

No. 65153-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MICHAEL J. MAJOR,

Appellant,

vs.

ANDREW C. BOHRNSEN and MAXEY LAW OFFICE,

Respondents.

RESPONDENTS' RESPONSE BRIEF

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF THE CASE	3
III.	ARGUMENT OF COUNSEL	4
	A. The Award of Sanctions By Judge Frazier and the Entry of an Order Awarding Costs and Attorney Fees Is a Judicially Sanctioned Procedure	5
	B. The Trial Court Had Authority to Dismiss Appellant’s Case on the Pleadings at the Conclusion of the Appellant’s Summary Judgment Proceeding	6
IV.	CONCLUSION	8
	APPENDIX 1	
	APPENDIX 2	

Table of Authorities

Cases

<u>Ford v. Chaplin</u> , 62 Wn. App. 896, 813 P.2d 532 (1991)	8
<u>M/V La Conte, Inc. v. Leisure</u> , 55 Wn. App. 396, 777 P.2d 1061 (1989)	8
<u>Tera v. Saran</u> , 68 Wn. App. 793, 846 P.2d 1375 (1993)	8

I. INTRODUCTION

This brief is Respondents' response to the appeal by the Appellant of the Court's order of dismissal in the third and final state court lawsuit filed by the Appellant and/or his son against the Respondents.

This Court has most recently affirmed the decision of the trial court authored by the Honorable David Frazier in the initial lawsuit filed against Respondents by Appellant and his son, Mark Major (Court of Appeals, Division One, Unpublished Opinion, filed May 3, 2010, No. 64858-1) (Copy attached as Appendix 1).

In response to Judge Frazier's decision, a subsequent lawsuit was brought by Mark Major against Respondents alleging malpractice, conspiracy and fraud, among other allegations, in obtaining Judge Frazier's order of dismissal. The Honorable Judge Tari Eitzen granted the Respondents' motion for summary judgment dismissing Mark Major's complaint; the Honorable Judge Salvatore Cozza subsequently granted the Respondents' motion for CR 11 sanctions, which requested that Appellant's son Mark Major be deemed a vexatious litigant. Mark Major's appeal of these two orders was dismissed by a ruling entered by Commissioner Joyce McGown, Division III of the Washington State Court of Appeals, Cause No. 27964-2-III, pursuant to Respondents' Motion on the Merits. (See Commissioner's Ruling in Court of Appeals, Division III, Cause No. 27964-2-III, dated December 16, 2009, attached as Appendix 2).

The instant appeal is taken from a cause of action filed by Appellant Michael Major immediately after the adverse rulings by Judges Eitzen and Cozza against Mark Major in the second lawsuit. This case, like the two before it, all grew out of a common set of facts involving the dissolution action between Mark Major and his ex-wife, Lacey Major. Those underlying facts are contained in this Court's unpublished opinion in Cause No. 64858-6-I (see Unpublished Opinion in Court of Appeals, Division I, Cause No. 64858-6-1, dated May 3, 2010, attached as Appendix 3).

Under Assignment of Error No. 1, Appellant clearly states that the "entire basis of this case" is insurance fraud on the part of the Respondents. (See Appellant's Amended Brief, Section A(1), page 1.) In so stating, the Appellant implicitly admits that all other allegations set forth in his complaint were previously addressed and submitted in the previous two lawsuits, which have been summarily dismissed, appealed and affirmed.

The Appellant's allegation of insurance fraud arises out of his failure to understand the legal principle of Subrogation. Appellant misconceives the judgment entered by Judge Frasier against him as an attempt by Andrew Bohrsen to double bill for his services, i.e. bill James River Insurance and Michael Major for the same services performed in defending the Maxey Law Firm against Appellant's frivolous lawsuit. Appellant thinks that since James River Insurance Company already paid Mr. Bohrsen for his services, the Judgment somehow represents an attempt by Mr.

Bohrnsen to impermissibly recover his attorney's fees a second time from the Appellant. In fact, James River Insurance Company has a legal right of subrogation to enforce the judgment against Michael Major since it was the entity that paid Mr. Bohrnsen's attorney's fees and costs incurred in the defense of The Maxey Law Firm against the Appellant's lawsuit; as such, there is no "insurance fraud" against James River Insurance Company and the Appellant, who is the Judgment Debtor, certainly has no standing to assert such a claim in this case.

Secondly, the Appellant assigns error to Judge Annette Plese's decision to dismiss Appellant's lawsuit at the conclusion of the hearing upon Appellant's motion for summary judgment on September 25, 2009, but prior to the court's hearing of Respondents' pending motion to dismiss the lawsuit on the pleadings.

At the time Judge Plese dismissed Appellant's case, Respondents had a motion to dismiss on the pleadings pending for hearing before the court two weeks later on October 9, 2009. The respondents submit that at the time of the September 25th hearing, the trial court had all of the Plaintiff's pleadings before it, had reviewed the entire file, and was well within her discretionary authority to dispose of the respondents' motion without further argument by the parties.

In the alternative, given the fact that all the parties' briefs concerning the motion to dismiss on the pleadings had been filed in

the record before September 25th, Judge Plese's decision to dismiss Appellant's lawsuit on September 25th, rather than wait until after oral argument on October 9th, did not constitute procedural error, or if it was error, it was harmless error and therefore, does not serve as a basis for reversal of her correct legal decision.

Respondents cannot respond to any of the other errors that Appellant alleges to have occurred as he cites no facts or law to support such contentions other than his own misconceived statements. Indeed, the record is devoid of any proof of material facts that support Appellant's claims.

II. STATEMENT OF THE CASE

As stated herein above, the Respondents would incorporate this Court's recitation of the facts surrounding this series of lawsuits as set forth in its unpublished opinion in Cause No. 64858-6-I (Appendix 1) and those facts and pleadings germane to the second suit, appeal and dismissal by Division III of Cause No. 27964-2-III (Appendix 2).

Since the Respondents moved to dismiss Appellant's complaint before Judge Plese on the pleadings alone, this court need only consider the Appellant's complaint in light of the voluminous and repetitive files in the prior two cases, which were also known and considered by the court (First Supplemental CP pp. 139-143, 144-148, 149-243).

As noted by the trial court at the time of the hearing on

September 25, 2009, Judge Plese had reviewed the entire case file, was fully conversant in the claims being made, and the Appellant's history of prior suits against the Respondents and the disposition of those suits. That same record is now before this Court on de novo review.

III. ARGUMENT OF COUNSEL

A. The Award of Sanctions By Judge Frazier and the Entry of an Order Awarding Costs and Attorney Fees is a Judicially Sanctioned Procedure.

Given the fact that this Court has already affirmed the appropriateness of Judge Frazier's award of costs and attorney fees under Civil Rule 11 (Appendix 1) and, in fact, awarded additional fees for the Appellant's prosecution of a frivolous appeal, no authority need be cited in support of the legal realities of subrogation claims and judicially awarded sanctions.

In short, Mr. Bohrsen was retained by James River Insurance Company to defend Respondent Maxey Law Office in the first lawsuit filed by the Appellant. The attorney's fees and costs for Mr. Bohrsen's services in defending the lawsuit were paid on behalf of the Maxey Law Office by its insurer, James River Insurance Company. Those fees and costs were documented to the trial court, which entered judgment against the Appellant in the amount sought after determining that Appellant had filed a frivolous

lawsuit. Should the Appellant ever comply with his legal obligation to satisfy this outstanding judgment, those funds will be immediately disbursed by the Maxey Law Firm to James River Insurance Company in reimbursement for the fees and costs James River paid to the Law Office of Andrew Bohrsen to defend the frivolous suit filed by Appellant.

Finally, if the Appellant had any “evidence” that this judicially sanctioned procedure in any way was departed from in the presentation of the motion for an award of CR 11 sanctions, the admissible proof of the fees and costs incurred, or the legal criteria applied by Judge Frasier in the award of those fees and costs, he failed to present any such evidence to Judge Plese at the hearing on his motion for summary judgment, or to this Court in his appeal of Judge Frazier’s ruling and entry of judgment. In summary, like every other unsupported allegation ever made by Mr. Major, it was pled in violation of CR 11 and meant only to harass the Respondents.

B. The Trial Court Had Authority to Dismiss Appellant’s Case on the Pleadings at the Conclusion of the Summary Judgment Proceeding.

At the risk of being redundant, it must be remembered that the Respondents had moved for a dismissal of Appellant’s lawsuit on the pleadings, not by motion for summary judgment. Secondly, as acknowledged by Appellant, the only new issue raised in Appellant’s third complaint was the alleged “insurance fraud” by

Respondents arising out of Judge Frazier's entry of a judgment as a sanction pursuant to CR 11 for costs and attorney's fees incurred by the Respondent Maxey Law Office in having to defend against Appellant's frivolous lawsuit. The propriety of that ruling has been affirmed by this Court in its recent unpublished opinion (Appendix 1). Therefore, this entire issue is moot.

Secondly, the only "new evidence" purportedly offered by the Appellant were inadmissible and totally irrelevant contentions related exclusively to the domestic relations dispute between Appellant's son, Mark Major, and his son's ex-wife Lacey in their dissolution action. This does not provide an evidentiary basis for a viable claim against these Respondents who were never involved in the Majors' dissolution action.

Secondly, as pled, the claim had to be dismissed since the trial court can take judicial notice of the procedure and propriety of a prior court's award of sanctions under CR 11, and was fully competent to understand and appreciate the law of subrogation and how that award would be disbursed when and if paid by the Appellant. Again, there was no purpose served by the trial court delaying its decision to dismiss Appellant's frivolous claim.

Finally, even assuming for purposes of argument that the court should have waited until hearing oral argument of Respondents' motion to dismiss on the pleadings, scheduled two weeks later on October 9, 2009, should that be determined to constitute procedural error, such error is harmless to the case pled

by the Appellant.

The law clearly requires the Appellant to demonstrate “prejudice” arising out of any alleged error, less the reviewing court find the same to be “harmless.” Tera v. Saran, 68 Wn. App. 793, 846 P.2d 1375 (1993); Ford v. Chaplin, 61 Wn. App. 896, 812 P.2d 532 (1991); M/V La Conte, Inc. v. Leisure, 55 Wn. App. 396, 777 P.2d 1061 (1989).

In the instant appeal, the appellant has failed to show that the trial court’s decision to dismiss on September 24, 2009, instead of waiting two weeks, in any way prejudiced the Appellant. He had admitted that the only new theory of recovery, “insurance fraud,” was one that had no basis in law and constituted a claim for which no recovery could be had. He had already admitted that the attorney’s fees and costs were generated in the defense of the Maxey Law Office, had been paid by that firm and James River Insurance Company, and he had never challenged the appropriateness of the amount as being reflective of work performed on behalf of the Maxey Law Office or that the billing rate was unreasonable.

Therefore, the Respondents would submit that Judge Plese did not abuse her discretion and was fully justified in dismissing the Appellant’s case at the close of hearing on Appellant’s motion for summary judgment rather than expend additional court time and resources in hearing additional oral argument by Appellant that presented no new facts in support of his allegations.

IV. CONCLUSION

This appeal represents the conclusion of literally years of litigation brought only for the purpose of harassing the Maxey Law Office, its attorney Andrew Bohrsen, Mr. Bohrsen's attorney Steven Stocker, and more judges and members of court staff than space permits to be listed. All prior claims have been either summarily dismissed on appeal or by formal opinion of the entire court. Not less than two federal actions were dismissed by the Ninth Circuit on its own initiative. The time for bringing to an end Mr. Major's acts of total contempt for the judicial system has arrived.

Judge Plese's order dismissing Appellant's complaint upon the pleadings should be affirmed.

RESPECTFULLY SUBMITTED this 16th day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of June, 2010, I caused to a copy of the foregoing to be served on the person shown below by depositing the same in the U.S. Mail, with first-class postage affixed thereon, addressed as follows:

Michael Major
7915 East Longfellow
Spokane, WA 99212



STEVEN R. STOCKER

APPENDIX 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL MAJOR and MARK MAJOR,)	
)	No. 64858-6-I
Appellants,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
MARK D. HODGSON and MAXEY)	
LAW OFFICE,)	
)	
Respondents.)	
)	FILED: May 3, 2010
)	

DWYER, C.J. — Michael and Mark Major filed this action against attorney Mark Hodgson and the Maxey Law Office alleging claims including fraud, breach of contract, and criminal conspiracy. Because the trial court correctly concluded that the Majors, in some instances, failed to demonstrate the existence of any genuine issues as to material facts and, in other instances, alleged claims that are not cognizable under Washington law, we affirm the dismissal of all claims. We also find that the Majors' appeal is frivolous and award attorney fees on appeal pursuant to RAP 18.9.¹

¹ This appeal was transferred to us from Division Three of the Court of Appeals.

This appeal, in which Michael Major and his son Mark Major² challenge superior court orders dismissing their causes of action against the Maxey Law Office (Maxey) and attorney Mark Hodgson, arises out of events that occurred during an earlier lawsuit. On April 5, 2007, the Majors filed an action in Spokane County Superior Court against Lacey Major, Mark's ex-wife, alleging claims of false incriminations, wrongful incarceration, an ongoing conspiracy of Lacey and her mother "to effect a wrongful death of Mark Major," first degree assault on an infant, acts of domestic violence against Mark, false accusations of stalking, perjury, ongoing child abuse, parental negligence, entrapment, negligent and intentional infliction of emotional distress, illegal substance abuse, "[w]renching Mark from his children," and ongoing welfare fraud.

On April 26, 2007, attorney Mark Hodgson appeared on behalf of Lacey Major and filed a response to the Majors' complaint. The Majors moved for partial summary judgment and noted multiple motions for a hearing on June 29, 2007.

On June 8, 2007, Lacey moved to dismiss the Majors' action for failure to state a claim under CR 12(b)(6) and requested sanctions under CR 11. Hodgson noted the motion to dismiss for a hearing on June 15, 2007.

On June 13, 2007, Michael filed a pro se motion to continue Lacey's motion to dismiss, seeking a new hearing date of June 29. In support of the motion to continue, Michael alleged that the short notice for the June 15 hearing posed a

² When necessary for purposes of clarity, we refer to the Majors by their first names.

No. 64858-6I/3

serious hardship that would prevent the Majors from participating. Later on June 13, Michael, who lived in Anacortes, contacted the Maxey Law Office in Spokane, seeking representation in conjunction with the June 15 motion to dismiss. Mark Major lived in Spokane. Later that evening, attorney David Partovi of the Maxey Law Office telephoned Michael.

Although the precise details of this conversation and several subsequent conversations are disputed, the parties agree that Partovi informed Michael that service of the notice for Lacey's CR 12(b)(6) motion appeared to be untimely, providing a legal basis to continue the June 15 hearing date. It is also undisputed that Partovi accepted Michael's offer of \$1,000 to represent the Majors for the limited purpose of filing a notice of appearance and seeking a continuance of the June 15 hearing date to at least June 29.

After the initial conversation, Michael faxed Partovi copies of the motion for continuance that he had filed, the complaint, and other pleadings. In a cover letter, Michael explained that if his litigation strategy proceeded as planned, Partovi might be retained for additional representation, but he acknowledged the parties' current agreement to be limited as follows:

Our agreement is that I will pay you \$1000 in credit card for you to put in a notice of appearance and continue the Friday [June 15, 2007] hearing until the noted hearings of June 29. You indicated you would contact Hodgson.

.....

Our agreement, at this point, is that you will do step one – notice of appearance, and get it continued – for \$1000.

Michael also signed a Nonrefundable Retainer Agreement that Partovi had prepared.

No. 64858-6I/4

The next day, June 14, 2007, Partovi filed a notice of appearance and a declaration of counsel in support of the motion for continuance, arguing that service of the notice of the June 15 hearing was untimely under the 5-day requirement of CR 6. Partovi stated that the motion to dismiss appeared to involve matters outside the pleadings and would therefore trigger the 28-day notice requirement of CR 56, in which case the hearing should be held after July 9. In the alternative, Partovi proposed that for purposes of judicial economy, the motion to dismiss should be scheduled for June 29. Partovi also filed Michael's declaration in support of the continuance, which recited Michael's unavailability on June 15 because of a heart condition and difficulty in obtaining counsel.

On the afternoon of June 14, Partovi met with opposing counsel Hodgson. According to Partovi, Hodgson acknowledged that service of the motion to dismiss was untimely, but refused to strike the motion or agree to a continuance. Because of a prior commitment, Partovi was unable to attend the scheduled hearing on June 15, and, with Michael's knowledge, arranged to send an associate, Camerina Brokaw-Zorrozua to court in his stead.

Upon arriving at the courtroom the following morning, Brokaw-Zorrozua discovered that Hodgson had not confirmed the hearing as required by local rules and that the motion to dismiss was therefore not scheduled on the docket. At some point on June 15, Hodgson renoted the motion to dismiss for June 22, 2007, and served a copy on Maxey.

No. 64858-61/5

At around 4:00 p.m. on June 15, Partovi called Michael and advised him of the status of the case. Michael claims that he asked Partovi to seek a continuance of the hearing that was now scheduled for June 22. Partovi acknowledges that he declined to expand the scope of the original agreement and advised Michael that there were significant problems with his pleadings. The parties agree that the exchange became heated and ended when Michael hung up after advising Partovi, "Well fine. You've just sunk your career."

Believing that Michael had terminated his employment, Partovi requested that his office file a notice of withdrawal. For purposes of summary judgment, Maxey does not dispute Michael's claim that Maxey did not provide him a copy of the notice of withdrawal.

Beginning on Monday, June 18, 2007, Michael served and filed a series of motions in the action against Lacey, including a motion for partial summary judgment, a motion to deny Lacey's motion to dismiss, an emergency motion for injunctive relief, and a motion for sanctions "against lawyers for criminal conspiracy." Michael noted the motions for June 22. Counsel for Lacey served all responses on Michael.

No further hearings occurred until July 20, 2007, when the trial court granted Lacey's motion and dismissed the Majors' action with prejudice. The court also granted Lacey's motion for sanctions and dismissed Michael from the action, concluding that he lacked standing to assert what were essentially Mark's claims arising out of the dissolution proceedings. The trial court ruling was affirmed on appeal. See Major v. Major, No. 26481-5-III, review denied, 165 Wn.2d 1026 (2009).

No. 64858-61/6

On July 9, 2007, the Majors filed this action against Mark Hodgson and the Maxey Law Office in Skagit County Superior Court, alleging claims including fraud, breach of contract, and criminal conspiracy. The complaint sought damages of \$1,000,000.00, disbarment of Hodgson and the Maxey attorneys, and an order directing the prosecutor to conduct a criminal investigation into the defendants' activities.

Hodgson did not respond to the complaint, and the trial court entered an order of default as to Hodgson on August 14, 2007. The court found venue improper as to Maxey and, in a separate order, transferred venue to Spokane County Superior Court.

Maxey and the Majors both filed motions for summary judgment. Hodgson did not participate in the summary judgment proceedings. On July 23, 2008, the trial court denied the Majors' motion for summary judgment and motion for discovery sanctions against Maxey and Hodgson. The court granted Maxey's motion for summary judgment and dismissed all claims against Maxey. The court further found that the Majors' complaint and motion for summary judgment were (1) not well founded in fact, (2) not warranted by existing law, (3) filed maliciously and interposed for the purpose of harassing the Maxey Law Office, and (4) brought "dishonestly, deceitfully, and in bad faith." The court awarded Maxey attorney fees and costs of approximately \$24,000 pursuant to CR 11. In a separate ruling, the court granted Hodgson's motion to set aside the Skagit County order of default for improper venue and dismissed the Majors' action against Hodgson under CR 12(b)(6). The court

No. 64858-6I/7

denied the Majors' motion for reconsideration on July 30, 2008. The Majors appeal all three orders.

II

The trial court dismissed the Majors' claims against the Maxey Law Office on summary judgment.³ When reviewing a grant of summary judgment, an appellate court undertakes the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). We consider the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party. Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

Maxey argues that the trial court's unchallenged findings of fact are binding on appeal and, in any event, supported by substantial evidence. However, because we review the record de novo, findings of fact entered in summary judgment proceedings are "merely superfluous" and the Majors' failure to assign error to them does not make them verities on appeal. Gates v. Port of Kalama, 152 Wn. App. 82, 86 n.6, 215 P.3d 983 (2009) (quoting State ex rel. Carroll v. Simmons, 61 Wn.2d 146, 149, 377 P.2d 421 (1962)). Moreover, because the trial court characterized its findings as

³ Before this case was transferred to Division One, a Division Three commissioner referred Maxey's motion on the merits to affirm to a panel of judges. See RAP 17.2(b). Because we have addressed all relevant issues on appeal, that motion is denied as moot.

No. 64858-61/8

undisputed material facts, the substantial evidence test does not apply. To the contrary, summary judgment is not warranted if reasonable minds could draw different conclusions from undisputed facts or if all of the material facts are not present. Schwindt v. Underwriters at Lloyd's of London, 81 Wn. App. 293, 297-298, 914 P.2d 119 (1996).

III

In their complaint, the Majors allege that the Maxey attorneys agreed to seek a continuance of Lacey's motion to dismiss, noted for June 15, 2007, and then breached the agreement when they failed to request a continuance. They further allege that Maxey's failure to perform its obligation under the agreement became part of a massive criminal conspiracy by the Maxey attorneys, opposing counsel Hodgson, and all participating judicial officers to betray the Majors, obstruct justice, and prevent the Majors from obtaining a fair trial of their allegations against Lacey. The Majors claim that the defendants' actions subjected them to liability for fraud, breach of contract, breach of the "ABA Code of Professional Conduct," "cheating at the law and rules of civil procedure," and joining a criminal conspiracy.⁴

The trial court concluded that the only claims in the Majors' complaint that are recognized under Washington law are fraud and breach of contract. On appeal, the Majors have not challenged the trial court's determination that they may not maintain an action for criminal conspiracy or violation of the Rules of Professional Conduct.

⁴ The trial court concluded that the Majors had failed to demonstrate a material factual issue supporting a claim of professional negligence. Because the Majors do not assert such a claim, we do not discuss it further.

No. 64858-61/9

See Hizey v. Carpenter, 119 Wn.2d 251, 259, 830 P.2d 646 (1992) (breach of ethics rules does not provide private remedy). Nor have the Majors identified a cognizable cause of action for “cheating at the law and rules of civil procedure.”

To establish fraud, a plaintiff must demonstrate: (1) representation of an existing fact, (2) materiality, (3) falsity, (4) speaker’s knowledge of its falsity, (5) speaker’s intention that it shall be acted upon by the plaintiff, (6) plaintiff’s ignorance of falsity, (7) reliance, (8) right to rely, and (9) damages. Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). Even when viewed in the light most favorable to the Majors, the evidence does not support an inference that a Maxey attorney made a false representation of an existing fact to Michael that resulted in injury.

As the moving party under CR 56, Maxey satisfied its initial burden by showing the absence of admissible evidence to support all of the elements of the Majors’ claims. See Schaaf, 127 Wn.2d at 21. The burden then shifted to the Majors to set forth specific facts demonstrating a genuine material issue for trial. To meet this burden, the Majors may not rely

on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists. Additionally, any such affidavit must be based on personal knowledge admissible at trial and not merely on conclusory allegations, speculative statements or argumentative assertions.

Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 198, 831 P.2d 744 (1992)

(footnote omitted).

On appeal, the Majors do not address the necessary elements of a claim of fraud, much less identify admissible evidence establishing the existence of a genuine

No. 64858-6I/10

factual issue for trial. As in the trial court, the Majors rely primarily on conclusory allegations of misconduct and the existence of a vast criminal conspiracy. Because the Majors failed to submit evidence establishing a material factual issue, the trial court properly dismissed their fraud claim on summary judgment.

In order to maintain their breach of contract claim, the Majors must demonstrate (1) the existence of an enforceable contract, (2) the parties' obligations under the contract, (3) violation of the contract, and (4) damages proximately caused by the breach. Citoli v. City of Seattle, 115 Wn. App. 459, 476, 61 P.3d 1165 (2002). The Majors claim that Partovi breached the terms of the agreement by not filing a "motion for continuance" or appearing in court and asking a judge for a continuance of the motion to dismiss that Lacey had noted for June 15, 2007. But the Majors mischaracterize the nature of Maxey's performance of the agreement.

It is undisputed that the scope of Maxey's representation was limited to obtaining a continuance of the motion to dismiss that Lacey had noted for June 15, 2007. It is also undisputed that on June 14, in accordance with the terms of the agreement, Partovi filed a notice of appearance and a declaration in which he asserted the legal basis for a continuance and requested a continuance either until June 29 or after July 9. Counsel's actions must be viewed in conjunction with the existing motion for a continuance that Michael himself had already filed on June 13. Consequently, the Majors' claim that Partovi breached the agreement by not filing a document labeled "motion" is frivolous.

No. 64858-6I/11

In addition, Partovi also spoke with opposing counsel, who refused to agree to a continuance. Partovi's associate therefore went to court on the morning June 15, the scheduled hearing date, and learned that Lacey's motion had not been docketed for that day because opposing counsel did not confirm the hearing as required by local rules. Consequently, contrary to the Majors' assertion, there was no longer a matter pending before the court to continue. The Majors have not made any showing that Maxey breached the terms of the agreement by not undertaking further actions at this point.

The Majors seem to argue that because Lacey renoted the motion to dismiss for June 22, Maxey was obligated to seek a continuance of that hearing as well. But they have not identified any admissible evidence supporting an inference that the parties' agreement encompassed any obligations that extended beyond the originally scheduled hearing date of June 15. In fact, no further hearing occurred until July 20, well past the date that the Majors originally requested. The trial court properly dismissed the Majors' breach of contract claim on summary judgment.

The Majors next contend that Maxey failed to comply with the 10-day notice requirement for withdrawal by notice. See CR 71(c). The parties dispute the precise nature of the conversation that led to the filing of a notice of withdrawal on the afternoon of June 15. But for purposes of summary judgment, Maxey concedes that the notice of withdrawal was not properly drafted and that Michael did not receive a copy of the notice of withdrawal.

No. 64858-6I/12

An attorney's strict compliance with CR 71 is unnecessary if there has been no prejudice. Lockhart v. Greive, 66 Wn. App. 735, 742, 834 P.2d 64 (1992). Michael was clearly aware that the relationship with Maxey had ended, as he immediately resumed filing all pleadings in the actions against Lacey, including a motion for sanctions against Partovi. Opposing counsel served all subsequent pleadings on Michael. Because the Majors have not demonstrated that any irregularity with regard to the notice of withdrawal impeded their ability to proceed in the action against Lacey (or identified any other prejudice), Maxey's failure to comply with CR 71 provides no support for the Majors' claims.

IV

The Majors next challenge the trial court's order setting aside the Skagit County order of default entered against Hodgson and then dismissing the Majors' complaint against Hodgson pursuant to CR 12(b)(6).

An order of default entered in a county of improper venue is valid "but will on motion be vacated for irregularity pursuant to rule CR 60(b)(1)." CR 55(c)(2). We review a trial court's decision on a motion to vacate an order of default for an abuse of discretion. Morin v. Burris, 160 Wn.2d 745, 753, 161 P.3d 956 (2007). Although a party seeking to set aside an order of default need not demonstrate a defense on the merits, the presence of a meritorious defense provides additional support for a decision to vacate the order. See Canam Hambro Sys., Inc. v. Horbach, 33 Wn. App. 452, 455, 655 P.2d 1182 (1982).

No. 64858-6I/13

Generally, a lawsuit must be filed in the county in which the defendant resides. See RCW 4.12.025(1). It is undisputed that the Majors knew and alleged that Hodgson lived in Spokane County. Under the circumstances, the Majors have not shown that the trial court abused its discretion in setting aside the order of default under CR 55(c)(2).

The Majors allege that in setting aside the order of default, the trial court “falsified” the Skagit County record by suggesting the Skagit County trial judge had found venue improper as to Hodgson. This contention mischaracterizes the trial court’s ruling. By setting aside the Skagit County order of default, the trial court necessarily recognized its current validity. The court’s decision was based on its own analysis of venue and application of CR 55(c)(2). The court did not find or suggest that the Skagit County trial judge had found venue improper as to Hodgson. Rather, the trial court merely noted that the Skagit County judge had found venue improper as to the claims against Maxey Law Office. Those claims formed the primary focus of the Majors’ action.⁵

The Majors also contend that the trial court erred by dismissing the action against Hodgson because he repeatedly “defaulted” anew by failing to respond to summary judgment motions, interrogatory requests, and requests for documents after venue was transferred from Skagit County to Spokane County. But Hodgson had

⁵ The Majors have not challenged the order transferring venue or alleged any resulting prejudice. See Hauge v. Corvin, 23 Wn. App. 913, 915-16, 599 P.2d 23 (1979) (party who challenges venue decision at the end of proceeding without seeking discretionary review must demonstrate prejudice).

No. 64858-6I/14

already been found to be in default, and he was not permitted to participate in the ongoing proceeding against Maxey. As the trial court correctly noted, the Majors did not identify any legal obligation requiring Hodgson to respond to the discovery requests as part of the proceeding against Maxey or cite any authority suggesting that the alleged “defaults” had any legal significance. The Majors’ contention that the trial court had expressly authorized them to pursue discovery against Hodgson is frivolous as it rests on a comment, taken out of context, in a proceeding involving the discovery requests directed to Maxey.

V

The Majors next contend the trial court erred in denying their motion for discovery sanctions against Maxey. They acknowledge that in response to the trial court’s motion to compel, Maxey attorneys provided answers to interrogatories and participated in a deposition. After reviewing the documents submitted in support of the motion for sanctions, the trial court found that no discovery violations had occurred, noting that Maxey had generally answered the interrogatories and raised proper objections based on the rules of evidence during the deposition.

On appeal, the Majors offer nothing more than conclusory allegations of improper conduct. They have not identified any specific incomplete answer to an interrogatory or demonstrated that any specific objection during the deposition was improper. Consequently, they have not demonstrated that the trial court abused its broad discretion to determine discovery sanctions. See Magaña v. Hyundai Motor Am., 167 Wn.2d 570, 582, 220 P.3d 191 (2009).

No. 64858-6I/15

The Majors contend that Maxey's counsel participated in an "illegal ex parte meeting" to obtain an improper temporary restraining order. They argue the order was improperly based on an affidavit containing "69 counts of libel and perjury."

In support of their claim, the Majors rely solely on references to documents filed in the trial court and a letter to the bar association. This is nothing more than an improper attempt to incorporate trial court arguments by reference into an appellate brief. See U.S. West Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n, 134 Wn.2d 74, 111-12, 949 P.2d 1337 (1997). Because the Majors have not presented any argument in their appellate brief demonstrating a deficiency in the trial court's issuance of a temporary restraining order, the issue is waived. Kwiatkowsky v. Drews, 142 Wn. App. 463, 499-500, 176 P.3d 510 (2008). And, in any event, because the trial court granted the Majors' motion to terminate the temporary restraining order, the Majors' allegations are moot.

VI

Maxey and Hodgson have requested an award of attorney fees for being forced to respond to a frivolous appeal. See RAP 18.9(a). An appeal is frivolous "if the appellate court is convinced that the appeal presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal." In re Marriage of Foley, 84 Wn. App. 839, 847, 930 P.2d 929 (1997). That standard is satisfied here.

On appeal, the Majors challenged orders dismissing their claims against Maxey on summary judgment and vacating the order of default and dismissing their

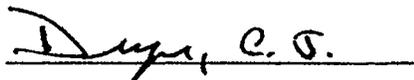
No. 64858-61/16

claims against Hodgson under CR 12(b)(6). The mere fact that the trial court vacated an order of default against Hodgson does not subject the Majors to sanctions. But as in the trial court, the Majors have not made any effort to conform their allegations to the elements of their alleged causes of action or to demonstrate that dismissal under CR 56 and CR 12(b)(6) was legal error. Rather, they rely almost exclusively on conclusory allegations of misconduct, unsupported by any meaningful legal argument or references to admissible evidence. An award of sanctions for a frivolous appeal is therefore appropriate.

Finally, the Majors filed a motion requesting, among other things, that the defendants be cited for fraud and referred to the appropriate authorities for criminal prosecution. The motion is denied as frivolous.

The trial court's orders setting aside the order of default against Hodgson and dismissing the Majors' claims against Hodgson and Maxey are affirmed; both Maxey and Hodgson are awarded attorney fees on appeal, subject to compliance with RAP 18.1(d); the Majors' motion for a citation of fraud is denied.

Affirmed.



We concur:





APPENDIX 2

blackmail him into giving up his rights. Mr. Major has also filed a Motion to Include Appendix. The decision of the trial court is affirmed.

On August 28, 2008, Mark Major filed a complaint against Mark Hodgson, Maxey Law Office, and Bohrsen and Stowe, alleging the following causes of action: fraud; breach of contract; multiple breaches of the lawyers' code of professional conduct; malpractice; use of the color of law to contravene the law to deny fundamental civil rights; obstruction of justice; corruption of a superior court judge; collusion to destroy an upstanding father, his children, and fiancée for the basest of reasons; moral turpitude; and lack of standing. Mr. Major later withdrew his claims for corruption of a superior court judge and lack of standing. The remaining claims stemmed from Maxey Law Office's limited representation of Mr. Major and his father, Michael Major, during the Majors' lawsuit against Lacey Major in 2007. At that time, Maxey Law Office was retained by the Majors solely to seek a continuance. A continuance was stipulated to by counsel and approved by the court. The Majors' lawsuit was eventually dismissed with prejudice, and that decision was affirmed by this Court. See *Mark Major, et al v. Lacey Major*, No. 26481-5-III. The Majors subsequently filed a lawsuit against Mr. Hodgson and Maxey Law Office in 2007. In that case, the court granted the defendants' motions for summary judgment and the Majors' subsequent appeal is pending in this Court. See *Mark Major, et al v. Mark Hodgson, et al*, No. 27346-6-III. Mr. Major then filed this action.

Mr. Major eventually voluntarily withdrew all claims against Bohmsen and Stowe. On January 15, 2009, Maxey Law Office moved for summary judgment, arguing that Mr. Major's claims were barred by res judicata and that Mr. Major was essentially attempting to re-litigate issues already decided. Mr. Major filed a competing motion for summary judgment. At a hearing, the judge asked Mr. Major if there were any new causes of action in this suit which were not in the prior suit against Mr. Hodgson and Maxey Law Office. Mr. Major acknowledged there were no new claims or issues. When asked what was different about this suit, Mr. Major stated, "I guess the only thing new about it is just me filing it." The court granted the defendants' motion and dismissed Mr. Major's cause of action with prejudice based on res judicata, collateral estoppel, failure to present expert testimony to support the professional negligence claim, failure to submit evidence complying with CR 56, and failure to submit admissible evidence supporting the breach of contract claim. Mr. Major appeals.

This Court reviews summary judgment orders de novo, performing the same inquiry as the trial court. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "[A]n appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it." *LaMon v. Butler*, 112 Wn.2d 193,

No. 27964-2-III

200-01, 770 P.2d 1027 (1989)(citing *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984)). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). In addition, "[q]uestions of fact may be determined as a matter of law 'when reasonable minds could reach but one conclusion.'" *Id.* at 788 (quoting *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)). When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Once the moving party has established there is no dispute as to any issue of material fact, the burden shifts to the nonmoving party to establish the existence of an element material to its case. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998).

First, Mr. Major contends that the court erred by "condoning" the fact that the plaintiffs' attorney and defense attorneys conspired together to ensure that he and his father lost their prior case against his ex-wife, Lacey Major.

Initially, it should be noted that Mr. Major does not assign error to the court's grant of summary judgment to the Respondents, but rather to Judge Eitzen's "condoning" of collusion that occurred in 2007 in relation to Mr. Major's lawsuit against Lacey Major. However, the record is devoid of any evidence showing the court in any way "condoned" the formation of a conspiracy or collusion on the part of Maxey Law

Office and Mr. Hodgson. Moreover, Mr. Major fails to cite to any authority standing for the position that “condoning” collusion is reversible error.

Furthermore, even if Mr. Major did assign error to the court’s decision granting summary judgment to the Respondents, the court’s decision was not erroneous. “Res judicata, or claim preclusion, bars the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action.” *Pederson v. Potter*, 103 Wn. App. 62, 69, 11 P.3d 833 (2000). “Application of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made.” *Id.* “Res judicata also requires a final judgment on the merits.” *Id.* The purpose of res judicata and collateral estoppel is to prevent re-litigation of the same subject matter by the same parties over the same cause of action. *Meder v. CCME Corp.*, 7 Wn. App. 801, 803, 502 P.2d 1252 (1972), *review denied*, 81 Wn.2d 1011 (1973).

Here, this lawsuit involves the same parties and subject matter as Mr. Major’s prior lawsuit against Mr. Hodgson and Maxey Law Office. Further, Mr. Major’s claims for fraud, professional negligence, breach of contract, breach of the rules of professional conduct, obstruction of justice, and collusion/corruption were litigated and decided in the prior lawsuit. Mr. Major’s remaining claims for use of the color of law to contravene the law to deny fundamental civil rights and moral turpitude arise from the same set of facts and could have been raised in the prior action, and are therefore also barred by res

No. 27964-2-III

judicata. See *Mellor v. Chamberlin*, 100 Wn.2d 643, 645, 673 P.2d 610 (1983); *Pederson*, 103 Wn. App. at 69. After examining the record, this is merely an attempt by Mr. Major to re-litigate the same claims against the same parties, which is precisely what the res judicata doctrine prevents. See *Meder*, 7 Wn. App. at 803. Mr. Major himself acknowledged there was nothing different about this cause of action other than the fact that his father was not involved this time. Consequently, the court did not err by granting summary judgment to the Respondents and dismissing Mr. Major's cause of action.

Second, Mr. Major's contention that the court erroneously suppressed evidence which indicated his innocence and Lacey Major's perjury is without error. He assigns error to "the suppression of evidence to persecute an innocent father and his children" by the court and points to a letter from his domestic violence treatment provider and a Dependency Review Hearing Order. However, Mr. Major fails to show where in the record the court "suppressed" either of these documents, which were attached to Mr. Major's Motion to Compel/Alternative Sanctions for Default, and Motion for Protective Order. In fact, there is no evidence in the record the court took any action with respect to these documents whatsoever. Consequently, Mr. Major has failed to show any error. Regardless, these documents appear to be wholly irrelevant as they do not relate to any of Mr. Major's claims in this case.

Third, Mr. Major's contention that the court erred by colluding with defense counsel to deny him a fair hearing and attempting to blackmail him into giving up his

rights is without merit. Again, the record is devoid of any evidence indicating the trial court “colluded” with defense counsel for any purpose. Likewise, Mr. Major has failed to show that he was denied a fair hearing or blackmailed into giving up rights. The “blackmail” Mr. Major refers to is Mr. Bohrsen’s offer to not pursue sanctions if Mr. Major agreed not to commence another similar lawsuit unless the lawsuit was signed off by the presiding judge. Mr. Major declined that offer. This was an offer from Mr. Bohrsen to Mr. Major. The court was not involved other than attempting to explain to Mr. Major what Mr. Bohrsen was offering. Mr. Major has failed to show how this was reversible error.

Mr. Major also moves to include in an appendix to his brief the following items: (1) the signature page from the Majors’ prior complaint against Mr. Hodgson and Maxey Law Office; (2) the signature pages from the Majors’ motion for summary judgment and from the Majors’ prior complaint against Mr. Hodgson and Maxey Law Office; (3) two pages from a transcript reporting a hearing held on June 26, 2008; (4) a letter written by Michael Major to the Commission on Judicial Conduct; and (5) a letter written by the Commission on Judicial Conduct to Michael Major dated October 15, 2009.

“If the record is not sufficiently complete to permit a decision on the merits of the issues presented for review, the appellate court may, on its own initiative or on the motion of a party (1) direct the transmittal of additional clerk’s papers and exhibits or administrative records and exhibits....” RAP 9.10. Generally the record on appeal cannot be supplemented by material that was not part of the trial court record. *Snødigar*

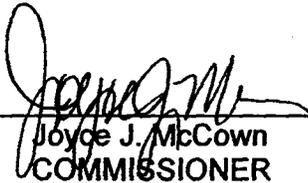
No. 27964-2-III

v. *Hodderson*, 114 Wn.2d 153, 164, 786 P.2d 781 (1990). Despite this general prohibition, a party may bring a motion to supplement the record with additional evidence under RAP 9.11(a). Additional evidence on review will be considered if it meets six conditions, one of them being “additional proof of facts is needed to fairly resolve the issues on review.”

Here, the signature page from the Majors’ prior complaint against Mr. Hodgson and Maxey Law Office is already in the record and before this Court and thus need not be included in an appendix to a brief. However, none of the remaining five documents were part of the trial court record, and none of them is necessary for this Court to fairly resolve the issues on review. Therefore, Mr. Major has failed to show how any of them would probably have changed the trial court’s decision, See RAP 9.11(a), and thus the motion to include these documents in the brief’s appendix is denied.

The motion on the merits is granted and the decision of the trial court is affirmed. The motion to include an appendix is denied.

December 16 , 2009.



Joyce J. McCown
COMMISSIONER