Washington State Court of Appeals
Division III

Docket No. 303314

IN THE MATTER OF THE ESTATE OF WENDELL K. MILES

RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF

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STRICT REPLY

Nancy Rose strictly replies to Ms. Tasker's response to Ms. Rose's cross-appeal assigning error to the monetary sanction of $1100.

A. No Cross-Appeal Assigning Error to Finding of Nonfrivolity.

Judge Nielsen sanctioned Ms. Rose $1100 pursuant to CR 11 for the sole reason that she was not an attorney yet signed and dated pleadings for a nonprofit corporation, not because the motion was frivolous or in any way filed in bad faith. **CP 826**. As stated in the cross-appeal brief, the order "corrected and replaced" the prior order's finding CVAS's CR 59 motion to have been filed in "bad faith." **CP 263**. The clerk's minutes confirm that Judge Nielsen would not make findings beyond the exclusive basis that Ms. Rose was not an attorney. **CP 280.** In amending, the court only found that "Nancy Rose is not an attorney licensed to practice law in the State of Washington." **CP 825:13-14.**

For the first time in any appellate brief, Ms. Tasker now argues that the motion to reopen also violated CR 11 because it was frivolous. She does so while acknowledging that the trial court:

> did not go so far as to say that the reason for the sanction was based upon frivolous motion by Ms. Rose. Rather, the sanctions were based strictly upon her unauthorized practicing of law in the filing of the pleadings. (CP 824-826)

***Tasker's Resp. Brief,* at 30-31**. Despite this concession, Ms. Tasker nonetheless argues why Judge Nielsen erred by not finding the motion to reopen frivolous. ***Id.*, at 31-32**. In seeking affirmative relief in the form a CR 11 monetary sanction premised on grounds explicitly rejected by the trial court, Ms. Tasker needed to file a notice of cross-review pursuant to RAP 2.4(a). Having failed to so designate that part of Judge Nielsen's order, this court should refuse to consider her argument.

B. No Abuse of Discretion in Finding of Nonfrivolity.

Preliminarily, even if the court evaluates Judge Nielsen's refusal to find the motion frivolous, it does so pursuant to an abuse of discretion standard. *Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co.,* 151 Wash.App. 195, 207 (2009). Ms. Tasker fails to prove that Judge Nielsen engaged in such abuse while contending that CVAS contrived the urgency to file the motion in response to Ms. Tasker's Sept. 23, 2011 letter threatening appeal, and that CVAS had agreed all along to abandon live testimony. Both contentions fail to pass muster.

1. No Agreement to Dispense with Live Testimony.

At 27, Ms. Tasker states that, "The decision to have the August 29, 2011 Distribution hearing conducted upon declarations and not testimony was made on advice of CVAS's own counsel." And at 32, Ms. Tasker argues that "CVAS's then attorney" entered into an "agreement to have

the matter heard by affidavit," yet in neither instance does she furnish evidence of same and cites to nothing in the record. No CR 2A stipulation was entered, nor a clerk's entry made pursuant to RCW 2.44.010 to establish that CVAS was ever bound by Mr. Webster's alleged agreed trial strategy. And CVAS argued as much in its motion to reopen and objection to the withdrawal of Mr. Webster. **CP 731-36** (motion to reopen); **673-77** (objection). See also Mr. Webster's memorandum in support of motion to withdraw, explaining this precise dispute with CVAS. **CP 686** (referencing letter to CVAS of Sept. 2, 2011).

Incidentally, Ms. Tasker's query as to "why CVAS would offer fourteen affidavits if it didn't expect the hearing to be conducted on affidavits all along" is irrelevant in light of the Court's *Order on Interim Report and Amended Interim Report,* stating:

> An evidentiary hearing date to determine the ultimate recipient of the real property is hereby set for Aug. 29, 2011, 1:30 p.m. at which time the Court shall hear **oral testimony**.

CP 288 (emphasis added). No order – written or oral – superseded this. When one reflects upon the fact that Ms. Tasker ambushed CVAS by filing a slab of declarations of her own the Thursday before the Monday hearing of Aug. 29, 2011, it is no wonder the decision to abandon live

testimony severely impaired CVAS's ability to rebut or impeach through live cross-examination.

2. Urgency Not Contrived.

Incidentally, Ms. Tasker's assertion at 27-28, that, "At the time the letter was written, it wasn't clear that Mr. Webster would actually be off the case for CVAS," and, thus, the letter was not "in the nature of an ambush when CVAS was stranded without counsel" is at best disingenuous when one actually reads the first paragraph of Mr. Simeone's letter of Sept. 23, 2012:

> Having received this day Colville Valley Animal Sanctuary's **Notice of Discharge of Counsel**, which may pre-empt your Motion to Withdraw, I write this as an open letter to you and to Ms. Rose for the purpose of discussing future management of our respective client's cases.

CP 740 (emphasis added).[1]

Mr. Webster filed his motion to withdraw on Sept. 7, 2011 with an effective date of Sept. 12, 2011 (**CP 671-72**), one week before the trial court actually entered its findings and conclusions as to which entity would receive the Miles realty. After receipt of that ruling, on Sept. 22, 2011, the day before Mr. Simeone penned his letter, Ms. Rose filed a formal *Notice of Discharge of Counsel* (the one acknowledged by Mr. Simeone in his letter) and *Response to Motion to Withdraw* that

[1] Such notice is effective immediately, obviating the need for formal withdrawal.

concluded, "Accordingly, we would urge Mr. Webster to strike the present motion, as no justiciable issue remains." **CP 730.** At that point, no doubt remained as to whether Mr. Webster still represented CVAS.

Importantly, CVAS had to fight to prophylactically keep an attorney of record over the period between Aug. 29, 2011 and Sept. 19, 2011, following Mr. Webster's attempt to untimely withdraw weeks prior to the trial court's ruling. Against that backdrop, the crux of the urgency arose from the concerning behavior of Mr. Webster, articulated in his Sept. 30, 2011 letter, stating:

> It appears that Ms. Tasker intends to appeal Judge Nielson's ruling and that further litigation may be imminent. RCW 2.44.040 states in pertinent part [quoting in part]. **Therefore, I am writing to inform you that I am opposed to the substitution of counsel in these matters**, and **will file a motion to prevent such**, unless and until your final bill has been paid in full.

CP 779 (emphasis added). Thus, Mr. Webster left CVAS completely exposed by first withdrawing, then acquiescing to the notice of discharge, only to seize upon the threat made by Mr. Simeone on Sept. 23, 2011 and prevent CVAS from acting in any way except through a nonlawyer – while knowing that CVAS could not appear in court, whether at the trial level or on appeal, except through counsel.

3. No Abuse of Discretion.

At the outset, it should be appreciated that the need for a motion to reopen the record did not become apparent until the afternoon of Saturday, Sept. 24, 2011, when CVAS received Mr. Simeone's letter threatening to appeal the judgment. At this point, the Sanctuary had only four working days to evaluate its options and to bring a motion under CR 59, or else be forever barred from doing so. As explained to the Court in the declaration of Nancy Rose, there was hardly time to *consult* with an attorney, much less hire one to bring a motion based upon a trial court record with which he had no familiarity at all. It is significant that during this period of time, CVAS was simultaneously receiving correspondence from its former counsel, Mr. Webster, threatening (unprofessionally and unethically) to *obstruct* the Sanctuary's effort to hire new counsel unless and until he was fully paid.

As to Ms. Tasker's assertion that CVAS is not "aggrieved," she cites to no case law supporting her interpretation of that word. As explained above, Ms. Tasker's threat of appeal put CVAS on alert. That CVAS prevailed on Sept. 19, 2011 did not guard against future impairment of its substantial rights in the form of (a) needing to finance opposition to Ms. Tasker's appeal, (b) potentially losing its footing on appeal based on a closed record, and (c) adding significant delay (average appeal will take nine to twelve months) to resolving this case and managing Mr. Miles's realty to the benefit of CVAS and the animals. Attorney misconduct and ineffectiveness created a procedural irregularity

preventing CVAS from having a fair trial and substantial justice from being done (per CR 59(a)(1,9)). In that regard, CVAS was aggrieved and its rights materially affected. The court should also consider that this matter sounds in equity, for which the trial court had nearly plenary authority to ensure substantial justice is done.

While CVAS then believed that Ms. Tasker might attempt to appeal regardless of what additional documentary evidence CVAS submitted, the likelihood of her doing so was then believed to be dramatically reduced in the face of a more complete and responsive record. CVAS thought it sensible to attempt to reopen the record before appealing, rather than through a post-appeal RAP 9.11(b) motion.

RAP 9.11(a)(emphasized) outlines six factors to be considered before permitting additional evidence to be taken:

> (a) Remedy Limited. The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) ***additional proof of facts is needed to fairly resolve the issues on review***, (2) the additional evidence would probably change the decision being reviewed, (3) it is ***equitable to excuse a party's failure to present the evidence to the trial court***, (4) the ***remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive***, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be ***inequitable to decide the case solely on the evidence already taken in the trial court***.

These requirements for receiving new evidence may be waived to serve ends of justice. *In re Detention of Brooks,* 94 Wash.App. 716, 722-24

(1994), *rev. granted*, 138 Wn.2d 1021, *aff'd/rev'd* 145 Wn.2d 275. In *Brooks*, the court granted the State's motion to supplement the record with the Declaration of Mark Selig, Ph.D., providing additional grounds for finding a rational basis for the statutory classification regarding less restrictive alternative. "We may, however, waive the requirements of [RAP 9.11(a)] pursuant to RAP 1.2 and 18.8 to serve the ends of justice." *Id.*, at 723 (*citing Sears v. Grange Ins. Ass'n*, 111 Wn.2d 636, 640 (1988)); see also *In re Parentage of L.B.*, 155 Wn.2d 679, 687 fn. 4 (2005) (acknowledging authority to waive rules but declining as new evidence is unnecessary for purposes of review).

CVAS argued to the trial court that even if the Court of Appeals were to have found that CVAS had not technically satisfied all six criteria, it would have had the authority to waive some or all of the criteria to serve the ends of justice. Note, however, that RAP 9.11(a)(4) asks whether the party could have brought a postjudment motion for relief – precisely what CVAS attempted to do below. RAP 9.11(a)(3,6) also consider the equities of not permitting additional evidence on record review, which provide the reasons why CVAS is "aggrieved" for purposes of CR 59.

Even if the cause of action lacks a factual or legal basis, no CR 11 sanctions may be imposed unless the court also finds that the attorney did not conduct a reasonable inquiry into the basis of the claim. Not prevailing

on the merits does not dispose of the CR 11 question of sanctions. "CR 11 is not a mechanism for providing attorney's fees to a prevailing party where such fees would otherwise be unavailable. *John Doe v. Spokane & Inland Empire Blood Bank,* 55 Wash.App. 106, 111, 780 P.2d 853 (1989)." *Id.*, at 220. Sanctions must "be reserved for egregious conduct and not be viewed as simply another weapon in a litigator's arsenal." *Biggs v. Vail*, 124 Wn.2d at 198 fn.2. Furthermore, "To avoid the 20/20 hindsight view, the trial court must conclude that the claim clearly has no chance of success,' not just that the claim may not have succeeded in the past or in the case at bar. *In re Cooke,* 93 Wash.App. 526, 529 (III, 1999).

Thus, even if the court choose to deny CVAS the relief sought, that would not have justified an award of sanctions. The *Motion to Reopen* was also not filed for an improper purpose and Judge Nielsen did not abuse his discretion by refusing to find Ms. Rose or CVAS acted frivolously.

C. Discretion Abused in Disregarding On-Point CR 11 Cases.

Ms. Tasker fails to successfully rebut the on-point cases cited by Ms. Rose finding an abuse of discretion under nearly identical circumstances. *See Biomed Comm., Inc. v. State of Washington*, 146 Wash.App. 929, 931 (2008)(reversing dismissal, counseling opportunity to cure through counsel); *Dutch Village Mall v. Pelletti,* 162 Wash.App. 531,

539 (2011)(reversing $750 sanction against pro se sole owner of LLC; invoking *Biomed*).

Dated this Jan. 10, 2013

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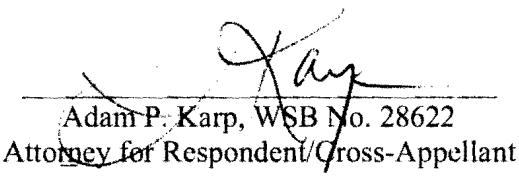

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Jan. 10, 2013, I caused a true and correct copy of the foregoing, to be served upon the following person(s) in the following manner:

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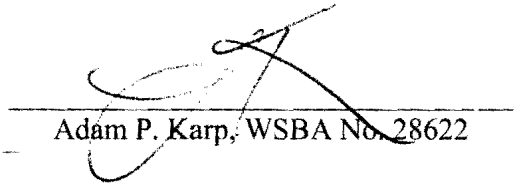

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