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No.: 42245-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

**KRISTY L. RICKEY and KELLY R. CAVAR, Individually, and as
Co-Executrixes of the Estate of Gerald Lee Munce, Deceased,**

Petitioners,

v.

**MICHAEL B. SMITH, as Litigation Guardian Ad Litem for
CLARENCE G. MUNCE,**

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

In this matter, it is quite clear that respondent's counsel is trying to mislead and confuse the Appellate Court. If one examines the procedural history of this case, it is noted that in May 2011, the Trial Court had two motions brought by the Plaintiffs, pending before it. The first motion was a MOTION FOR PARTIAL SUMMARY JUDGMENT wherein the Plaintiff (Appellants herein) sought partial summary judgment against the Defendant on the issue of whether or not the Defendant was negligent, and whether or not such negligence was a proximate cause of Plaintiffs' decedent's pre-death injuries and ultimate death. That motion, along with substantial supportive materials, was filed on April 7, 2011. (CP 69-459).

A **separate motion** for entry of an order of default was filed on May 11, 2011. (CP 640-674). That motion was predicated upon paragraph 19 of Judge Larkin's February 12, 2010 "Amended Findings of Facts and Conclusions of Law and Order on Plaintiff's Motion for Determination of Discovery Sanctions," located at pages 10 and 11 of that document. Paragraph 19 provides as follows:

*The court has considered whether or not a less severe sanction would suffice, given the nature of the discovery violations at issue in this matter. Mindful of the purposes of discovery sanctions, the court finds that the only way to ameliorate the prejudice suffered by the plaintiffs in the preparation of their case for trial, is to impose some of the some severe sanctions authorized by CR 37. Plaintiff requested that the sanctions should include the follows: 1) defendant's affirmative defenses and **answer shall be***

stricken; 2) defendant's counterclaim shall be forthwith dismissed; 3) with respect to plaintiff's claims, defendant should be deemed in default; 4) all requests for admissions subject to denial or equivocal admission should be deemed admitted; 5) plaintiff's counsel should be awarded costs and terms related to this motion and the aborted deposition of Clarence Munson in an amount to be determined at a subsequent hearing; and 6) a protective order should be entered precluding the defendants from taking any additional discovery in this matter.

The court having reviewed the files and records herein, and having heard the argument of counsel, has determined that under the facts and circumstances of this case, the court in the exercise of its discretion shall impose some of the sanction requested by the plaintiffs herein, but not others. Specifically, the court will impose sanctions as follows: (1) defendant's affirmative defenses and ***answers shall be stricken***; (2) defendant's counterclaim shall be stricken and shall be forthwith dismissed; and (3) the plaintiff shall be awarded the cost of the court reporter and videographer who attended the unsuccessful effort to take the deposition of Clarence Munce, which occurred on or about July 3, 2009.

The court in the exercise of its discretion shall not award the following sanctions requested by the plaintiff in this matter: (1) the court shall not enter an order of default, which would be tantamount to a directed verdict on the issue of liability in this matter; (2) in addition, the court shall not award attorney's fees to the plaintiffs for the bringing of this motion and for counsel's attendance at the unsuccessful to take the deposition of Clarence Munce, who occurred on or about July 3, 2009; and (3) the court will not enter an order precluding further discovery on behalf of the defense in this case in that such an order would be essentially moot because discovery cutoff has already occurred in this case. (Emphasis added).

(CP 49-50).

Given the fact that the language "the answers shall be stricken" appears within Judge Larkin's written Order, versus his oral pronouncements,

is really not that significant. Further, and dispositively, it is noted that any ambiguity between Judge Larkin's oral pronouncements with respect to a desire not to enter a default, versus the striking of Mr. Munce's Answer, addresses an entirely separate issue as to whether or not Judge Larkin intended by that Order to strike all of Defendant Munce's Affirmative Defenses and Counterclaim. He clearly did. (CP 43, 44, 50); (CP 64, "I am going to trike the counterclaims and the affirmative defenses.").

With respect to Judge Larkin's desire to strike affirmative defenses, there is no ambiguity within the Order, nor, for that matter, within Judge Larkin's oral pronouncements. *Id.* In fact, it is specious for the Defendant to now try to contend, in any way, that there was any form of ambiguity in the striking of affirmative defenses. Given the fact the defense sought discretionary review on this very issue, which was denied. (CP 4-7). The only participant in this case that had any confusion on this issue appears to be Judge Stolz.

Further, Plaintiff's Motion for a Default was decided by an entirely separate Order than the Order which is subject an appeal in this matter, which has a very limited scope. Judge Stolz's Order Denying Plaintiff's Motion for Default was entered on May 20, 2011 and is attached hereto as Appendix No. "1". (CP 902-04). The Trial Court's decision on Plaintiff's Motion for Partial Summary Judgment on the issues of negligence and proximate cause was first resolved by way of Judge Stolz's written memorandum decision

dated May 23, 2011, which decided an entirely separate motion. (CP 905). Such memorandum decision was not finalized until the entry of a June 10, 2011 Order Granting Partial Summary Judgment and which, pursuant to the memorandum decision, incorporated Judge Stolz's *sua sponte* determination to reinstate the defense of comparative fault into this case, despite Judge Larkin's clear decision to strike all defenses including that defense.¹ (CP 1066-70). (Appendix No. "2").

Although Plaintiff's Notice of Discretionary Review to the Court of Appeals filed on June 17, 2011, included as an attachment the Order Denying Plaintiff's Motion for Default, it is clear upon Reviewing Plaintiff's Motion for Discretionary Review, which was filed with this Court, that Plaintiffs were solely seeking review with respect to the Court's June 10, 2011 Orders regarding Plaintiff's Motion for Partial Summary Judgment and for Reconsideration of the same.²

Nor is the propriety of Judge Larkin's February 12, 2010 Order before this Court in any form. Commissioner Schmidt, under the authority vested in him pursuant to RAP 2.3(e), limited the issues before the Court. Commissioner Schmidt, in his Order granting review, made it crystal clear

¹ Judge Larkin's Order Striking Affirmative Defenses and Defendant's Counter-claim was subject to two motions for discretionary review at the behest of defendant Munce, which were denied by two separate decisions issued by Commissioner Skerlec.

² In other words no party has briefed nor did the Court Commissioner grant review with respect to the propriety of the Trial Court's May 20, 2011 Order denying Plaintiff's motion for Default. Obviously, (CP 902-04), such an issue was rendered moot by the fact the Trial Court granted Plaintiffs' Motion for Summary Judgment on the issue of negligence, and there is no real issue regarding proximately cause.

that the only issue subject to his Order was Judge Stolz's determination to reinstate the previously stricken defense of contributory/comparative fault.

Commission Schmidt's Order of August 1, 2011 specifically provided:

Because Judge Larkin's February 12, 2010 order has already been subject to a motion for discretionary review, a review is limited to the propriety of Judge Stolz's ruling. RAP 2.3(e). The clerk will issue a perfection schedule. (Emphasis added).

A panel of the Judges from this Court refused to modify this limitation.

As Commissioner Schmidt has limited review pursuant to RAP 2.3(e), it would be counter-intuitive and contradictory for the Court to apply the proposition that an Appellate Court "may affirm a lower Court decision on any ground supported by the record" given the limited nature of the review in this case. See generally, *Person v. State Department of Labor and Industries*, 164 Wn.App. 426, 441, 262 P.3d 837 (2011). Court rules are interpreted the same way as statutes. See, *State v. Kone*, 165 Wn. App. 420, 435, 266 P.3d 916 (2001). Appellate Courts first look to the plain meaning of the rule and construe the rule in accordance with the drafting body's intent. *Id.*, citing to *Gourley v. Gourley*, 158 Wn.2d 460, 466, 145 P.3d 1185 (2006). Court rule should be interpreted in a manner that "no word, clause or sentence is superfluous, void or insignificant." See, *State v. Osman*, 168 Wn.2d 632, 638, 229 P.3d 729 (2010).

It is humbly suggested that the application of the principle that the appellate court can affirm on any grounds within the record, would be contradictory and would render superfluous and meaningless RAP 2.3(e) which provides that the Appellate Court can accept a case for discretionary upon limited issues. It would render such power to limit the issues useless if such limitations could be arbitrarily disregarded by application of the above general proposition.

Thus, the Respondent's efforts to challenge the propriety of Judge Larkin's February 12, 2010 Sanction Order should be stricken. The propriety of such an Order clearly is not before this Court, given the RAP 2.3(e) limitation within this appeal.

As a result of such limitations, it was and is entirely inappropriate for the Defendants even to try to indirectly challenge the propriety of Judge Larkin's Discovery Sanction Order. Thus, any reference within Respondent's Brief that Judge Larkin made "an error" should not be considered by this Court. In addition, pages 19 through 22 of the Respondent's Brief should be stricken as being nothing more than a not-so-veiled effort to challenge the propriety of Judge Larkin's February 12, 2010 Order, which is off limits due to the operation of RAP 2.3(e).³

³ Another example of Respondent's inappropriate efforts to challenge that which is currently off limits is set forth at Page 9 of respondent's brief which provides "the underlying order plaintiff seeks to preserve from Judge Larkin is for discovery sanctions. It is well established that orders on discovery motions are subject to review for abuse of discretion." (Citations omitted). Again, this Order is not before the Court, so which standard of review would have application to such an Order is irrelevant.

Naturally, since the propriety of Judge Larkin's underlying Order is excluded from review in this case, what standard review may be applicable to such order is irrelevant. As such, that portion of page 9 of Respondent's Opening Brief also should be stricken. The only matter at issue in this case is the propriety of Judge Stolz's Order which was memorialized on June 10, 2011, wherein she *sua sponte* modified Judge Larkin's Sanction Order based on untenable, illogical and baseless reasons.

II. COUNTER-STATEMENT OF THE FACT

A number of the core procedural and substantive facts in this matter are not subject to dispute. However, there are number of factual assertions set forth within Respondent's Brief which are simply untrue, or which are misstatements of fact, or based on rank speculation which only serves to underscore the damage done by Mr. Munce's discovery abuse.

The recitation of facts set forth within respondent's brief at pages 4 and 5 are particularly problematic, as is Respondent's prefatory comment at page 3 that "the evidence which the plaintiffs reply upon is the same evidence which the defense plans to use to argue its affirmative defense, and therefore there is no substantial prejudice or limitations on the plaintiff in now having to deal with this single affirmative defense." From Plaintiff's perspective, such a proposition is far from true. The same is true with respect to Respondent's conclusory allegations at page 29, that "[a]mple evidence supports and affirmative defense of comparative fault..." That is absolutely

untrue. Without the testimony of Clarence Munce, (which has been denied to Plaintiffs), such a defense is based on nothing more than inadmissible hearsay, argumentative assertions, conclusory allegations and rank speculation.

The evidence presented below with respect to the events of June 21, 2008, was comprised of the physical facts as developed by law enforcement personnel, the results of the postmortem examination of Gerald Munce, a recording of a 911 call made by Clarence Munce, as well as police homicide investigation reports, and the deposition testimony of various police officers and emergency personnel who arrived at the scene. (CP 108-420). The near entirety of the evidence which the defense intends to rely upon, would be nothing more than Mr. Munce's hearsay statements that were made to the 911 operator. (CP 577-581). In contrast, if Mr. Munce's negligence remained at issue (it no longer is), Plaintiffs would rely upon the physical facts, as well as those aspects of Clarence Munce's statements to the police, which would constitute admissions and/or admissions against interest under the terms of ER 801(d)(2) and ER 804(b)(3) (statements against interest). The source of such admissions are primarily the statements made by Clarence at the police station, and prior to his assertion of any Fifth Amendment privileges. Such statements are a mixture of rank hearsay and admissions against interest.

Based on such statements and other surrounding circumstances, it is all but undisputed that on June 21, 2008, Gerald arrived at his father's

residence, at his father's invitation, in response to his father's request that Gerald return a bulldog hood ornament that Clarence had previously given to Gerald some years earlier. (CP 327). While it is true that such a request was initially made while Gerald was at "a bar," it is simply unknown how much time transpired between Gerald leaving that bar and his ultimately fatal arrival at his father's home. Upon Gerald's arrival at an undetermined time, Clarence used a golf club to strike Gerald bilaterally in the rib cage, lacerating his liver. (CP 327). Following this brutal assault, Gerald ran towards the street in a stooped position and was shot in the back by Clarence. (CP 108-116). The bullet was shot by Clarence from an M1 carbine rifle traveled through Gerald's back, through his neck and out his jaw. Clarence later admitted that he fired the shot not out of any urge to defend himself, or for any other reason, but rather simply to "scare" Gerald. (CP 327). Beyond such facts, the vast majority of the remaining evidence is nothing more than Clarence's confused and self-serving hearsay, which is otherwise inadmissible. Further, such hearsay statements otherwise should be precluded even if subject to a potential hearsay exception, under the terms of ER 403 because Plaintiffs have been denied an opportunity to depose Clarence with respect to such events and statements, thus the prejudicial impact of the admissions of any such statements would be far outweighed by their prejudicial effect.

On several occasions before the Trial Court, the Defendants have asserted that Clarence's statements to 911 would be subject to the "excited utterance" exception set forth within ER 803(2). Such a proposition is far from a foregone conclusion.

While at page 5 of Respondent's Brief it is asserted that Clarence "immediately contacted 911 for help ..." (without citation of the record), there is simply **no evidence as to actually how much time transpired between the firing of the fatal shot and the 911 call**. Thus, it is dubious that the Respondent will be able to establish the "spontaneity" necessary as a foundation for "an excited utterance." Given any clear information regarding the amount of time passed, the content of a number of Clarence's statements to the 911 operator clearly are indicative of an absence of spontaneity and an opportunity to reflect and fabricate. See generally, *State v. Sharp*, 80 Wn. App. 457, 909 P.2d 1333 (1996); *State v. Brown*, 127 Wn.2d 749, 903 P.2d 459 (1995); *Brown v. Spokane Fire and Protection District*, 100 Wn.2d 188, 168 P.2d 571 (1983).

The mere fact that in the 911 call Clarence sounds "upset" does not change the fact that by content the 911 call indicates that Clarence had some ability to reason and reflect, and the critical inquiry is whether or not there had been sufficient passage of time for him to be able to collect his thoughts and to engage in a fabrication. *State v. Sellers*, 39 Wn. App. 799, 695 P.2d 1014 (1995).

Additionally, if a statement is made in response to questions, it may not be sufficiently reliable to be an excited utterance when other factors are also present would suggest unreliability. See, *State v. Griffith*, 45 Wn. App. 728, 736, 727 P.2d 247 (1986). The fact that Clarence was responding to the questions from the 911 operator undercuts the probability that the statements were made spontaneously, and were a provoked response by the very events themselves. See, *State v. Rivas*, 49 Wn. App. 677, 746 P.2d 1312 (1987).

It is also a significant factor for Courts to weigh in determining whether or not a statement is spontaneous or reliable versus fabricated, is whether the declarant later changed their story and/or recanted their statements. See, *State v. Young*, 160 Wn.2d 799, 161 P.3d 967 (2007) (If the Court concludes original statement was a fabrication based on the recantation, the statement is inadmissible).

Also, although not an absolute controlling factor, the Courts must take into consideration the fact that the declarant suffered from dementia and as a result may not have the ability to reliably relate facts. See, *Warner v. Regents Assisted Living*, 132 Wn. App. 126, 130 P.3d 865 (2006); see also, *State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992). As noted in the *Warner* case, at page 135, because the excited utterance exception of the hearsay rule presumes "a particular guarantee of trustworthiness" a reliability analysis is extremely difficult when the declarant suffers from dementia. That is clearly amongst the problems with the evidence here.

Beyond the inability to establish the appropriate temporal relationship, clearly Clarence's alleged statements to the 911 operator have an overwhelming indicia of unreliability and fabrication. Alternatively, they appear to be nothing more than the ramblings of a confused Alzheimer's sufferer who subsequently admitted at the police station that his initial statements to the 911 operator were self-servingly false.

If one actually examines the purported transcript of the 911 statement, it is noted that Clarence contradicts himself in a number of ways. Clarence seems to be confused as to whether or not he is wearing any clothing. Further, although Clarence asserts that Gerald "broke into my house," the physical facts developed at the scene indicates that Clarence was lying. There is absolutely no evidence of a break-in whatsoever.¹

There is also substantial indication that Clarence was lying about being asleep prior to Gerald's arrival. Once the police arrived at the scene, it was noted that the lights in Clarence's bedroom were on and his TV was "cranked up" at an extremely high volume.² (CP 259-60).

Further, and perhaps even more significantly, the alleged statement made by Gerald that "you got it coming, you son-of-a-bitch" would be a statement otherwise barred under the terms of the Dead Man's Statute

⁴ It is noted that despite earlier allegations before the trial court the defense now has tempered this allegation by indicating that "He began pounding on his father's door causing Clarence to believe someone was trying to break in". There is simply no evidence that Gerald was trying to break into the home, and Plaintiffs were denied discovery with respect to any subjective beliefs Clarence may have had.

⁵ It seems highly improbable that Clarence after shooting his son returned to his bedroom to turn the TV on at a high volume.

RCW 5.60.030. As the Supreme Court noted long ago "Death having closed the lips of one party, the law closes the lips of the other." See, *Estate of Cunningham*, 94 Wn. 191, 193, 161 P. 1193 (1917). Testimony about a transaction with the deceased are barred under the terms of this statute. The term transaction is defined as testimony about the business of the management of any affair, when the testimony could be contradicted by the deceased if he were alive. The critical question is whether the deceased could have contradicted the testimony and whether or not "he would have." See, *Wildman v. Taylor*, 46 Wn. App. 546, 731 P.2d 541 (1987).

Intentional tort, such as assault and battery, are considered "transactions" under the terms of the statute. See, *Maciejczak v. Bartell*, 187 Wn. 113, 60 P.2d 31 (1936). An act of negligence also can be considered "a transaction." See, *Hofseang v. Estate of Brooks*, 78 Wn. App. 315, 897 P.2d 370 (1995); see also *Erikson v. Robert F. Kerr, M.D., P.S., Inc.*, 69 Wn. App. 891, 851 P.2d 703 (1993), (Dead Man's Statute restricted physician's testimony in his efforts to defend against malpractice claim brought by a patient's estate).

Beyond the dubious admissibility of the Defendants' alleged "facts," it is noted that such problems of proof arise from the fact that the only two witnesses to the events are and were unavailable to testify. Gerald is dead, and Clarence, in violation of the discovery rules, has refused to testify. Thus, to the extent that any "scuffle" may have ensued prior to Clarence striking

Gerald with the golf club, we simply cannot know whether or not such a scuffle was a by-product of any actions of Gerald, or whether or not it was solely the actions of Clarence. These facts are simply unknowable and simply cannot be "filled in" based on rank argumentative assertions and speculation.

Also significant, although it is true that a postmortem blood draw establishes Gerald's alcohol level at 0.10, given absence of proof, it is unknowable as to whether or not such intoxication had any role to play in the events that transpired on the evening of June 21, 2008. Thus, this fact, in and of itself is nothing more than a "red herring" that the Defendants hope will simply bias the court against Gerald.³

In any event, as indicated above, it is clearly the Plaintiff's position, that there is simply no admissible and/or competent evidence that would ever support submitting a claim of "comparative fault" to the jury in this case.

⁶ Either as an aspect of comparative fault and/or an intoxication defense pursuant to RCW 5.40.060, it would be incumbent upon the defense to establish that such intoxication was "a proximate cause" to the plaintiff's own injuries and/or damages. See *Hickly v. Bare*, 135 Wn. App. 676, 145 P.3d 443 (2006). Here, beyond the fact that Gerald had some alcohol within his system, there is simply **no admissible, non-speculative evidence that Gerald's alcohol intake in any way was a proximate cause of the events which transpired on June 21, 2008**. Additionally, it is simply another "red herring" for the defense to assert that "This was not the first altercation, but was yet another sad chapter in a long history of physical and verbal abuse" as set forth within Page 4 of respondent's brief. Obviously even if such allegations were true admissions of any evidence of any negative prior interactions between this father and son would be barred under the terms of ER 404(b). There is simply no evidence that Clarence was operating with a mental state generated by any particular past event. Further, it is simply misleading for the defendants to assert that the allegations below are indicative that Gerald was somehow abusive towards Clarence. The evidence presented below establishes that Clarence generally was an extremely abusive individual who, among other things, even went so far as finding some level of enjoyment at throwing firecrackers at the Jehovah Witnesses who happened to come to his door. (CP 219).

Because of Clarence Munce's misconduct, and his unwillingness to testify, there is simply no **admissible evidence establishing the existence of such a defense.**

Further, even if there were such evidence, the Plaintiff's ability to respond and/or defend against such a defense, has been hopelessly prejudiced and damaged by Clarence's willful refusal to testify in this case. Such a proposition certainly did not escape Commissioner Schmidt, who within his Order Granting a Review observed:

*Further, Judge Stolz's ruling substantially alters the status quo. As Commissioner Skerlec described in detail in her ruling denying Clarence's motion for discretionary review of Judge Larkin's February 12, 2010 Order, **Gerald's ability to defend against Clarence's affirmative defenses and counterclaim was significantly impaired by Clarence's non-participation in discovery as a result of his medical condition and his invocation of the right against self-incrimination.** And there is no possibility that Clarence's condition will improve so as to allow him to participate in discovery. Reinstating Clarence's affirmative defense of contributory fault at this point would again significantly impair Gerald's ability to defend against that defense and so substantially alters the status quo. Discretionary review of Judge Stolz's ruling is appropriate under RAP 2.3(b)(2).*

In this matter, Judge Stolz's action in reinstating the defense of contributory fault was absolutely senseless, and based on the untenable grounds that there was an "inconsistency" between Judge Larkin's oral pronouncements and his final orders. Such a proposition is flatly wrong when it comes to his determination to strike the affirmative defenses and, as such, her basis for her actions was and is an abuse of discretion.

III. REPLY ARGUMENT

While one can certainly debate whether a Trial Court has authority pursuant to CR 54(b) to revise the orders of a previously assigned Trial Judge, which have already been subject to two prior motions for a discretionary review which were denied, the Court does not have to reach this issue because it is simply beyond question that Judge Stolz abused her discretion by doing what she did.

As noted in Appellant's Opening Brief, an abuse of discretion occurs when a Trial Court engages in an act which is "... manifestly unreasonable, or exercise on untenable grounds for untenable reasons." See, *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Under such a standard, the Appellate Court, in determining whether an abuse of discretion occurs, must look to the actual reasons given by the Trial Court for its actions. Thus, Respondent's efforts to engage in a *post hoc* manufacture of justifications for the Trial Court's actions should be rejected. There is no indication within the record that Judge Stolz did what she did because she thought the sanctions entered by Judge Larkin were too harsh or erroneous, or because she believed that further development of the record warranted revision of Judge Larkin's prior orders.⁴ As is self-evident, there

⁷ Further such a proposition is substantially untrue. Plaintiff's Memorandum in Opposition to Defendants' Motion for a Protective Order etc. filed on June 30, 2009 including exhibits was 252 pages long and included much of the same materials which were attached to plaintiff's motion for partial summary judgment. (See, Supp. CP). As the pleadings and hearings relating to sanctions progressed and which culminated in the entry of the February 12, 2010 Sanction Order entered by Judge Larkin. See, for example, Declaration of Shellie McGaughey filed December 16, 2009 which included as attachment purported 911

was simply nothing inconsistent between Judge Larkin's final Sanction Order and his oral pronouncement as it related to his determination to strike all affirmative defenses.

While one might be able to argue that there is some level of inconsistency between Judge Larkin's oral pronouncements that he did not desire to grant a default judgment as a sanction, he never said he did not intend to "strike Defendants' Answer" as part of his sanctions, and he clearly, affirmatively stated that he did intend to strike all affirmative defenses including comparative fault and any counterclaim.

Further, it is undisputed that it is an abuse of discretion for a Trial Court to engage in an erroneous interpretation of the law or to apply the wrong legal standards. See, *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 463, 232 P.3d 591 (2010). It is well recognized that for the purpose of determining whether or not an abuse of discretion has occurred, a decision is based on "untenable grounds" or made for "untenable reasons" when it was reached by applying the wrong legal standard. See, *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). A Court abuses its

(Supp) transcript. There is no question that Judge Larkin prior to entry of his February 12, 2010 Order had before him all of defendants' speculative arguments regarding "comparative fault" including allegations that there had been "prior altercations" between Clarence and Gerald, and allegations that Gerald had somehow "wounded" Clarence somewhere between being viciously assaulted with a golf club and being shot dead by his father and that there was a toxicology report showing "Gerald was grossly intoxicated when he came to his father's house at night and started banging on the door." (Respondent's Brief, p. 29). Obviously Judge Larkin was not impressed by evidence which constituted nothing more than inadmissible hearsay or which was predicated on illogical and speculative leaps as to what the evidence actually could be on such issues.

discretion if its ruling is based on an erroneous view of the law. *Wash. State Physicians Ins. Exchange, and Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

In this case, it is quite clear that Judge Stolz reached an erroneous factual view as to the content of Judge Larkin's oral pronouncement and his final Sanction Order of February 12, 2010. There is nothing "inconsistent" within the terms of either which would justify a conclusion that there is "any inconsistency" on the question of whether or not Judge Larkin intended to strike all affirmative defenses, including comparative/contributory fault.

Further, even if such an inconsistency could be found, (it cannot), with respect to the striking of affirmative defenses,, the Trial Court clearly applied an erroneous legal standard and had an erroneous view of the law as to its capacity to find the existence of such "inconsistency." The law is clearly established that a Judge's written orders and findings control over any oral pronouncements made prior to their entry. Such a proposition was clearly stated in the case of *Ferree v. Doric Company*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963), which clearly provides the following:

*In support of this contention, the appellant relies, in large measure, on the trial court's oral decision rendered immediately following the trial. **It must be remembered that a trial court's oral decision is no more than a verbal expression of its informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formerly incorporated into the findings, conclusions, and judgment.*** (Emphasis added).

As is typically the case, the Plaintiffs in this case, as the prevailing party on the sanction issue, drafted appropriate Findings of Facts and Conclusions of Law, served them upon opposing counsel, and opposing counsel was provided an appropriate opportunity to object to the proposed Findings and Conclusions, and had an opportunity to present their own proposed Findings if he desired to do so. See, 14A Wash. Prac., *Civil Procedure* § 33.10, Tegland, Karl B. (2011) (noting customary practice of a prevailing party to present proposed findings to court with provision of an opportunity for opposing party to object to content).

Judge Larkin is a well-seasoned Trial Judge, and is certainly not a simpleton who would sign anything that Plaintiffs' counsel happened to place before him. Once he had a full and complete opportunity to hear argument, and to review Plaintiffs' Proposed Amended Findings of Facts and Conclusions of Law, he signed them.

In doing so, he was acting 100 percent consistent with his prior determination, that all of the Defendants' affirmative defenses should have been stricken as a sanction for Clarence Munce's discovery abuse. Further, although not dispositive, even if some ambiguity existed between Judge Larkin's determination not to enter a default judgment in this case, and his determination to strike Defendants' Answer, (which are two entirely separate matters), any such ambiguity as a matter of law would be resolved

based on the above controlling principles. Judge Larkin's Order clearly indicated that he intended to strike the Defendants' Answer.

Nevertheless, whether or not Judge Larkin intended to strike the Defendants' Answer and whether such a determination was somehow inconsistent with his prior oral pronouncement, is an academic and a moot point. Judge Stolz's own Order, which was not subject to a Motion for Discretionary Review at the behest of Clarence Munce, already made a determination as a matter of law that Clarence Munce was negligent. Thus, rendering any concerns regarding the need for entry of an Order of Default, and/or for the striking of the Defendants' Answer in this case, somewhat academic.⁵

IV. CONCLUSION

Judge Stolz clearly abused her discretion by reinstating an affirmative defense that had been previously stricken by Judge Larkin. The sanctity of Judge Larkin's February 12, 2010 Sanction Order is beyond the scope of this appeal, thus the Defendants' not-so-veiled efforts to challenge the propriety of such Order should be rejected, and those portions within his Brief where he attempts to engage in such actions should be stricken.

As it is, Judge Stolz's determination makes no sense, and is both

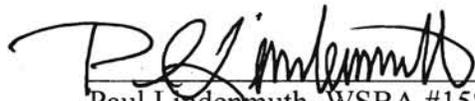
⁸ It is noted that there is simply no question in this case that Clarence Munce's actions were a proximate cause of injury to Gerald Munce and his ultimate death. Thus, to the extent that Judge Stolz's summary judgment ruling leaves open the question of "proximate cause" due to the existence of contributory fault, such issue certainly upon reversal of her abusive actions, can be appropriately addressed by way of additional motions. As it is, there are no real issues remaining with respect to proximate cause.

legally and factually unsupportable, and as a result constitutes an abuse of discretion.

Judge Larkin, at the time he sanctioned the Defendants, was well aware of the Defendants' allegations in this case, and no doubt understood the speculative and hearsay nature of Defendants' likely proof. Given the lack of admissible evidence in this case, there is no question that Judge Larkin was well within his prerogatives by punishing Clarence Munce for his discovery abuse, particularly when the only other eye-witness in this case, Gerald Munce, was killed by him. It certainly was not an abuse of discretion on Judge Larkin's part to remove an affirmative defense which more likely than not could never be supported by admissible evidence.

Judge Stolz's rather bizarre *sua sponte* decision in this case, which failed to acknowledge the devastating prejudice suffered by the Plaintiffs as a result of Clarence Munce's misconduct, should be reversed, and this case, in its current procedural posture, should proceed before a jury solely on the issue of damages.

DATED this 5th day of April, 2012, at Tacoma, Washington.

A handwritten signature in black ink, appearing to read "P. Lindenmuth", written over a horizontal line.

Paul Lindenmuth, WSBA #15817
Attorney Plaintiffs

DECLARATION OF SERVICE

I, Marilyn DeLucia, hereby declare under penalty of perjury that the following statements are true and correct:

I am over the age of 18 years and am not a party to this case.

On April 5, 2012, I caused to be served delivered to the attorney for the Respondents, a copy of APPELLANT'S REPLY BRIEF, and this Declaration of Service, and caused those same documents to be filed with the Clerk of the above-captioned Court. The address to which these documents were provided to Respondents' attorney:

Shellie McGaughey
McGaughey, Bridges, Dunlap, PLLC
325 -1 18th Avenue SE, Ste. 209
Bellevue, WA 98005

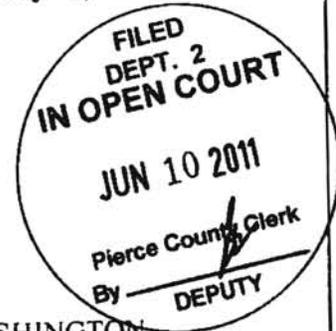
- by hand delivery
- via legal messenger (ABC Messenger Service)
- via facsimile
- via email
- First Class US Mail postage prepaid

DATED this 5th day of April, 2012, at Tacoma, Pierce County, Washington.



Marilyn DeLucia
Paralegal

Hon. Katherine M. Stolz
Plaintiffs' Motion for Partial Summary Judgment
Friday, May 20, 2011 at 9:00 a.m.



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

KRISTY L. RICKEY and KELLEY R.)
CAVAR, individually, and as Co-Executrixes)
of the Estate of Gerald Lee Munce, Deceased,)

Plaintiffs,)

vs)

MICHAEL B SMITH as Litigation Guardian)
Ad Litem for CLARENCE G MUNCE,)

Defendant.)

NO. 08-2-10227-6

**ORDER ON PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

THIS MATTER having come before the court upon the Plaintiffs' Motion for Partial Summary Judgment re: Negligence and Proximate Cause, and the Court having considered the files and records herein, the pleadings submitted in support of and in opposition to said motion, having denied the parties cross motions to strike which were denied with said orders being entered on May 20, 2011, and having considered specifically the following:

- 1) Plaintiffs' Motion for Partial Summary Judgment re. Negligence and Proximate Cause;
- 2) Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment re: Negligence and Proximate Cause;

ORDER GRANTING IN PART AND DENYING
IN PART PLAINTIFFS' SUMMARY
JUDGMENT MOTION - 1-

Exhibit


McGAUGHEY BRIDGES DUNLAP PLLC
 325 - 118th AVENUE SOUTHEAST SUITE 209
 BELLEVUE WASHINGTON 98005 - 3539
 (425) 462 - 4000
 (425) 637 - 9638 FACSIMILE

- 3) Declaration of Paul Lindenmuth and the attached exhibits;
- 4) Defendant's Opposition to Plaintiffs' Motion for Summary Judgment re: Negligence and Proximate Cause;
- 5) Declaration of Shellie McGaughey and the attached exhibits;
- 6) Plaintiffs' Reply to Defendant's Response to Plaintiffs' Summary Judgment re: Negligence and Proximate Cause,
- 7) Affidavit of Paul A. Lindenmuth in Support of Plaintiffs' Reply to Defendant's Response to Plaintiff's Motion for Partial Summary Judgment;
- 8) Oral argument of counsel for both parties

And further taking the matter under advisement before ruling; The Court grants in part and denies in part Plaintiffs' Motion for Partial Summary Judgment. The Court GRANTS Plaintiffs' motion on liability only. The percentage of fault attributable to Clarence Munce is a question of fact for the jury to determine at trial as Defendant will be allowed to argue contributory negligence at trial and it will be for a jury to determine the relative percentage of fault between Clarence Munce and Gerald Munce.

Plaintiff's motion on proximate cause is DENIED.

ORDERED this 10th day of June, 2011

FILED
DEPT. 2
IN OPEN COURT
JUN 10 2011
Pierce County Clerk
By: [Signature]
DEPUTY, PLLC

[Signature]
Hon. Katherine M. Stolz

Presented by:

McGAUGHEY BRIDGES DUNLAP, PLLC

[Signature]
Shellie McGaughey, WSBA #16809
Attorney for Defendant

Approved as to form;
Notice of presentation waived

LAW OFFICES OF BEN F. BARCUS
& ASSOCIATES

[Signature] WSBA
Ben Barcus, WSBA #15576 #15817
Attorney for Plaintiffs

ORDER GRANTING IN PART AND DENYING
IN PART PLAINTIFFS' SUMMARY
JUDGMENT MOTION - 2-


McGAUGHEY BRIDGES DUNLAP, PLLC
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08-2-10227-6 38441017 ORDYMT 05-23-11

Hon. Katherine M. Stolz
Plaintiffs' Motion for Default
Friday, May 20, 2011 at 9:00 a.m.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

KRISTY L. RICKEY and KELLEY R.)
CAVAR, individually, and as Co-Executrixes)
of the Estate of Gerald Lee Munce, Deceased,)

NO. 08-2-10227-6

Plaintiffs,

~~PROPOSED~~ ORDER ON PLAINTIFFS'
MOTION FOR DEFAULT

vs.

MICHAEL B. SMITH as Litigation Guardian)
Ad Litem for CLARENCE G. MUNCE,)

Defendant.



THIS MATTER having come before the court upon the Plaintiffs' Motion for Defalut,
and the Court having considered the files and records herein, the pleadings submitted in support
of and in opposition to said motion, specifically including the following:

- 1) Plaintiffs' Motion and Affidavit for Order of Default;
- 2) Defendant's Opposition to Plaintiff's Motion for Default;
- 3) Declaration of Justin E. Bolster in Opposition to Default;

SMS 4) Justin E. Bolster _____ ;

5) _____ ;

6) _____;

7) Oral argument of counsel for both parties.

The Court hereby DENIES plaintiffs' motion ^{for default.} and finds that plaintiffs' motion for default was filed in bad faith and without reasonable basis in law or fact. The filing is in violation of CR 11 as the order entered by Judge Larkin on February 12, 2010 did not strike defendant's answer and Judge Larkin clearly denied plaintiffs' request for a directed verdict or default. This pleading has unnecessarily increased the costs of litigation.

P
SMB

[Handwritten signature]

Plaintiffs are hereby sanctioned in the amount of _____ which must be paid to defendant within _____ days.

[Large handwritten scribble]

ORDERED this 20th day of May 2011.

[Handwritten signature]
Hon. Katherine M. Stolz

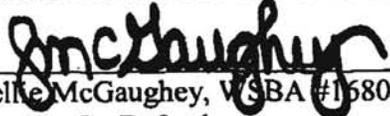
FILED
DEPT. 2
IN OPEN COURT
MAY 20 2011
Pierce County Clerk
By *[Signature]*
DEPUTY

ORDER DENYING PLAINTIFFS' MOTION FOR DEFAULT - 2-


MCGAUGHEY BRIDGES DUNLAP PLLC
325 - 118th AVENUE SOUTHEAST, SUITE 209
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1 Presented by:

2 McGAUGHEY BRIDGES DUNLAP, PLLC

3 
4 Shelke McGaughey, WSBA #15809
Attorney for Defendant

5
6 Approved as to Form; Notice of Presentation Waived:

7 THE LAW OFFICES OF
8 BEN F. BARCUS & ASSOCIATES

9 
Ben Barcus, WSBA #15576
Attorney for Plaintiffs

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