No. 47500-6-II

THE COURT OF APPEALS, DIVISION II

State of Washington

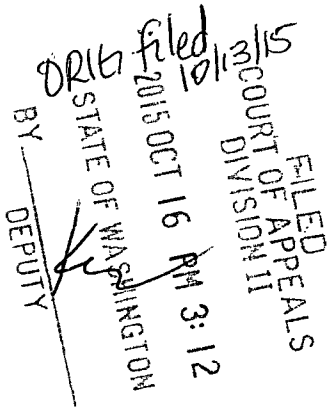
WCEM, INC., A WASHINGTON CORPORATION

PLAINTIFF

VS.

LOST LAKE RESORT, LLC, A WASHINGTON LIMITED LIABILITY COMPANY,

DEFENDANTS



APPELLANT'S OPENING BRIEF

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CR 41
DISMISSAL OF ACTIONS

(a) Voluntary Dismissal.

(1) Mandatory. Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:

(A) By stipulation. When all parties who have appeared so stipulate in writing; or

(B) By plaintiff before resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of plaintiff's opening case.

(2) Permissive. After plaintiff rests after plaintiff's opening case, plaintiff may move for a voluntary dismissal without prejudice upon good cause shown and upon such terms and conditions as the court deems proper.

(3) Counterclaim. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of plaintiff's motion for dismissal, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.

(4) Effect. Unless otherwise stated in the order of dismissal, the dismissal is without prejudice, except that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state.

(b) Involuntary Dismissal; Effect. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

(1) Want of Prosecution on Motion of Party. Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

(2) Dismissal on Clerk's Motion.

(A) Notice. In all civil cases in which no action of record has occurred during the previous 12 months, the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution unless, within 30 days following the mailing of such notice, a party takes action of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date. If the court does not receive such a status report, it shall, on motion of the clerk, dismiss the case without prejudice and without cost to any party.

(B) Mailing notice; reinstatement. The clerk shall mail notice of impending dismissal not later than 30 days after the case becomes eligible for dismissal because of inactivity. A party who does not receive the clerk's notice shall be entitled to reinstatement of the case, without cost, upon motion brought within a reasonable time after learning of the dismissal.

(C) Discovery in process. The filing of a document indicating that discovery is occurring between the parties shall constitute action of record for purposes of this rule.

(D) Other grounds for dismissal and reinstatement. This rule is not a limitation upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise.

(3) Defendant's Motion After Plaintiff Rests. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross Claim, or Third Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross claim, or third party claim. A voluntary dismissal by the claimant alone pursuant to subsection (a)(1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) Notice of Settlements. If a case is settled after it has been assigned for trial, it shall be the duty of the attorneys or of any party appearing pro se to notify the court promptly of the settlement. If the settlement is made within 5 days before the trial date, the notice shall be made by telephone or in person. All notices of settlement shall be confirmed in writing to the clerk.

[Originally effective July 1, 1967; amended effective September 1, 1997; April 28, 2015.]

RULE CR 11
SIGNING AND DRAFTING OF 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, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. 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) 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. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

(b) In helping to draft a pleading, motion or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or legal memorandum, and that to the best of the 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. The attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

[Originally effective March 1, 1974; amended effective January 1, 1974; September 1, 1985; September 1, 1990; September 17, 1993; October 29, 2002; September 1, 2005.]

ASSIGNMENTS OF ERROR

The Superior Court erred in refusing to grant plaintiffs' CR 41 motion to dismiss without prejudice, and in dismissing this case with prejudice at the beginning of the trial.

The Superior Court erred in striking every witness offered by plaintiff, thereby effectively dismissing the case, without considering any lesser sanctions for alleged discovery sanctions.

The Superior Court erred in awarding a judgment for fees personally against Christian Gerling, a non-party.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. If plaintiff, before resting his case in chief, moves for dismissal without prejudice, is the granting of such a motion mandatory?
2. Before entering sanctions tantamount to dismissing the case, must the Superior Court meaningfully consider other lesser sanctions?

3. Can the court properly enter any judgment against a non-party to the action, and a person who's never been served with any summons or complaint?
4. Can the court properly award a judgment, or sanctions, under CR 11 against a mere witness in the case who has never signed any pleadings?

STATEMENT OF THE CASE

STANDARD OF REVIEW

This is an appeal of a ruling interpreting and applying various court rules, including importantly CR 41 relating to voluntary dismissals, but also various rules allowing for sanctions, including CR 11. Interpretation of a court rule is a question of law reviewed de novo. *State v. Schwab*, 163 Wash.2d 664, 671, 185 P.3d 1151 (2008) (citing *City of College Place v. Staudenmaier*, 110 Wash.App. 841, 845, 43 P.3d 43 (2002)).

This is also partly an appeal of the trial court's findings relating to sanctions imposed for failure to comply with various court rules. A trial court exercises broad discretion in imposing discovery sanctions under CR 26(g) or 37(b), and its determination

will not be disturbed absent a clear abuse of discretion. *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wash.App. 223, 229, 548 P.2d 558 (1976); An abuse of discretion occurs when a decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Associated Mortgage*, 15 Wash.App. at 229, 548 P.2d 558. A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.' " *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Lewis*, 115 Wash.2d 294, 298-99, 797 P.2d 1141 (1990)).

This appeal also involves a judgment entered against Christian Gerling, who owned the plaintiff corporation, but was never made a party, never served with any summons and complaint, and never signed any pleadings or was represented by counsel. It thus implicates legal questions of due process. Issues of law are reviewed de novo. *State v. McCormack*, 117 Wash.2d 141, 143, 812 P.2d 483 (1991).

IMPORTANT FACTS

This case was filed as a straight-forward action on a promissory note. The note was given to plaintiff, WCEM, Inc., by defendant Lost Lake Resort, LLC, and the complaint states a case for collection of the principal and interest. CP 1-3.

A motion for summary judgment was filed, challenged by the defense, and denied early in the case. CP 15.

On February 19, 2015, the defense filed a motion to dismiss asserting plaintiff had failed to comply with discovery requests, had not participated in alternative dispute resolution and that plaintiff failed to disclose witnesses. CP 9-14.

Plaintiff responded to that on February 25, 2015. CP 15-16. And, the court denied that motion on February 27, 2015.

On March 9, 2015, Plaintiff filed a witness list identifying two witnesses: Jeff Graham, owner of Lost Lake Resort LLC, who signed the note, and Christian Gerling, the owner of the company providing services and the payee on the note. CP 54, lines 4-6.

At the end of that month, on March 30, 2015, the case came on for trial. The defense repackaged its dismissal motion as a motion in limine, asking that all witnesses for plaintiff be

excluded. CP 19-20. The court granted this motion, effectively preventing plaintiff from putting on any case at all. CP 53-55.

The order granting the motion to exclude all witnesses, contains the following language:

> 3. This untimely disclosure of trial witnesses was willful and without a reasonable excuse or justification;
> 4. The plaintiff's untimely disclosure of trial witnesses causes substantial prejudice to the defendant's ability to prepare for trial; and
> 5. Lesser sanctions than the exclusion of plaintiff's undisclosed witnesses, such as monetary sanctions, have been considered but would be inadequate;

However, a review of the March 30, 2015 transcript shows that, in fact, the court neither discussed nor considered any alternative sanctions, nor was there any showing of, or even discussion of, lesser sanctions, or of prejudice or surprise on the part of the defendants. There is a perfunctory discussion of rules and schedules which were not met, but zero showing or discussion of how or why the defense was prejudiced. *See* Verbatim Transcript of hearing March 30, 2015.

Plaintiff then moved for dismissal under CR 41(a)(1)(B). Counsel requested a dismissal "without prejudice." *See* Transcript of March 30, 2015 at page 6, lines 10-13.

The defense asked that the case be dismissed with prejudice, and without discussion or any call for response, the court

summarily dismissed the case "with prejudice." Transcript of March 30, 2015 at page 6, lines 15-19.

Three weeks later, on April 22, 2015, the defense filed a motion for fees. That motion asked for an award of "attorney fees and costs pursuant to the terms and conditions of the alleged promissory note at issue herein." CP 57-58.

A supporting memorandum discussed at length the status of WCEM, Inc. and contains a section seeking sanctions for "frivolous" filing, but nowhere does the motion or supporting material discuss personal liability of Christian Gerling. Mr. Gerling was the owner of WCEM, Inc., but was not a party to the case (although he was identified as a witness). Mr. Gerling was never served with any complaint, or third-party complaint. Compare CP 1-3 and CP 6-8.

He was never represented by counsel. See Transcript of May 1, 2015 at page 3, lines 15-18. Nor was he even served with notice of the motion for fees.

At the hearing relating to the request for fees, an oral request was made to make an award of fees against Mr. Gerling *personally*. See Transcript of May 1, 2015 hearing at page 11.

The asserted basis for the award against Mr. Gerling personally was that he's signed "inappropriate interrogatory answers" in violation of CR 11. Transcript of May 1, 2015 at pag 11, lines 1-4 and 13-15.

Without much discussion, the court entered judgment against Mr. Gerling personally for $10,185.

LAW AND ARGUMENT

1. The trial court erred in refusing to grant plaintiff's CR 41(a)(1)(B) motion for dismissal without prejudice.

CR 41says this:

CR 41
DISMISSAL OF ACTIONS

(a) Voluntary Dismissal.

(1) Mandatory. Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:

(A) By stipulation. When all parties who have appeared so stipulate in writing; or

(B) By plaintiff before resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of plaintiff's opening case.

(4) Effect. Unless otherwise stated in the order of dismissal, the dismissal is without prejudice, except that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state.

A motion to dismiss made pursuant to CR 41(a)(1)(B) gives rise to "a mandatory, absolute right to dismissal of [plaintiff's] action without prejudice, fixed on the day of the filing of the

motion." *Calvert v. Berg*, 312 P.3d 683, 177 Wn.App. 466 (Wash.App. Div. 1 2013).

Because plaintiff made its CR 41(a)(1)(B) motion before resting its case, the court erred in refusing to grant plaintiff's motion for a CR 41(a)(1)(B) dismissal without prejudice; instead dismissing the case with prejudice. *Calvert*, supra.

2. *The trial court erred pre-trial when it sanctioned plaintiff by excluding all witnesses without considering any lesser sanctions.*

Reasons for discovery sanctions should, typically, be clearly stated on the record so that meaningful review can be had on appeal. *Burnet v. Spokane Ambulance*, 131 Wash.2d 484, 494, 933 P.2d 1036 (1997). When the trial court "chooses one of the harsher remedies allowable under CR 37(b), ... it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed," and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial. *Snedigar v. Hodderson*, 53 Wash.App. 476, 487, 768 P.2d 1 (1989). Washington courts have also said that "'it is an abuse of discretion to exclude testimony as a

sanction [for noncompliance with a discovery order] absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.' " *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wash.2d 693, 706, 732 P.2d 974 (1987) (quoting *Smith v. Sturm, Ruger & Co.*, 39 Wash.App., 740, 750, 695 P.2d 600, 59 A.L.R.4th 89, review denied, 103 Wash.2d 1041 (1985)).

Here, a fair review of the transcript of the hearing on March 30, 2015, as opposed to inspecting the verbiage in the court order, shows that the court considered nothing, and made no substantial findings except that plaintiff had not completely complied with the case schedule. The verbiage in the court's order simply rotely reports (inaccurately) that lesser sanctions had been considered and would be inadequate to serve the purpose of the rules. Then, the court essentially made plaintiff's presentation of a case impossible by exclusing all witnesses.

Because the court did not meaningfully consider lesser sanctions, nor did it put anything on the record to allow meaningful review, the trial court's decision in this case was an abuse of discretion.

3. *The trial court erred in awarding judgment against Christian Gerling personally because he was never a party to the action and had no fair opportunity to defend.*

First and basic to any litigation is jurisdiction, and first and basic to jurisdiction is service of process. *Scott v. Goldman*, 82 Wash.App. 1, 6, 917 P.2d 131, review denied, 130 Wash.2d 1004, 925 P.2d 989 (1996). When a court lacks in personam jurisdiction over a party, any judgment entered against that party is void. *Id.* at 6, 917 P.2d 131. Here, Mr. Gerling, against whom judgment was entered personally, was never served with any summons and complaint. Hence, the court had no jurisdiction to enter judgment against him.

CR 15 permits amendments to the pleadings to conform to the evidence. And, CR 14(a) allows a defendant to bring in a third party, but the rule says a defendant "may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the defending party for all or part of the plaintiff's claim against the defending party." Mr. Gerling was never served with any summons – ever. And, yet the court entered judgment against him. That's clear error.

In fact, the idea of asking a trial court to amend the pleadings by adding the owner of a probably insolvent corporation

and instantly assessing the judgment against the owner personally has been tried, and that procedure was rejected in *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 120 S.Ct. 1579, 146 L.Ed.2d 530, 68 U.S.L.W. 3654, 68 U.S.L.W. 4311 (2000). The difference between that case and this is that in Nelson v. Adams, the defense at least filed a motion to amend the pleadings and add Nelson as a party. Here, no such motion was ever drafted and presented. Still, even with the actual motion to amend, the U.S. Supreme Court disapproved of adding Nelson and instantly assessing against him liability for the judgment levied against the corporate defendant.

Before the court can properly enter a judgment against Mr. Gerling, he has to be served and made a party to the action, and he has to be given fair notice and opportunity to respond to a request that judgment be entered against him. In this case, that wasn't done and so the court erred in entering a judgment agasint Mr. Gerling personally.

4. The trial court erred in awarding in assessing sanctions pursuant to CR 11 because Mr. Gerling never signed any pleadings.

Separate from the problem that Mr. Gerling was never made a party, and seperate from the due process issues relating to

instantly assessing personal liability, a review of the transcript shows that the defendants relied on CR 11, asserting that "He [Mr. Gerling] signed the discovery responses under oath," that he was prepared to testify and submitted "discovery answers that were not true." Transcript of May 1, 2015 hearing at page 8-9.

It's not at all clear what the exact basis was for the court's entering judgment against Mr. Gerling, but to the extent the trial court relies on CR 11, that's wrong because CR 11 pertains to the signing of pleadings without adequate investigation. Perjury, not CR 11, is the process by which a witness might be called to account for falsly testifying.

CR 11 says:

> 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) 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.

...

If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

Very plainly, the court can sanction attorneys or pro se litigants who sign pleadings, motions, or legal memoranda in violation of the rule. Not included as a basis for sanctions is the signing of affidavits or the giving of testimony. Knowingly testifying falsly is the subject of laws on perjury.

So, if the court's judgment against Mr. Gerling is based on CR 11, then the court erred in assessing sanctions on that basis.

CONCLUSION

The court erred in denying plaintiff's motion for dismissal pursuant to CR 41(1)(B) because once made, it's mandatory for the court to grant a dismissal without prejudice.

The trial court erred in excluding all witnesses for plaintiff without considering in any meaningful fashion the prospects of lesser sanctions for accomplishing the purposes of the rules.

The trial court erred in entering a judgment against Mr. Gerling personally because he's just not a party to the action, has never been served with any summons and complaint and had no fair notice and opportunity to defend the request that a judgment be entered against him personally.

To the extent, the judgment might be seen as based on CR 11, the court erred because Mr. Gerling never signed any pleadings, motions or memoranda. CR 11 doesn't apply to testimony or affidavits or the presentation of evidence.

DATED this 8th day of September, 2015.

Thomas T. Osinski, Jr.
WSBA# 34154
Attorney for Plaintiff

WASHINGTON STATE COURT OF APPEALS
Division Two

WCEM, INC., a Washington Corporation, Plaintiff, Vs. LOST LAKE RESORT, LLC, a Washington Limited Liability Company, Defendant.	No. 47500-6-II Declaration of Service

JEFF GRAHAM declares under penalty of perjury of the State of Washington that I am over the age of 18 and that on 10/13/2015, a copy of the attached Appellant's Opening Brief was delivered at approximately 11:45 AM to the office of Dan Kyler, 4701 South 19th Street, Suite 300, Tacoma, WA, attorney for the David Block herein and at approximately 12:00 PM to the office of Bart Adams 2626 North Pearl Street, Tacoma, WA, attorney for Brent McClausand and Lost Lake Resort, LLC.

DATED at Tacoma, WA this 15th day of October, 2015.

JEFF GRAHAM

No. 47505-7-II

THE COURT OF APPEALS, DIVISION II

State of Washington

WCEM, INC., A WASHINGTON CORPORATION

PLAINTIFF

VS.

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DEFENDANTS

APPELLANT'S OPENING BRIEF

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