Court of Appeals No. 300935-III

Spokane County Superior Court Cause No. 03206739-8

JAMES W. and JUDY D. AASEBY, husband and wife,

Respondents/Cross-Appellants,

v.

WILLIAM VUE, et. al,

Defendants,

J. SCOTT MILLER of Law Offices of J. Scott Miller, PLLC

Appellant/Cross-Respondent.

RESPONDENTS/CROSS-APPELLANTS AASEBYS' REPLY TO REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT MILLER

Michael J. Delay
WSBA No. 18692
Michael J. Delay, P.S.
10 N. Post, Suite 301
Spokane, Washington 99201
509.624.3300
Attorney for Respondents/Cross-Appellants

Court of Appeals No. 300935-III

Spokane County Superior Court Cause No. 03206739-8

JAMES W. and JUDY D. AASEBY, husband and wife,

Respondents/Cross-Appellants,

v.

WILLIAM VUE, et. al,

Defendants,

J. SCOTT MILLER of Law Offices of J. Scott Miller, PLLC

Appellant/Cross-Respondent.

RESPONDENTS/CROSS-APPELLANTS AASEBYS' REPLY TO REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT MILLER

Michael J. Delay
WSBA No. 18692
Michael J. Delay, P.S.
10 N. Post, Suite 301
Spokane, Washington 99201
509.624.3300
Attorney for Respondents/Cross-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Appendix

Attorney J. Scott Miller, Appellant, and sole member of the law firm, J. Scott Miller, PLLC, hereafter '**Miller**', filed his opening brief May 8, 2012. Miller's opening brief did not contain issues pertaining to assignments of error, a violation of RAP 10.3(a)(4).

Respondents/Cross-Appellants James and Judy Aaseby, hereafter '**Aasebys**', filed their opening brief July 6, 2012. Aasebys' opening brief did respond to and address Miller's Arguments A through E, despite Miller's noncompliance with RAP 10.3(a)(4).

Unlike Miller's opening brief, Aasebys' opening brief did contain issues pertaining to assignments of error. Each of Aasebys' issues addressed Miller's Arguments, A through E, inclusive. Additionally, Aasebys' Argument, pages 30-48, covered each Assignment of Error in support of their Cross-Appeal.

Aasebys respond below to Miller's reply brief filed October 25, 2012. However, first, Aasebys will address Commissioner Monica Wasson's Ruling on Terms for Miller's motion filed July 18, 2012.

I. COMMISSIONER'S RULING ON TERMS FOR MILLER'S LATEST MOTION TO MODIFY

On July 18, 2012, a Motion to Dismiss Cross-Appeal and To Modify Clerk's Letter, hereafter '**motion to modify**', was filed by Miller.

On July 30, 2012, in response, Aasebys filed an Answer and Motion for Terms. On September 4, 2012, Commissioner Wasson denied Miller's motion. See Appendix, A-2 – A-5.

Commissioner Wasson referred Aasebys' Motion for Terms and reasonable attorney's fees under RAP 18.8(d) and 18.9(a) to the panel of judges for decision. On pg. 4 (A-5), Comm. Wasson:

> *...Miller himself was the person who requested a* ***stay*** *of the pending court of appeals' matters while the trial court considered several motions.* ***And, it was Miller that moved this Court to grant the superior court permission to formally enter the decisions on those motions****. To now bind Aaseby to 30 days after the November 22, 2011 signature date or to 14 days after the December 22, 2011 notice of appeal date would result in a* ***gross miscarriage of justice****. Aaseby reasonably relied on RAP 7.2(e), and calculated its time for cross appeal from the date the superior court formally entered the amended judgment, after this Court gave it permission to do so.*
>
> *Accordingly, IT IS ORDERED, Miller's motion to dismiss Aaseby's cross-appeal as untimely filed is denied. Aaseby's motion for terms and reasonable attorney fees under RAP 18.8(d) and 18.9(a),* ***is referred to the panel of judges that ultimately decides this appeal****. This ruling also effectually denies Mr. Miller's motion to modify the clerk's letter of February 14, 2012.*

Numerous deadlines for the parties to this appeal were established by the Clerk's Scheduling Letter of February 14, 2012, (CP 2281). The deadlines established by the Clerk's Letter were relied on and followed by Miller and the Aasebys. The deadlines began only after a final decision

(Amended Judgment Summary and Judgment (CP 936-37)) was entered in the trial court on February 3, 2012, and only after expiration of the Stay on February 1, 2012.[1] See Stay, A-6. It is common practice by this Court to issue a scheduling letter containing various deadlines for all counsel to follow on appellate procedural matters.

Miller's belated motion in July, 2012 for modification of the Clerk's Letter of February 14, 2012, sought to modify a February 28, 2012 (expired) deadline for the Aasebys to file their Notice of Cross-Appeal (CP 2283). Miller's motion to modify was filed some 5 months *after* the expiration of the established Cross-Appeal deadline of February 28, 2012 (CP 2281).

If Miller's untimely motion to modify was granted by this Court it would permit Miller, months after the deadline had expired, to change an expired deadline for the Aasebys' Notice of Cross-Appeal. A never disclosed deadline would then be selected by *Miller*, not this Court. The numerous deadlines as originally established by the Clerk's Letter of February 14, 2012, (CP 2281), would remain the same except *one*. Only

---

[1] On November 30, 2011, pursuant to Miller's motion to continue the initial stay, Comm. Wasson:

> ***11/29/11***
> ***Granted. The appeal is stayed until February 1, 2012.***
> ***Monica Wasson***
> ***Commissioner***

the expired deadline for the Aasebys to file a Notice of Cross-Appeal would be changed and would expire *before* entry of a final decision in the trial court and *before* the Stay expired. Miller's motion to modify the expired deadline violated numerous rules, including RAP 5.2(f) and (g) and RAP 7.2(e). It also violated the Stay, A-6, and the Clerk's Letter (CP 2281).

Miller's motion to modify did not mention the *two stays* he was granted earlier by this Court on October 18 and November 29, 2011, while he awaited a final decision from the trial court. Miller filed a RAP 7.2(e) Motion To Grant Superior Court Authority To Enter Orders, etc. Commissioner Wasson granted Miller's RAP 7.2(e) motion on February 3, 2012.

Miller's misconduct during these proceedings was exemplified by his belated motion to modify an expired deadline for the Aasebys' Notice of Cross-Appeal, (CP 2283).

In addition to violating RAP 5.2(f) and (g) and 7.2(e), Miller's motion to modify an expired deadline needlessly delayed the appeal, a violation of RAP 18.9(a). If granted, a new deadline to be selected by Miller would be applied to the Aasebys' Notice of Cross-Appeal in violation of the Stay that was in-effect until February 1, 2012, A-6. Miller's motion to modify an expired deadline was frivolous under RAP

18.9(a). Terms, including reasonable attorney fees, are appropriate under RAP 18.8(d).

II. AASEBYS' REPLY TO MILLER'S REPLY BRIEF

Aasebys will now respond to Miller's reply brief filed October 25, 2012. In the Aasebys' opening brief, Miller's lack of an inquiry during the entire proceedings was broken down into five (5) stages, as follows:

> *Miller's pleadings;*
> *Miller's certified responses to discovery;*
> *Re-opening of the litigation;*
> *Conclusions of Law B and C; and*
> *Supersedeas proceedings under RAP 8.1.*

A. *Miller's Motion for CR 11 Sanctions Against Aasebys and Counsel for Supersedeas Proceedings*

Aasebys commenced supersedeas proceedings in the trial court (CP 2306 – 2315). Aasebys' motion for supersedeas bond was in the amount of the trial court's Amended Judgment against Miller, plus the fees and costs likely on appeal, under RAP 8.1(b) and (c)(1) (2306 – 09).

In response, Miller filed a Notice of Hearing, Declaration, and an eight page memorandum in support of his motion for CR 11 sanctions (2316 – 2327). Sanctions in the amount of $8,785 (hourly rate of $350)

were sought by Miller's motion (CP 2316) and declaration (CP 2317) and against the Aasebys and their counsel.

Miller asserted that the *sole* purpose of a RAP 8.1 supersedeas bond is to protect the judgment debtor (Miller), 'to stay enforcement of a judgment'.[2] Miller did not inform this Court of the holdings in: *Estate of Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763, 769 (2001); *Lampson Universal Rigging v. WPPSS,* 105 Wn.2d 376, 378 (1986); *Seventh Elect Church v. Rogers,* 34 Wn. App. 105, 120 (1983); *Murphree v. Rawlings,* 3 Wn. App. 880, 882 (1970); and *State Ex Rel. Pioneer Mining & D. Co. v. Sup'r Ct.,* 108 Wn. 183, 186 (1919). These cases, not cited by Miller, held that a purpose of a supersedeas bond also includes the protection of the judgment creditor, in this case the Aasebys. *Id.* To delay execution of the judgment *and* to ensure and protect the judgment creditor of the judgment debtor's ability to satisfy the judgment is not impaired during the appeal process. *Id.*[3]

---

[2] On pg. 32 of Miller's reply brief, filed October 25, 2012:

> *The **sole** purpose of a RAP 8.1 supersedeas bond is to stay enforcement of a judgment. ...*

[3] *Estate of Spahi v. Hughes-Northwest, Inc.*, supra, at p. 769:

> *A supersedeas bond serves two purposes: it serves the interest of the judgment debtor by delaying execution of the judgment, **and** it serves the interest of the **judgment creditor** by ensuring that the judgment debtor's ability to satisfy a judgment will not be impaired during the appeal process.* (Citations omitted.)

Any party to a review proceeding has the right to seek a stay of enforcement of the judgment by filing a supersedeas bond in the trial court that covers the amount of the judgment, interest, costs and attorney fees likely to be awarded on appeal. RAP 8.1(b) and (c)(1):

> *(b)* ***Right to Stay Enforcement of Trial Court Decision****. A trial court decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule.* ***Any party*** *to a review proceeding has the right to stay enforcement of a money judgment, ...*
>
> *(1) Money Judgment. ..., a party may stay enforcement by filing in the trial court a supersedeas bond ...*
>
> *(c)(1) Money Judgment. The supersedeas amount shall be the amount of the judgment, plus interest likely to accrue during the pendency of the appeal and attorney fees, costs, and expenses likely to be awarded on appeal.*

Trial court Judge Linda Tomkins also deferred to the panel of judges for an award of reasonable attorney's fees against Miller for the Aasebys having to respond to Miller's motion for sanctions.[4] Miller had claimed 'sanctions should be imposed' on the Aasebys and counsel:

> *The motion requesting that the court compel a non-party to post a supersedeas bond clearly shows that Plaintiff's counsel* [Mike Delay] *lacks even an elementary understanding of the issue. Plaintiff's motion* [for

---

[4] Judge Tompkins' Order, April 3, 2012 (CP 2340):

> *IT IS ORDERED that: The Court recognizes the Satisfaction of Judgment, denies all other motions, and* ***defers the issue of attorney fees pending further decision by the court of appeals.***

> supersedeas bond] *is either based on total ignorance of the fundamental purpose of supersedeas because of inadequate or nonexistent legal research, or it is a blatant attempt to trick the court into committing gross error. In either instance,* ***sanctions should be imposed*** (CP 2320).

Miller did not supersede payment of the Amended Judgment under RAP 8.1(d). See RAP *Form 24*: *Notice of Cash Supersedeas*, a notice which expressly preserves a pending appeal. Miller paid the Amended Judgment in full, with interest and filed a Satisfaction of Amended Judgment, (CP 2342). He filed a Notice of Payment Of Judgment (in Full), (CP 2347), as well.

In *Murphree v. Rawlings*, 3 Wn. App. 880, 882 (1970), the appellant voluntarily paid into court the exact amount of the judgment. When making payment, the judgment debtor/appellant, to avoid making his appeal moot, did '*expressly signify his intention to pursue the appeal. The respondent drew this sum of money out.' Id.* In *Murphree v. Rawlings*, supra, the respondent had not filed a cross-appeal unlike the Aasebys who *did* file a Cross-Appeal and therefore did not draw the sum of money out.

In *State v. Smithrock Quarry, Inc.*, 49 Wn.2d 623, 625 (1956), when *voluntary* payment of the judgment occurred, it required a reservation of the right of appeal to avoid the appeal becoming moot: '*Any appropriate reservation attached to the payment that would accomplish*

this would preserve the right of appeal. ... The respondent, electing not to appeal, accepted the money and the judgment was thereby satisfied.' In *State v. Smithrock Quarry, Inc.*, supra, there was no cross-appeal filed. Unlike in *State v. Smithrock Quarry, Inc.*, the Aasebys did not draw out the money paid into court so as to preserve their Cross-Appeal.

Payment of the Amended Judgment was voluntary by Miller. Payment by Miller was in full with a Satisfaction of Judgment, (CP 2342). Payment by Miller was <u>not</u> in the form of a supersedeas payment as requested by the Aasebys' motion under RAP 8.1, (CP 2306-09). Miller's payment did <u>not</u> include an appropriate reservation expressly preserving his pending appeal. See '*Satisfaction of Amended Judgment*' with Instructions to Clerk,[5] (CP 2342-3). Also, see *Notice of Payment of Judgment (In Full)*, (CP 2347): *'...J. Scott Miller and Miller, Devlin & McLean, P.S. (dissolved) and hereby notify the court that the Amended Judgment entered in this matter November 22, 2011 (Dkt. No. 320) has this date been paid in full, with interest,...*'

Miller refused to supersede the Amended Judgment under RAP 8.1(d), following the judgment creditor's, Aasebys', motion under RAP

---

[5] Satisfaction of Amended Judgment (CP 2342):

> *The Court having received a cashier check payable to the Clerk of the Spokane County Superior Court in the amount of $23,267.75 the Amended Judgment shall be and hereby is deemed to be satisfied in full.*

8.1. On his own volition, without any reservation to preserve his pending appeal, Miller paid in full and with interest the Amended Judgment.

Miller's Motion for CR 11 Sanctions (CP 2316-27) was contrary to his voluntary payment in full of the Amended Judgment. Miller's memorandum filed in support of sanctions against the Aasebys and their counsel misrepresented the law, cited above, that clearly provided protection of the judgment creditor under RAP 8.1's supersedeas proceedings. Aasebys' Cross-Motion for sanctions (CP 2331-37) and Cross-Appeal should be granted as Miller's motion for CR 11 sanctions completely misstated the law and is willful misconduct, again. Additionally, Miller's appeal is moot after payment of the Amended Judgment, in full, without any reservation to preserve his appeal.

B. *Miller's Pleadings and Withdrawal Were Improper and Signed by Miller Without Any Inquiry Whatsoever*

From the very beginning of Miller's representation of the Vue family members, including when Miller filed his Notice of Appearance (CP 960) and, later, his Answer, (CP 7), *all* pleadings were filed without any inquiry conducted by Miller. A lack of inquiry would slowly begin to be revealed over the many years of hearings and after the litigation against the Vue family was re-opened in July, 2005 (CP 20).

Aasebys had filed and served a written objection (CP 16) to Miller's original Notice of Intent to Withdraw, (CP 14-15). Then Miller filed a Notice of Intent to Withdraw and Substitution, (CP 17-18). After a timely written objection was made by the Aasebys, Miller did not obtain an order from the trial court as to the objection to his withdrawal and substitution. This procedure violated CR 71(c)(1) and (4), which states:

> (1) *Notice of Intent to Withdraw*. The attorney shall file and serve a Notice of Intent to Withdraw on all other parties in the proceeding. The notice shall specify the date when the attorney intends to withdraw, which date shall be **at least 10 days after the service of the Notice of Intent to Withdraw**. The notice shall include a statement that the withdrawal shall be effective without order of court **unless an objection to the withdrawal is served upon the withdrawing attorney prior to the date set forth in the notice**....
>
> (4) *Effect of Objection*. If a timely written objection is served, withdrawal may be obtained **only by order of the court**

Although CR 71 does not require prejudice, there was in fact prejudice caused to the Aasebys by Miller's withdrawal and substitution over the Aasebys' objection and without the trial court's permission.[6]

---

[6] On pgs. 8-9 of Miller's reply brief, filed October 25, 2012:

> *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.*

First, Miller had not produced a copy of his client's, William Vue's, Farmers auto policy, (even if Miller had inquired into coverage, which he clearly stated he had not so inquired (CP 687, lines 22-25; and CP 688, lines 1-2)).[7] Second, Miller violated CR 11(a) and 26(g) and (e)(2) when, without any inquiry, he signed pleadings and responded to the Aasebys' discovery representing just the opposite, that he had in-fact performed a reasonable inquiry *before* responding to discovery. See answer to Interrogatory 1, (CP 1068).

In advance of the Show Cause Hearing on July 1, 2005, the Aasebys had sent letters to Miller to produce William Vue's policy, previously requested by the Aasebys in their discovery. The letters to Miller were dated June 10, 17 and 22, 2005, (CP 984, 985, 988). Miller was informed well before the Show Cause Hearing that the Aasebys would seek attorney fees and costs if the policy for his client, William Vue, was not produced, as follows (CP 988):

> *We requested from you and received no response concerning contact information for a Farmers Insurance representative. Further, you now request Aasebys contact the Vues directly without providing any of the Vues contact*

---

[7] On June 23, 2006, Miller (CP 687-8):

> *It is my understanding that Farmers issued a claim number and I believe that Mr. Delay is correct in that. I don't know what Farmers did after that point.* ***I have never been in contact with them.*** *I have recently, but I had not been in contact with them,* ***wasn't aware that policy existed.***

information or a legally valid Notice of Withdrawal in effect at the time. I cannot ethically advise the court on your behalf or Vues as I do not represent you or Vues/Allstate. Obviously, ***this type of conduct contributes to unnecessary legal expense.***

Please be advised Aasebys will seek attorney fees and costs associated with the expense in serving, filing, and setting aside the order and damages caused by the Vues for any misrepresentations under oath. Especially, given the fact Aasebys could have avoided these unnecessary expenses...

Despite the Aasebys' discovery requests and their letters demanding the same in advance of the Show Cause Hearing, Miller did not produce his client's Farmer's policy. This is a further violation by Miller of CR 26(b)(2)(i) and (e)(2) and CR 1.

C. *Miller's Certified Responses to Discovery Reveal Willfulness*

Aasebys very first interrogatory and answer (CP 1068):

1. INTERROGATORY: ***Prior*** *to responding to these discovery requests, have you* ***thoroughly researched*** *and identified* ***every document*** *and made inquiry of every person, employee or agent having knowledge of the information and subject matter sought by these discovery requests?*

ANSWER:

YES

At the time of discovery, and unbeknownst to the Aasebys, the Vue family members had requested contact with their attorney, Miller. Yet, the Vue *children* (Vilay, Agnes and William, who all resided in the same home (CP 25, ¶4)) and the Vue *parents* (Pai and Cheu Veu) did not have any contact with Miller. William Vue had made material changes as to basic and key facts about the Vue family, (CP 698-9). Miller was to incorporate the changes into the Vue family's discovery responses, (CP 1423, ¶7). None of the changes were made by Miller. The answers and responses provided to the Aasebys' discovery were, in-fact, mostly false and were not based on any inquiry whatsoever. The representation of due diligence and thoroughly researched and identified documents was certified as true under CR 26(g) and under penalty of perjury, (CP 204, lines 2-4 and 17-23; and CP 982).

In his reply and opening briefs, a newly licensed associate, Crystal Spielman, was who Miller had attempted to make out as the scapegoat for a total lack of inquiry and candor towards the tribunal. It was determined by the trial court that Spielman signed the discovery responses at the direction of Miller, (CP 1461, ¶25). Ms. Spielman (CP 697): *"...if I would have refused to sign them at the direction of the managing partner* [Miller] ***I'd probably be issued my walking papers.***"

Miller was President of his now dissolved law firm, Miller, Devlin, McLean & Weaver, P.S., (CP 389-91). On November 2, 2008, Miller registered and filed with the State of Washington his current firm, Law Offices of J. Scott Miller, PLLC, of which he is the President and only listed member/manager, (CP 389 – 92). The same address was and is used for the Miller law firms, (CP 545). The same staff, as well, as to paralegal Lisa S. Mittleider (fka Lisa Keller), (CP 191). Many pleadings (CP 145, 152, 155, 192, 210, 601, 394, 548, 550, etc.) were signed by Miller with the firm name, J Scott Miller, PLLC, on behalf of his non-dissolved law firm. As a result, under agency principles, he did so as an agent of his law firm. *Madden v. Foley*, 83 Wn. App. 385, 392-3 (1996); and *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 130 (1993). Changing firms to avoid law firm responsibility for the misconduct herein only perpetuated such misconduct. The law firm of J. Scott Miller, PLLC, should be included as a Judgment Debtor on the Amended Judgment and as the successor law firm. The trial court erred in striking the Law Office of J. Scott Miller, PLLC, from the Judgment entered on June 23, 2011, (CP 398-400).

III. AASEBYS' MOTION FOR TERMS AND REASONABLE ATTORNEY FEES ON APPEAL UNDER RAP 18.8(d) AND 18.9(a)

On September 16, 2011, trial court Judge Tompkins (CP 838):

> *Frankly, it shouldn't have been necessary to engage in a* ***declaratory judgment action*** *had information been transmitted as required by the discovery rules* [CR 26(b)(2)(i), (e)(2) and (g)] *and by the due diligence rule* [CR 11(a)].

On June 16, 2011, Judge Tompkins stated (CP 574, lines 9-12): '*..., this case has been plagued with baseless filings and abuses to the judicial system. The time and effort that has been invested by Counsel, ..., has been extreme.*'

The late Judge Robert Austin stated on February 15, 2006, as to the **basic and key facts** that were misrepresented (CP 35): '*The Answer and discovery materials admit key facts which defendants and their counsel, after "reasonable inquiry," could have and should have known were false. Defendants' previous counsel, Mr. Scott Miller, placed his signature on the Answer, and therefore certified his belief, formed after reasonable inquiry, that the information contained within the Answer was well grounded in fact. ...*'

Aasebys do hereby move this Court for an award of reasonable attorney fees and terms on Miller's motion to modify and for Miller's appeal. RAP 18.8(d) provides:

> ***Terms.*** *The remedy for violation of these rules is set forth in rule 18.9. The court may condition the exercise of its*

authority under this rule by imposing terms or awarding compensatory damages, or both, as provided in rule 18.9.

RAP 18.9(a) provides:

Sanctions. *The appellate court on its own initiative or on motion of a party may order a party or counsel, ..., who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or ...*

A motion is frivolous if it lacked any basis in law or fact and/or it misrepresented the law to the Court. *West v. Thurston County*, 169 Wn. App. 862, 868 (2012); and *In re Marriage of Foley*, 84 Wn. App. 839, 847 (1997). Here, Miller's motion to modify filed on July 18, 2012, lacked any basis in law or fact. It misrepresented to this Court the case law and Rules of Appellate Procedure.

In the latter stages of these proceedings, Miller's misconduct rose to a level of willful or intentional misconduct. The original Judgment for reasonable attorney fees and costs of $46,285.27, (CP 398-9), albeit not the full amount of time and costs expended by the Aasebys and their counsel, should be reinstated by this Court. The misconduct has continued to the present. The trial court's original Judgment when reinstated should include as a judgment debtor, J. Scott Miller, PLLC.

IV. CONCLUSION

Both trial court Judges agreed as to Miller's complete lack of an inquiry and misleading the trial court was in violation of CR 11(a) and 26(b)(2)(i), (e)(2) and (g). Additionally, CR 1 was violated by Miller's misconduct. The level of misconduct rose to a level of gross misconduct which resulted in numerous hearings in the trial court and now this Court. If Miller had complied with our civil rules, these proceedings could have ended long ago and perhaps avoided altogether, without litigation, as liability was undisputed for the motor vehicle accident caused by William Vue. The amount of the Aasebys' damages exceeded all available coverage limits. Miller's appeal should be denied and, additionally, is moot. The Aasebys' cross-appeal should be granted.

DATED this 26th day of November, 2012.

MICHAEL J. DELAY, P.S.

Michael J. Delay
WSBA No. 18692
Attorney for Respondents/Cross-Appellants

V. APPENDIX

A-2 – A-5:	Commissioner's Ruling, filed September 4, 2012
A-6:	Stay granted November 29, 2011 (appeal proceeding was stayed until February 1, 2012)

The Court of Appeals

of the

State of Washington

Division III

JAMES W. AASEBY, et al., Respondents, v. WILLIAM VUE, et al., Defendants. J. SCOTT MILLER, Appellant.	)	No. 30093-5-III COMMISSIONER'S RULING

J. Scott Miller (Miller) moves this Court to dismiss the cross-appeal of James W. Aaseby, et al. (Aaseby), and to modify the clerk's letter of February 14, 2012.[1] He contends Aaseby did not timely file its notice of cross-appeal.

[1] The clerk's letter stated that "[i]f respondent is seeking cross-review, the notice of cross-review is to be filed 14 days from the date of this letter, by February 28, 2012." Motion at A-2.

The pertinent facts consist of the following: On November 29, 2011, this Court granted Miller a stay of his motion for discretionary review until February 1, 2012, pending resolution of certain matters in superior court. *See* no. 30060-9-III, which this Court had earlier consolidated with no. 30093-5-III. On February 3, 2012, this Court granted Mr. Miller's RAP 7.2(e) motion to permit the superior court to enter several documents, which included an amended judgment the superior court had signed on November 22, 2011. Miller had prematurely filed his notice of appeal of the amended judgment on December 22, 2011. Aaseby filed its notice of cross-appeal on February 27, 2012.

Miller contends that Aaseby's cross appeal was late. This Court disagrees. RAP 5.2(f) provides that a party who seeks a cross-appeal must file its notice within 14 days of service on it of the opposing party's notice of appeal, or within 30 days of the decision of the trial court, whichever date is later. Since the superior court here did not have permission of this Court to enter its amended judgment until February 3, 2012, the 30 day time period for appeal commenced on February 3rd. And, Aaseby timely filed its notice of cross-appeal within 30 days of that date – on February 27th.

Nevertheless, Miller asserts that the superior court did not need permission to file its amended judgment. He cites caselaw from 1978 and 1982 for the proposition that a trial court can entertain a motion for reconsideration while an appeal is pending, and it

can even enter new findings of fact and conclusions of law. But the full text of the rule states that although "[t]he trial court has authority to hear and determine (1) postjudgment motions authorized by the civil rules . . .[,] *[i]f the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision.*" (Emphasis added.) As applied here, the rule is clear that formal entry of the amended judgment did not occur until this Court granted permission for such entry.

Alternatively, the facts here support this Court extending the time for Aaseby to file the notice of cross appeal. RAP 18.8(b) allows this Court to do so in "extraordinary circumstances and to prevent a gross miscarriage of justice . . .." Such extraordinary circumstances exist when a party's notice of appeal, while defective, was defective "despite reasonable diligence" on the would-be appellant's part and, therefore, can be said to be due to "excusable error." *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988). Such a lost opportunity to timely appeal constitutes a gross miscarriage of justice. *Id.*

This Court agrees that generally, a litigant cannot simply rely upon erroneous advice from court employees. But the circumstances here are extraordinary. The parties had two motions for discretionary review and two notices of appeal pending in the court of appeals for several months before the superior court signed the amended judgment at

issue here. Miller himself was the person who requested a stay of the pending court of appeals' matters while the trial court considered several motions. And, it was Miller that moved this Court to grant the superior court permission to formally enter the decisions on those motions. To now bind Aaseby to 30 days after the November 22, 2011 signature date or to 14 days after the December 22, 2011 notice of appeal date would result in a gross miscarriage of justice. Aaseby reasonably relied on RAP 7.2(e), and calculated its time for cross appeal from the date the superior court formally entered the amended judgment, after this Court gave it permission to do so.

Accordingly, IT IS ORDERED, Miller's motion to dismiss Aaseby's cross-appeal as untimely filed is denied. Aaseby's motion for terms and reasonable attorney fees under RAP 18.8(d) and 18.9(a), is referred to the panel of judges that ultimately decides this appeal. This ruling also effectually denies Mr. Miller's motion to modify the clerk's letter of February 14, 2012.

September 4, 2012

Monica Wasson
Commissioner

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

DEC 01 2011

November 30, 2011

J. Scott Miller
Law Offices of J Scott Miller
201 W North River Dr Ste 500
Spokane, WA 99201-2266

Michael J. Delay
Attorney at Law
10 N Post St Ste 301
Spokane, WA 99201-0705

Patrick G. Mcmahon
David Lawrence Force
Carlson McMahon & Sealby PLLC
37 S Wenatchee Ave Ste F, PO Box 2965
Wenatchee, WA 98807-2965

CASE # 300609 (consolidated with #300935)
James W. Aaseby v. William Vue, et al
SPOKANE COUNTY SUPERIOR COURT No. 032067398

Counsel:

Pursuant to the Appellant's motion to continue the stay in the above appeals, the following notation ruling was entered:

11/29/11
Granted. The appeal is stayed until February 1, 2012.
Monica Wasson
Commissioner

A stay status report is due by February 1, 2012.

Sincerely,

RENEE S. TOWNSLEY
Clerk/Administrator

Janet L. Dalton, Case Manager

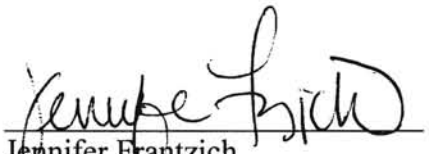
RST:jld

A-6

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November, 2012, a true and correct copy of the foregoing, Respondents/Cross-Appellants Aaseby's Reply to Reply Brief of Appellant/Cross-Respondent Miller, filed on November 26, 2012, was hand-delivered to J. Scott Miller at the following address:

J. Scott Miller
Law Office of J. Scott Miller, PLLC
201 W. North River Drive, Suite 500
Spokane, WA 99201



Jennifer Frantzich
Paralegal
Michael J. Delay, P.S., Inc.