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DIVISION II

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY  DEPUTY

NO. 40459-1-II

STATE OF WASHINGTON,

Real Party of Interest – The Clallam County Prosecuting Attorney’s Office

Appellant,

vs.

LOVERA MAJORIE BLACKCROW,

Real Party of Interest – Ms. Karen Unger

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 09-1-00342-3

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUE:

1. Did the trial court act within its discretion by sanctioning the Clallam County Prosecuting Attorney's Office pursuant to CR 11 when the court found that the DPA's certified motion to sever was not well grounded in fact, that the DPA failed to conduct an inquiry reasonable under the circumstances, and imposed a sanction that would necessarily further the deterrent purpose of CR 11?

II. ARGUMENT:

- A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PROPERLY APPLIED CR 11, AND IMPOSED AN APPROPRIATE SANCTION. THEREFORE, THE ORDER FROM THE TRIAL COURT SHOULD BE AFFIRMED.

The order from the trial court imposing CR 11 sanctions on the Clallam County Prosecuting Attorney's Office (the Prosecutor's Office) should be affirmed. The trial court did not abuse its discretion when it properly found that the deputy prosecuting attorney (DPA), Ms. Soublet, breached Civil Rule 11 when she filed her declaration in support of a motion to sever the joint defendants in a vehicular homicide case. Further, the trial court did not abuse its discretion when it fashioned an appropriate sanction for said breach. "An attorney must sign and date every pleading, motion, and legal memorandum." CR 11(a). The core of CR 11 explains that this signature certifies that the:

[A]ttorney has read the pleading, motion, or legal memorandum, and that to the

best of the ... attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief ... If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it ... an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

CR 11(a). CR 11 deals with two types of filings: (1) filings that are lacking a factual or a legal basis, otherwise known as baseless filings, and (2) filings that are made for an improper purpose. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 883, 912 P.2d 1052 (1996). A baseless filing is one that is “(a) not well grounded in fact, *or* (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.” *Id.* at 883-884 (emphasis added). Because CR 11 was modeled after, and is similar to, the Federal Rule of Civil Procedure 11 (Rule 11), interpretations of Rule 11 offer guidance in understanding CR 11. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 218-219, 829 P.2d 1099 (1992).

1. The trial court properly found that the DPA violated CR 11 in her motion to sever because the assertion of a potential conflict of interest was not well grounded in fact.

Rule 11 seeks to curb abuses of the judicial system, therefore, it requires that “litigants certify to the court, by signature, that any papers filed are well founded.” *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 542, 111 S.Ct. 922 (1991). An attorney’s signature certifies that the attorney “has read the document, has conducted a reasonable inquiry into the facts and the law and is satisfied that the document is well grounded in both...” *Id.* Three types of issues are considered when determining whether an attorney has violated Rule 11. *Cooter & Gell v. Hartmarx Corporations, et al.*, 496 U.S. 384, 399, 110 S.Ct. 2447 (1990).

[First,] [t]he court must consider factual questions regarding the nature of the attorney’s prefiling inquiry and the factual basis of the pleading or other paper. [Second,] [l]egal issues are raised in considering whether a pleading is “warranted by existing law or a good faith argument” for changing the law and whether the attorney’s conduct violated Rule 11. Finally, the district court must exercise its discretion to tailor an “appropriate sanction.”

Id. In order for a motion to become the proper subject of CR 11 sanctions, it “must lack a factual *or* legal basis...” *Bryant*, 119 Wn.2d at 220 (emphasis added). If a motion does lack a factual or a legal basis, a CR 11 sanction cannot be imposed unless the court “also finds that the attorney who signed and filed the complaint failed to conduct a *reasonable inquiry* into the factual and legal basis of the claim.” *Id.* (emphasis in original).

Therefore, a motion may only be subject to CR 11 sanctions “if it is *both* (1) ‘baseless’ *and* (2) signed without reasonable inquiry.” *Hicks v. Colwell*, 75 Wn. App. 156, 163, 876 P.2d 953 (1994) (emphasis in original). Ultimately, Rule 11 imposes an affirmative duty

on an attorney to conduct a reasonable inquiry before a document is filed. *Business Guides, Inc.*, 498 U.S. at 551. An objective standard is used to evaluate the reasonableness of an attorney's inquiry. *Bryant*, 119 Wn.2d at 220. The standard to determine whether a reasonable inquiry has been made is one of reasonableness under the circumstances. *Business Guides, Inc.*, 498 U.S. at 551. Specifically, the attorney's conduct should be evaluated by determining what was reasonable to believe at the time the document was submitted:

The court should inquire whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified.

Bryant, 119 Wn.2d at 220.

The violation of Rule 11 is complete when the motion is filed. *Cooter & Gell*, 496 U.S. at 395, quoting *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077 (CA7 1987), *cert. dismiss'd*, 485 U.S. 901, 108 S.Ct. 1101, 99 L.Ed.2d 229 (1988). The imposition of a Rule 11 sanction requires the determination of whether an attorney has abused the judicial process, and, if so, what sanction would be appropriate. *Id.* at 396. The filing of a motion "without taking the necessary care in [its] preparation" is an abuse of the judicial system. *Id.* at 398. In order to deter such misconduct, it is useful to impose sanctions on abusive litigants. *Id.* The Rule only calls for an "appropriate sanction." *Business Guides, Inc.*, 498 U.S. at 553. The language is purposefully broad because the "main objective of the Rule is not to reward parties who are victimized by

litigation; it is to deter baseless filings and curb abuses.” *Id.* The fear of violating Rule 11, and thus being subjected to sanctions, should provide an attorney with “incentive to stop, think and investigate more carefully before serving and filing papers.” *Cooter & Gell*, 496 U.S. at 398, quoting Amendments to Federal Rules of Civil Procedure, 97 F.R.D. 165, 192 (1983) (Letter from Judge Walter Mansfield, Chairman, Advisory Committee on Civil Rules) (Mar. 9, 1982). The Rule must be read in light of concerns that it will “spawn satellite litigation and chill vigorous advocacy.” *Id.* at 393. Importantly, however, any interpretation of the Rule “must give effect the Rule’s central goal of deterrence.” *Id.*

The trial court properly found that the DPA violated CR 11 in her motion to sever as the motion was both baseless and signed without conducting a reasonable inquiry. The DPA filed a baseless motion to sever as the motion was lacking a factual basis concerning the potential conflict of interest regarding Mr. Mallicott and Ms. Unger. Further, the DPA failed to conduct a reasonable inquiry into the facts concerning the alleged conflict of interest. While the State might have been attempting to bring a potential conflict of interest to the attention of the trial court, the facts to form the basis that an actual conflict did exist were false. Therefore, the filing becomes baseless. There was no actual conflict because Ms. Unger was neither the attorney for Mr. Mallicott’s motorcycle club nor the attorney for Mr. Mallicott. The DPA failed to produce any evidence to support the

assertions made in her motion to sever. Rather, she made a completely false statement (that Ms. Unger was the attorney for the Hells Angels) and then, by signing the motion, certified this statement to be completely true. By her own admission, the DPA prepared this very significant motion “from memory” (RP); it is hard to imagine that a court could abuse its discretion by imposing sanctions for such a violation when the offending party admits that a sworn statement was prepared in such an irresponsible fashion.

Appellant notes that Mr. Mallicott attempted to contact Ms. Unger after he informed officers that his motorcycle club required its members to follow certain procedures. In an attempt to show that Ms. Soublet did not act unreasonably, appellant refers to and states the following:

As I [the arresting officer] started to explain the first test to Mr. Mallicott he stated, “Wait, I’m not sure I should be doing this I’m a member of a club (Amigos) and we have procedures for this. Mallicott then stated that he wanted to call *his* attorney before submitting to the field sobriety tests. Mallicott called information on his cellular telephone and asked for the telephone number of Karen Unger, a local defense attorney...Mallicott called information a second time, got the number for Unger, and called her office. The answering machine answered the telephone at Unger’s office and Mallicott left a message for her to call.

CP 25-26 (emphasis by appellant). Appellant argues that “[b]ased on these facts, the DPA reasonably believed that Ms. Unger may have had a legal relationship with Mr. Mallicott and/or his motorcycle club.” Appellant’s Br. 28-29 (May 18, 2010). However, it was not reasonable to infer that Ms. Unger was the attorney for the motorcycle club, or

that the motorcycle club was the Hell's Angels. Appellant places emphasis on the fact that Mr. Mallicott wanted to call *his* attorney. Therefore, isn't it possible that the procedure of the club is to contact *an* attorney? If Ms. Unger was *the* attorney for the club, wouldn't it be reasonable that Mr. Mallicott would already have her contact information? Mr. Mallicott didn't say he needed to call the attorney for his club. Furthermore, in her motion to sever, the DPA did not state that Ms. Unger may have had a legal relationship with Mr. Mallicott *and/or* his motorcycle club. She stated that Ms. Unger was, at the time of the collision, the attorney for the Hells Angels *and* the attorney defendant Mallicott attempted to contact for legal advice at the scene of the collision. CP 35.

Had Ms. Soublet conducted a reasonable pre-filing inquiry (or actually referred to the police reports, rather than try to "recall" what was contained therein), she would have easily discovered that Mr. Mallicott was allegedly a member of the Amigos, not the Hells Angels. She would have also easily been able to discover that Ms. Unger was not the attorney for any motorcycle club, and more specifically, not the attorney for the Hells Angels. A reasonable attorney in a similar situation would have looked at the case file and the investigative reports before drafting, signing, and submitting the motion to sever. A reasonable attorney in like circumstances would not have prepared and certified such a motion from memory.

The Prosecutor's Office argues that the motion was merely worded poorly, however, the proper designation would be that the motion was worded incorrectly—the motion contained falsities certified to be true. Therefore, the trial court properly found that in her motion to sever the DPA breached CR 11. These falsities were the basis of a motion that would ultimately result in a severance of defendants and the county expense of having 2 separate trials.

2. The trial court did not abuse its discretion when it imposed an appropriate CR 11 sanction because the sanction furthered the purpose of CR 11 as it was imposed to deter similar future misconduct.

The standard of appellate review for CR 11 sanctions is the abuse of discretion standard. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). Under this standard, an appellate court asks whether the sanction was “manifestly unreasonable or based on untenable grounds.” *MacDonald*, 80 Wn. App. at 884. The Circuits are in agreement that appellate courts should review a lower court's selection of a sanction, as well as the lower court's findings of fact, under a deferential standard. *Cooter & Gell*, 496 U.S. at 400. Rule 11 policy goals support an abuse-of-discretion standard:

The district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence. Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering

facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation.

Id. at 404.

The trial court must exercise its discretion to fashion an “appropriate sanction.”

Id. at 399. Additionally, the trial court must remain mindful of the fundamental deterrent purpose of the rule. *Biggs*, 124 Wn.2d at 202 n.3. The least severe sanctions adequate to serve the purpose of the Rule should be imposed. *Bryant*, 119 Wn.2d at 225, quoting Schwarzer, *Sanctions Under the New Federal Rule 11-A Closer Look*, 104 F.R.D. 181, 201 (1985). The award of sanctions must be based on reasonable or tenable grounds. *In re Cooke*, 93 Wn. App. 526, 529, 969 P.2d 127 (1999). A trial court would thus abuse its discretion if it based its ruling on an “erroneous view of the law or on a clearly erroneous assessment of the evidence.” *Cooter & Gell*, 496 U.S. at 405. When imposing CR 11 sanctions, the trial court must specify the sanctionable conduct in its order:

The court must make a finding that either the claim is *not* grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, *or* the paper was filed for an improper purpose.

Biggs, 124 Wn.2d at 201.

The trial court did not abuse its discretion when it fashioned the appropriate sanction as the sanction furthered the fundamental deterrent purpose of CR 11.

Therefore, this Court should give deference to the trial court’s sanction order and affirm.

The sanction imposed by the trial court was not manifestly unreasonable or based on untenable grounds. The sanction is appropriate because it will deter similar misconduct in the future. Even though the Prosecutor's Office apologized in open court for the misconduct, the sanction is still appropriate because the purpose of CR 11 is to have the attorney check *before* filing. If an attorney is able to correct mistakes after filing a motion in order to avoid sanctions, the deterrent purpose of the Rule becomes moot. Why would an attorney check and certify a document before he or she files it, if the document can just be corrected afterwards? How is it to be known that the Prosecutor's Office won't simply continue to apologize in open court for its violations? If this were to be the standard, the deterrent purpose of the Rule would be toothless.

The trial judge concluded that the statement made in Ms. Soublet's motion was incorrect and disparaging towards Ms. Unger. The trial judge justified the sanction by expressing his concern that candor should be shown to opposing counsel, especially in a small community. Specifically, the judge stated:

...I think to indicate unequivocally and probably worse than the mistake with regard to the – what group it is, to say that Ms. Unger is the attorney for the Hell's Angels, or even the motorcycle group, has really not a whole lot of foundation to it. I think in a small community such an allegation is particularly harmful and particularly egregious, especially when it comes from somebody in the prosecutor's office...I think the main concern the Court has with – when motions of this sort are made, or statements of this sort are made, that the Court has confidence that an officer of the court is going to present that information accurately and not make allegations that are not supported by the evidence. And whether that means taking a look at the police report or whatever that takes to

look, I think before those allegations are made, you know, the Court expects the attorneys to look into that and make sure that it's accurate information and it's relevant to the case.

RP (02/16/2010) at 10-11. Simply, the sanction was appropriate as it should deter future misconduct of drafting motions from memory, not checking documents for accuracy, and failing to conduct reasonable inquiries before certification and submission to the Court.

III. CONCLUSION:

The trial court did not abuse its discretion when it imposed the CR 11 sanction because the DPA's motion to sever lacked a factual basis, the DPA failed to conduct a reasonable inquiry into the facts, and furthermore, the sanction was not manifestly unreasonable or based on untenable grounds. Therefore, the trial court's order imposing the CR 11 sanction should be affirmed.

Respectfully submitted this 27th day of September, 2010.

KAREN L. UNGER, P.S.



KAREN L. UNGER
Attorney for Respondent

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STATE OF WASHINGTON

BY _____
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IN THE COURT OF APPEALS
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STATE OF WASHINGTON,)
Real Party of Interest, Clallam County)
Prosecuting Attorney's Office)
Appellant,)
vs.)
LOVERA MARJORIE BLACKCROW,)
Real Party of Interest, Ms. Karen Unger)
Respondent.)

NO. 40459-1-II

DECLARATION OF MAILING

STATEMENT OF LAURIE HAYES, MADE UNDER PENALTY OF PERJURY

I, Laurie Hayes, state as follows:

That I am now and at all times hereinafter mentioned am a citizen of the United States and a resident of Port Angeles, Washington, over the age of 18 years, competent to be a witness in the above entitled proceeding and not a party hereto; that I mailed a true copy of the attached document in this matter by placing it in an envelope, postpaid and addressed as follows:

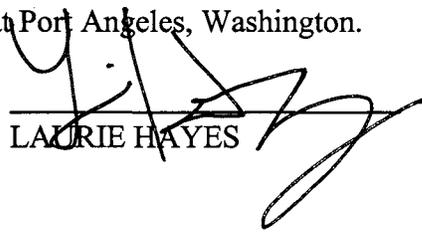
Documents Sent: **Brief of Respondent**

Address Sent To: Clallam County Prosecuting Attorney
Brian P. Wendt, Deputy Prosecuting Attorney
223 East 4th Street, Suite 11
Port Angeles, WA 98362

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING STATEMENT IS TRUE AND CORRECT.

DATED THIS 28th day of September, 2010 at Port Angeles, Washington.



LAURIE HAYES