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.

RESPONDENTS/CROSS-APPELLANTS' BRIEF

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I. INTRODUCTION

Attorney J. Scott Miller, Appellant, was former President of the dissolved law firm Miller, Devlin, McLean & Weaver, P.S., Inc.[1] J. Scott Miller (hereafter '**Miller**') appeals the imposition of monetary sanctions for wrongfully certifying his signed Answer and for wrongfully certifying inaccurate and false answers to interrogatories and responses to requests for production. Miller would later attempt to withdraw as counsel for his clients without proper notice. A Notice of Intent to Withdraw as Counsel, (CP 14), was filed by Miller. It violated CR 71(c)(1). Respondents/Cross-Appellants (Plaintiffs) objected to Miller's withdrawal to avoid further prejudice (CP 16)[2]. After timely written objection, (CP 16), an order of the court was required to permit Miller's withdrawal. An order of the court was *not* obtained by Miller as required by CR 71(c)(4).

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1 Mr. Miller's law firms: Miller, Devlin, et.al., of which he was a named senior partner and President until the firm ceased in 2008; and, thereafter, '*Law Offices of J. Scott Miller, PLLC*', of which he is the sole managing member (CP 389, 2160-1). The firms are registered under and operated from the same physical address and with the same President and Managing Member, Miller (CP 389-92, 2160).

2 Plaintiffs' objection:

> *Plaintiffs object to the withdrawal of Defendants' counsel...counsel of record that signed answers to interrogatories pursuant to CR 26(g) and CR 11(a), in which the Defendants under oath misrepresented insurance coverages in effect at the time of collision and for which the Plaintiffs are currently seeking damages and an order vacating and setting aside the Stipulated Order of Dismissal with Prejudice. Counsel of record for Defendants is aware of this pending motion and seeks to withdraw* ***before*** *the motion is decided; such withdrawal would further prejudice Plaintiffs* (CP 16).

A personal injury lawsuit was commenced against a tortfeasor-driver, William Vue ('defendant'), and his natural parents, the registered owners of the family car. It was believed, at the time of commencement, that the parents of William Vue were Vilay and Agnes Vue, husband and wife ('defendants') (CP 3, ¶ 1.3). After litigation was commenced by the Respondents/Cross-Appellants, James and Judy Aaseby, husband and wife (hereafter '**Aasebys'**), the Vues retained defense counsel, Miller.

The defense provided by Miller, from the very start of the litigation in 2003, completely misled the trial court. Miller misled his clients, the Vues, and the Aasebys, the Plaintiffs, from the very start of litigation, as well. This occurred when Miller performed no inquiry or investigation. Also, Miller ignored changes made by his clients to discovery responses. Miller would represent just the opposite to the trial court and to the Aasebys when it was claimed that he had, in fact, performed due diligence and had, in fact, performed a reasonable inquiry *before* responding to discovery and when filing various pleadings throughout these proceedings. As a result, Miller's lack of an inquiry during discovery and his signed pleadings all contained inaccurate and completely false information which was provided to the trial court and to the Aasebys throughout these proceedings. Sanctions were imposed on Miller by the trial court for '*significant violations*' of CR 11(a) and 26(g) (CP 934, ¶B. (1)).

The inaccurate information and false statements provided by Miller occurred at every stage of litigation, beginning in 2003. It has continued to the present. For this Court's benefit, the stages of these proceedings were broken down, below, into *five* stages. Each stage appears in chronological order. The very first stage of the misconduct was *Miller's Pleadings*. The next stage of Miller's misconduct was *Certified Responses to Discovery*. A third stage of Miller's misconduct was during the *Re-opening of the Litigation*. The trial court's *Conclusions of Law B and C* did not reflect the record. The fifth and final stage of Miller's misconduct was during *Supersedeas Proceedings.*

II. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1: The trial court erred in entering an Amended Judgment on November 22, 2011.

No. 2: The trial court erred in denying Aasebys' motion to revise the trial court's Conclusions of Law B and C, entered on October 14, 2011.

No. 3: The trial court erred in striking the law firm of J. Scott Miller, PLLC, from its Judgment entered June 23, 2011.

No. 4: The trial court erred in entering an Order on April 3, 2012, denying Aasebys' cross-motion for CR 11 sanctions.

Issues Pertaining to Assignments of Error

No. 1: Should the trial court award reasonable attorney fees and costs as sanctions for counsel's violation of CR 11 and 26(g) for the entire proceedings?

No. 2: Should the trial court's conclusions of law have been revised to reflect the record of proceedings?

No. 3: Were both law firms liable that employed the same senior partner that violated CR 11(a) and 26(g) during the entire proceedings?

No. 4: Did counsel violate CR 11(a) in responding to a supersedeas motion?

III. STATEMENT OF THE CASE

Miller's Pleadings – No Inquiry

Litigation was commenced by the Aasebys after a motor vehicle collision. It was commenced against the Vue family members when filed on October 16, 2003 (CP 1-6). On November 3, 2003, Miller filed his Notice of Appearance (CP 960). The Notice of Appearance was signed by Miller (CP 960). He signed as counsel for all of the defendant Vues as named and identified by the Aasebys' *Verified*[3] Complaint for Damages (CP 3-6). Miller's signed Notice of Appearance did not correct the familial

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3 On pg. 4 of the Aasebys' Verified Complaint for Damages (CP 6):

> *We are the Plaintiffs in this action. We have read the preceding Complaint for damages, know its contents and believe it to be true and correct.*

Wayne and Judy Aaseby, Plaintiffs, signed below the above statement.

relationships of the Vue family members. No inquiry had been conducted by Miller at the time of filing his Notice of Appearance. If one had been conducted, the family members that Miller represented would have been revealed differently then was identified in Miller's Notice of Appearance (CP 960) and by the Verified Complaint.

On January 5, 2004, Miller filed his Answer (CP 7-10) to the Aasebys' Verified Complaint for Damages. If, pursuant to CR 11(a), he had conducted a reasonable inquiry Miller would have been informed of the facts about his clients, when filing his Notice of Appearance and when filing an Answer on his clients, the Vue family (William, Vilay and Agnes Vue) behalf. If any inquiry at all was made by Miller, he would have been informed that the basic and key facts he admitted as true in his Answer were indeed inaccurate and completely false.[4]

---

4 In his opening brief, Miller would assert blame for his lack of an inquiry, required under our civil rules. Lack of an inquiry by Miller was, according to Miller, the fault of the Vues and/or Aasebys' counsel, per pg. 22 of his brief:

> *Before the case was settled and dismissed no information was provided by the Vues or plaintiffs' attorney Mike Delay that*
>
> *(a) The **Answer** was incorrect in admitting allegations in the Complaint, or*
>
> *(b) That **interrogatory responses** were incomplete. ...*

Miller's duties and legal obligations under CR 1, 11(a), 26(b)(2), (e) and (g) and 71(c)(1) and (4) were not voluntary or optional.

Key and basic facts were contained in the caption of the Aasebys' Summons (CP 1). These and other key facts were expressly alleged in their *Verified* Complaint for Damages (CP 3-4):

> *1.3 Defendants, Vilay and Agnes Vue, are* ***husband and wife*** *and residents of Spokane County, Washington. Plaintiffs believe Vilay and Agnes Vue are the natural* ***parents*** *of the Defendant* [William Vue]. (CP 3)
>
> ...
>
> *3.1 The* ***registered owners*** *of the vehicle driven by the Defendant are believed to be* ***Vilay and Agnes Vue****, named defendants herein.* (CP 4)
>
> ...
>
> *3.3 Defendant was the driver of a 1983 Honda 4-door sedan, with the* ***permission of the registered owners****, defendants Vilay and Agnes Vue.* (CP 4)
>
> ...
>
> *3.6 Both vehicles were totaled from impact. Defendant paid for the property damage sustained by Plaintiffs' Cheverolet Lumina.* (CP 4)

In response to the above allegations by the Aasebys, Miller admitted as true as to all of the above allegations, as follows (CP 8):

> *1.3 These Defendants* ***admit*** *the same.*
>
> ...
>
> *3.1* ***Admit****.*
>
> ...
>
> *3.3* ***Admit****.*
>
> ...
>
> *3.6* ***Admit***

The Answer was signed by Miller. It was signed as legal counsel for the entire Vue family (CP 7, 10; and CP 960). It was certified as true by Miller, pursuant to CR 11(a). The admissions certified by Miller as true

were in fact not true. The Aasebys relied on the admissions, above. The truth of the matter was that the Vues, William, Vilay and Agnes, were all *siblings*. Vilay and Agnes Vue were not husband and wife. The parents of the Vues were not Vilay and Agnes but *Cheu and Pai Vue*. The registered owner of the car driven by the defendant, William Vue, was not Vilay and Agnes Vue, husband and wife. Miller did not amend or later correct his Notice of Appearance or his Answer.

Aasebys relied on Miller's signed Answer (CP 7-10) and his Notice of Appearance (CP 960). The trial court relied as well when it signed and entered a Stipulation and Order of Dismissal (CP 11-12). The Order was prepared, signed and presented by Miller (CP 12), pursuant to CR 11. The Order of Dismissal (CP 12) was signed by the Aasebys based on the above admissions and discovery responses, below, all verified as true by Miller or Miller's agent and newly licensed associate, Crystal Spielman.

Certified Discovery Responses – No Inquiry

Discovery was conducted by the Aasebys in 2003-4. On November 3, 2003, Aasebys had served on Miller written Interrogatories and Requests for Production Propounded to The Defendants – William Vue,

and Vilay and Agnes Vue, husband and wife (CP 233). They were pursuant to CR 26(b), 33 and 34 (CP 233).

Unbeknownst to the Aasebys, at the time, Miller had inserted into each interrogatory and request for production propounded by the Aasebys and to the Vues (William, Vilay and Agnes Vue) pertaining to insurance and pertaining to any documents affecting coverage under any policy of insurance for the Vues: '*Attorney Will Answer*' (CP 231-7). This fact was not revealed by Miller. It was not revealed to the Aasebys and the trial court until 2011 by David Force, new counsel for the Vues (CP 223, ¶3).

Aasebys' interrogatories and requests for production had inquired into insurance for each of the Vue family members as William Vue had mentioned Farmers at the scene in 2000. Additionally, the Aasebys discovery had inquired into the registered owner of the vehicle driven by the defendant, William Vue (CP 233-7). Aasebys' discovery was propounded to each of the Vues. Miller's instruction in 2003 to the Vues after each of the interrogatories follows, in bold:

> *14. <u>INTERROGATORY</u>: Do any insurance or indemnification agreements or policies exist that may satisfy part or all of a judgment that may be entered in this action; or to indemnify or reimburse for payments made to satisfy such award/judgment? If so, please state as to each insurance policy or indemnification agreement:*
>
> *(a) Name, address and telephone number of insurer or indemnitor;*

(b) Name, address and telephone number of each named insured or indemnitee;
(c) Each type of coverage provided;
(d) Applicable limits of the type of coverage provided;
(e) Amount of deductible on each coverage;
(f) Policy period coverage; and
(g) Policy number.

ANSWER:

ATTORNEY WILL ANSWER

1. *REQUEST FOR PRODUCTION: Please produce all insurance and indemnification agreements or policies identified in response to the preceding interrogatory, including all applicable declaration pages, endorsements and amendments.*

ANSWER:

ATTORNEY WILL ANSWER

2. *REQUEST FOR PRODUCTION: Please produce any other documents affecting insurance coverage (such as any documents denying coverage, extending coverage, or reserving rights), from or on behalf of any person carrying on an insurance business, to any defendant or covered person, or such person's representative.*

ANSWER:

ATTORNEY WILL ANSWER

15. INTERROGATORY: Have any of the insurers or indemnitors identified in your response to the preceding interrogatories denied in whole or in part coverage or indemnification for any of the Aaseby's claims, or accepted defense of this action upon a reservation of rights? If so, please state as to each:

(a) Name, address and telephone number of the insurer or indemnitor;
(b) Contract language upon which the insurer or indemnitor bases its denial of coverage, indemnification or reservation of rights; and
(c) Reasons for the insurer's or indemnitor's denial of coverage, indemnification or reservation or rights.

ANSWER:

ATTORNEY WILL ANSWER

(CP 234-7).

In addition to the above, Aasebys' discovery (32 pages) also inquired into information *personal* to each of the Vues. Miller could not possibly answer (accurately) the Aasebys' discovery without input from each of the Vues. A letter to the Vues would be revealed to the Aasebys in 2011, wherein Miller instructed the Vues on November 5, 2003:

> *Some questions are stamped "Attorney Will Answer." The answers to these questions will be completed by our office.* ... (CP 231)[5]

---

5 Contrary to Miller's letter to the Vues in 2003 (CP 231), is his opening brief, at pg. 3, footnote 2:

> *The discovery responses were prepared by and signed by William Vue, ...*

Also, contrary to pg. 3, footnote 2, is the Declaration of William Vue (CP 1407):

> *11. I was never given an opportunity to review the final answers to Plaintiffs' interrogatories. Additionally, I was never given an opportunity to review the Answer to Plaintiffs'* [Verified] *Complaint. Furthermore, I never met with Mr. Miller or any other attorney to go over the answers to Interrogatories, Answer, or any other aspect of this case.*

A notation was made in December, 2003 by a paralegal for Miller when meeting with William Vue to correct the Vue relationships[6] (CP 1423, ¶ 7; CP 1426). A correction was requested by William Vue in 2003. It was expected to be incorporated into the answers and responses to discovery (CP 1423, ¶7). The corrections to the Aasebys' discovery responses as to basic and key facts about the Vues were *not* made by Miller (CP 1423, ¶7).

It was represented, *under oath*, to the Aasebys that a reasonable inquiry and due diligence were made *prior* to responding to the Aasebys' discovery, including the discovery requests for any insurance policies. The Vues' insurance disclosed during discovery and their certified discovery responses provided to the Aasebys were as follows (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***

6 William Vue met with a paralegal, Justin Whittekiend, to prepare draft answers to discovery. At that time, William corrected the caption and he or the paralegal wrote on the draft answers that Vilay was his brother and Agnes was his sister. (CP 1423, ¶ 7; and 1426). As instructed by Miller, (CP 231), *William Vue did not provide any information about insurance* (CP 1407, ¶ 9).

14. INTERROGATORY: Do any insurance or indemnification agreements or policies exist that may satisfy part or all of a judgment that may be entered in this action; or to indemnify or reimburse for payments made to satisfy such award/judgment? If so, please state as to each insurance policy or indemnification agreement:

(a) Name, address and telephone number of insurer or indemnitor;
(b) Name, address and telephone number of each named insured or indemnitee;
(c) Each type of coverage provided;
(d) Applicable limits of the type of coverage provided;
(e) Amount of deductible on each coverage;
(f) Policy period coverage; and
(g) Policy number.

ANSWER:

(a) Allstate
(b) Vilay Vue
(c) Liability/property
(d) $25,000/$50,000/$10,000
(e) None
(f) 9/21/00 – 3/21/01
(g) 064355033

1. REQUEST FOR PRODUCTION: Please produce all insurance and indemnification agreements or policies identified in response to the preceding interrogatory, including all applicable declaration pages, endorsements and amendments.

ANSWER:

See attached. [Allstate policy, only, was attached.]

(CP 1069).

2. REQUEST FOR PRODUCTION: Please produce any other documents affecting insurance coverage (such as any documents denying coverage, extending coverage, or reserving rights), from or on behalf of any person carrying on an insurance business, to any defendant or covered person, or such person's representative.

ANSWER:

None.

(CP 1069-70).

15. INTERROGATORY: Have any of the insurers or indemnitors identified in your response to the preceding interrogatories denied in whole or in part coverage or indemnification for any of the Aaseby's claims, or accepted defense of this action upon a reservation of rights? If so, please state as to each:

(a) Name, address and telephone number of the insurer or indemnitor;
(b) Contract language upon which the insurer or indemnitor bases its denial of coverage, indemnification or reservation of rights; and
(c) Reasons for the insurer's or indemnitor's denial of coverage, indemnification or reservation or rights.

ANSWER:

No.

(CP 1070).

35. INTERROGATORY: Please state the name, address and telephone number of the ***registered owner*** *of the vehicle you were driving at the time of the collision.*

ANSWER:

Vilay Vue – 4230 E. Carlisle – 509-475-3384

(CP 1071).

The above answers and responses to the Aasebys' discovery were certified as true under '*penalty of perjury*' and under CR 26(g) (CP 204, lines 2-4 and 17-23; and CP 982). The above answers and responses provided to the Aasebys were actually *not* true. They were false and inaccurate. They were never amended, supplemented or changed by Miller. The driver, William Vue, was insured under his parents' Farmers policy. This policy was not produced during discovery or disclosed as required under CR 26(b)(2). No document affecting (denying, etc.,) coverage of the Aasebys' claim under the Vues' Farmers policy was produced or disclosed, as well, during discovery. The actual parents (Pai and Cheu Vue) of William Vue were not disclosed by Miller.

Over the course of many years and numerous hearings conducted into 2011, it would slowly be revealed that Miller had had absolutely no contact with his clients, the Vue family. If Miller would have bothered to meet the Vues, he would have learned that the Vue family members were accessible as all lived together in the same house in Spokane (CP 25, ¶4).

Re-opening the Litigation – No Inquiry

After tender of the disclosed Allstate policy limit for William Vue and his parents, Vilay and Agnes, the Aasebys' personal injury case against the Vues was dismissed on June 23, 2004 (CP 12). The case would be re-opened on Motion by the Aasebys, one year later, on July 1, 2005 (CP 19-21). A motion was filed by the Aasebys for sanctions on December 2, 2005 (CP 1041-1061). Following a hearing on December 16, 2005, Judge Austin stated that he "… agrees with Plaintiffs. Sanctions are appropriate, …" (CP 34). The trial court requested 'findings and order for signature', see Memorandum Decision, pg. 6, filed February 21, 2006 (CP 37). In response to findings requested by Judge Austin, in 2006, the following testimony by the Vues was provided to the trial court in 2006-7.

Declaration of ***Vilay*** Vue, May 30, 2006 (CP 1393):

> ...
> *4. I did not participate, in any way, in the lawsuit. Specifically, I did not participate in drafting any pleadings or answering any discovery requests.*
>
> *5. I have never met, spoken with, or had any other contact with attorneys Scott Miller or Crystal Spielman.*

Declaration of ***Agnes*** Vue, June 7, 2006 (CP 1400):

> …
> *5. I did not participate, in any way, in the lawsuit. Specifically, I did not participate in drafting any pleadings or answering any discovery requests.*

6. I have never met, spoken with, or had any other contact with attorneys Scott Miller or Crystal Spielman.

Declaration of ***William*** Vue, June 21, 2007 (CP 1405-21):

...
7. On December 3, 2003, I went to Mr. Miller's office to go over the interrogatory questions. Upon arrival at the office, I met with a male paralegal who went over some of the interrogatory questions with me. I believe that the male paralegal was Justin Whittekiend.

8. When I met with Mr. Whittekiend, I informed him that the caption of the lawsuit was incorrect and that Vilay and Agnes were, in fact, my siblings.
...
10. Also during the meeting, at Mr. Whittekiend's request, I signed the signature page, ***most of the interrogatory questions had not yet been answered, including Interrogatory No. 14*** [quoted above].

11. ***I was never given an opportunity to review the final answers to Plaintiffs' interrogatories. Additionally, I was never given the opportunity to review the Answer to Plaintiffs' Complaint. Furthermore, I never met with Mr. Miller or any other attorney to go over the answers to Interrogatories, Answer, or any other aspect of this case.***

Hearings before the trial court involved Miller and Ms. Spielman.

In Affidavits submitted to the trial court, Spielman testified (CP 1458):

...
5. ... I do not believe that Defendants [Vues] *responses to discovery were verified ... I signed the discovery responses on December 22, 2003.*

6. On November 13, 2003, I was admitted to practice law in the State of Washington. Following my admittance I was

employed as an Associate at the law firm of Miller, Devlin, McLean & Weaver, P.S.

7. ... Following their review the written discovery requests were sent to Defendants with instructions to those questions ***not stamped with "Attorney will answer."*** *Unfortunately I did not meet with Defendants to discuss their responses to the written discovery or assist them in answering the questions. My only involvement in this case consisted of reviewing the discovery responses prepared by Mr. Miller or Ms. Keller. Therefore, when I verified the responses to the discovery requests,* ***I relied upon Mr. Miller that the discovery requests had been thoroughly researched and all responsive documents identified****. ..., and then gave them back to Mr. Miller for his final approval. ... On December 22, 2003, I signed the written discovery requests* ***at the direction of Mr. Miller****.*[7]

(CP 1458).

8. ... I completely relied upon Mr. Miller and Ms. Keller that the discovery responses had been fully investigated and appropriately answered.

(CP 1459).

---

7 Miller's opening brief, pg. 3, footnote 2, placed blame for certifying false and inaccurate responses to discovery on Ms. Spielman. At a reasonableness hearing on September 16, 2011, Judge Tompkins (CP 817, lines 21-5; CP 818, lines 1-3):

> *I am reiterating that the attorney fee award against Mr. Miller, ... As the agent, the individual lawyer being assigned the case and acting on behalf of the client, it matters not to the Court who, in support and under the direction of Mr. Miller, put their hands on the file and assisted in document production, whether discovery or...*
>
> *... but there was an abject failure at the* ***start*** *of the case to enable the matter to be properly litigated based on responsibilities set forth in CR 11 and CR 26.*
>
> (CP 819, lines 24-5; and CP 820, lines 1-2).

Ms. Spielman, during a hearing before Judge Austin on June 23, 2006, stated (CP 695, lines 15-25; CP 696, lines 1-5):

> *... I would like to point out there are some inaccuracies in one of the affidavits that was submitted by Mr. Miller. First of all I don't ever recall having been asked by Mr. Miller to work with a client that answered these interrogatories. I have reviewed my calendar and I was never scheduled to have an appointment with this individual* [William Vue].
>
> *... Ms. Keller reviewed the interrogatories after Mr. Whittekiend had met with the client. And I had looked at them after they had already been typed up – and in presumably final form by the paralegal for Mr. Miller.*
>
> *So those are some of the inaccuracies. I gave them back to Mr. Miller because it was his case. He was lead counsel.*

Ms. Spielman stated, further (CP 696, line 25; CP 697, lines 1-8):

> *... At that point I was in practice roughly a month when I had signed those and I was given them at the direction of lead counsel. I had submitted – and gave everything back to lead counsel after I reviewed it because I had no familiarity with the case. I really don't know what I could have otherwise done. Because if I would have refused to sign them at the direction of the managing partner* [Miller] ***I'd probably be issued my walking papers***.

The above testimony before the trial court revealed a complete lack of inquiry by the Vues' counsel, Miller. The lack of inquiry occurred during the entire course of the litigation against the Vues. It increased the costs and time of litigation to the Aasebys, especially by Miller *not*

meeting with or making changes to the discovery as was expected by his client, William Vue, when meeting with Miller's paralegal.

Attorney James King did not see a need for litigation (CP 2025):

> ...
> *12. From my review of the pleadings in this matter, the failure to disclose by the defendant William Vue and his counsel resulted in* ***eight years of litigation all of which could have been avoided*** *if the conduct by the defendant William Vue had not occurred and had his counsel made the kind of reasonable inquiry into the facts and/or timely supplemented inaccurate responses to discovery with accurate responses under the rules.*

In 2004 a single policy, only, and issued by Allstate for the Vues, was disclosed by Miller. See above certified answers to interrogatories, namely, no. 14 and 15 (CP 980-1). This same information was provided, again, by Miller in a release and a dismissal prepared by Miller and for Aasebys to sign. "*The dismissal of the case was based on a release agreement that did not accurately identify the parties, …*" (CP 839, lines 12-13). "*… there was an* ***abject failure*** *at the* ***start*** ***of the case*** *to enable the matter to be properly litigated based on responsibilities set forth in* ***CR 11*** *and* ***CR 26.***" (CP 840-41).

When signed by the Aasebys, the release (Settlement Agreement and Release of All Liability) drafted by Miller was modified by the Aasebys to exclude releasing their UIM claim with Grange Insurance Co.,

hereafter 'Grange' (CP 1073). It was also modified to reflect a waiver by Grange of their PIP coverage limits of $10,000 (CP 1073).

During the Aasebys' UIM claim, counsel for Grange, Mr. John Riseborough, advised William Vue may have his own policy and Mr. Riseborough wanted to give Mr. Delay '*a head's up*' as to the amount of offset for this potential policy (CP 1483). Based on the certified information provided by Miller under penalty of perjury, and only after he had '*thoroughly researched and identified every document*', as represented in answer to interrogatory no. 1, above, Mr. Riseborough was informed on October 19, 2004, by Aasebys' counsel, Mr. Delay, that '*My independent investigation verified this* [no policy other than the Allstate policy for the Vues] *as well. ... Additionally, you may contact Allstate or counsel, Scott Miller, and either would be happy to verify this information again for you.*' (CP 1484).

Thereafter, the actual parents of William Vue were called into question, as well. On June 22, 2005, Aasebys' counsel filed an Affidavit (CP 967-992) and a Motion for Order to Show Cause (CP 993-4). They were filed in support of an Order to Show Cause (CP 13). The trial court's Order to Show Cause and the supporting pleadings leading up to the Order were personally served on Miller and William Vue (CP 1020-1 and 1018-9). At the time of the show cause hearing on July 1, 2005, before Judge

Austin, Miller did not produce William's Farmers policy. Miller did not supplement the Vues discovery responses or his Answer with the correct information for the Vue family. At the hearing on July 1, 2005, Judge Austin signed an *Order Granting Plaintiffs' Motion to: Vacate and Set Aside Stipulation and Order of Dismissal with Prejudice* (CP 19-21).

On August 25, 2006, Judge Austin insisted a declaratory judgment action be brought against Farmers (CP 171 and 183, lines 20-25). On September 25, 2006, before the Aasebys had a chance to file, Farmers filed a Declaratory Judgment Action to determine coverage of the Aasebys' claim. The Aasebys, mandatory parties to the action, were *not* named by Farmers. However, the Aasebys moved to intervene in Farmers' declaratory judgment action (CP 1605-6), which motion was granted. An Order Staying Trial in Aasebys' re-opened case and staying all other matters, including motion for sanctions against the defendant, William Vue, and his counsel, Miller, was entered on February 13, 2007 (CP 1728, ¶1) while the issue of coverage under William's Farmers policy was resolved by declaratory judgment action, Superior Court case no. 06204216-1. On appeal, No. 26353-3–III, this Court affirmed the trial court's (Judge Leveque's) denial of coverage under William Vue's policy issued by Farmers (CP 224-9). Our Supreme Court declined review of this Court's unpublished opinion.

Coverage under William Vue's Farmers policy was clearly not decided during the discovery phase of the Aasebys' litigation. Even William Vue did not know the extent of coverage when he inquired of Miller in an email on October 26, 2004, before the Aasebys' case was re-opened (CP 1489):

> *You know what, Farmers insurance contacted me and now I am not sure if I had two insurances or not. If I was under Farmers' policy but the car was under Allstate, does that mean I was under two policies? Also, how does that work, would both insurance companies be just as liable?*

After the case was re-opened, Miller acknowledged on June 23, 2006, before Judge Austin that he had not performed an inquiry into William Vue's Farmers policy:

> *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.*
>
> (CP 687, lines 22-25 and CP 688, lines 1-2).

Consistent with Mr. King's testimony, above, (CP 2025), was trial court Judge Tompkins, who replaced retired Judge Austin. She stated on September 16, 2011:

> *The identity of the Defendants and the relationships are the* ***foundation for but separate from the coverage issue****. It is very difficult at this point to not apply the information we have in hindsight to determine the seriousness of the issue when it was arising back in* ***2004, 2005 and 2006****.*

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), (g) and (e)] *and by the due diligence rule* [CR 11(a)].

(CP 838, lines 3-10).

In his 2006 Memorandum Decision, at pg. 2-3, Judge Austin:

FACTS:

…The alleged misrepresentations by Defendants include the following:

1. *Misrepresenting and certifying Vilay and Agnes Vue are husband and wife and the parents of William Vue in ¶1.3 of Defendants' Answer;*

2. *Misrepresenting and certifying Vilay Vue is the registered owner of the Honda automobile in response to Plaintiff's First Set of Interrogatories, interrogatory No. 35, and in the Answer, ¶3.1; and*

3. *Misrepresenting the only policy in place and effective for the Honda on the day of the accident was the Allstate policy, in response to Plaintiff's First Set of Interrogatories, interrogatory No. 14. Plaintiff alleges the Farmers policy was effective on the day of the collision as a secondary liability policy.*

This Court agrees with Plaintiffs. Sanctions are appropriate*, ...*

(CP 33-4).

Judge Austin continued on pg. 4 of his Memorandum Decision:

The ***Answer*** *and* ***discovery materials*** *admit key facts which Defendants and their* ***counsel****, after "reasonable inquiry," could have and should have known were false. ... The*

> *failure of* ***Mr. Miller*** *... to make reasonable inquiry and discover obvious falsehoods constitutes a violation of CR 11 and CR 26(g), and accordingly, exposes Mr. Miller... to sanctions.* (CP 35).

Years of the Aasebys' time was required to uncover key and basic facts about the Vues. The cause of the *false and inaccurate* statements in Miller's pleadings, release and in the wrongfully certified discovery responses as to key and basic facts was no inquiry at all and flat-out willful misconduct by Miller. It was made worse when Miller did not make the requested changes by his client to the responses to Aasebys' discovery. When Judge Tompkins replaced Judge Austin in 2011, Miller claimed, falsely, that retired trial court Judge Austin had *reversed* his six page Memorandum Decision (CP 32-7) wherein sanctions were appropriate for Miller's violations of CR 11(a) and 26(g) (CP 37). On September 16, 2011, Miller would concede the falsity of his earlier statement and stated: '*... I misled the* [trial] *court to some degree by using the term "reversal". ... Judge Austin did not use that term "reversal".*' (CP 788, lines 11-15).

The record suggests that the insurers, Allstate and Grange, had long since concluded that the value of the Aasebys' personal injury claim was at least in excess of the UIM policy limit ($100,000), the PIP endorsement limits ($10,000) and the amount of the Allstate liability

policy limit of $25,000. See Mr. King's Affidavit, "*From my review of the matter, ... damages arising out of this motor vehicle accident exceeded all available coverage limits ... These coverage limits were tendered by the respective carriers to the Plaintiffs* [Aasebys] *without a need for a trial on either liability or damages.*" (CP 2024-5, ¶11).

What could have been a fairly quick and inexpensive tender of Vilay Vue's Allstate liability policy limit (without litigation) became a costly, protracted and vexatious litigation of nine years. Miller's recalcitrance during the entire proceedings continued even after trial court Judge Austin retired.

The Memorandum Decision which when issued by Judge Austin in February, 2006, did not have the benefit of the information that would be revealed later by Spielman and the Vues, and by new counsel for the Vues, Mr. Force and Mr. McMahon, in 2011 (CP 32-7).[8]

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8 Retired Judge Robert Austin's Memorandum Decision, pg. 1-2, February 21, 2006:

FACTS:

> *The Defendants' motion* [to dismiss Vilay and Agnes Vue] *does not seek dismissal of Defendant William Vue. Defendants' motion is based on Plaintiffs improperly identifying Vilay and Agnes Vue as husband and wife, believing them to be the natural parents of William Vue. As it turns out, Vilay and Agnes Vue are not husband and wife, nor are they the parents of William Vue, but rather the three Defendants are brothers and sisters of the same parents, Cheu and Pai Vue. From depositions of Cheu Vue it also appears he is the registered owner of the Honda automobile at issue, not Vilay Vue as admitted in the Answer* [and was stated by the Vues' answer to interrogatory no. 35]. *As Vilay and Agnes Vue are not the parents of William Vue, and as*

Sanctions for reasonable attorney fees and costs were awarded by the trial court's Judgment (CP 398-400). It was entered on June 23, 2011, and against Miller in the amount of $46,287. At the request of trial court Judge Tompkins, a detailed segregation of attorney fees and costs (266-79) was set forth in advance of entry of Judgment and by Affidavit of Mr. Delay, counsel for the Aasebys (CP 257-279)[9].

The Judgment entered on June 23, 2011, followed reasonableness hearings on May 27 and June 16, 2011 (CP 566-87). Findings of Fact and Conclusions of Law were entered by the trial court on June 16, 2011 (CP 340-73). At that time, sanctions were entered against all defense counsel for their behavior. Miller filed a one sentence Motion for Reconsideration (CP 394).

Despite a lack of candor towards the trial court which was later admitted to by Miller, (CP 788, lines 11-15)[10], the trial court eliminated

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> *neither Vilay nor Agnes are the registered owners of the Honda automobile at issue, ...* (CP 32-3).

9 Sanctions were awarded of $46,287 which was less than the amount of attorney fees actually incurred and itemized in the Affidavit of Michael Delay, filed May 20, 2011 (CP 257-60). Segregated attorney fees and costs incurred by Mr. Delay exceeded $81,270.27. Total fees and costs pertaining to Miller's significant violations of CR 11 and 26 were segregated and limited to $79,050 in fees and $2,220.27 in costs (CP 266-79).

10 Mr. Miller, before Judge Tompkins, on September 16, 2011:

> *..., I want to start out by acknowledging that* ***I misled the Court*** *to some degree by using the term "reversal". ... although in reading the transcript very clearly Judge Austin did not use that term "reversal".*

the costs previously awarded in its Judgment. It amended its Judgment and reduced the reasonable attorney fees awarded to the Aasebys just months before (CP 934, ¶E and F; and 937). The reasonable attorney fees awarded in the original Judgment were reduced to include only the fees incurred through July 1, 2005, or $22,300 (CP 933-4, 937). Paradoxically, the trial court stated on November 22, 2011 that it agreed with its prior Judgment of June 23, 2011 (CP 398-400). The trial court stated that its prior award of attorney fees which included attorney fees incurred by the Aasebys[11] *after* July 1, 2005, could be awardable:

> B.(1). *Because of the* ***significant violations*** *by original defense counsel* [Miller], *even* [attorney] *fees after the July 1, 2005, order* [CP 19-21] *could be awardable*;...(CP 934).

Miller's '*significant violations*' of CR 11 and 26(g) and willful misconduct caused Aasebys to incur attorney fees and costs as was segregated and itemized, in detail, (CP 257-79, 313-24), for the trial court. Mr. Delay's attorney fees and costs were supported by testimony, un-

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11 On pg. 27 of Miller's brief it is represented without citation to any factual support that the attorney fees awarded Aasebys included time Mr. Delay spent on a declaratory judgment action. Not only did Miller's representation lack any citation to the record, but Mr. Delay's Affidavit, filed May 20, 2011 (CP 259) stated, unequivocally:

> *12. The attached billing statements (2)* ***exclude*** *my time spent with regards to the declaratory judgment action, commenced in 2006 by Farmers, the Motion for Summary Judgment Dismissal by Vilay and Agnes Vue, and complete dismissal of Vilay and Agnes Vue. ...*

Also, see Affidavit of James B. King (CP 2025).

refuted, of James B. King (CP 2023-27). Absent Miller's misconduct, the trial court stated on September 16, 2011: '*Frankly, it shouldn't have been necessary to engage in a declaratory action had information been transmitted as required by the* ***discovery rules and by the due diligence rule.***' (CP 838).

Conclusions of Law B and C

On October 14, 2011, the trial court's Conclusion of Law B stated that Plaintiffs' (Aasebys') counsel was in a position to investigate further the initial information about Farmers (CP 825). Yet, the Aasebys were informed under oath about Allstate's insurance, only, for the Vues. It was certified as true by Miller. Further, it was certified as true by Miller's pleadings that William Vue's parents were Vilay and Agnes, Allstate insureds (CP 8, ¶1.3; and CP 1069, answer to interrogatory, no. 14). These same parents were alleged by the Aasebys in their Verified Complaint (CP 3-4). When informed of the true identity of William's parents, Pai and Cheu Vue, *after* the case was re-opened, their depositions were taken to confirm the same as Miller did not amend his Answer or change his certified discovery responses (CP 1078-84; and 905-15). As investigated under CR 11 and 26(g), Farmers did not exist for any of the Vue family

members. Additionally, Pai and Cheu Vue were *not* the parents of William Vue as certified as true by Miller's pleadings and discovery responses.

The trial court stated in Conclusion of Law C that Aasebys' counsel failed to advise that Judge Austin declined to enter proffered findings and conclusions at the June 23, 2006 hearing (CP 826). The new trial court judge, Judge Tompkins, was informed at the very beginning of the Aasebys' motion, attaching the proposed findings, all filed on March 4, 2011. The motion stated at the very beginning: "Retired Judge Austin's opinion (pg. 6) requested findings for which Judgment *may then be entered*." (CP 95-6; and CP 37). Additionally, at the conclusion of Aasebys' same motion for Judgment for sanctions, it was stated: "After entry of Findings of Fact and Conclusions of Law, attached hereto, …" (CP 107). The trial court's conclusions of Law B and C do not reflect the record. They should be revised, as requested, before, by the Aasebys (CP 851-9).

Supersedeas Proceeding – No Inquiry

An *Amended Notice of Cross-Appeal*, (A-2 – A-3), was filed by the Aasebys. It was filed in response to Miller's signed Notice of Hearing (CP 2327) and Motion for Sanctions under CR 11 (CP 2316), filed on March 29, 2012. Without any legal or factual basis, Miller asserted Aasebys'

counsel violated CR 11 when Aasebys filed a Motion for Posting Supersedeas Bond pursuant to RAP 8.1(b) and (c) (CP 2306-12). Miller filed an eight page memorandum (CP 2319-26) claiming Aasebys' counsel had violated CR 11 by filing such a *staggeringly dishonest* motion. As legal authority in support of Miller's motion for sanctions he cited six cases (CP 2319-26). The holdings of each of the cases cited by Miller and the plain language of the governing rule, RAP 8.1(b) and (c), were misrepresented by Miller (CP 2331-37).

Without advance notice to the trial court or to Aasebys, on April 3, 2012, Miller paid the Amended Judgment, in full, by cashier's check made payable to the Clerk of the Court. The trial court issued an Order on April 3, 2012, and denied sanctions and deferred on the issue of reasonable attorney fees to the Court of Appeals (CP 2340). CR 11 sanctions were appropriate as requested by the Aasebys' cross-motion (CP 2331-39) in having to respond to sanctions sought by Miller's memorandum and his declaration seeking fees in the amount of $8,785 (CP 2318).

IV. **ARGUMENT**

A. The trial court erred in reducing the reasonable attorney fees and costs awarded to the Aasebys from $46,285.27 to $22,300.

This argument will address Aasebys' Assignments of Error 1 and 2, and is in support of Aasebys' cross-appeal for the attorney's fees and

costs awarded by the trial court in its original Judgment in the amount of $46,285.27 (CP 398-400).

On November 22, 2011, the trial court erred when it amended its original Judgment, (CP 398-9), and entered an Amended Judgment for reasonable attorney fees, only, of $22,300 (CP 936-8). It reduced its original Judgment amount of $46,285.27 by eliminating the costs and any attorney fees that were previously awarded to the Aasebys for after July 1, 2005. The trial court's amendment to its original judgment constituted an abuse of discretion. Litigation was completely avoidable or unnecessary. This was established by the testimony from Mr. King, experienced defense counsel. It was acknowledged by both trial court Judges, Austin and Tompkins. Numerous misrepresentations, discovery abuses and attempts to mislead the trial court, when combined, caused Aasebys' litigation against the Vues to extend over the course of nine years. Miller's misconduct was egregious and willful. Misconduct and a lack of candor by Miller constituted significant violations of CR 11(a) and 26(e) and (g). The trial court's opinion of the misconduct and lack of candor was '***significant violations***' *by Miller even* <u>*after*</u> *July 1, 2005* (CP 934, ¶B. (1)).

A total lack of inquiry by Miller with the Vues, his clients, that all resided in the same home. Not any inquiry at all by Miller during the

discovery phase. Not a single time slip was produced by Miller revealing time spent with the Vues. To obtain accurate and complete responses to Aasebys' discovery, it would require due diligence. Due diligence was what was represented, falsely, to the Aasebys by the Vues' certified answer to the Aasebys very first interrogatory, *Interrogatory No. 1*. Likewise, in advance of filing signed pleadings with the trial court over the years, Miller did not conduct a reasonable inquiry and actually filed in the trial court false and inaccurate information throughout the entire proceeding.

When a hearing took place on July 1, 2005, pursuant to an Order To Show Cause (CP 13), it required Miller appear in person and produce William Vue's Farmers policy. Rather than produce the policy, Miller attempted to withdraw without proper notice, in violation of CR 71(c)(1) (CP 14). Miller appeared at the show cause hearing and refused to produce the policy for William Vue.[12] This amounts to intentional or willful

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12 On pg. 27 of his opening brief, Miller blamed Aasebys' counsel or the result of '*failure to mitigate*'. What Miller did not inform the Court of was Aasebys' counsel's letters (3) to Miller dated June 10, June 17 and June 22, 2005. They were written in an effort to obtain complete and accurate responses to the information originally sought during discovery and to avoid further litigation. On June 10, 2005, Mr. Delay (CP 984):

> *We are advised that William Vue has Farmers insurance for the collision on October 20, 2000 involving William Vue and Wayne & Judy Aaseby. This was not disclosed by Mr. Vue. Would you please open a claim with Mr. Vue's insurer, Farmers, and provide a copy of that documentation previously requested from Mr. Vue.*

misconduct by Miller.[13]

William Vue would meet with Miller's paralegal to make changes to the draft discovery responses. The changes by his client were ignored by Miller. This conduct by Miller was reprehensible.

Patrick McMahon, substituted counsel for the Vues, testified (CP 697-8):

> *First and foremost the Court needs to understand that Mr. Vue, my client,* ***never met with any of the attorneys*** *that were representing him at the time that he was involved in the accident...*
>
> *Mr. Vue* ***corrected the draft interrogatories****, corrected the caption, as Mr. Whittenkind has declared under penalty of perjury in his declaration, by saying no, that is my brother and that is my sister, I'm speaking of Vilay and Agnes that was penned in on the rough draft answers. The Answer to the complaint was submitted later, not by William, but that correction had not been made, and – the inadvertent mistake they were husband and wife* ***never got changed****, even though my client had informed the attorneys that that was incorrect. The draft answers he got also have attached in there in red ink, attorneys will answer. That's*

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13 Also, on June 22, 2005, Mr. Delay (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 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...*

> *significant, because the key interrogatory question is number 14, whether there is any other policy of insurance for indemnification for the accident. Attorney will answer.* ***Mr. Vue never answered that question****. Never provided an answer to that question.* (CP 698-9).

The trial court recognized a complete lack of an inquiry by Miller and, further, a total failure to supplement under CR 26(e)(2) when it stated:

> *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 is well grounded in fact. In regards to the Defendants' responses to Plaintiffs' Interrogatories, ...*
> *The failure of* ***Mr. Miller*** *... to make reasonable inquiry and discover obvious falsehoods constitutes a violation of CR 11 and CR 26(g), and accordingly, exposes Mr. Miller... to sanctions.*
>
> (CP 35).

Our civil rules require due diligence, reasonable inquiry and candor towards the tribunal. They were cited by Judge Austin and Judge Tompkins as authority for sanctions, including reasonable attorney fees and costs, against Miller. CR 11(a) and (26)(g) follow and state:

> ***CR 11 SIGNING AND DRAFTING PLEADINGS, MOTIONS, AND LEGAL MEMORANDA; SANCTIONS***
>
> ***(a)*** *Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and*

signed by at least one attorney of record in the attorney's individual name, ... The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an ***inquiry reasonable under the circumstances****:*

(1) it is well grounded in fact;

(2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

...

CR 26 GENERAL PROVISIONS GOVERNING DISCOVERY

(d) Signing of Discovery Requests, Responses, and Objections. *Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, ... The signature of an attorney or party constitutes a certification that he has read the request, response, or objection and that to the best of his knowledge, information, and belief formed after a* ***reasonable inquiry*** *it is:*

(1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

> *(2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needles increase in the cost of litigation; and*
>
> *(3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. ...*

Judge Tompkins on October 14, 2011 (CP 825):

> A. *Original defense counsel's lack of diligence in the Answer and discovery responses and withdrawal from the case before properly identifying parties defendant sufficiently warrants sanctions of reasonable attorney fees*[14] *in an amount of $22,550.00 through the July 1, 2005 hearing.*[15]

The trial court recognized that this was a clear liability motor vehicle accident. Fault was not at issue. The defendant driver, William Vue, had admitted that both vehicles were totaled during impact and had acknowledged the fault of the defendant by paying for the property damage caused the Aasebys' car (CP 4, ¶3.6; and CP 8, ¶ 3.6). In the

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14 In *Mayer v. Sto Industries, Inc., id.*, 685, 689, a CR 26(g) signature constitutes a certification that the attorney read the request, response, ..., it was formed after conducting a reasonable inquiry..., and the imposition of sanctions is mandatory for a violation. CR 26(g):

> *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, which may include an order to pay the amount of reasonable expenses incurred because of the violation, including a reasonable attorney fee.*

15 In his opening brief, pg. 32, Miller quoted the Conclusions of Law from Judge Tompkins, however, he (deliberately) omitted paragraph A, quoted above.

words of Mr. King, the very first layer of coverage, Allstate's liability policy limit of $25,000, could and should have been tendered without any need for litigation (CP 2024-25, ¶11). Also, see Mr. Delay's Affidavit (if after a reasonable inquiry by Miller, no need for litigation to recover the first layer of coverage provided by Allstate's liability policy for Vilay Vue) (CP 260, ¶14).

The trial court's original Judgment for costs and reasonable attorney fees of $46,285.27 should be reinstated. The trial court clearly abused its discretion when it entered an Amended Judgment eliminating costs and reducing fees. Aasebys' cross-appeal should be granted based on Miller's significant violations of CR 11(a), 26(e)(2) and (g), and CR 71(c)(1) and (4). Miller's appeal should be denied.

B. The trial court erred in striking the Law Office of J. Scott Miller, PLLC, from the Judgment.

This argument will address Aasebys' Assignment of Error 3. It pertains to the trial court's error in striking Miller's law firm, Law Office of J. Scott Miller, PLLC, from its original Judgment entered on June 23, 2011 (CP 398-400).

The law firm name for Miller changed after dissolution of his original firm (Miller, Devlin, et. al.) in 2008. Miller's law firm was re-named: 'Law Offices of J. Scott Miller, PLLC'. It operated with a sole

member and Manager, Miller (CP 389-92, 2160). It operated from the same address and offices as before and during these proceedings with Miller's same staff or paralegal as before (CP 191).

Miller's paralegal, Ms. Lisa Mittleider, fka, Lisa Keller, filed a declaration on March 17, 2011, and on behalf of Miller's firms. Ms. Mittleider's declaration stated she has been the paralegal for Miller under both firm names. (CP 191, ¶1). She explains procedures for answering interrogatories for 'our clients' (CP 191, ¶2). Mittleider did not distinguish between clients of Miller Devlin, et. al., and clients of Law Office of J. Scott Miller, PLLC. Miller himself did not distinguish between his former firm name and successor firm name, when on March 11, 2011, he filed his declaration and pleadings (CP 145-155) on his current firm stationary and stated:

> *... without affording an opportunity for* ***them (us)*** *to provide background information.*
>
> (CP 149, line 13).

Throughout the nine year litigation, Miller filed pleadings on his firm letterhead. Miller has signed pleadings with current law firm name, 'LAW OFFICE OF J. SCOTT MILLER, PLLC', typed above and below the signature line (CP 145, 152, 155, 394, *et. al.*). In March, 2011, Miller retained legal representation by Peter A. Witherspoon (CP 217). After

Judgment was entered on June 23, 2011, against Miller, Witherspoon filed a Notice of Withdrawal and Substitution of Counsel on June 28, 2011 (CP 404-5). Miller then proclaimed to be representing himself 'pro se' (CP 545). However, Miller continued to file pleadings on his firm letterhead and under his typed firm name. Miller has signed pleadings in this manner, on behalf of his current law firm, as recently as June 29, 2012, when he filed an objection to Respondents/Cross-Appellants Second Motion for Extension of Time for filing their brief. Appendix A-4 – A-6.

In *Madden v. Foley,* 83 Wn. App. 385, 392-3 (1996):

> *CR 11 authorizes a court to impose sanctions against "the person who signed" a pleading, motion or other legal memorandum. We do not construe that phrase as prohibiting courts from imposing sanctions against the signer's law firm where, as here, the individual attorney who signed the pleading did so as an agent of the law firm.*
> ...
>
> *The law firm's name was typed on the signature line of the complaint and above Cohen's own signature. Cohen signed the complaint on behalf of the law firm. Because Cohen signed the complaint in the name of the law firm, we will treat the complaint as having been signed by the law firm as well for purposes of imposing sanctions under CR 11.*

Also, see *Jones v. Halvorson-Berg*, 69 Wn.App. 117, 130 (1993), the Court of Appeals applied agency principles in determining who signed a pleading in violation of CR 11. Here, similar to *Madden* and *Jones,* Miller signed pleadings as an agent of his firm(s) throughout the entire

nine years of litigation. 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). It is clear from *Madden* and *Jones* that the trial court struck Miller's law firm, Law Office of J. Scott Miller, PLLC, in error. Miller's firm, as was Miller, should be listed on the Judgment as a 'Judgment Debtor' (CP 398).

C. The trial court abused its discretion and erred in denying Aasebys' cross-motion for sanctions where Miller paid the Amended Judgment in full, the paying of which was the very basis alleged by Miller for CR 11 sanctions against Aasebys and counsel.

This argument will address Aasebys' Assignment of Error 4. It pertains to Aasebys' cross-appeal of the denial of sanctions against Miller when he misrepresented the holdings of case law and sought sanctions in the amount of $8,785 against Aasebys' counsel, and then, on the morning of and just before the supersedeas and sanctions hearing, Miller paid the Amended Judgment, in full.

On June 16, 2011, Judge Tompkins (CP 574, lines 9-12):

> *Unfortunately, this case has been **plagued with baseless filings and abuses to the judicial system**. The time and effort that has been invested by Counsel, by Counsels' clients, certainly by the Court in getting to this place has been extreme.*

The very purpose embodied in our Civil Rules, including CR 11, 26(b)(2), (e) and (g), and CR 71(c)(1) and (4), is found in CR 1:

> *These rules govern the procedure in the superior court in all suits of a civil nature ... They shall be construed and administered to secure the* ***just, speedy, and inexpensive determination of every action.***

When the Aasebys filed their Motion for Supersedeas Bond under RAP 8.1(b) and (c)(1), (CP 2306-15), Miller filed in response a Notice of Hearing, a Declaration and an eight page memorandum for CR 11 sanctions (CP 2316-27). Miller claimed Aasebys and their counsel owed Miller $8,785 at $350 per hour under CR 11 (CP 2317-18). According to Miller's signed memorandum of authorities in support of terms under CR 11: "*Washington law is replete with cases that show the Plaintiffs'* [Aasebys'] *position in this* [RAP 8.1] *motion is frivolous and based on blatant fabrication and disregard for the law. The following cases are only a few of the examples how* ***staggeringly dishonest*** *the Plaintiff's argument is."* (CP 2321, lines 12-15).

Miller claimed: "*The only purpose of Supersedeas is to protect the Defendant, not the Plaintiff*" (CP 2320). This was false. Just the opposite, a supersedeas bond is to protect a Judgment Creditor/Respondents (Aasebys):

> *It is our view that the bond meets the statutory requirements. It was intended to protect the respondents from payment of the costs of an unsuccessful appeal and is sufficient for that purpose.*
>
> *Sims' Estate v. Lindgren,* 39 Wn.2d 288, 296 (1951).
>
> (CP 2332).

Miller's memorandum proceeded to cite and misrepresent to the trial court the holdings in six cases, including the above *Sims' Estate* case (CP 2321).

A second case cited by Miller and relied on by Miller for sanctions, *Lampson Universal Rigging v. WPPSS*, 105 Wn.2d 376, 379 (1986), involved an appeal by a municipal corporation and whether this type of an appellant is exempt from the supersedeas bond procedure. Miller was ***not*** a municipal corporation, <u>*unlike*</u> *WPPSS.* Miller did not inform the trial court of our Supreme Court affirming the trial court's decision to not require a supersedeas bond of a municipal corporation due to the fact that WPPS was statutorily exempt under RCW 4.92.080. *Id.* Our Supreme Court stated in *Lampson, id.*, 379:

> *RCW 4.92.080 provides that "[n]o bond shall be required of the state ... for any purpose in any case in any of the courts of the state of Washington ..." Furthermore, CR 65(c) provides that "[p]ursuant to RCW 4.92.080 no security shall be required of the State of Washington, municipal corporations or political subdivisions of the State of Washington."*

Miller, *if* deemed a municipal corporation, could assert a statutory exemption applied to preclude posting a cash or supersedeas bond. When Miller cited *Lampson* as purported authority for Miller's claim that Aasebys' argument was '*staggerinly dishonest*', the law of the *Lampson* case had absolutely nothing to do with this case involving sanctions against an *individual*, such as Miller.

On page 378 of *Lampson, id.,* in reference to *Lampson's* lack of attempted enforcement of the judgment entered against *WPPSS*, Miller omitted informing this Court that our Supreme Court stated: '*no enforcement attempt was required*' to invoke the supersedeas procedure on appeal by a respondent. Miller had claimed enforcement was required.

A third case cited by and relied on by Miller for sanctions was *Ryan v. Plath*, 18 Wn.2d 839, 855-56 (1943). It involved a constructive trust for real and personal property. Our Supreme Court affirmed the trial court's decision requiring of the appellant a ***cost bond on appeal of $200***, and, in addition, required of the appellant a '***preliminary deposit' of $21,635.80 on appeal***. *Id.* Miller misinformed the trial court of our Supreme Court's holding in *Ryan v. Plath* which affirmed the trial court's cost bond requirement on appeal and a preliminary deposit requirement of the appellant, for the appeal. *Id.* Miller did not provide a deposit or bond when appealing from the Amended Judgment entered against him for

sanctions. As a result, a cash or supersedeas bond was sought to protect Aasebys and to pay the legal obligation of Miller if unsuccessful on appeal.

Miller's misrepresentations did not end. A fourth case was cited and relied on by Miller (CP 2323). In *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 42-3 (1991), Miller cited this case in support of sanctions against the Aasebys. The Judgment Creditor in this case was the State and it executed on the property of the Judgment Debtor, without seeking a supersedeas bond from the appellant (judgment debtor) during the appeal. *Id.* When cited by Miller, (CP 2323-4), he did not mention that in this case, our Supreme Court stated: '*The relief afforded by RAP 8.1 is available [to respondent, plaintiffs, herein] as a matter of right. 86 Wn.2d 1176 (1976).*' *Id.*, at 44.

The fifth case cited and relied on in Miller's memorandum was *Malo v. Anderson,* 76 Wn.2d 1, 5 (1969). It dealt with the lack of filing of a supersedeas bond after entry of judgment did not affect the Judgment Creditor's right to improve real property at the risk of losing the real property and investment in the improvements. The judgment entered against Miller was a money judgment for sanctions. *Malo* dealt with a *non-monetary* judgment of real property and the risk of losing improvements to the real property performed by the Judgment Creditor.

Id. Malo is not a case involving a money judgment and is distinguishable on other grounds, as well, dealing with improvements to real property during an appeal.

A final case cited and relied on by Miller, *Murphree v. Rawlings*, 3 Wn.App. 880, 882 (1970), involved a money judgment entered against Rawlings from which Rawlings appealed. The Court of Appeals, at 882:

> *In the present case, though the appeal was properly perfected, no supersedeas bond was filed. Consequently, the respondent proceeded to execute on the judgment. After the sheriff had levied on certain of his property, the appellant paid into court the exact amount of the judgment* ***without*** *conditioning its disbursement but expressly signifying his intention to pursue the appeal. The respondent drew this sum of money out. He claims the judgment having been satisfied, this appeal is now moot. We disagree.*

Miller did not 'pay into court the exact amount of the judgment' (nor did the Plaintiffs/respondent draw this sum of money deposited out of the court). Unlike *Murphree v. Rawlings*, Miller opposed any payment of funds into court to protect the Aasebys should Miller's appeal be unsuccessful. *Murphree* applies had Miller paid into the trial court the amount of the Judgment entered against him for sanctions and had it been withdrawn by the Aasebys and thereafter claiming Miller's appeal was now moot.

The cases cited and relied on by Miller in opposition to Aasebys'

motion for supersedeas bond did not involve any cases that imposed monetary sanctions against counsel. This was significant as Miller has had two different trial court Judges, Judge Robert Austin and Judge Tompkins, find that sanctions under CR 11(a) and 26(g) were appropriate. Miller concluded his memorandum (CP 2325) by citing cases wherein sanctions under CR 11 were imposed for a failure to conduct a reasonable inquiry. Ironically, Miller cited *Madden v. Foley, id.*, the same case cited above by the Aasebys and cited in support of Miller's law firm's responsibility.

At the beginning of the hearing on April 3, 2012, without notice to the trial court or to the Aasebys and before oral argument on Aasebys' motion for cash or supersedeas bond, Miller signed and filed: (1) Notice of Payment of Judgment (in Full) (CP 2347); and (2) Satisfaction of Amended Judgment (including Instructions to Clerk) (CP 2342-3). The trial court then entered an Order Denying Supersedeas and Sanctions on April 3, 2012, which stated (CP 2340):

II. FINDING

> After reviewing the case record to date, and the basis for the motion, the court finds that*: there is not good cause to grant the sanctions and supersedeas Motions.* ***Miller tendered at hearing a cashier's check for the*** **[Amended]** ***Judgment amount plus interest to date.*** *Plaintiffs* [Aasebys] *have not sought to enforce the Judgment to date.*

III. ORDER

> 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.***

Miller could have tendered a cash or supersedeas bond in the amount provided under RAP 8.1(b)(1) and/or (c)(1). Miller did not. Instead, Miller made payment of the Amended Judgment, in Full, including post judgment interest (CP 2342-7). When Miller paid the amount of the Amended Judgment in full, he filed instructions to the clerk. No conditions were contained in Miller's instructions to the clerk to preserve his appeal. At time of payment, Miller was not required by the trial court to make any payment. Payment by Miller was voluntary. It was without any Order of the trial court. Payment was made by Miller without any condition or reservation by Miller preserving his appeal (CP 2342-3; 2347)[16]. Voluntary payment, in full, by Miller should have included an appropriate reservation attached to his payment that would preserve

---

16 Miller, unlike in *Murphree v. Rawlings*, *id.*, did not expressly preserve his appeal. See Satisfaction of Amended Judgment, prepared by and filed by Miller, pg. 2 (CP 2343):

> **INSTRUCTIONS TO CLERK**
>
> *The clerk is hereby instructed as follows:*
>
> 1. *To accept and deposit the cashier's check and hold the funds pending further order of the court; and*
> 2. *Make all necessary and appropriate entries to indicate the Amended Judgment has been fully satisfied.*

Miller's right of appeal. *State v. Smithrock Quarry*, 49 Wn.2d 623, 625 (1956): "*Any appropriate reservation attached to the payment that would accomplish this would preserve the right of appeal.*"

V. CONCLUSION

Miller's total lack of inquiry and a total lack of candor towards the trial court was, according to Miller, the fault of his clients, the Vues, or the Aasebys and Mr. Delay. All, other than Miller, were responsible for the inaccurate and false information provided by Miller. Both trial court judges disagreed. Both found Miller to have committed significant violations of the legal obligations owed and ignored by Miller under CR 11 and 26. The trial court's original Judgment for sanctions for reasonable attorney fees and costs under CR 11(a) and CR 26(g) for Miller's gross misconduct over the entire course of the litigation should be reinstated by this Court. The attorney fees and costs awarded to the Aasebys by the trial court were in the original amount of $46,285.27 (CP 398-400). Indeed, far more time and fees were spent than actually awarded due to segregation of fees by Aasebys' counsel to the total exclusion of time spent during a declaratory judgment action with Farmers and the like (CP 257-79).

J. Scott Miller, PLLC, employed Miller for the past five years. It was the successor law firm whose offices, attorney, staff, stationary, etc.,

were used after the original Miller law firm ceased. J. Scott Miller, PLLC, was used to prepare, sign and filed baseless and misleading pleadings in the trial court (CP 574, lines 9-12). Judgment should include the law firms from which Miller operates. Otherwise, a shell game would be used by Miller's dissolved and existing law firms to avoid responsibility.

Withdrawal by Miller required an Order from the trial court. No such Order was ever obtained by Miller or his law firms. The latest motion filed by Miller seeking sanctions against Aasebys and counsel was baseless. It involved Miller misrepresenting to the trial court the holdings of the cases cited in Miller's signed memorandum and declaration in support of a motion for fees of $8,785 under CR 11 (CP 2318).

VI. AASEBYS' MOTION FOR AWARD OF REASONABLE ATTORNEY'S FEES ON APPEAL

Aasebys move the Court for an award of reasonable attorney's fees on appeal under CR 11(a) and 26(g). Also, Miller's appeal is frivolous and without any legal or factual basis.

An appellate court may order a party who files a frivolous appeal to pay the reasonable attorney's fees and other damages to any other party harmed by the action. RAP 18.9(a). Independent of RAP 18.9(a) are CR 11(a) and CR 26(g). They each state if there is a violation the court may/shall (CR 11(a) states may and CR 26(g) states shall): "*impose upon*

the person who made the certification, ... an appropriate sanction, which may include an order to pay the amount of reasonable expenses incurred because of the violation, including a reasonable attorney fee."

This Court has previously outlined a number of factors to consider in determining whether an appeal is frivolous. The considerations are:

> (1) A civil appellant has a right to appeal under RAP 2.2;
> (2) All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant;
> (3) The record should be considered as a whole;
> (4) An appeal that is affirmed simply because the arguments are rejected is not frivolous; [and]
> (5) An appeal is frivolous if there are no debatable issues upon which reasonable minds differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Schmerer v. Darcy, 80 Wn.App. 499, 510-511 (Div. III, 1996) (quoting *Streater v. White,* 26 Wn.App. 430 (1980)).

As such, the Aasebys respectfully request this court grant its request for reasonable attorney's fees against Miller. Leave of Court is requested following the Court's decision to file an Affidavit supporting attorney's fees. RAP 18.1(d).

DATED this 6th day of July, 2012.

MICHAEL J. DELAY, P.S.

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

VII. APPENDIX

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

JAMES W. and JUDY D. AASEBY, husband and wife, Plaintiffs, v. WILLIAM VUE, a single person; and VILAY and AGNES VUE, husband and wife, Defendants.	NO. 03206739-8 AMENDED NOTICE OF CROSS-APPEAL TO THE COURT OF APPEALS, DIVISION III COURT OF APPEALS CASE NO. 300935

Plaintiffs James ('Wayne') and Judy Aaseby by and through their attorney of record, Michael J. Delay of Michael J. Delay, P.S., originally sought cross-review by the Court of Appeals, Division III of the State of Washington, by Notice of Cross-Appeal filed on February 27, 2012. Plaintiffs amend their Notice, herein, to include cross-review of the Order Denying Supersedeas and Sanctions, entered on April 3, 2012. A Copy of the trial court's Order Denying Supersedeas and Sanctions is attached.

DATED this 11th day of April, 2012.

MICHAEL J. DELAY, P.S.

Michael J. Delay, WSBA #18952
Attorney for Plaintiffs

Jh\Clients\41103\Notice of Amended Cross-Appeal.doc

MICHAEL J. DELAY, P.S.
PEYTON BLDG.
10 NORTH POST, #301
SPOKANE, WASHINGTON 99201
(509) 624-3300

A-2

FILED

APR - 3 2012

THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
COUNTY OF SPOKANE

Azeby

Plaintiff (s)

VS.

Vue

Defendant(s)

CASE NO. 03206739-8

ORDER DENYING SUPERSEDEAS AND SANCTIONS

I. BASIS

Plaintiffs moved the court for: an order requiring Miller ~~and ADAM to post a supersedeas bond~~ to post a supersedeas bond or cash bond. Miller moved the Court for sanctions against Plaintiffs. Plaintiffs moved for sanctions against Miller. sanctions and supersedeas

II. FINDING

After reviewing the case record to date, and the basis for the motion, the court finds that: there is not good cause to grant ~~for~~ ~~not~~ ~~has~~. Miller tendered at hearing a cashiers check for the judgment amount plus interest to date. Plaintiffs have not sought to enforce the judgment to date

III. ORDER

IT IS ORDERED that: The Court recognizes the satisfaction of Judgment, denies all other motions, and ~~refers~~ defers the issue of attorney fees pending further decision by the court of appeals

Dated: 4/3/2012

HONORABLE LINDA G. TOMPKINS

~~Presented by~~:

Michael A. Adley
WSBA 18692

J. Scott
WSBA 14620

ORDER

CI-03.0300-7/780WP

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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 OBJECTION TO RESPONDENT'S SECOND MOTION FOR EXTENSION OF TIME TO FILE RESPONDENT'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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COMES NOW the Appellant, J. Scott Miller, and objects to Respondents'/Cross Appellants' Second Motion for Extension of Time to File Opening Brief on the following basis:

1. The voluminous documents identified by Respondent as Clerk's Papers are irrelevant to the original appeal and cross appeal.

2. Respondents have literally identified as Clerk's Papers each and every document filed in the Superior Court file which is unnecessary and unduly burdensome.

3. The judgment in this matter has been paid and further delay of this appeal is harmful, damaging and prejudicial to the Appellant.

4. It is respectfully requested that the Court deny Respondent/Cross Appellants' Second Motion for Extension of Time to File Opening Brief.

LAW OFFICE OF J. SCOTT MILLER, PLLC

By: _____
J. SCOTT MILLER, WSBA #14620
Attorneys for Appellant/Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2012, a true and correct copy of the foregoing was placed in an envelope, sealed and sent via U.S. Mail, postage prepaid, at Spokane, Washington, addressed to the following:

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

Lisa S. Mittleider, Paralegal

|X:\80311001.062\2012 APPEAL\OBJECTION TO SECOND EXTENSION.WPD

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2012, a true and correct copy of the foregoing, Respondents/Cross-Appellants' Brief, filed on July 6, 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

Zanthi M. Darling

Zanthi Darling
Paralegal
Michael J. Delay, P.S., Inc.