

No. 73456-3-I

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SUPERIOR COURT
STATE OF WASHINGTON
2015 OCT 22 PM 2:48

**IN THE COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON**

JIMMY C. FLETCHER

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The following Memorandum of Points and Authorities is respectfully submitted in appeal of the Trial Court's order for sanctions. The Trial Court's order of sanctions is without legal or factual authority and acts as a "chilling effect" on plaintiff's attorneys bringing forth such cases, which is the opposite effect of the guise of RCW 49.60, Washington's Law Against Discrimination. (CP 4-13); even he was not the original judge that defended to summary judgment. Plaintiff successfully survived summary judgment on this case, but lost at jury trial. Emboldened by plaintiff's loss, the respondent, Washington Department of Corrections, sought to punish plaintiff and plaintiff's counsel for bringing this case by moving for sanctions. The Trial Court erroneously awarded sanctions, of \$20,288.68 against plaintiff and plaintiff's counsel by merely, "Making up its own formula, which has no support (CP 4-16, 37-43) and is in violation of RCW 49.60:

The legislative purpose in authorizing attorney fee awards in employment discrimination claims is to enable vigorous enforcement of laws against discrimination. *Martinez v. Tacoma*, 81 Wash.App. 228, 914 P.2d 86, *review denied*, 130 Wash.2d 1010, 928 P.2d 415 (1996).

"[T]he legislature has declared that discrimination is 'a matter of state concern, that ... threatens not only

the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.’ ” Money damages are an inadequate yardstick for measuring the results of discrimination.

Martinez, 81 Wash.App. at 241-42, 914 P.2d 86.

Appellant requests that this sanction, for bringing forward a legitimate WLAD case, be overturned. Otherwise the purpose of RCW 49.60 would be deemed meaningless and would discourage plaintiff’s attorneys from bringing forth such cases, instead of encouraging the prosecution of such claims.

II. ASSIGNMENTS OF ERROR

The Trial Court erred in awarding the State of Washington monetary sanctions after plaintiff successfully prevailed on summary judgment and lost at trial; this ruling should be overturned and stricken.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the Trial Court misapply the rules of CR 11 when it awarded sanctions against plaintiff and plaintiff’s counsel after plaintiff brought claims in good faith for violation of RCW 49.60, prevailed at summary judgment and lost at jury trial?

IV. STATEMENT OF FACTS

A. FACTUAL SUMMARY AND MOTION FOR SANCTIONS.

1. IT WAS THE RESPONDENT THAT MOVED WAS PROPERLY SANCTIONED FOR THEIR CITITION OF UPUBLISHED AUTHORITY

Respondent's misconduct, placed appellant in the untoward position of having to respond to this rule violation by addressing the unpublished opinion.

Additionally, as will be established below, a close reading of *Satterwhite*, and the authorities cited therein, serves to establish that the state's motion for sanctions in and of itself is frivolous on a variety of grounds, and thus violative of CR 11. Long ago our Supreme Court informed that frivolous motions for CR 11 sanctions in and of themselves are violative of CR 11. *Bryant v. Joseph Tree, Inc.* 119 Wn.2d 210, 222, 829 P.2d 1099 (1992) (upholding imposition of sanctions for bringing a frivolous motion for sanctions). Had the defense actually read the *Satterwhite* opinion and cited it appropriately, it would have informed the Trial Court that in *Satterwhite*, the sanctions imposed against plaintiff's counsel were reversed because the Trial Court did a number of the things

which, if the Court were to follow the defense's arguments in this case would be deemed to be inappropriate.¹

Finally, with respect to introductory issues, it is noted that the Court should strike the "appendix" to Mr. Triesch's declaration. This "appendix" is simply a compilation of a number of complaints filed by plaintiff's counsel in other cases, in other jurisdictions, over the years. (CP268-401) The appendix proves that this plaintiff attorney regularly battles the State of Washington and Attorney General's Office, (the largest law firms in this State), as a solo practitioner and the Respondent's response to plaintiff's counsel is often to outsource and out work the plaintiff, merely because it has the resources. The actual proof of the case outcomes are highly relevant and prove that these are worthy causes and

¹ Plaintiff's counsel following reversal of remand in *Satterwhite* ultimately did not have to pay any sanctions. They were not pursued because the Respondent, State of Washington, knew that they were frivolous. Further in *Satterwhite* the dismissal of the underlying claims was not subject to appeal. However, if one "reads between the lines", arguably had the dismissal of the underlying claims actually been brought up on appeal in *Satterwhite*, it is highly debatable as to whether or not the dismissal of such claims ultimately would have been subject to reversal. It is noted that in *Satterwhite* even when evaluating plaintiff's claims and finding a number of them, (if not all), to be "non frivolous", the Appellate Court nevertheless applied the now discredited proposition that a plaintiff in a discrimination case had an obligation to prove "pretext" in order to prevail. See *Scrivener v. Clark College* – Wn.2d – 334 P.3d 541 (2014) (clarifying that an employment discrimination plaintiff is not obligated to prove "pretext", but may pursue a claim based on whatever evidence may be available, establishing that an impermissible consideration may have been a "substantial factor" in an adverse employment decisions". Had the guidance of *Scrivener* been available at the time the summary judgment was heard in the *Satterwhite* case it is highly likely that the outcome would have been different, and *Satterwhite* would be yet another case where the State of Washington was subject to an adverse judgment for violations of our law against discrimination, RCW 49.60. It is only the State of Washington that has pursued such sanction motions against plaintiff's counsel, which is retaliatory and a bullying tactic against this solo plaintiff's attorney.

that plaintiff's counsels should be encouraged to take on these case. (CP 54-95). Putting authentication issues aside, it is respectfully suggested that the existence of such complaints simply have no relevance to any issue currently pending before this Court, and are purposely being placed before the Court in a manner which is calculated to both confuse and mislead. Thus, such information does not meet the test of basic relevancy under ER 401 and ER 402. Further, given the incomplete nature of such information, such information would be subject to exclusion pursuant to ER 403, under a number of grounds, including the fact that such information, standing alone is misleading and confusing and has virtually no probative value.

Apparently the State is submitting such documentation to establish that plaintiff's counsel brings "frivolous claims". However, in some of the cases submitted in the Respondent's Appendix, the State paid to settle those cases. What is noticeably absent is any finding in those particular cases that any of the claims asserted within the subject complaints were "frivolous" or violative of CR 11. It is well beyond this Court's jurisdiction to rule one way or another as to whether or not the claims set forth in complaints filed in other cases were in any way frivolous. As discussed below, there is simply nothing wrongful, particularly in an area where often the claims are nuanced, and/or there is substantial overlap

between statutory and common law, for a plaintiff to plead a variety of claims in the alternative. In fact, as discussed below that is an entirely appropriate practice.

Beyond *Satterwhite*, a case where the sanctions were subject to reversal the state can point to no other case within its appendix where plaintiff's counsel was sanctioned for violation of CR 11.

In fact, in the case of *Stinson v. State*, Pierce County Cause No. 11-2-06528-1, plaintiff's counsel was able to acquire, after a substantial jury verdict, a settlement inclusive of the Award and attorney's fees in the amount of \$200,000.00 against the State of Washington. Recently in the *Lowry v. State* case, plaintiff's counsel was able to have a successful finding of hostile work environment liability, which should ultimately result in a substantial award of attorney's fees in favor of the plaintiff in that case.² Further, if anything the fact that the appendix shows that plaintiff's counsel is willing to file discrimination cases against the State of Washington on behalf of its employees. The Court can take note that often such cases occur in a "David versus Goliath" setting, and involved an area of the law where the plaintiff through its counsel is acting

² In *Lowry* the jury found that Mr. Lowry was a victim of a "hostile work environment" but awarded no damages. (No particular damage amount was requested.) Because there has been an affirmative finding of liability, Mr. Lowry will be entitled to a full award of all of his costs and attorney's fees relating to that case. See *Minger v. Reinhard Distributing Co., Inc.* 87 Wn.App. 941, 943 P.2d 400 (1997).

as a “private attorney general”. See *Marquis v. City of Spokane* 130 Wn.2d 97, 109, 922 P.2d 43 (1996):

This Court has held that the purpose of the law is to deter and eradicate discrimination in Washington, *Mackey v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 309-10, 898 P.2d 284 (1995); *Burnside v. Simpson Paper Co.* 123 Wn.2d 93, 99, 864 P.2d 937 (1994), and has stated that a plaintiff brings a discrimination case in Washington assumes the role of a private attorney general, vindicating a policy of highest priority. *Allison v. Housing Authority* 118 Wn.2d 79, 86, 821 P.2d 34 (1991).”

The Respondent’s appendix, if anything, shows that plaintiff’s counsel has willingly accepted this role. Further, the fact that plaintiff’s counsel often is involved in litigation for the state, provides the true motivation for the Respondent’s efforts to bring a frivolous motion for CR 11 sanctions in this matter. It is quite obvious that such efforts are an attempt on the part of the State to close the courtroom doors to its employees, who view themselves as being victims of discrimination, by dissuading individuals, such as plaintiff’s counsel, from bringing such claims. As discussed below, such efforts on the part of the State violate basic notions involving “access to the courts” and arguably, in and of themselves, constitute an actionable wrong.

Under CR 8, and our system of mature pleadings, the plaintiff uses the discovery process to uncover evidence necessary to pursue such

claims. *Putnam v. Wenatchee Valley Medical Center, P.S.*, 166 Wn. 2d 974, 982, 216 P.3d 374 (2009). Such a system fully permits a plaintiff to plead attentive theories of liability or alternative claims. CR 8(e)(2); *Jacob's Meadow Owners Association v. Plateau 44 II, LLC*, 139 Wn. App. 743, 162, P.3d 1153 (2007); Plaintiff's complaint was permissibly consistent with the rules.

The Trial Court did sanction Respondent DOC \$500 for this violation. CR 34-36

2. SPECIFIC STATEMENT OF FACTS WELL SUPPORTED CASE, WHICH COMPEL REVERSAL.

For the purposes of a "statement of facts", given page limitations plaintiff adopts by this reference, the Memorandum of Points and Authorities submitted in opposition to Respondent's motion for summary judgment, as well as all other annexed materials. (CP 105-202). Appellant's original summary judgment response is 64 pages full of contested facts brought in good faith. (1164-1227). Further, plaintiff incorporates all trial pleadings in this case as if fully set forth herein.

For the purpose of this motion, the key facts are plaintiff's counsel voluntarily dismissed five claims after discussions with opposing counsel. Additionally, although that left a number of remaining, often overlapping claims, including two claims which ultimately went to trial none of these

claims are frivolous, and in opposition to summary judgment plaintiff made a good faith effort to factually support such claims with appropriate factual materials and citation to controlling legal authority. Although only two claims survived through trial (CP402-403), those claims in and of themselves, survived Respondent's motion for directed verdict and though ultimately rejected by the jury, were not "frivolous". CP 203-216, 240-248, 250-256.

V. LEGAL DISCUSSION

A. Respondent's Motion for CR 11 Sanctions Was Untimely.

Here, the respondent, post verdict, seeks CR 11 sanctions for claims that were ultimately vetted in a summary judgment hearing which occurred several months ago in front of a different judge.

A party seeking sanctions pursuant to CR 11 should do so as soon as it becomes aware that such sanctions are warranted. "Prompt notice of the possibility of sanctions fulfills the primary purpose of the rule, which is to deter litigation abuses. See *Biggs v. Vail*, 124 Wn.2d 193, 198 876 P.2d 448 (1994). Sanctions are not supportable under CR 11 if the moving party delays in bringing such a motion until the case has progressed deep into litigation. *North Coast Elec. Co. v. Selig*, 136 Wn.App. 636, 649-50, 151 P.3d 211 (2007), (Trial Court reversed CR 11 sanctions due to the lack of specific findings of what conduct was

sanctionable and based on the fact that such motion was not brought until a year after the alleged offending pleadings was filed).

What is further problematic, with respect to the timing of Respondent's motion for sanctions, relates to the fact that the entry of CR 11 sanctions are matters vested within the discretion of the Trial Court and subject to any "abuse of discretion" standard for review on appeal. See *Skimming v. Boxer* 119 Wn.App. 748, 754, 82 P.3d 707 (2004). The reason why a "abuse of discretion standard" is applicable to such a determination, is because it is assumed that the trial court is in a better position than the appellate court to decide issues of this nature. *Id.* n.1 citing to *Eugster v. City of Spokane* 110 Wn.App. 212, 231, 39 P.3d 380 (2003). This is because a trial court has "tasted the flavor of the litigation and is in the best position to make these kind of determinations." *Id.* Citing to *Miller v. Bagley* 51 Wn.App. 285, 300, 753 P.2d 530 (1988).

In this case it was Judge Okrent who heard the Respondent's motion for summary judgment (but not the trial), and who presumptively vetted under summary judgment standards, the various claims asserted by the plaintiff in this case. (CP 409-412, 415-520, 714-1163). It was Judge Okrent who felt that some claims should go forward while others should not. It is Judge Okrent who knows what his rationale for such a determination was reasonable, which is not necessarily disclosed under the

bland terms of the applicable order. Judge Okrent obviously would be in the best position to determine why some claims went forward while others not. Thus, a motion for sanctions at this late date would undermine the purposes of CR 11 and its *juris prudencia* which otherwise provides deference to the Trial Court.

Finally on the question of timing it is respectfully suggested that the defense's dilatory tactic should be viewed as a matter resulting in a "waiver". A waiver occurs in one of two ways; (1) if a Respondent's assertion of a defense is inconsistent with the Respondent's previously behavior. *Lybbert v. Grant County* 141 Wn.2d 29, 39, 1 P.3d 1124 (2000). Or, (2) a waiver can occur when Respondent's counsel has been dilatory in asserting a position. *Id.* citing to *Raymond v. Fleming* 24 Wn.App. 112, 115, 600 P.2d 614 (1979).

Here, Respondent's inaction is both "inconsistent" and prejudicially dilatory. Although the defense is not seeking fees for the "trial" in this case of the claim which according to it are "non frivolous" by not seeking sanctions earlier "assuming *arguendo* that any are appropriate – (they are not), plaintiff was denied an opportunity to try to come to a negotiated resolution of this case where any such sanctions could be set against potential liabilities on triable issues.

In any event CR 11 sanctions should be denied due to such untoward delay.

B. Sanctions Should Not Be Awarded For Voluntarily Dismissed Claims.

As correctly pointed out by the respondent in their motion for sanctions, plaintiff's counsel voluntarily agreed to dismiss claims earlier in the litigation. (CP 258-260). Instead of trying to address this issue the defense in a rather overreaching fashion simply asked for "90 percent" of pretrial fees. The burden is on the moving party to justify a request for sanctions. *Skimming v. Boxer* 119 Wn.App. at 754-55. As *Satterwhite* teaches, (262-268), not only does such a burden apply to an entitlement to sanctions under CR 11, but also includes the obligation of tracing any injuries and/or damages, (fees accrued), attributable to such sanctionable misconduct. A Court must limit any attorney fee Award to the amounts reasonably expended in responding to the sanctionable filing. See *MacDonald v. Korum Ford*, 80 Wn.App. 877, 891, 912 P.2d 1052 (1999).

Here, defense counsel made no effort to submit to the Court accurate time records, which in any way reflect which tasks were being performed at any particular point in time. (CP 230-238). Had such detail been provided it likely would have shown that at most a *de minimus* amount of time was expended either calling and/or writing plaintiff's

counsel and negotiating voluntary dismissal of the above-referenced claims. Such a failure to prove alone justifies the denial of sanctions relating to the voluntarily dismissed claims.

Further, it would make no sense to punish plaintiff's counsel for what the law otherwise encourages him to do. CR 11 should not be used as a fee shifting mechanism. *Bryant* 119 Wn.2d at 220. In addition, where a party voluntarily dismisses a claim, such corrective action should be used to mitigate the amount of sanction imposed. *Biggs* 124 Wn.2d at 199-200. The Court should also impose the least severe sanction necessary. *Miller v. Bagley* 151 Wn.App at 303-04. The mere fact that a party agreed to dismiss claims after discovery, without no more is no basis for the imposition of sanctions. *Tiger Oil Corp. v. The Dep't of Licensing*, 88 Wn.App. 925, 946 P.2d 1235 (1997). The mere fact that plaintiff, voluntarily agreed to simplify this case by dismissing claims is something that should be viewed as laudable and not sanctionable.

C. Under Standards Applicable to CR 11, There Was No Basis for Awarding Sanctions in This Case.

CR 11 permits the imposition of reasonable attorney's fees and costs as a sanction where a bad faith filing of pleadings for an improper purpose or a filing of pleadings not grounded in fact or warranted by law has occurred. See *Bryant v. Joseph Tree Inc.* 119 Wn.2d at 217. The

party moving for sanctions bears a heavy burden justifying the request. *Biggs v. Vail* 124 Wn.2d at 202. The fact that the complaint does not prevail on the merits is not dispositive of the question of the appropriateness of CR 11 sanctions. *Bryant* 119 Wn.2d at 220. Because CR 11 sanctions have a potential chilling effect on “access to the courts” the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. See *Lee v. Jasman* – Wn.App. – 332 P.3d 1106 (2014), citing to *Skimming* at 755. The fact that the complaint does not prevail on the merits is not enough. *Id.* citing to *Building Industry Association of Washington v. McCarthy*, 152 Wn.App. 720, 745, 218 P.3d 196 (2009). “To avoid 20/20 hindsight, the Trial Court must conclude that the claims clearly had no chance of success before it may impose sanctions under Rule 11 for filing of claim.” In re *Cooke* 93 Wn.App. 526, 529, 969 P.2d 1227 (1999). In other words lack, of success does not automatically equate to sanctionable misconduct.

Here, the respondent failed to provide any kind of analysis as to why it views any of plaintiff’s claims as being frivolous, either on a legal or factual basis. On a simple review of plaintiff’s response to Respondent’s motion for summary judgment, there is no question that all of plaintiff’s claims had a “legal basis” and did not involve anything which could be characterized as a novel theory. Boldly asserting that

plaintiff's claim "lacked factual support" is far from meeting the respondent's burden as the moving party seeking sanctions.³

Again, with respect to the factual sufficiency of such claims plaintiff hereby adopts by this reference plaintiff's opposition to Respondent's motion for summary judgment. Without any kind of reasoned analysis by the defense with respect to these claims at best can be said that the defense is contending that it is entitled to a staggering Award of CR 11 sanctions simply because the plaintiffs did not prevail on such claims. That is not the standard and clearly is not a proper basis for the imposition of CR 11 sanctions which are generally reserved for egregious misconduct.

As such, Respondent's motion for CR 11 sanctions must be unequivocally denied.

VI. APPELLANT'S CROSS MOTION FOR CR 11 SANCTIONS

CR 11 also precludes advocacy done for an improper purpose, such as harassment, undue delay or needless expense. See *In Re: Recall of*

³ At Page 6 of the state's brief it suggests that plaintiff's claim of "negligent infliction of emotional distress" "fails to state a claim" and is duplicative of WLAD. Such assertions are legally incorrect and in fact are facially frivolous. It has long been established in Washington that an employee can bring a claim for negligent infliction of emotional distress which is not "duplicative" with a WLAD claim if it is based on facts other than those supportive of the discrimination or retaliation claim. See *Chea v. Men's Warehouse, Inc.* 85 Wn.App. 405, 932 P.2d 1261 (1997).

Lindquist 172 Wn.2d 120, 258 P.3d 9 (2011); *In re Cooke* 93 Wn.App. 529, 969 P.2d 127 (1999,) (party threatening to destroy opponent and force her to incur substantial legal costs); *In Re Matter of Pearsall v. Stipek*, 136 Wn.2d 255, 961 P.2d 343 (1998), (recall petition motivated by spite).

Here, an improper purpose on the part of the respondent can be gleaned by the fact that plaintiff’s counsel regularly files discrimination cases against the State of Washington. This meritless motion for CR 11-sanctions is an obvious attempt on the part of the state to “chill” plaintiff’s counsel’s continuing representation of the state employees in discrimination cases. Not only is such an effort on the part of the state violative of the basic public policies animated by RCW 49.60. et. seq., but also is an attempt to misuse CR 11.⁴ Given the inadequacies within respondent’s motion for “CR 11 sanctions”, and its patent lack of merit, the Court should award plaintiff’s counsel CR 11 sanctions, (full attorney’s fees), for having to respond to this motion.

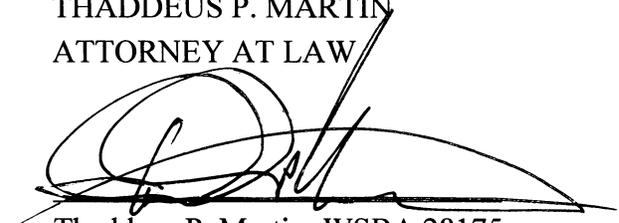
⁴ It is noted that the right to access to the court is protected by the First Amendment to the United States Constitution. See *Rendish v. City of Tacoma*, 123 F.3d 1216, 1220 (9th Cir. 1997). Thus to the extent the defense is seeking sanctions against Mr. Fletcher, such efforts clearly implicate his constitutional right to have access to the courts. It has long been recognized that frivolous efforts to punish plaintiffs who seek access to the courts by filing retaliatory meritless “counterclaims” in and of itself may be violative of the first amendment and actionable. See *Harrison v. Springdale Water and Sewer Comm’n*, 780 F.2d 422, 427 (8th Cir. 1986).

VII. CONCLUSION

For the reasons stated above, the trial court's ruling on respondent's motion for CR 11 sanctions should be overturned. Appellant's cross motion for CR 11 sanctions should be granted, as well as sanctions from the respondent counsel's clear violation for the prohibitions set forth within GR 14.1(a).

DATED this 20th day of October, 2015.

THADDEUS P. MARTIN
ATTORNEY AT LAW

A handwritten signature in black ink, appearing to read 'T. P. Martin', is written over a horizontal line. The signature is stylized and cursive.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I AM NOT A PARTY TO THIS ACTION AND THAT I PLACED FOR SERVICE ON COUNSEL OF RECORD THE FOREGOING DOCUMENT VIA EMAIL, FOLLOWED BY LEGAL MESSENGER ON THE 20th DAY OF OCTOBER, 2015.

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SIGNED Kara Denny
KARA DENNY, LEGAL ASSISTANT