorney expects this Court to sift through fifty pages of argument (plus appendices) and guess what parts might be responsive to the issues raised by appellant's Assignments of Error.

Our state Supreme Court has clearly explained that appellate courts will not read the entire record to discern

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[1] The *Adams* court specifically noted that although the problem more typically arises when a respondent fails to file a brief, courts have recognized the same rule with respect to issues ignored by the respondent, citing *Bolt v. Hurn,* 40 Wash.App. 54, 60, 696 P.2d 1261, *review denied,* 104 Wn.2d 1012 (1985).

possible applicable passages, and rule accordingly. *Tremlin v. Tremlin*, 59 Wn.2d 140, 367 P.2d 150 (1961). It is, obviously, unfair to foist such a burden onto the court; it has been repeatedly said that lawyers should not treat judges as if they are "... pigs, hunting for truffles buried in briefs." *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991); *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1066 (9th Cir. 2009).

This Court is respectfully requested to enter an appropriate ruling accepting the appellant's five Assignments of Error as proven verities, based on the plaintiff's failure and refusal to respond to them in any meaningful and articulate way.

II. APPELLANT'S RESPONSE TO PLAINTIFF'S CROSS APPEAL

A. COUNTER STATEMENT OF FACTS

Plaintiff's Cross-Appeal brief presents the underlying facts in a manner that misleads the court and misrepresents the truth.

The Complaint in the underlying litigation was filed 10/16/2003. (CP 1-6). A standard notice of appearance was filed by original litigation defense counsel, Miller, Devlin,

McLean & Weaver, P.S. (CP 960)[2], followed by an Answer to the Complaint (CP7-10). Prior to commencement of the litigation plaintiffs' attorney dealt directly with Allstate Insurance. Typically litigation defense attorneys are not involved in settlement negotiations prior to commencement of suit, and in this case were not consulted as plaintiffs' attorney negotiated with the insurance company before deciding whether to file the Complaint. It is improper and unfair to argue that defense counsel is responsible for whether the plaintiffs would or would not file a Complaint. Defense counsel was not involved with this matter until after the Complaint was filed.

Discovery in the underlying case was minimal, and consisted entirely of (a) an exchange of interrogatories and (b) defendant's attorney deposition of Mr. Aaseby. (Plaintiff's counsel took no depositions.) The case was settled for Allstate's policy limits and dismissed with prejudice on 06/24/2004. (CP 11-12).

Plaintiffs then, apparently, submitted a claim for UIM benefits under their own insurance policy with Grange Insurance. The UIM claim was eventually also settled for policy limits. The UIM claim process is entirely separate and unrelated

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[2] *Miller, Devlin, McLean and Weaver, P.S.* was the name of the corporation until the name was changed in 2006 to *Miller, Devlin & McLean, P.S.* , and the UBI number was 601063881. The official records of the Secretary of State confirm that the corporation was formally dissolved 05/01/2009. *The Law Firm of J. Scott Miller, PLLC* is an entirely different entity, and was formed in 2008; its UBI number is 602876096.

to the litigation involving the Vues, and was not affected in any way by the underlying litigation. Submitting a UIM claim was entirely within plaintiffs' sole discretion, and would have proceeded in exactly the same manner regardless of the issues now on appeal.

In the course of investigating the UIM claim three things became apparent to the plaintiffs: (a) the Complaint (CP 1-6) incorrectly identified Vilay and Agnes Vue as the parents instead of siblings of William Vue[3], (b) the Answer (CP 7-10) did not correct the error in the Complaint, (c) this information did not affect either the amount paid by Allstate on behalf of William Vue or by Grange under the Aaseby's UIM policy.

It is uncontroverted that Mr. Aaesby not only knew about the Farmers Insurance policy at the scene of the accident (CP 1136-1142), but before settling for the Allstate Insurance policy limits plaintiff's counsel knew about the Farmers Insurance policy. (CP 708:19- 22; CP 1133-1134).

Plaintiffs insisted in pursuing pointless litigation trying to create coverage under the Farmers policy. This court affirmed the trial court's decision that there never was coverage for the

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[3] Vilay Vue was the legal owner of the vehicle his brother William was driving at the time of the collision at issue in the underlying litigation, although might have been registered to Pai Vue, their father. In his deposition Pai Vue indicated he was uncertain to whom the vehicle was registered. The name of the registered owner does not necessarily identify the legal owner. RCW 46.12.675; *Beatty v. Western Pac. Insur. Co.*, 74 Wn.2d 530, 445 P.2d 325 (1968); *Gingrich v. Unigard Sec .Insur. Co.*, 57 Wn.App. 424, 788 P.2d 1096 (1990).

underlying accident under the Farmers Insurance policy. *Farmers Insur. Co. v. Vue, and Aaseby*; 2009 WL 19411991 (Wash. App. Div. 3), *rev. den.*, 167 Wn.2d 1015, 220 P.3d 209 (2009).

There is no basis on which reasonable persons could conclude that confusion about the identity of William Vue's parents affected the plaintiffs' decision to fruitlessly pursue a non-existent claim against Farmers Insurance, particularly since that claim had been previously denied. Further, there is absolutely nothing in the record that supports the allegation that any act or omission by litigation defense counsel affected the outcome of the Farmers Insurance litigation. The court's decisions would have been the same regardless of when plaintiffs tried to create coverage under that policy.

After settling with Grange Insurance for policy limits, plaintiffs' attorney filed a motion for Order to Show Cause so the underlying settlement could be set aside. The Order to Show Cause was issued on 06/22/2004 (CP 13). Immediately following receipt of that notice, attorney Miller filed a notice of withdrawal on behalf of the firm (CP 14-15), and attorney Pat McMahon of the firm Carlson, McMahon & Sealby, PLLC filed a notice of substitution on 06/28/2004 (CP 17-18). Attorney McMahon appeared for defendants at the Show Cause hearing (CP 19-21). The notice of intent to withdraw became

moot when the notice of substitution was filed, and there was no prejudice associated with the withdrawal or the substitution.

Following substitution of counsel in 2004 the next time any of the attorneys at Miller, Devlin and McLean, P.S. had any contact with the case was a motion for sanctions filed by attorney Delay in 2006, which was denied. There was nothing that took place regarding former defense counsel for the next five years plaintiffs' until plaintiffs' attorney filed a motion for sanctions 03/04/2011[4]. The record shows that in the lengthy interim plaintiffs' attorney was busy unsuccessfully pursuing the claim against Farmers Insurance. There is nothing in the record that shows any act or omission by original defense counsel caused the litigation to be extended.

Plaintiffs seem to encourage this court to disregard one of the most important pieces of information in this case. The letter from attorney Pat McMahon to plaintiff's attorney, Mike Delay, dated June 29, 2005 (CP 1123-1124) , which was before the July 1, 2005 show cause hearing[5], correctly clarified the family relationships among the Vues (CP 1123-1124). This is significant because plaintiffs now claim, falsely, that they were

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[4] As explained to the trial court and discussed herein, between the Dismissal with Prejudice in 2004 and the Order to Show Cause in 2005 Miller, Devlin, McLean & Weaver, P.S. changed to Miller, Devlin and McLean, P.S. The firm was eventually dissolved by the Secretary of State in 2009, almost two years before plaintiffs' motion for sanctions.

[5] CP 19-22

required to spend extraordinary amounts of time to obtain this same information, which was obviously redundant and clearly unnecessary and irrelevant.

Furthermore, and equally important, is the fact the Complaint contains no allegation of liability against the owner of the vehicle. In fact, plaintiffs voluntarily dismissed all liability claims against the siblings and parents, reserving liability claims against only William Vue (CP 34).

The liability claims against William Vue were dismissed by the trial court with prejudice, and plaintiffs have not appealed that dismissal.

Plaintiffs also conveniently fail to explain to this court that the letter opinion by Judge Austin in which sanctions were first discussed (CP 32-27), was issued without affording any attorney from Miller, Devlin, McLean & Weaver, P.S. notice of the hearing. Judge Austin, recognized the due process violations at the hearing on 06/23/2006 (CP 686:14 – 687:5).

Plaintiffs further failed to discuss the fact that after hearing from former litigation counsel Judge Austin declined to sign the findings and conclusions prepared by plaintiffs' attorney, and his closing comments were:

> "Just factually there's enough in here that I'd like to review this and write another memo. I'm not going to sign findings today. I know this is really a presentment. I'm not sure even findings are a way to go. There are

> thinks in your findings that I'm not sure I found. At any rate, I'll let you know. Thank you."

(CP 713:12-19).

After providing original defense counsel with an opportunity to submit information at the hearing on June 23, 2006 at which Judge Austin declined to sign the Findings and Conclusions submitted by plaintiffs, he never issued a new memorandum opinion, never signed findings and conclusions, and never entered an order imposing sanctions.

Judge Tompkins correctly found that the letters issued in 2006 were not intended to be Judge Austin's final decision regarding sanctions. She concluded incorrectly, however, that a judgment should be entered against attorney Miller for the monumental waste of time and resources by plaintiffs' attorney, Mike Delay.

B. COUNTER STATEMENT OF THE CASE

The "Statement of the Case" section of plaintiffs' Cross-Appeal brief constitutes more than one-half of the brief and actually consists of argument, allegations, and misrepresentations of the record.

(1) There Was Substantial and Appropriate Inquiry Prior to Filing The Answer to Plaintiffs' Complaint

Plaintiffs raise a new theory on appeal, and appear to argue that a Notice of Appearance is required to correct plaintiffs' misstatements contained in the Complaint[6]. This absurd argument is novel and was not presented to the trial court. It is, of course, inappropriate to raise a new issue for the first time on appeal. *Smith v. Shannon,* 100 Wash.2d 26, 666 P.2d 351 (1983); RAP 2.5.

It is completely false for plaintiff's to argue that there was no inquiry conducted before filing an answer. The Complaint in this case alleges that during the collision (a) William Vue was driving a vehicle, that (b) was owned by his parents and that (c) his parents were named Vilay and Agnes Vue. When the case was assigned to defense counsel Allstate Insurance confirmed that there was no dispute that it provided coverage for the vehicle at the time of the accident and that the information regarding vehicle ownership was correct. (CP 80-85 at ¶2 and CP 153-155 at ¶4). William Vue was contacted on multiple occasions by litigation defense counsel, but did not correct this information (which is now known to be incorrect). (CP 80-85 at ¶4).

Before it was finalized and filed, the proposed Answer was submitted to every named defendant; none of the

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[6] Cross-Appeal brief at p. 4-5 & p. 7 & p. 20-21.

defendants indicated there was a discrepancy or error in the way the family relationships were identified in the Complaint. (CP 80-85 at ¶7).

Before filing the Answer, William Vue confirmed to defense counsel Miller that the vehicle he was driving was owned by Vilay Vue (CP 205-210 at ¶5). William Vue also testified in an affidavit that he was given permission to drive the vehicle by Vilay (CP 24-26 at ¶5), and that he believed Vilay was the registered owner (CP 24-26 at ¶7).

It remains puzzling why the correct names of William Vue's parents ever became a significant question. William Vue was driving a vehicle owned by a member of his family, and was the only one against whom any liability allegations were made. There were no allegations against the vehicle owners for either direct or vicarious liability.

If, for example, the Complaint had identified the parents as "John Doe and Jane Doe" it would not have changed the fact that Allstate acknowledged coverage and paid policy limits for William Vue's liability as the permissive driver of the vehicle. The identity of the vehicle owners did not affect the UIM claim and Grange would still have paid its policy limits. And the Farmers Insurance policy which was at issue in plaintiffs' fruitless declaratory judgment litigation would still have been

unavailable because it did not provide coverage for the vehicle in this accident.

(2) Attorney Miller Cannot Be Sanctioned Regarding Allegedly Incorrect Interrogatory Answers

At pages 7 - 14 of the Cross-Appeal brief, Plaintiffs attempt to concoct a basis on which attorney Miller can be held responsible for allegedly incorrect interrogatory responses. Plaintiffs' attorney improperly asserts that Miller should be sanctioned under CR 26(g) for failing to make inquiry before certifying interrogatory answers.

Plaintiffs assert that the interrogatory answers were "not true" and "false and inaccurate"[7] and argue that Miller should be sanctioned for discovery violations. It is uncontroverted, however, that Miller did not sign the interrogatory responses, those discovery responses were signed solely by attorney Crystal Spielman, WSBA No. 34194(CP 204).

The language of CR 26(g), however, clearly and explicitly states that sanctions, if any, are to be imposed "upon the person who made the certification". It is inappropriate to impose sanctions on a person who did not make the certification. *Washington Motorsports Limited Partnership v.*

[7] Cross-Appeal Brief p. 14.

Spokane Raceway Park, Inc., 168 Wn.App. 710, 282 P.3d 1107 (2012).

Judge Tompkins eventually concluded that attorney Miller should be held liable for the inaccurate information certified by attorney Spielman, apparently through some sort of respondeat superior theory(CP 817: 21 – 818:3). For reasons never explained, despite the fact there are affidavits with conflicting statements, Judge Tompkins failed to hold a hearing on the motion for an evidentiary hearing[8] to resolve the disputed issues (including the sequence of events associated with defendants' original discovery responses that were certified by Ms. Spielman.)

It is undisputed that Judge Tompkins never held a hearing on any of the disputed issues. However, she relied on what she understood was Judge Austin's original rulings in 2005[9]. (CP 255). She apparently recognized that this was reversible error after she read the transcript of the June 23, 2006 hearing before Judge Austin (CP 681-715).

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[8] The Motion for evidentiary hearing and supporting Memorandum of Authorities are at CP 239-254. The Trial minutes for that hearing are at CP 255.

[9] There is no transcript from the April 7, 2011 hearing but attorney Force's argument at the hearing on May 9, 2011 confirms that Judge Tompkins ruled from the bench that she considered Judge Austin's letter to be a final order, which is consistent with the trial minutes at CP 255. (CP 330:3-7)

Defendants' new defense counsel filed a motion for summary judgment that was, apparently heard December 16, 2005[10]. (There was no notice or opportunity to participate provided to defendants' former defense counsel, including Miller and Spielman.) It appears from the record that a motion to intervene by Farmers Insurance was heard at the same time. This December, 2005 hearing was, apparently, what prompted Judge Austin to render two letter opinions that Judge Tompkins erroneously interpreted as final orders (CP 29-31 and CP 32-37).

After he received the facts presented at the hearing on June 23, 2006 it was clear that Judge Austin was not inclined to enter an order based on his letter opinion which had issued without affording due process to defendants' former attorneys. (CP 713:11-19). It is significant, of course, that Judge Austin never did enter Findings and Conclusions or a Judgment awarding sanctions. That issue seemed to have been resolved until attorney Delay filed a motion five years after the hearing at which Judge Austin declined to enter Findings and Conclusions.

[10] CP 1026-1040

C. SUMMARY OF RESPONSES TO PLAINTIFFS ASSIGNMENTS OF ERROR

Plaintiff's Cross-Appeal briefing is rife with contentions completely unrelated to the assignments of error, and appear to be included for no other purpose than mudslinging. This brief will focus on responding to the legally significant issues.

Plaintiffs have designated four alleged errors in the Cross-Appeal, each including a variety of issues, all of which can be summarized as follows:

1. The trial court should not have amended its original judgment dated 06/23/2011;

2. The Amended Judgment contains two incorrect conclusions of law (B & C);

3. The Law Offices of J. Scott Miller, PLLC, (an entity which did not exist at the time of the alleged sanctionable conduct) should be included on the judgment as being liable for sanctions;

4. The trial court should have imposed sanctions because Miller paid the judgment instead of posting a supersedeas bond for the amount claimed.

These positions are not supported the record, and the court is respectfully requested to decline any invitation to base its decision on these claimed errors.

D. RESPONSE TO ASSIGNMENT OF ERROR NO. 1: THE TRIAL COURT'S JUDGMENT OF 06/23/2011 WAS FLAWED AND REVERSIBLE

(1) Introduction[11]

Plaintiffs begin with an "Introduction" arguing that after the Motion to Show Cause was filed, the procedure was somehow deficient where the firm of Carlson, McMahon & Sealby, PLLC substituted for Miller, Devlin, McLean & Weaver, P.S., but there is no evidence in the record that there was any prejudice to any party. The alleged "prejudice" is never defined, and cannot be discerned from the record. It is uncontroverted that the trial court did not issue sanctions based even remotely on the withdrawal and substitution.

For the first time on appeal, plaintiffs argue that there was some type of error associated with the initial Notice of Appearance[12]. There is nothing in the record to support these new allegations, which is evidenced by the fact the brief makes no attempt to provide any reference to a document or testimony in the record.

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[11] Cross-Appeal brief at p. 1 - 3
[12] Cross-Appeal brief at p. 4-5.

(2) Sanctions Against Original Defense Counsel Are Inappropriate

Throughout the Cross-Appeal brief plaintiffs argue that that attorney Miller should be sanctioned for failing to amend the Answer or supplement discovery responses after he had been replaced as defendant's counsel![13] The record clearly shows that defendants were being represented by Pat McMahon of the Carlson, McMahon & Sealby, PLLC firm since 06/28/2005. (CP 19-23). The record also shows that there was no attempt to serve prior litigation defense counsel with any pleadings or notice regarding sanctions being sought after substitution.

This court should reject Plaintiff's argument that there was any prejudice or sanctionable conduct associated with failure to amend the Answer, and is requested to reverse the trial court. The record is clear that even when substitute counsel for defendants attempted to amend the Answer (CP 38-44 and 49-58) plaintiffs vigorously resisted this attempt. (CP 45-48). Therefore, it is appropriate that this court find that the plaintiffs waived this alleged error.

[13] See p. 20-21 of the Cross-Appeal brief.

The Introduction section of plaintiffs' Cross-Appeal brief admits that the Complaint references William Vue's parents, but misidentified them as being Vilay and Agnes, instead of Pai and Chue[14]. The alleged issue regarding identification of the registered owner is a red herring in this case. There were no allegations against the vehicle owners in the Complaint (CP 3-6), and the plaintiffs voluntarily dismissed all liability complaints against them after acknowledging there were no legitimate claims that could be asserted (CP 32-37).

As indicated herein and previously, Judge Austin declined to enter Findings and Conclusions after he heard additional facts[15]. Judge Tompkins denied the motion to allow an evidentiary hearing before imposing sanctions. Therefore it is impossible to ascertain why she believed the name of the registered owner was legally significant. The only glimpse available regarding the court's thought process is found in Judge Tompkins' ruminations on vehicle ownership being a relevant issue in Idaho (CP 570:16-24). It is difficult to understand why or how this could be relevant, or provide rationale for imposing sanctions.

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[14] Cross-Appeal brief at p.2

[15] The letters written by Judge Austin in February 2006 (CP 29- 31 and CP 32-37) were based solely on plaintiffs' summary judgment argument, which was without notice to previous defense counsel.

Plaintiffs have continued to argue that there was prejudice from defendants' failing to correct the incorrect identification in the Complaint[16]. However, plaintiffs vigorously resisted efforts by substituted defense counsel to amend the Answer to include the corrected information. (CP 1241-1262)

(3) It Is Reversible Error to Enter Judgment of Sanctions Against Attorney Miller For Discovery Responses Certified by Another Attorney

Beginning at page 15 of the Cross-Appeal brief, Plaintiffs egregiously misrepresent the truth with respect to the issue regarding the answers to interrogatories. Attorney Delay argues throughout his brief that attorney Miller violated CR 26(g) by signing incorrect interrogatory responses. This is absolutely and completely untrue.

The task of responding to interrogatories was assigned to attorney Crystal Spielman solely, who was an associate attorney that had worked for the firm for two years, while she attend Gonzaga Law School, and after passing the bar then went to

[16] Throughout the Cross-Appeal brief plaintiffs argue that sanctions against former defense counsel are appropriate because of alleged failure to file correcting documents after withdrawal and substitution. This assertion is absurd, because after withdrawing there is no legal basis for an attorney to continue filing pleadings on behalf of a former client. It would, undoubtedly, be a violation of ethics to do so and would certainly be sanctionable. Nevertheless, the trial court apparently agreed that there was a continuing duty regardless of whether counsel was attorney of record or not. (CP 581:12-582:3).

work under the close supervision of Christine Weaver, one of the firm's shareholders. It was Ms. Spielman that was to meet with the client and it is her signature on the discovery responses.

It was Ms. Spielman whom Judge Austin identified as being subject to sanctions in his informal letter opinion of February, 2006 (CP 32-37). It was not until 2011 that Judge Tompkins decided to hold attorney Miller vicariously responsible for attorney Spielman's alleged shortcoming, without citation to any legal authority, and in disregard of the fact he explicitly denied having participated in preparing the responses. Judge Tompkins actions were in direct disregard of the clear language of CR 26(g) which provides in relevant part:

> (g) **Signing of Discovery Requests, Responses, and Objections**. … 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, of the reasonable expenses incurred because of the violation, including a reasonable attorney fee. (emphasis added).

In a different case before Judge Austin, attorney Jerome Shulkin was sanctioned for certifying improper discovery

responses he asserted were prepared by his co-counsel who had refused to certify them. This court explained that it is appropriate to focus the sanction only on the individual signing the document, not the attorney that allegedly prepared it:

> [¶14] The emphasized language[17] [of CR 26(g)] mandates that court sanction a person who violates the rule. …
>
> [¶24] Co- Counsel Mr. Miller[18] refused to sign the certification. This was a huge warning flag for counsel. Nonetheless, Mr. Shulkin certified a response that was patently inadequate and had even been ruled "incomplete and evasive" a year earlier by the same trial judge who would have to pass judgment on it again. Far from justifying counsel's behavior, the purported ethical dilemma did not exist and did not excuse counsel from complying with CR26(g).

Washington Motorsports Limited Partnership v. Spokane Raceway Park, Inc., 168 Wn.App. 710, 282 P.3d 1107 (2012).

Plaintiffs in this case falsely accuse attorney Miller of ignoring "changes made by his clients to discovery responses[19]"

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[17] The emphasized language cited by this court in this decision reads as follows: "*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 ... an appropriate sanction* …" (italics original)

[18] No relation to J. Scott Miller

[19] Cross-Appeal Brief at p. 2.

and "lack of inquiry during discovery[20]" in an attempt to divert the court's attention from the facts. Plaintiffs' attorney is well aware that Ms. Spielman was solely responsible for completing the discovery responses, and was the only attorney certifying them pursuant to court rule. The trial court did not conduct a hearing to receive evidence on this issue, or make any finding that any other attorney in the firm participated in responding to the discovery.

Judge Austin found that attorney Spielman, not attorney Miller, was responsible for the discovery responses (CP 35). This would be the correct conclusion because she certified the answers and Miller did not. It is improper to sanction Miller for Spielman's conduct, but Judge Tompkins did so on the basis of "failure to supervise" her (CP 569:20 – 570:3; CP 571:20-572:5; CP 817:23-818:3)

To the extent there are any inaccurate or incomplete responses, CR 26(g) clearly provides that the attorney certifying the pleading is the only one responsible for alleged inaccuracies. It is reversible error to impose sanctions on an attorney that did not sign discovery responses.

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[20] *Id.*

(4) The Trial Court Improperly Failed To Consider Lesser Sanctions

It is important to recognize that no court orders were violated. In fact, the trial court expressly found no intent to deceive. (CP 573:25-574:8). Plaintiffs' Cross-Appeal brief argues that the trial court should have entered a larger judgment based on alleged violations of CR 26(g).

Conclusion of Law A imposes sanctions of $22,550 on three bases, none of which are supported by the record:

(1) lack of diligence in the Answer. However, the Answer was provided to defendants before it was filed and they failed to indicate there was anything incorrect with it, or with the allegations in the Complaint (CP 82 ¶7).

(2) lack of diligence in discovery responses, but the discovery responses were not certified by Miller. (CP81 ¶5).

(3) withdrawing from the case before the parties were properly identified. However, the parties were properly identified before the show cause hearing (CP 1123-1124). Furthermore, the identity of the parties was irrelevant regarding liability (because there was no allegations of fault addressed to the vehicle owners) and irrelevant to damages (because the plaintiffs received policy limits.)

Before imposing sanctions the court is required to "consider the surrounding circumstances, the importance of the evidence to its proponent and the ability of the opposing party to formulate a response or to comply with the request." *Wash. Physicians Insur. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 343, 858 P.2d 1054 (1993). "The least severe sanctions adequate to serve the purpose should be imposed." *Miller v. Badgley*, 51 Wn.App. 285, 303-304, 753 P.2d 530 (1988). Sanctions should be reserved for egregious conduct and are not properly used as another weapon in counsel's quiver. *Biggs v. Vail*, 124 Wn.2d 193, 198 n.2, 878 P.2d 448 (1994)

When attorney fees are awarded under CR 11 they should be restricted to the activity directly involved in sanctionable filings. *Biggs v. Vail*, 124 Wn.2d 193, 201, 878 P.2d 448 (1994). It is improper for the court to award fees under CR 11 when the expenses could have been avoided or were self imposed. *MacDonald. v. Korum Ford*, 80 Wn.App. 877, 891, 912 P.2d 1052 (1996).

A trial court must consider lesser sanctions in the course of ascertaining what sanctions, if any, are appropriate. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). The trial court must expressly identify what lesser sanctions were considered, the willfulness of the violation, and

that substantial prejudice resulted. *Blair v. Ta-Seattle East No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011).

Here, there is no reasonable basis for concluding plaintiffs' were prejudiced by the inadvertent mistake regarding the identity of the vehicle owner. It is also apparent that the trial court failed to consider other lesser sanctions.

E. RESPONSE TO ASSIGNMENT OF ERROR NO. 2: THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION TO AMEND CONCLUSIONS OF LAW B & C

Conclusions of Law B&C provide as follows:

> B. Plaintiffs' 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 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.

(CP 825:23 – 826:7)

The discussion of this alleged error is in plaintiffs' Cross-Appeal brief at p. 28-29. It appears plaintiffs' counsel still does

not appropriate that he is solely responsible for creating all of the confusion. The Conclusions of Law B & C are clearly supported by the record.

Mr. Aaseby testified that on the day of the accident he was fully aware that there was a Farmers Insurance policy (CP 157-161), and that he actually submitted a claim which was denied (CP 80-90; CP 154: 24-28; CP 160; CP 205-212).

Judge Austin pointedly asked Mr. Delay at the June 23, 2006 hearing whether the Farmers policy was considered at the time plaintiffs accepted the Allstate policy limits offer, but Mr. Delay failed to provide a response. (CP 708:17 – 710:3).

The key point, of course, was articulated by Judge Austin at the hearing on 08/25/2006[21]:

> And, if there is coverage [under the Farmers policy] then all these other issues fall into place. If there isn't coverage, then I think the matter is pretty much at an end. I think the proper way to do this would be a declaratory judgment.

(CP 181:20-24)

With respect to Conclusion of Law C plaintiffs are unable to identify anywhere in the record where attorney Delay notified Judge Tompkins that Judge Austin declined to enter Findings and Conclusions after hearing from defense counsel at

[21] The full transcript of that hearing is at CP 1876-1919.

the June 23, 2006 hearing (CP 681-715). After reviewing that transcript, Judge Tompkins wrote:

> This transcript casts doubt on the finality of the two earlier written memo decisions of Judge Austin which have been the foundation for this court's rulings to date. It also underscored the importance of the question of whether the sanctions issue is or is not necessarily linked to the dismissal vacation/liability issues.

(CP 727)

It is clear that both Conclusions of Law are correct and supported by the record. Plaintiff's Assignment of Error No. 2 is invalid.

F. RESPONSE TO ASSIGNMENT OF ERROR NO. 3: THE TRIAL COURT PROPERLY REFUSED TO ENTER JUDGMENT AGAINST *THE LAW FIRM OF J. SCOTT MILLER, PLLC*

The argument for alleged error no. 3 is found at Cross-Appeal Brief p. 37-40 and is premised on the legally insufficient contention that

> The Law Office of J. Scott Miller, PLLC, and Miller, Devlin, et.al. are, in fact one in the same. Miller essentially decided to change his 'labeling' from a Professional Services (PS) to a Professional Limited Liability Company (PLLC).

Plaintiffs' Cross-Appeal brief at p. 40.

This is, of course, a gross mischaracterization of the law, as well as factually inaccurate.

During the time that the underlying case was pending, defendants were represented by Miller, Devlin, McLean & Weaver, P.S., which was a professional services corporation[22]. The shareholders were J. Scott Miller, Greg Devlin, Jim McLean and Christine Weaver. After Ms. Weaver left the corporation the name was changed to Miller, Devlin, & McLean, P.S[23], and the Secretary of State's records indicate it was assigned UBI number 601063881. It was administratively dissolved by the Secretary of State in 2009[24].

The Law Offices of J. Scott Miller, PLLC was not even created until 11/02/2008 and has been assigned UBI number 602876096 (CP 392).

Plaintiffs seem to be arguing that this court should disregard the established law of corporations and create a new rule that shareholders carry liability from a dissolved Professional Services Corporation to a completely separate Professional Limited Liability Company. This is unprecedented, unfair, and unreasonable.

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[22] The Answer (CP 7-10) and the Stipulation and Order of Dismissal with Prejudice (CP 11-12) were both filed by Miller, Devlin, McLean & Weaver, P.S.

[23] The Notice of Intent to Withdraw (CP -15) and Notice of Substitution (CP 17-18) were filed by Miller, Devlin & McLean, P.S.

[24] A complete history of the firms is included in the affidavit at CP 596-599.

Miller was a minority shareholder in a corporation that is now-dissolved. There is absolutely no lawful grounds on which to pierce the corporate veil of The Law Offices of J. Scott Miller, PLLC which did not exist at the time any of the alleged sanctionable actions.

An LLC is permitted to have a sole member (RCW 25.15.005(4)). The fact that a corporation has only a single member provides no basis on which to disregard the corporate veil. *Truckweld Equipment Co., Inc. v. Olson*, 26 Wn.App. 638, 618 P.2d 1017 (1980)

The trial court correctly found that Miller's only involvement after being replaced as defense counsel in July 2005, was to respond to plaintiffs' motions for sanctions. Contrary to plaintiffs' belief, responding to a motion for sanctions is not sanctionable behavior.

G. RESPONSE TO ASSIGMENT OF ERROR NO. 4: THE TRIAL COURT CORRECTLY DENIED PLAINTIFF'S POST-JUDGMENT MOTIONS FOR CR 11 SANCTIONS ASSOCIATED WITH PAYMENT OF THE JUDGMENT

Plaintiffs' argument on this assignment of error is at p. 40-48. It is difficult to follow plaintiffs' convoluted analysis regarding a request for CR 11 sanctions. It appears that plaintiffs' counsel misapprehends the basic purpose of a supersedeas bond.

The trial court erred at the hearing on June 16, 2011 by concluding sanctions were imposed by Judge Austin. (CP 569:5-11). However, the Judgment that had been entered on that erroneous belief (CP 398-400) was vacated (CP 922). New Findings and Conclusions were entered (CP 822-827) with a Judgment Summary (CP 828). An Amended Judgment was ultimately entered, which is at issue here. (CP 936-938). That judgment was paid in full and the trial court entered a Satisfaction of Judgment (CP 2342-2347).

The sole purpose of a RAP 8.1 supersedeas bond is to stay enforcement of a judgment. *Malo v. Anderson*, 76 Wn.2d 1, 5, 454 P.2d 828 (1969). Without a supersedeas bond the plaintiff is free to initiate enforcement procedures to collect the judgment. *Ryan v. Plath*, 18 Wn.2d 839, 855-856, 140 P.2d 968 (1943).

> "We start with the proposition that a trial court judgment is presumed valid and, unless superseded, the judgment creditor has specific authority to execute on that judgment. RAP 7.2(c)."

State v. A.N.W. Seed Corp., 116 Wn.2d 39, 44, 802 P.2d 1353 (1991).

Here, the judgment was paid, which obviates the need for a supersedeas bond. Plaintiffs' counsel is clearly and

unarguably wrong when he claims there is something nefarious about a defendant paying a judgment while a matter is pending on appeal.

Washington case law has settled this matter with finality.

> "An appellant is under no obligation to supersede a judgment or a decree appealed from. It is a right and a privilege granted, in certain cases, under certain conditions, to preserve the fruits of his appeal if he prevails, but it is not something he is obligated to do."

Sim's Estate v. Lindgren, 39 Wn.2d 288, 297, 235 P.2d 204 (1951).

Contrary to plaintiffs' assertion, a defendant has no obligation to post a supersedeas bond pending appeal. The bond is a mechanism available to stay enforcement of the judgment while an appeal is pending.

> "An appellant is not obligated to supersede a judgment from which it is appealing; it must, however, post security if it desires to stay enforcement of an adverse judgment pending appeal, unless it is exempt from posting bond."

Lampson Univ. Rigging, Inc. v. WPPSS, 105 Wn.2d 376, 378-379, 715 P.2d 1131 (1986). (emphasis original)

And finally, there is no question that failure to file a supersedeas bond does not invalidate a pending appeal. And contrary to the unusual argument raised by plaintiffs at p. 47-48, it would not have been appropriate to impose any conditions

that would prevent the clerk of court from distributing the judgment that was paid.

> "In the present case, though the appeal was properly perfected, no supersedeas bond was filed. Consequently, the respondent proceeded to execute on the judgment. ... Although the appellant herein did not file a supersedeas bond or condition his payment so as to prevent disbursement, he did perfect his appeal and expressed his intention to continue. In such circumstances he did not waive his right to continue the appeal. His appeal is viable, not moot."

Murphee v. G. Rawlings, 3 Wn.App. 880, 882-883, 479 P.2d 139 (1970).

Contrary to the curious argument raised by plaintiffs at p. 47-48, it would not have been appropriate to impose any conditions that would prevent the clerk of court from distributing the judgment that was paid. *Murphee*, *supra*.

H. REFERENCES TO ATTORNEY JAMES KING IN CROSS-APPEAL BRIEF ARE IMPROPER

Plaintiffs' Cross-Appeal brief contains references to an affidavit plaintiffs submitted by attorney James King which improperly commented on his view of legal issues, that are within the exclusive jurisdiction of the court.

Efforts were made to challenge Mr. King's analysis (CP 523-530) but the trial court never allowed discovery on that issue.

Ultimately, the trial court stated that Mr. King's affidavit was not considered. (CP 816:4-5). However, his bill was included in the calculation of sanctions. (CP 573:1-4), and it appears his legal opinion was also considered. (CP 567:10-15).

I. OBJECTION TO REQUEST FOR ATTORNEY FEES

The Cross-Appeal brief contains a request for attorney fees, based apparently on a claim that the appeal was frivolous.

As implied by plaintiffs, such a finding is extraordinary and rarely granted. In this case it cannot be seriously argued that the appeal was frivolous. Clearly there are issues that require the appellate court's involvement to resolve.

As noted at p. 50 of the Cross-Appeal brief, an appeal is frivolous only if there are no debatable issues on which reasonable minds could differ, and the appeal is so totally devoid of merit that there is no reasonable chance of reversal. Such clearly is not the case here.

III. CONCLUSION

Plaintiffs' Cross-Appeal brief fails to address any of the Assignments of Error in Appellant's opening brief. Consequently, those issues should be decided in favor of Appellant.

The trial court's Findings of Fact and Conclusions of Law entered on October 14, 2011 (CP 822-827) together with the Judgment Summary entered at that same time (CP 828-829)

and Amended Judgment subsequently entered on November 22, 2011 (CP 936-938), should be reversed and vacated with respect to the sanctions imposed on attorney Miller and the now dissolved law firm, Miller, Devlin and McLean, P.S.

There is not substantial evidence to support the trial court's conclusion that there was inadequate investigation prior to filing an Answer to the Complaint. The fact that the Answer admitted an allegation that later was discovered to be incorrect is not sufficient basis. The defendants' family relationships are facts that cannot be ascertained by defense counsel, and it is therefore reasonable for an attorney to rely on the defendants' affirmation that the information is correct.

There is no substantial evidence on which the trial court could properly sanction attorney Miller for another attorney's improper certification of discovery responses. There are no facts in the record that justify such a finding.

There is no substantial evidence on which the trial court to impose sanctions without considering lesser sanctions, and indicating in the record the rationale used. In the alternative, sanctions be reduced to a reasonable level with an award of attorney fees ending no later than the show cause hearing at which the original dismissal was vacated, such as outlined to the trial court (CP 523-530 and CP 531-544).

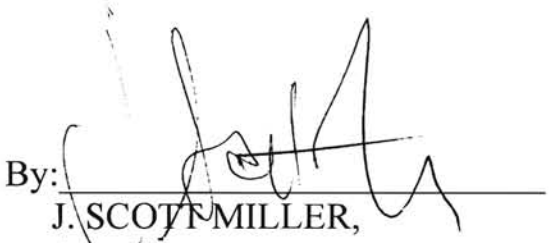
There is substantial evidence in the record to support the trial court's Conclusions of Law B&C.

There is substantial evidence in the record to support the trial court's refusal to enter judgment against The Law Offices of J. Scott Miller, PLLC.

There is no legal basis on which the trial court could have imposed CR 11 sanctions as a result of attorney Miller paying the judgment instead of posting a supersedeas bond. Therefore the court's refusal to impose sanctions on that basis was correct.

Appellant respectfully requests that the court reverse and vacate the Findings of Fact and Conclusions of Law and Amended Judgment imposition of sanctions.

Respectfully submitted this 25th day of October, 2012.



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

CERTIFICATE OF SERVICE

I hereby certify that on this 25h day of October, 2012, a true and correct copy of the foregoing was hand delivered to the following:

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