

69847-8

69847-8

No. 69847-8-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

Patrick Smith,
Respondent,

v.

Congruent Software Inc.,
Appellant.

BRIEF OF APPELLANT

Katie J. Comstock
Attorney for Appellant,
Congruent Software, Inc.

FILED
APR 11 2011
11:02
30

Katie J. Comstock
Levy von Beck & Associates, P.S.
600 University St., Ste 3300
Seattle, WA 98101-1129
206-626-5444
WSBA #40637

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	1
<i>Assignments of Error</i>	
No. 1	1
No. 2	1
<i>Issues Pertaining to Assignments of Error</i>	
No. 1	2
No. 2	2
III. STATEMENT OF THE CASE	2
IV. ARGUMENT	5
A. The Trial Court Erred in the Facts of This Case.	5
B. The Trial Court Erred in Fact as to Elements of Plaintiffs' Claims.	6
V. CONCLUSION	8

TABLE OF AUTHORITIES

Page(s)

Table of Cases

Mitchell v. Wash. State Inst. of Public Policy,
153 Wn. App. 803 (2009)..... 7

Whatcom Cnty. v. Bellingham, 128 Wn.2d 537 (1996)..... 6

Statutes and Rules

Superior Court Civil Rules

CR 11 *passim*

54(d) *passim*

78(e) 7

Revised Code of Washington

RCW 4.84.185 *passim*

RCW 4.84.010 4

RCW 49.48.030 3

INTRODUCTION

Appellant, Congruent Software Inc. (“Congruent”), seeks review and reversal of the Order Denying Defendant’s Motion for Award of Sanctions Under CR 11 and RCW 4.84.185, which was signed by the Honorable Michael Heavey, King County Superior Court Judge, on January 2, 2013 and filed on January 3, 2013 (CP 63-64) (the “January 2013 Order”). The January 2013 Order also vacated the Order Granting Defendant’s Motion for Sanction Under CR 11 & RCW 4.84.185 signed by Judge Heavey on December 21, 2012 and filed on December 24, 2012 (CP 61-62) (the “December 2012 Order”). Specifically, this case involves the application of Court Rule (“CR”) 54(d) and RCW 4.84.185 to the briefing of a claim for sanctions under CR 11.

ASSIGNMENTS OF ERROR

Assignments of Error

No. 1. The trial court erred in denying [Congruent’s] Motion for Award of Sanctions Under CR 11 and RCW 4.84.185 filed December 12, 2012 (CP 35-60) (the “2012 Motion for Sanctions”) as untimely under CR 54(d).

No. 2. The trial court erred in denying Congruent’s 2012 Motion for Sanctions as untimely under RCW 4.84.185.

Issues Pertaining to Assignments of Error

No. 1. Whether CR 54(d), which imposes a 10-day post-judgment deadline for filing a motion for attorney fees, applies to a motion for sanctions under CR 11.

No. 2. Whether the 30-day deadline for a motion for sanctions under RCW 4.84.185 applies to a judicially ordered supplemental motion to quantify, following a timely and successful motion for statutory sanctions.

STATEMENT OF THE CASE

Appellant, Congruent Software (“Congruent”), was sued in King County Superior Court by its former employee, Respondent, Patrick Smith (“Smith”). (CP 2) Smith alleged causes of action relating to his employment with Congruent, including for unpaid wages, willful failure to pay wages, breach of contract, and constructive discharge. (CP 5-6) Smith claimed damages “in excess of \$200,000.” (CP 6)

On September 8, 2011, after a trial to the court during which Smith’s claims for willful failure to pay wages, breach of contract, and constructive discharge were dismissed, Judge Heavey filed Findings of Fact and Conclusions of Law (CP 1-10) awarding Smith a total of \$277.00 on his claim for failure to pay wages (CP 5). At the same time, the court also commended Congruent’s principal, Mr. Krishnamurthy, for

determining that, in fact, \$277.00 in unpaid wages was owed to Smith and for bringing evidence of it to the Court's attention. (CP 4) Because Congruent had prevailed on all but one of Smith's claims and also reduced Smith's recovery on the remaining claim for over \$200,000 to \$277, the court determined that both parties had prevailed in part.

Thereafter, on September 13, 2011, the court entered Findings and Conclusions Regarding Motion for Award of Attorney Fees and Costs (CP 11-16) awarding Smith attorney fees in the amount of \$9,483.10 "as the prevailing party for the purposes of CR 54(d), and RCW 49.48.030" (CP 13).

And on October 24, 2011, the court entered Findings and Conclusions Regarding [Congruent's] Motion for Sanctions Under CR 11, concluding that Smith's Constructive Discharge cause of action was "frivolous and advanced without reasonable cause." and leaving the "award [of] an appropriate sanction" to "be considered upon motion by [Congruent]" (CP 34), evidently because the Declaration submitted by Congruent in support of its motion for sanctions did not provide sufficient information to quantify the "appropriate sanction." *See* CP 30-33. However, the Court set no timeframe or deadline for the "motion" from which the amount of the "appropriate sanction" would be determined. *See* CP 34.

Although Congruent's Motion (CP 17-29) had requested "Sanctions under CR 11 and Costs and Attorney's Fees" (CP 17), the 12-page Motion included less than a page relating to costs "under RCW 4.84.010 and CR 54," and Congruent candidly admitted it "may have missed the 10-day deadline for filing" under 4.84.010. *See* CP 27-28. Clearly, as the court obviously perceived in referring to Congruent's motion as one "for Sanctions under CR 11," Congruent was relying on CR 11, not the statute authorizing an award of costs including attorney's fees.

Following entry of the Findings and Conclusions in Congruent's favor (CP 34), Pro Se counsel for Congruent attempted to negotiate a "walk-away" settlement with Smith (*see* CP 58). When Smith finally declined the proposal in September 2012, Congruent determined to pursue the motion to quantify its 2011 award of sanctions. (*See id.*) Accordingly, Congruent filed its motion (CP 35-60) and in an Order filed December 24, 2012, the court awarded Congruent \$14,475.65 in sanctions against Smith and his legal counsel. CP 61-62. The basis for the bulk of the award (\$10,400) was the court's finding that Smith's "constructive discharge case was baseless. It was not well grounded in fact, nor warranted by existing law. It was interposed for an improper purpose -- to threaten the Defendant, because of the open-ended exposure, into settling the case." (CP 62)

Although the court granted Congruent's Motion, apparently due to a calendaring error, it did so without reviewing Plaintiff's response to the Motion. Upon receiving Plaintiff's brief, the court vacated its December 24, 2012 order and entered an order denying sanctions on the grounds that Congruent's motion was untimely under CR 54(d) and RCW 4.84.185. (CP 63-64)

ARGUMENT

The Court Erred in Determining That Congruent's 2012 Sanctions Motion Was Untimely Under CR 54(d).

First, Congruent's 2012 Motion was specifically filed in response to the court's October 24, 2011 "Findings and Conclusions Regarding [Congruent's] Motion for Sanctions Under CR 11" (CP 34) requiring a motion by Congruent to determine the "appropriate sanction" to be awarded. The basis of the October 2011 award was Smith's "Constructive Discharge cause of action" that the court determined was "frivolous and advanced without reasonable cause." (*Id.*) There can be no dispute that the award to Congruent was based on Smith's sanctionable frivolous conduct under CR 11.

It is RCW 4.84.185 that controls the award of sanctions for opposing frivolous causes of action under CR 11, and specifies a 30-day deadline for filing the motion for sanctions. CR 54(d) applies when a

judgment involves “Costs, Disbursements, Attorney’s Fees, and Expenses” and provides for a 10-day deadline to move for an award of the same “[u]nless otherwise provided by statute.” RCW 4.84.185 “otherwise” provides for the specific type of motion Congruent filed.

Furthermore, the 10-day deadline in CR 54(d) is obviously inconsistent with the 30-day deadline under RCW 4.84.185. “We construe a rule so as to effectuate that intent, avoiding a literal reading if it would result in unlikely, absurd, or strained consequences.” *Whatcom Cnty. v. Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Application of CR 54(d) to sanctions awards would render the 30-day deadline in RCW 4.84.185 void. CR 54(d) had no application to this case and it was error for the court to consider it in determining whether Congruent’s October 2011 Motion was timely.

**The Court Erred in Determining That Congruent’s 2012
Sanctions Motion Was Untimely Under 4.84.185.**

There is no basis for applying the RCW 4.84.185 30-day deadline for bringing a motion for sanctions to a supplemental motion required by the court upon the hearing of the initial, timely motion. The court considered Congruent’s original October 2011 motion for sanctions and issued Findings of Fact and Conclusions of Law in Congruent’s favor;

however, Congruent apparently did not provide sufficient support at the time for the court to determine the amount of a monetary award.

Therefore, the trial court ordered briefing to quantify the sanctions. This was an exercise of the Court's inherent power, not subject to any procedural rule, and not subject to any specific time limit. It is undisputed that the October 2011 Motion was timely. Moreover, the trial court was evidently unconcerned with the time that had elapsed since it entered its Findings and Conclusions on the original motion.

In fact, if the 30-day deadline set forth in RCW 4.84.185 were determined to apply to the supplemental motion, Congruent could not possibly have complied with it because on October 24, 2011 when the court ordered the additional briefing, the proceedings were already well beyond 30 days after the September 8, 2011 date the court's Findings of Fact and Conclusions of Law after trial to the court were filed. The only reasonable construction is that Congruent complied with RCW 4.84.185 when it filed its October 2011 motion, and what remained was a supplemental proceeding ordered by the Court's inherent power. *See Mitchell v. Wash. State Inst. of Public Policy*, 153 Wn. App. 803, 823, 225 P.3d 280 (2009) (discussing CR 78(e)) (absent clear language to the contrary, the court would not apply rule mechanically to deprive a litigant of costs to which he is justly entitled or to enrich a litigant with costs he

has unjustly secured), *review denied*, 169 Wash.2d 1012, 236 P.3d 205 (2010). It was error for the trial court to rely on RCW 4.84.185 and determine that Congruent's December 2012 Motion was untimely.

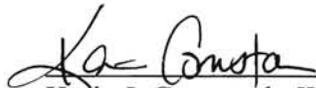
CONCLUSION

In its January 3, 2013 Order Denying Defendant's 2012 Motion for Sanctions, the trial court also vacated its December 2012 Order Granting Defendant's Motion for Sanctions. But the court erred in applying CR 54(d) in the first instance, and in applying RCW 4.84.185 a second time to concluding that the December 2012 Motion should have been denied as untimely. This Court should therefore reverse and vacate the trial court's January 3, 2013 Order Denying Defendant's Motion for Award of Sanctions Under CR 11 and RCW 4.84.185, thereby reinstating the trial court's December 24, 2012 Order granting Congruent the total amount of \$14,475.60 as sanctions against Smith and his legal counsel, jointly and severally.

DATED this 10th day of November, 2013.

Respectfully submitted,

LEVY • VON BECK & ASSOCIATES, P.S.



Katie J. Comstock, WSBA #40637
Attorneys for Appellant,
Congruent Software Inc.