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No. 75063-1-I

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION ONE

RICHARD JOLLEY, ESQ., STEWART ESTES, ESQ., AND
KEATING, BUCKLIN & MCCORMACK, INC.

Appellants,

v.

LYNN DALSING

Respondent.

2016 OCT 21 AM 8:57
COURT OF APPEALS
STATE OF WASHINGTON

CORRECTED BRIEF OF RESPONDENT

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I. INTRODUCTION

This case is about upholding the inherent authority to control judicial proceedings and to sanction counsel for bad faith litigation tactics.

II. RESTATEMENT OF THE CASE

On December 2, 2015, after Pierce County Prosecutor had approved the settlement language, (RP 156, Ex. 29), defense counsel submitted the release and settlement agreement to plaintiff's counsel, to pay plaintiff \$250,000 for her release of all state and federal claims against Pierce County and its employees (Ex. 14). Pierce County Prosecuting Attorney Lindquist, an individual defendant in the related federal case, had already given his approval to the settlement (RP 154, Ex. 22), as required by Pierce County Code, PCC 4.36.040 which states in part that "Upon the concurrence of the Prosecuting Attorney, the Executive or designee may settle claims up to a maximum of \$250,000.00 without the approval of the County Council".

After plaintiff counsel agreed to the settlement terms presented by defense counsel (Ex. 24), defense counsel later advised plaintiff counsel that the Pierce County risk manager had decided not to settle the case (Ex.24, CP 484). Plaintiff brought her motion to enforce the settlement. (CP 16-24, 27).

Upon considering the written and oral presentations of counsel, the trial court found a genuine issue of material fact: “whether both parties intended to be bound by the terms that the County’s attorneys were drafting” (RP (December 22, 2015) at 22) and ordered an evidentiary hearing. (CP 112-114).

At the January 19, 2016 evidentiary hearing, defense counsel was given full opportunity to present briefing, evidence, exhibits, and sworn testimony from live witnesses, as well as being given their own opportunity to testify and to fully cross-examine plaintiff’s counsel. (CP 194-198) (RP 1-167).

Upon hearing hours of sworn testimony, including the examination and cross-examination of defense counsel Richard Jolley, at the January 2016 evidentiary hearing, and after carefully considering all the evidence on whether to enforce the settlement, the trial court issued its findings and conclusions (CP 200-211). The trial court determined that defense counsel had engaged in “intentionally misleading conduct” by not then disclosing to plaintiff counsel that the Pierce County Risk Manager had never agreed to settle the cases against Pierce County. (CP 211). Judge Andrus explained, in part:

The Court finds it astonishing that neither Mr. Estes nor Mr. Jolley ever notified plaintiff's counsel that by November 25, 2015, Mr. Maenhout had rejected a settlement offer of \$250,000. Not only did they withhold this information from plaintiff's counsel, but they made extremely misleading statements, suggesting that the only outstanding issues related to the language of the agreement, not the settlement amount. Mr. Diamondstone and Mr. Woodley reasonably assumed that Mr. Estes and Mr. Jolley had been authorized to finalize the terms of a settlement that included the payment of \$250,000 by the county to Ms. Dalsing in exchange for a release containing language acceptable to Messrs. Linquist, Ausserer and Maenhout. In reading the emails, any attorney knowledgeable about the case would have made that assumption... Had defense counsel informed plaintiff's counsel of Mr. Maenhout's position on November 25, then plaintiff's counsel would not have spent their holiday weekend working on wordsmithing the release language. And the time and expense of the motion to enforce the settlement and this evidentiary hearing could have been avoided. *The Court asks the parties to brief the issue of whether the Court should impose sanctions against defense counsel for their intentionally misleading conduct. . .*

Briefs on the imposition of sanctions should be submitted to the Court by February 8, 2016.

[Emphasis supplied.] (CP 210-211). The trial court *sua sponte* raised the question of whether defense counsel should be sanctioned, giving defense counsel both notice and the opportunity to be heard on this matter. (CP 211). Defense counsel then briefed the trial court as to why they should not be sanctioned. (CP 280-297).

On February 17, 2016, the trial court issued its order on whether to impose sanctions upon defense counsel and decided that sanctions should be imposed, explaining that:

This Court takes very seriously the imposition of sanctions against attorneys. Every day, trial judges see parties and their attorneys ignore rules of civil procedure, minimize their own rule violations, and magnify the malfeasance or perceived malfeasance of opposing parties and their counsel. Trial judges routinely overlook minor rule violations and aggressive litigation tactics when they perceive no harm has come from them or if neither side comes to the court with clean hands. But this case presents a disturbing situation that, after great reflection, the Court cannot dismiss as “just the way the game is played.”

On January 22, 2016, after an evidentiary hearing, the Court entered a memorandum decision denying Plaintiff’s motion to enforce what Plaintiff’s counsel reasonably believed was an enforceable settlement agreement. The Court found that Plaintiff’s counsel thought the agreement was enforceable because defense counsel misled them into believing that Pierce County had agreed to pay the Plaintiff \$250,000. In fact, defense counsel drafted a settlement agreement that contained this very term and forwarded it to Plaintiff’s counsel for their review. Unbeknownst to Plaintiff’s counsel, however, the risk manager for Pierce County had – a week earlier – informed defense counsel that he would **not** pay the Plaintiff \$250,000. The Court found that:

...neither Mr. Estes nor Mr. Jolley ever notified plaintiff’s counsel that by November 25, 2015, Mr. Maenhout had rejected a settlement offer of \$250,000. Not only did they withhold this information from

plaintiff's counsel, but they made extremely misleading statements, suggesting that the only outstanding issues related to the language of the agreement, not the settlement amount....

The Court asked the parties to brief the issue of whether the Court should impose sanctions against defense counsel for their intentionally misleading conduct. ¹

Plaintiff's counsel has filed a motion for the imposition of sanctions and seeks attorney fees and costs of \$52,661.19, the costs they contend they incurred in litigating the enforceability of the alleged settlement agreement. Counsel for Pierce County challenges the Court's legal authority to impose sanctions at all, challenges the Court's findings of intentional misconduct, and challenges the amount of fees Plaintiff's counsel seek.

The Court agrees with defense counsel that sanctions under CR 11, CR 26 and CR 37 are not appropriate.² None of these civil rules addresses the situation in which one attorney misleads another into believing that his client has approved a settlement agreement. The sole basis for imposing sanctions arises under the court's inherent authority to enforce order in proceedings before it. Every court has the power to ensure the orderly conduct of litigation and to fashion and impose appropriate sanctions under its inherent authority to control litigation. *In re Firestorm 1991*, 129 Wash.2d 130, 139, 916

¹ To the extent the Court erred in finding that Plaintiff's counsel worked over the Thanksgiving holiday on wordsmithing settlement language, the Court amends its memorandum decision to delete that finding. This modification does not change the Court's ultimate findings and conclusions.

² The Court declines to impose attorney fees and costs for Ms. McCarthy's failure to attend a deposition.

P.2d 411 (1996). A court may award attorney fees on equitable grounds when it finds a party has acted in bad faith. *In re Matter of Pearsall–Stipek*, 136 Wash.2d 255, 267, n. 6, 961 P.2d 343 (1998).

[A] trial court's inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith.... The court's inherent power to sanction is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."

State v. S.H., 102 Wash. App. 468, 475, 8 P.3d 1058 (2000) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). Sanctions are appropriate "if an act affects 'the integrity of the court and, [if] left unchecked, would encourage future abuses.'" *S.H.*, 102 Wash. App. at 475 (quoting *Gonzales v. Surgidev Corp.*, 120 N.M. 151, 899 P.2d 594, 600 (1995)). A court must "exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees." *Chambers*, 501 U.S. at 50, 111 S.Ct. 2123; *Geonerco, Inc. v. Grand Ridge Properties IV, LLC*, 159 Wash. App. 536, 544, 248 P.3d 1047 (2011).

First, this Court finds that defense counsel engaged in bad faith litigation tactics by misleading Plaintiff's counsel into believing that Pierce County was willing to pay Plaintiff \$250,000, when in fact Pierce County was not willing to do so. The Court rejects as not credible defense counsel's contention that their approach was to negotiate the language of non-monetary terms first before negotiating payment terms. This version of events is inconsistent with the emails between the attorneys and ignores the fact that defense counsel sent plaintiff's counsel a draft settlement agreement containing

a provision indicating that Pierce County would pay Plaintiff \$250,000. If, as the risk manager testified, Pierce County was **unwilling** to make such a payment, why in the world would defense counsel prepare and send to plaintiff's counsel a draft containing this very provision? The Court can reach no conclusion other than that defense counsel acted in bad faith.

Second, the Court finds that defense counsel's conduct affects the integrity of the court and, if left unchecked, such conduct would encourage future abuses. The Court cannot permit lawyers to engage in intentionally misleading conduct—whether that conduct is directed toward opposing counsel or toward the Court. The Court rejects defense counsel's contention that the Plaintiff did not suffer any prejudice by their misconduct. The fee affidavits of Mr. Diamondstone and Mr. Wooley clearly demonstrate that they spent a significant amount of time dealing with the alleged settlement agreement that they would not otherwise spent but for the misleading behavior of defense counsel.

Third, the Court has provided the attorneys for Pierce County due process in determining whether they engaged in bad faith conduct and in determining whether and what sanctions should be imposed. The Court conducted an evidentiary hearing, taking testimony from both Pierce County's defense attorney, Richard Jolley, and Pierce County's risk manager. The Court notified counsel it was considering the imposition of sanctions and gave the parties the opportunity to brief this issue.

The Court concludes that an award of attorney fees is appropriate to ameliorate the impacts of defense counsel's bad faith. However, the amount sought by Plaintiff's counsel exceeds what the Court deems to be reasonable or equitable. The Court finds that an hourly rate of \$400 is reasonable; an hourly rate of \$600 is not. Moreover, it is appropriate to reduce the total amount of time to reflect the fact that ultimately Plaintiff did not prevail on the motion

to enforce the settlement agreement. The Court finds that 20 hours of Mr. Diamondstone's time and 60 hours of Mr. Wooley's time, both computed at an hourly rate of \$400 is an appropriate monetary sanction in this case. The Court thus imposes a sanction of \$32,000 against defense counsel for failing to disclose Mr. Maenhout's November 25, 2015 rejection of the settlement offer and for their misleading conduct between November 25 and December 3, 2015. This conduct resulted in Plaintiff incurring legal fees that, in equity, neither she nor her counsel should have to bear.

ORDER

Based on the foregoing, the Court awards Plaintiff the sum of \$32,000 against defense counsel as a sanction for their misleading settlement negotiations in this case.

(CP 332-335).

After reviewing the fee declarations and time records, the trial court lowered and reduced the attorney fees by more than \$20,000, down to \$32,000. (CP 335).

Thereafter, defense counsel moved for reconsideration of the trial court's findings that they had intentionally misled plaintiff counsel and deserved to be sanctioned. (CP 342-361). In support of their reconsideration motion, defense counsel produced a new declaration from the Pierce County Risk Manager that repudiated much of the Risk Manager's January 19, 2016 sworn testimony heard by the trial court. (CP 362-365). The record demonstrates the care taken when the trial court considered the motion for

reconsideration. The trial court took the additional step of going back with the transcript of the January 19, 2016 hearing and considered the earlier live testimony when it considered the Risk Manager's new declaration and altered testimony. From that step, the trial court determined that the revised, altered testimony (CP 362-363), offered in support of reconsideration, was simply not credible:

The Court has reviewed to the live oral testimony of Pierce County Risk Manager Mark Maenhout and compared that testimony to his February 26, 2016 declaration. This Court previously found his live testimony, where the Court had the opportunity to observe his demeanor, to be credible. The Court finds his subsequent declaration testimony, which is inconsistent with this live testimony, to be not credible. At no time during the hearing did Mr. Maenhout appear to lack a recollection of the timing of his rejection of the \$250,000 offer. In addition, the attorney with whom Mr. Maenhout had this conversation was physically present in the courtroom when Mr. Maenhout described the conversation to the Court. No one suggested there was a need to clarify any mistake as to the timing of this conversation until well after the Court imposed sanctions. Finally, the Court reviewed the invoice Mr. Maenhout testified about during his live testimony. The date stamp on this invoice supports the testimony he gave at the evidentiary hearing.

(CP 514-515). Judge Andrus, with the permission of counsel, had specifically asked clarifying questions of Mr. Maenhout at January 19th evidentiary hearing and he testified as follows:

THE COURT: In this conversation you had with Mr. Jolley on the 25th of November, did you give him a number that you—tell him a number you would be willing to settle for?

THE WITNESS: I wanted to defend it.

THE COURT: You did not want to settle at all.

THE WITNESS: No.

(RP, January 19, 2016, at 84). The Court determined on reconsideration that:

The Court cannot accept the suggestion that an attorney has no duty to correct a false impression he has given opposing counsel about his client's acceptance of a material settlement term. RPC 4.1(a) provides that in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact to a third person. The Comments to that rule indicate that misrepresentations can occur by partially true, but misleading statements or omissions that are the equivalent of affirmative false statements. The Court concluded previously that the failure to tell plaintiff's counsel that Pierce County had not agreed to pay \$250,000 in settlement reasonably misled them to conclude that Pierce County had accepted the monetary term and that the only outstanding issue was the language of the release. The Court finds nothing to undermine this previous finding in what defense counsel has recently submitted. This Court understands that innocent comments can lead to misunderstandings during settlement negotiations. This is not what occurred here. Defense counsel had repeated opportunities to explicitly state to plaintiff's counsel that Pierce County was not sure whether it would agree to the requested \$250,000.

(CP 515).

After already conducting a lengthy January 19, 2016 evidentiary hearing, after giving defense counsel both notice and the opportunity to be heard on whether to impose sanctions in February 2016 (CP 211), and

after considering defense counsel's lengthy February 29, 2016 motion for reconsideration (CP 342-361), the trial court respectfully disagreed with defense counsel's assertion that they were not given notice and the opportunity to be heard on the issue of whether to impose sanctions, explaining, in part, that:

3. The Court rejects defense counsel's due process challenge. One of the defense attorneys took the stand and testified under oath about statements made to him by his client on various dates during the negotiations. Whenever an attorney takes the stand to offer testimony, he should understand that his credibility is at issue. Indeed, the sole reason the Court ordered an evidentiary hearing was because the attorneys disputed what was said to whom and when. Credibility was always an issue in the proceeding and counsel knew or should have known it.
4. Finally, the Court did not order the evidentiary hearing for the purpose of evaluating whether to impose sanctions. Frankly, it was the evidence presented by Pierce County's attorneys at the hearing that caused the Court to have concerns. The Court did not impose sanctions without providing defense counsel the opportunity to explain why sanctions were not appropriate. The evidence presented with the motion for reconsideration could have and should have been submitted then. Yet, neither Pierce County nor its attorneys, in initially opposing the imposition of sanctions, argued that Mr. Maenhout's testimony was inaccurate or the result of a faulty memory. It was only after the Court decided to impose \$32,000 in attorney fees that this issue was first brought to the Court's attention....

The Court has considered the new evidence submitted with the motion and finds it insufficient to warrant vacating the sanctions order.

(CP 516) (Corrected Order on Motion for Reconsideration, April 1, 2016.)

When defense counsel continued to refuse to pay the February 2016 sanctions levied against them, the trial court entered judgment against defense counsel on May 27, 2016, (CP 589-591), in the reduced amount of attorneys' fees as sanctions for what the trial court had earlier described as "bad faith litigation tactics" (CP 334) and their "intentionally misleading conduct" (CP 211). This appeal followed. (CP 523-534).

III. STANDARDS OF REVIEW

A. Abuse of Discretion Standard of Review:

The "proper standard to apply in reviewing sanctions decisions is the abuse of discretion standard". *Physicians Insurance Exchange v. Fisons*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993)

B. Arbitrary, Capricious, or Contrary to Law Standard of Review

"The choice of sanctions remains subject to review under the court's inherent authority applying the arbitrary, capricious, or contrary to law standard of review." *Butler v. Lamont School*, 49 Wn. App. 709, 712, 745

P.2d 1308 (1987).

IV. ARGUMENT

A. **Defense Counsel Made No Assignments Of Error, Other Than The Trial Court Using Its Inherent Authority To Sanction Defense Counsel, Including Lead Counsel Estes, For \$32,000 In Attorney Fees Incurred Because Of Defense Counsel Bad Faith Misconduct; The Trial Court's Unchallenged Findings Are Verities On Appeal.**

Defense counsel made three Assignments of Error in this appeal, claiming that the trial court erred in 1) “imposing sanctions based on its inherent authority”, 2) “imposing sanctions against Mr. Estes”, and 3) “determining the amount of sanctions”. Brief of Appellants at page 2.

Defense counsel made no Assignments of Error to the trial court’s findings that defense counsel engaged in bad faith litigation tactics and that they intentionally misled plaintiff’s counsel regarding settlement.

RAP 10.3(g) requires

A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

It has long been the law in Washington that unchallenged findings of fact become verities on appeal. *Davis v. Department of Labor &*

Industries, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980). Our Supreme Court in *Davis* reaffirmed that:

On appellate review, this court is firmly committed to the rule that a trial court's findings of fact will not be disturbed if they are supported by "substantial evidence." See, e.g., *Sylvester v. Imhoff*, 81 Wn.2d 637, 503 P.2d 734 (1972). As a corollary to this rule, we note that unchallenged findings of fact become verities on appeal. As such, it is unnecessary for us to search the record to determine whether there is substantial evidence to support them. They are the facts of the case. *Goodman v. Bethel School Dist.* 403, 84 Wn.2d 120, 124, 524 P.2d 918 (1974).

Ibid. The Court concluded that it would not re-weigh the trial court's evidentiary or credibility findings on appeal, saying that:

As to the findings of fact, it is not the function of an appellate court to substitute its judgment for that of the trial court or to weigh the evidence or the credibility of witnesses. *Beeson v. Atlantic-Richfield Co.*, 88 Wn.2d 499, 563 P.2d 822 (1977). In this case, we hold that the trial court's unchallenged findings of fact may not be reweighed on appeal.

Davis, supra at 124. Not only did Judge Andrus carefully weigh the evidence and the credibility of witnesses in making findings supported by substantial evidence, but the unchallenged findings are verities on appeal.

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B. The Trial Court Has Broad Discretion To Exercise Its Inherent Authority To Sanction Bad Faith Litigation Conduct.

The inherent authority and power to sanction attorney misconduct is founded on the premise that the trial court must have the means to control the proceeding, the parties, and their attorneys in order to protect and safeguard the judicial process and the fair administration of justice. The trial court's inherent authority and power to sanction attorney misconduct has been squarely addressed by the United States Supreme Court in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 11 S. Ct. 2123, 115 L.Ed. 2d 27 (1991) when it declared that "federal courts have inherent power to assess attorney's fees against counsel . . .the inherent power extends to a full range of litigation abuses". 501 U.S. at 45-46. The Supreme Court assured the trial court that "the court may safely rely on its inherent power." 501 U.S. at 50.

Twenty one years later, our own Supreme Court in *State v. Gassman*, 175 Wn.2d 208, 283 P.3d 1113 (2012) ruled that

Sanctions, including attorney fees, may also be imposed under the court's inherent equitable powers to manage its own proceedings. *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 266-67, 961 P.2d 343 (1998). Moreover, where the court's inherent power is concerned, "[w]e are at liberty to set the boundaries of the exercise of that power." *Id.* at 267 n.6. Trial courts have the inherent authority to control and manage their

calendars, proceedings, and parties. See *Cowles Publ'g Co. v. Murphy*, 96 Wn.2d 584, 588, 637 P.2d 966 (1981).

No one argues that the sanctions in this case were imposed under a statute or a rule or because of a violation of a court order. Our analysis is limited to the court's inherent powers to sanction. We have stated that a finding of bad faith is sufficient for attorney fees sanctions under our inherent powers. *Pearsall-Stipek*, 136 Wn.2d at 267 n.6. Under federal case law, courts may assess attorney fees as an exercise of inherent authority only where a party engages in willfully abusive, vexatious, or intransigent tactics designed to stall or harass. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-47, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). Our Court of Appeals has based its jurisprudence on federal case law. It has held that while an express finding of bad faith by the trial court is not required, a sanction of attorney fees imposed under the court's inherent authority must be based on a finding of conduct that was at least "tantamount to bad faith." *State v. S.H.*, 102 Wn. App. 468, 474, 8 P.3d 1058 (2000) (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980))

Gassman, supra at 1114-1115. There, the trial judge found that the State's conduct was just "careless" and was not tantamount to bad faith. *Ibid.*

Here, by contrast, Judge Andrus made a specific "bad faith" finding, determining that defense counsel Stewart Estes, Richard Jolley, and their firm Keating, Bucklin & McCormack engaged in "bad faith litigation tactics" (CP 334) and engaged in "intentionally misleading conduct". (CP 211).

On January 22, 2016, the trial court explained, in part, that:

The Court finds it *astonishing that neither Mr. Estes*

nor Mr. Jolley ever notified plaintiff's counsel that by November 25, 2015, Mr. Maenhout had rejected a settlement offer of \$250,000. Not only did they withhold this information from plaintiff's counsel, but they made extremely misleading statements, suggesting that the only outstanding issues related to the language of the agreement, not the settlement amount.

. . . The Court asks the parties to brief the issue of whether the Court should impose sanctions against defense counsel for their intentionally misleading conduct. . .

[Emphasis supplied.] (CP 210-211). These trial court findings are supported by substantial evidence, are treated as verities on appeal, (since defense counsel declined to assign error to them), and are not to be re-weighed on appeal. *Davis*, at 123-24.

C. Under The Abuse of Discretion Standard of Review, Deference Is Accorded To the Trial Court.

Our Supreme Court in *Physicians Insurance Exchange v. Fisons Corp.*, 122 Wn.2d 299, 338-39, 858 P. 2d 1054 (1993) held that:

the proper standard to apply in reviewing sanctions decisions is the abuse of discretion standard.

The abuse of discretion standard again recognizes that deference is owed to the judicial actor who is "better positioned than another to decide the issue in question." *Cooter & Gell v. Hartmarx Corp.*, 496

U.S. 384, 403, 110 L.Ed.2d 359, 110 S.Ct. 2447 (1990) (quoting *Miller v. Fenton*, 474 U.S. 104, 114, 88 L.Ed.2d 405, 106 S.Ct. 445 (1985)). Further, the sanction rules are "designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are proper in a given case and to `reduce the reluctance of courts to impose sanctions'.... If a review de novo was the proper standard of review, it could thwart these purposes; it could also have a chilling effect on the trial court's willingness to impose ... sanctions." *Cooper v. Viking Ventures*, 53 Wn. App. 739, 742-43, 770 P.2d 659 (1989) (quoting Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. 198 (1983)).

Judge Andrus was the judicial officer better positioned than anyone else to decide the issue in question: whether or not to sanction defense counsel for their bad faith litigation tactics and their intentionally misleading conduct. Judge Andrus had "wide latitude and discretion . . .to determine what sanctions are proper". *Fisons, supra*. The sanctions chosen are

subject to review under the court's inherent authority applying the arbitrary, capricious, or contrary to law standard of review. *Pierce Cy. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 694, 658 P.2d 648 (1983); *Williams v. Seattle Sch. Dist. 1*, 97 Wn.2d 215, 221-25, 643 P.2d 426 (1982).

Butler v. Lamont School, 49 Wn. App. 709, 712, 745 P.2d 1308 (1987).

Under either standard of review, deference is owed to the trial court.

Fisons, supra. As our Supreme Court said in the case of *In re Firestorm*

1991, 129 Wash.2d 130, 136, 916 P.2d 411 (1996), "[t]he trial court is not powerless to fashion and impose appropriate sanctions under its inherent authority to control litigation." The decision on whether or not to impose sanctions, after having reviewed all the evidence and after assessing the credibility of witnesses, is left to the sound discretion of the trial court judge and should be upheld on appeal, under the abuse of discretion standard of review. The Ninth Circuit, in *Norelus v. Denny's Inc.* 628 F.3d 1270, 1280 (2010), explained that

The application of an abuse-of-discretion review recognizes the range of possible conclusions the trial judge may reach." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc).

By definition ... under the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call. That is how an abuse of discretion standard differs from a de novo standard of review. As we have stated previously, the abuse of discretion standard allows "a range of choice for the district court, so long as that choice does not constitute a clear error of judgment."

Id.; see also *McMahan v. Toto*, 256 F.3d 1120, 1129 (11th Cir.2001) ("[U]nder an abuse of discretion standard there will be circumstances in which we would affirm the district court whichever way it went."); *In re Rasbury*, 24 F.3d 159, 168 (11th

Cir.1994) ("Quite frankly, we would have affirmed the district court had it reached a different result, and if we were reviewing this matter de novo, we may well have decided it differently."). "[W]hen employing an abuse-of-discretion standard, we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard." *Frazier*, 387 F.3d at 1259 (citing *Maiz v. Virani*, 253 F.3d 641, 662 (11th Cir.2001)).

Norelus v. Denny's Inc, *supra* at 1280. The trial court did not make a clear error of judgment and did not apply the wrong legal standard on whether to sanction bad faith litigation tactics under the court's inherent authority to sanction such misconduct and to manage its proceedings, the parties, and their counsel.

D. Defense Counsel Have Failed To Establish An Abuse Of Discretion By The Trial Court Using Its Inherent Authority To Sanction Mr. Estes, Mr. Jolley, And The Keating, Bucklin Firm In The Amount of \$32,000.

The question before this Court is whether defense counsel have failed to meet their heavy burden of establishing an abuse of discretion in sanctioning defense counsel for their bad faith litigation misconduct. "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds." *Fisons*, *supra* at 339. Defense counsel is required to establish by clear evidence that the trial court's decision to sanction defense

counsel's bad faith litigation conduct was either "manifestly unreasonable or based on untenable grounds." *Fisons, supra*. Failing in that endeavor, defense counsel is required to establish by clear evidence that the trial court's decisions to impose sanctions for their bad faith litigation misconduct and then to lower the amount of sanctions from \$52,000 to \$32,000 was arbitrary or capricious, clearly outside the trial court's broad discretion, or manifestly unreasonable. *Butler v. Lamont School*, 49 Wn. App. 709, 712, 745 P.2d 1308 (1987)

Defense counsel fail to make the case; they have failed to meet their burden on appeal. The record shows that the trial court acted well within its discretion, giving defense counsel ample prior written notice and the opportunity to be heard, (CP 210), *before* it decided to issue sanctions on February 17, 2016 and denied their motion for reconsideration on April 1, 2016. The trial court reduced the hours requested, as well as the rate of one of plaintiff's attorneys. Even if this Court were to disagree with the trial court reducing over \$20,000 from plaintiff's counsel time and rate, the trial court's findings are within its broad discretion and are not to be disturbed on appeal. *Fisons, supra*.

Here, defense counsel do not challenge these findings of fact.

Instead, defense counsel make an unsupported strawman argument, implying that it was plaintiff's counsel who bore the burden and failed to present clear evidence of the bad faith litigation conduct, in essence, attempting to nullify the trial court's finding of bad faith litigation misconduct by defense counsel. This argument fails; it ignores the fact that, in this case, it was the trial court itself which found that defense counsel misled plaintiff's counsel, while entering findings supporting the court's denial of the motion to enforce the settlement. (January 22, 2016 Order, CP 208-209). The trial court judge *sua sponte* raised the question of whether or not the trial court should exercise its inherent authority to sanction offending counsel. That decision was exclusively for the trial court judge to make; plaintiff's counsel does not have any burden to re-prove the findings made by the trial court, when the trial court determined that there had not been a meeting of the minds and that defense counsel had withheld material facts, thereby misleading plaintiff's counsel. (CP 208-209). There is no Washington case law which says otherwise.

The trial court's February 17, 2016 Order (CP 332-337) recognized that the court "must exercise caution in invoking its inherent power" to impose sanctions, but then found that defense counsel had "engaged in bad

faith litigation tactics by misleading plaintiff's counsel" and that such conduct "affected the integrity of the court".

E. Subjective Intent Or Good Faith Does Not Shield An Attorney From Sanctions.

Defense counsel claim that the trial court must make "a determination of intent sufficient to support a finding of bad faith", concluding that

As such, the trial court's award of sanctions against Appellants was an abuse of discretion as the trial court did not find a level of intent sufficient to constitute bad faith or conduct tantamount to bad faith.

(Appellants' Brief at 29). This is another strawman argument; there is no subjective intent threshold required in Washington for a court to impose sanctions for bad faith litigation misconduct. The Court in *Fisons* made it crystal clear: "Subjective belief or good faith alone no longer shields an attorney from sanctions under the rules." *Fisons*, *supra* at 343.

F. Defense Counsel Were Afforded Due Process.

Defense counsel make a meritless claim at 22-25--that they were denied due process, all the while ignoring the fact that 1) the trial court

provided them prior written notice on January 22, 2016; that 2) it was considering imposing sanctions for their intentionally misleading conduct; and 3) it asked them to brief the court on this issue, 4) *before* the trial court took up in February 2016 the issue of whether to sanction defense counsel for their misconduct. The trial court provided defense counsel with due process-- prior notice and the opportunity to be heard-- before addressing the issue of whether to use the court's inherent authority to impose any sanctions. (CP 211). The trial court squarely rejected defense counsel's unsupported claim, based on these facts. (CP 516). This Court should also reject defense counsel's claim.

**G. The Slur Against The Integrity Of The Trial Court
Should Be Rejected Under RAP 10.3(a)(5) and RPC 8.2(a).**

Finally, we address defense counsel's slur against the trial court, where they cast aspersions against the integrity of the court, in violation of RPC 8.2(a), saying at 24:

Here, while the trial court may have ordered briefing on the issue of sanctions, the trial court had already made up its mind regarding the imposition of sanctions before it requested briefing. It was not a matter of if sanctions would be imposed, but how much.

[Emphasis supplied.]

This is an outrageous statement. There is no citation to the record and no proof. Just an unsupported slur that is unfair to Judge Andrus, who followed where the evidence took her and very carefully applied the facts and the law before exercising the court's inherent authority to sanction bad faith litigation conduct. This unsupported slur is also unfair to this Court. It is an unfair attempt to skew this Court's appraisal of the trial court's exercise of its judicial authority and to falsely create a "lack of due process" issue where none exists. Judge Andrus deserves better than this. So does this Court.

As the Court said in *Bartel v. Zuckriegel*, 112 Wn. App. 55, 61, 47 P.3d 581 (Div. 3, 2002):

First, this statement is wholly unsupported and outside of the record. And we will not consider allegations outside the scope of this court's review. *Weems v. N. Franklin Sch. Dist.*, 109 Wn. App. 767, 779, 37 P.3d 354 (2002). Second, Attorney Jackson's accusation violates RAP 10.3(a)(5) because it cites neither to the record nor any legal authority.

Finally, and most importantly, the statement appears to violate RPC 8.2(a):

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning

the qualifications, integrity, or record of a judge

There is simply no basis (other than losing) that supports Attorney Jackson's attack on Judge Small's integrity. It is then both unwarranted and regrettable.

Appellants' counsel's "prejudging" slur against the trial court violates RAP 10.3(a)(5) and RPC 8.2(a), is "unwarranted and regrettable", and should not be countenanced by this Court. "False statements can unfairly undermine public confidence in the administration of justice." *Comment*, RPC 8.2(a).

H. **Appellate Fees and Costs Requested Under RAP 18.1(a)**

Under the American rule, parties must generally pay their own attorney fees. The rule is subject to exceptions for a contractual or statutory right to fees or a "recognized ground of equity". *Hsu Ying Li v. Tang*, 87 Wash.2d 796, 797-98, 557 P.2d 342 (1976). Equitable exceptions to the American rule include "misconduct or bad faith by a party". . . . *Rustlewood Ass'n v. Mason County*, 96 Wash. App. 788, 801, 981 P.2d 7 (1999).

Burt v. Washington State Department of Corrections, 191 Wn. App. 194, 288, 361 P.3d 283 (2015). The trial court awarded attorneys' fees as sanctions as an equitable exception to the American rule for bad faith litigation misconduct. Attorneys' fees and costs on appeal were incurred to

defend the trial court's exercise of its inherent authority to sanction bad faith litigation misconduct under *Fisons, supra* at 339.

The appellate court is requested to award plaintiff and her counsel their attorneys' fees and costs on appeal on this same equitable basis. This request complies with the RAP 18.1.

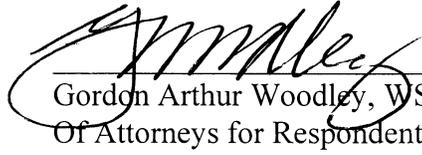
V. CONCLUSION

Defense counsel bad faith litigation tactics caused the trial court to consider whether to exercise inherent authority to impose sanctions for such misconduct. Defense counsel have failed to establish an abuse of discretion regarding the decision to sanction, especially where deference is accorded the judicial officer who is the best position to determine whether sanctions are warranted. This Court is respectfully requested to defer to the trial court and uphold the decision to issue sanctions, there being no abuse of discretion. The amount of sanctions was not arbitrary or capricious and should be not be vacated.

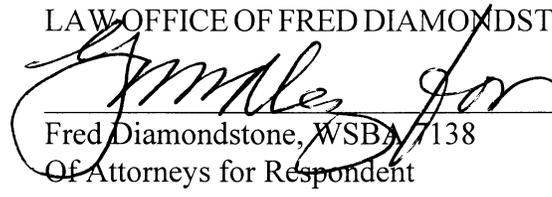
Under RAP 18.1, respondent requests that the Court equitably award her appellate fees and costs incurred to defend the trial court and its decision to sanction bad faith litigation tactics.

Respectfully resubmitted this 20th day of October, 2016.

WOODLEY LAW


Gordon Arthur Woodley, WSBA 7783
Of Attorneys for Respondent

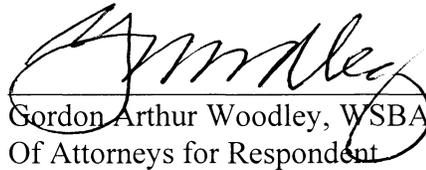
LAW OFFICE OF FRED DIAMONDSTONE


Fred Diamondstone, WSBA 7138
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned declares, under penalty of perjury under the laws of the state of Washington, that on this date, I caused to be served by First Class Mail, a true and accurate copy of the Brief of Respondent upon appellants' counsel Shannon Benbow, 520 Pike Street, Suite 1525, Seattle, WA 98101.

Dated this 20th day of October, 2016, at Bellevue, Washington.


Gordon Arthur Woodley, WSBA 7783
Of Attorneys for Respondent