No. 46963-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROLFE GODFREY and KRISTINE GODFREY, husband and wife and their marital community composed thereof,

Appellants,

v.

STE. MICHELLE WINE ESTATES LTD, dba CHATEAU STE. MICHELLE, a Washington Corporation; and SAINT-GOBAIN CONTAINERS, INC.,

Respondents.

and

ROBERT KORNFELD,

Additional Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE KATHERINE M. STOLZ

BRIEF OF APPELLANT ROBERT KORNFELD

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Appellant
Robert Kornfeld

TABLE OF CONTENTS

I. INTRODUCTION 1

II. INCORPORATION OF BRIEF OF APPELLANT 2

III. ISSUE 2

IV. ARGUMENT 3

A. The trial court erred in awarding attorney's fees without supporting findings and in awarding fees beyond the small amount attributable to the absence of a "separate" joint statement of evidence. 3

V. CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Berryman v. Metcalf,
177 Wn. App. 644, 312 P.3d 745 (2013), *rev. denied*, 179 Wn.2d 1026 (2014) 3-6

Hume v. Am. Disposal Co.,
124 Wn.2d 656, 880 P.2d 988 (1994), *cert. denied*, 513 U.S. 1112 (1995) 4

Just Dirt, Inc. v. Knight Excavating, Inc.,
138 Wn. App. 409, 157 P.3d 431 (2007) 4-5

Mahler v. Szucs,
135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998) 4

RULES AND REGULATIONS

CR 26 4

RAP 10.1 1-2

I. INTRODUCTION

Appellant Rob Kornfeld was wrongly sanctioned $10,000 in attorney's fees because he did not file a separate "joint statement of evidence" on behalf of his client, appellant Rolfe Godfrey, under the Pierce County Local Rules. But those rules require *the parties* to file a *joint* statement, which they did, when respondents Chateau Ste. Michelle and Saint-Gobain Containers, Inc., filed a statement incorporating the one Mr. Kornfeld provided them. For the reasons set forth in Mr. Godfrey's brief, this Court should reverse all sanctions based on the lack of a "separate" joint statement of evidence (which no rule requires), including the $10,000 fee award imposed on Mr. Kornfeld. RAP 10.1(g).

Regardless, the $10,000 fee award cannot be justified. The trial court made no findings supporting its award, including findings explaining the basis for the award and demonstrating that the fees awarded related to the "sanctionable" conduct. In fact, the fees imposed on Mr. Kornfeld were not related to the absence of a separate joint statement of evidence, but were fees for normal trial preparation that *any* attorney preparing for *any* trial would incur. This Court should reverse the trial court's unsupported and unjustified attorney's fee sanction.

II. INCORPORATION OF BRIEF OF APPELLANT

Mr. Kornfeld adopts and incorporates by reference the assignments of error, issues, statement of facts, and arguments set forth in Mr. Godfrey's brief. RAP 10.1(g). As explained in Mr. Godfrey's brief the trial judge's refusal to grant his motion to change judges was an error of law, and accordingly anything that followed is null and void, including the sanctions and terms, which are reversible error in their own right. Mr. Kornfeld also submits this additional issue and argument in support of reversal of the trial court's award of attorney's fees:

III. ISSUE

1. Must an award of attorney's fees imposed as a sanction be reversed where the trial court fails to make any findings in support of its sanction and the vast majority of fees are unrelated to the "sanctionable" conduct, but rather are fees incurred as part of normal trial preparation?

IV. ARGUMENT

A. The trial court erred in awarding attorney's fees without supporting findings and in awarding fees beyond the small amount attributable to the absence of a "separate" joint statement of evidence.

Because there was no sanctionable conduct, the trial court erred in imposing any sanctions. Regardless, the $10,000 in fees awarded by the trial court must be reversed. As with its underlying sanctions order, the trial court made no findings supporting its attorney's fee award. (CP 761-62; App. A) For that reason alone, its order must be reversed. Moreover, the vast majority of fees the trial court awarded are unrelated to the "violation" of not filing a "separate" joint statement of evidence, but were incurred during normal trial preparation. This Court should reverse the $10,000 sanction against Mr. Kornfeld.

Washington adheres to the "American Rule" that each party must pay its own attorney's fees unless a statute, contract, or recognized ground of equity allows an award from the opposing party. *Berryman v. Metcalf*, 177 Wn. App. 644, 656, ¶ 24, 312 P.3d 745 (2013), *rev. denied*, 179 Wn.2d 1026 (2014). Attorney's fees awarded for sanctionable conduct are not a fee-shifting mechanism and a trial court must "limit those fees to the amounts reasonably

expended in responding to the sanctionable" conduct. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 418, ¶ 35, 157 P.3d 431 (2007); *see also* CR 26(g) (fees awarded as sanction must be limited to those "incurred because of the violation"); *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 672, 880 P.2d 988 (1994) ("the attorney fees award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues"), *cert. denied*, 513 U.S. 1112 (1995).

The burden of demonstrating the appropriateness of a fee award is on the party requesting fees. *Berryman*, 177 Wn. App. at 657, ¶ 25. "Courts must take an *active* role in assessing the reasonableness of fee awards . . . [and] should not simply accept unquestioningly fee affidavits from counsel." *Berryman*, 177 Wn. App. at 657, ¶ 27 (emphasis in original) (quoting *Mahler v. Szucs*, 135 Wn.2d 398, 434–35, 957 P.2d 632, 966 P.2d 305 (1998)). Although an award of attorney's fees is reviewed for an abuse of discretion, a trial court necessarily abuses its discretion by awarding fees without making findings to support its award, including specifying the basis for the award and how it calculated the amount of the fees. *Just Dirt*, 138 Wn. App. at 415-16, ¶¶ 24-29. Where a trial court fails to make the necessary findings, an

appellate court will remand – with appropriate guidance – for the trial court to make findings. *Berryman*, 177 Wn. App. at 659-60, ¶ 33.

Here, the trial court failed to make any findings supporting its award of attorney's fees, just as it did with its underlying sanctions order. (CP 761-62) It thus erred as a matter of law and its attorney's fee award must be reversed.

And here, there is no basis for a remand because in no event could the trial court justify its award of attorney's fees based on Mr. Kornfeld's "failure" to file a separate joint statement of evidence. As the respondents' own billing records confirm, the vast majority of fees awarded were unrelated to the absence of a separate joint statement of evidence. For example, the trial court included in its fee award time spent reviewing plaintiff's exhibit list (which is separate from the joint statement of evidence) and formulating objections. (CP 593, 726-27, 729, 737) That is something any attorney must do in preparing for trial and is not time "expended in responding to the sanctionable" conduct. *Just Dirt*, 138 Wn. App. at 418, ¶ 35. Likewise, respondents had to prepare their portion of the Joint Statement of Evidence whether Mr. Godfrey prepared his

or not (which he did and sent to respondents three days before the due date). (CP 593, 728-30)

The list goes on. An attorney in any case will have to copy exhibits (CP 593-94), review withdrawn exhibits (which both parties did days before trial) (CP 742), prepare for the pretrial conference (CP 738) and other general "trial preparation" (CP 739, 741-43). Indeed, respondents' lead attorney failed to keep contemporaneous records and instead backfilled the "trial preparation" related to the absence of a separate joint statement of evidence a month after trial. (CP 683-84) The trial court made no finding that this after-the-fact reconstruction was accurate and instead "unquestioningly" accepted counsel's self-serving assertion that her time was accurate. *Berryman*, 177 Wn. App. at 657, ¶ 27. The trial court erred in awarding fees in no way attributable to the absence of a separate joint statement of evidence. In the event this Court remands for entry of findings to support a monetary sanction against Mr. Kornfeld, it should limit those fees to those attributable to the "failure" to file a separate joint statement of evidence. Those fees totaled $1,300 at most, as established in the annotated spreadsheet submitted by Mr. Godfrey below. (CP 750-52)

V. CONCLUSION

This Court should reverse the trial court's award of attorney's fees imposed personally on Mr. Kornfeld because no sanction should have been imposed. Moreover, the trial court's failure to grant the request for a change of judge was error and all orders which followed are void. If this Court remands for additional findings it should instruct the trial court that its fee award should not exceed $1,300.

Dated this 14th day of July, 2015.

SMITH GOODFRIEND, P.S.

By: _____
Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

Attorneys for Appellant
Robert Kornfeld

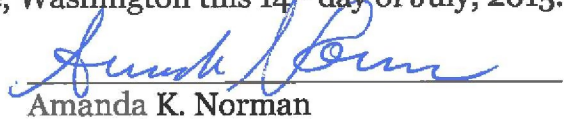
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July, 14 2015, I arranged for service of the foregoing Brief of Appellant Robert Kornfeld, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	___ Facsimile ___ Messenger ___ U.S. Mail _✓_ E-File
Robert Kornfeld Kornfeld Trudell Bowen & Lingenbrink PLLC 3724 Lake Washington Blvd. N.E. Kirkland, WA 98033-7802	___ Facsimile ___ Messenger ___ U.S. Mail _✓_ E-Mail
Seann C. Colgan Emily J. Harris Corr Cronin Michelson Baumgardner & Preece LLP 1001 4th Ave Ste 3900 Seattle, WA 98154-1051	___ Facsimile ___ Messenger _✓_ U.S. Mail _✓_ E-Mail
Russell A. Metz Metz & Associates, P.S. 999 3rd Ave., Ste. 2600 Seattle, WA 98104	___ Facsimile ___ Messenger _✓_ U.S. Mail _✓_ E-Mail
Kenneth W. Masters Masters Law Group PLLC 241 Madison Ave N Bainbridge Island WA 98110-1811	___ Facsimile ___ Messenger _✓_ U.S. Mail _✓_ E-Mail

DATED at Seattle, Washington this 14th day of July, 2015.



Amanda K. Norman

12-2-12968-7 43723597 ORG 12-03-14

0111 4398 12/3/2014

THE HONORABLE KATHERINE M. STOLZ

FILED
DEPT. 2
IN OPEN COURT
DEC - 1 2014
Pierce County Clerk
By DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

ROLFE GODFREY and KIRSTINE GODFREY, husband and wife and their marital community composed thereof,

Plaintiffs,

v.

STE. MICHELLE WINE ESTATES LTD. dba CHATEAU STE. MICHELLE, a Washington Corporation; and SAINT-GOBAIN CONTAINERS, INC.,

Defendants.

No. 12-2-12968-7

ORDER GRANTING PETITION FOR AWARD OF FEES AND COSTS PURSUANT TO COURT'S ORDER ON MOTION FOR AN AWARD OF SANCTIONS RE: PLAINTIFF'S FAILURE TO FILE JOINT STATEMENT OF EVIDENCE

[~~PROPOSED~~]

THIS MATTER having come before the undersigned Judge on Defendants Ste. Michelle Wine Estates Ltd. and Saint-Gobain Containers, Inc.'s Petition for an Award of Fees and Costs Pursuant to Court's Order on Motion for an Award of Sanctions Re: Plaintiff's Failure to File Joint Statement of Evidence, and the Court having considered the materials filed on this issue and the pleadings in this matter, and being fully advised; now, therefore,

IT IS HEREBY ORDERED that Defendants' Petition for an Award of Fees and Costs Pursuant to Court's Order on Motion for an Award of Sanctions Re: Plaintiff's Failure to File Joint Statement of Evidence is GRANTED. Plaintiff's counsel of record shall pay Defendants the sum of ~~$10,907.54~~ $10,000 within fourteen (14) days of the entry of this Order.

CORR CRONIN MICHELSON BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

0112 4398 12/3/2014

IT IS SO ORDERED this 1st day of DECEMBER, 2014.

The Honorable Katherine M. Stolz
Pierce County Superior Court Judge

FILED
DEPT. 2
IN OPEN COURT
DEC - 1 2014
Pierce County Clerk
By

Presented By:

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP

/s/ Seann C. Colgan
Emily Harris, WSBA No. 35763
Seann Colgan, WSBA No. 38769
Attorneys for Defendants

Copy Received
WSBA 10669

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

SMITH GOODFRIEND PS

July 14, 2015 - 1:58 PM

Transmittal Letter

Document Uploaded: 4-469634-Appellant's Brief.pdf

Case Name: Godfrey v. Ste. Michelle Wine Estates LTD
Court of Appeals Case Number: 46963-4

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Appellant's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

Brief of Appellant Robert Kornfeld

Sender Name: Victoria Vigoren - Email: victoria@washingtonappeals.com

A copy of this document has been emailed to the following addresses:

ian@washingtonappeals.com
robert@kornfeldlaw.com
russm@metzlawfirm.com
eharris@corrcronin.com
scolgan@corrcronin.com
lnims@corrcronin.com
elesnick@corrcronin.com

ken@appeal-law.com