

NO. 50561-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NATHAN SCOTT JOHNSON,

Appellant,

v.

CITY OF TACOMA, DEPARTMENT OF TACOMA PUBLIC
UTILITIES, TACOMA RAIL, a municipal corporation,

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

This appeal arises from a negligence case brought under the Federal Employers Liability Act (FELA) that was settled in March of 2017. In the course of that litigation, Appellant Nathan Scott Johnson and his attorneys (hereinafter “Johnson”) made claims that were wholly unsubstantiated by the facts, which compelled Respondent City of Tacoma, Tacoma Rail (hereinafter “City”) to expend significant defense costs. The City brought appropriate motions for summary judgment and CR 11 sanctions, which were properly granted by the trial court. Johnson now appeals those rulings related to CR 11 sanctions. As outlined herein, the trial court’s rulings were, in all respects, proper and should be affirmed.

II. ISSUES ON APPEAL

1. Whether the trial court abused its discretion by granting City’s motion for CR 11 sanctions against Johnson for failing to conduct reasonable inquiry into the factual and legal basis of the claims.
2. Whether the trial court violated Johnson’s due process rights by granting CR 11 sanctions against Johnson; and whether the trial court acted properly within its broad discretion in awarding the full amount of attorney’s fees to City.
3. Whether this Court may now independently review the record to determine whether a CR 11 violation has occurred, where the trial court’s order lacked specific findings that Johnson failed to conduct reasonable inquiry into the factual and legal basis of the claim.

III. STATEMENT OF THE CASE

A. Factual History

On November 18, 2014, Mr. Johnson was working as a conductor for Tacoma Rail, located in Tacoma, Washington. In the early morning hours on this date, Mr. Johnson allegedly attempted to board a moving railcar. He claimed that he slipped and fell, sustaining injuries that ultimately resulted in the amputation of his left leg, below the knee. CP 29.

B. Procedural History

Johnson filed his Complaint for Damages on December 9, 2015. CP 1-4. The Complaint asserted negligence under FELA. *Id.* On May 2, 2016, Johnson conducted an inspection of the railcar allegedly involved in Johnson's incident. CP 29. Alan Riesinger attended the inspection on behalf of Johnson and claims to have measured the stirrups (sill step) on the railcar at that time. *Id.* On October 6, 2016, Johnson filed a Motion for Leave to Amend Complaint, nearly 10 months after filing his initial Complaint. CP 7-12. On October 12, 2016, the City filed its Opposition to the Motion for Leave to Amend Complaint. CP 28-33. The City noted to the trial court that this motion was made only five days before the discovery cutoff and less than two months before the trial date. CP 28.

On October 14, 2016, Johnson filed its Amended Complaint, including claims under the Federal Safety Appliance Act (SAA). CP 65-69. On December 7, 2016, Johnson filed a Motion for Partial Summary Judgment under the SAA. CP 73-86. The parties attended mediation on December 6, 2016. At mediation, the City showed Johnson their own photo, which shows the railcar was in compliance, and asked Johnson to withdraw his summary judgment motion, and he refused. RP2¹ at 13:5-10.

As a direct result of Johnson's refusal to withdraw his Motion for Summary Judgment, City was compelled to measure the sill step on the railcar in question. CP 109. This became a monumental and expensive task over a holiday weekend (January 3, 2017), sending two experts to inspect the railcar, located at that time in Kansas City, KS. *Id.* The two experts correctly measured the sill step in question and confirmed that it had not been recently altered. CP 110. Experts from both Johnson and the City inspected the railcar on this date and found that the sill step was in compliance with SAA regulations. CP 111. Johnson still refused to withdraw his Motion for Summary Judgment, until the City sent him a still shot of his own expert's measurement in Kansas City. *Id.* The City also notified Johnson that it would file its own Motion for Summary Judgment

¹ RP2=Report of Proceedings for Plaintiff's Motion for Reconsideration of Defendant's Motion for Partial Summary Judgment and for CR 11 Sanctions or Alternative Request for a Clarification of This Court's February 17, 2017 Order, on March 10, 2017 (motion at CP 293-305).

and CR 11 sanctions if he did not strike the SAA claim. Johnson ignored the City's request. *Id.*

On January 19, 2017, the City filed its Motion for Partial Summary Judgment and for CR 11 Sanctions. CP 107-118. The trial court heard argument on this motion on February 17, 2017, and granted CR 11 sanctions in the amount of \$25,518.91 in costs and fees to the City. CP 290-91. The trial court also heard Johnson's Motion for Reconsideration on March 10, 2017, and upheld its previous order. CP 293-305.

IV. STANDARD OF REVIEW

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), citing to *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338-39, 858 P.2d 1054 (1993). The purpose of CR 11 is to deter baseless filings and curb abuse of the judicial system. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). Courts should use an objective standard to evaluate attorney conduct, including the appropriate level of pre-filing investigation. *Bryant, supra*, at 220, 829 P.2d 1099.

V. ARGUMENT

As a preliminary matter, Johnson presented new legal theories at the Motion for Reconsideration and again on appeal. Johnson (attorney Herschensohn) now asks the Court of Appeals to consider arguments on due process violations, sufficiency of CR 11 notice, the good faith standard, lodestar analysis, and inadequacy of the written order. Brief of Appellant Johnson at 19-25, 34-35. These issues are not found in Johnson's Opposition to Defendant's Motion for Partial Summary Judgment and for CR 11 Sanctions (signed by Johnson's attorney Mostul) or mentioned by Johnson at oral argument for that motion (appearance by Johnson's attorney Thornton). CP 194-213, RP1.² In Johnson's Motion for Reconsideration, they argue new legal theories (CR 11 Notice, clarification of order, and lodestar) with new evidence (in the form of declarations from Mr. Herschensohn, Mr. Thornton, Mr. Ripley, and Mr. Mostul, and new exhibits). CP 293-338. Johnson has not attempted to explain why these theories and arguments were not timely presented in the initial hearing. CR 59 does not allow a plaintiff to propose new legal theories that could have been argued before the adverse decision was entered. *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005), citing to *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App.

² RP1=Report of Proceedings for Defendant's Motion for Partial Summary Judgment and for CR 11 Sanctions" on February 17, 2017 (motion at CP 107-118).

1, 7, 970 P.2d 343 (1999). *See also Linth v. Gay*, 190 Wn. App. 331, 342 (FN11), 360 P.3d 844 (2015). Because the trial court did not consider these new theories and evidence at reconsideration, they should not be considered by this Court on appeal. RP2 at 14-15.

On appeal, Johnson advances more new legal theories, including due process violations and the good faith standard under CR 11. Brief of Appellant Johnson at 19-21, 25. The Washington State Supreme Court has ruled that courts will not consider issues raised for the first time on appeal unless dealing with a “manifest error affecting a constitutional right” under RAP 2.5(a)(3). *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). This prohibition on new issues on appeal applies to both civil and criminal cases. *State v. WWJ Corporation*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). *See also Clapp v. Olympic View Publishing Co., LLC*, 137 Wn. App. 470, 476, 154 P.3d 230 (2007). Accordingly, the Court of Appeals should reject and not consider new theories, arguments, and evidence on appeal, including: (1) due process violations, (2) CR 11 Notice, (3) the good faith standard under CR 11, (4) the lodestar analysis, and (5) adequacy of the order. Even if these new arguments had been timely presented, they are not persuasive, as explained below.

As a final preliminary matter, Johnson has failed to make any citations to the Clerk’s Papers or Reports of Proceedings, in addition to

making numerous factual assertions for which there is no citation to the record and no support in the record. This omission has been difficult for the City to address in its Response and does not add to the legitimacy of Johnson's appeal.

A. The trial court was well within its broad discretion to grant CR 11 sanctions against Johnson for failing to conduct reasonable inquiry into the factual and legal basis for his own claims.

Civil Rule 11 requires an attorney to sign all pleadings, certifying that the attorney has read the pleadings, and to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that:

(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. CR 11(a).

The rule imposes three independent duties on an attorney signing pleadings: (1) a duty to conduct reasonable inquiry into the facts supporting the document; (2) the duty to conduct a reasonable inquiry into the law supporting the document, including a good faith argument to change the law; and (3) the duty to not interpose the document for purposes of delay, harassment, or increasing litigation costs. *Watson v.*

Maier, 64 Wn. App. 889, 896, 827 P.2d 311 (1992), citing to *Miller v. Badgley*, 51 Wn. App. 285, 300, 753 P.2d 530 (1988); *Thomas v. Capitol Sec. Servs., Inc.*, 836 F.2d 866 (5th Cir. 1988)(en banc).

Johnson indicates that he had “strong suspicions” about defective equipment when originally filing the case. Brief of Appellant Johnson at 5. These suspicions apparently morphed into evidence more than five months after Mr. Riesinger’s inspection of the railcar, when Johnson made his motion to amend the complaint. CP 7-11. As illustrated in City’s Motion for Partial Summary Judgment and for CR 11 Sanctions, Mr. Riesinger was not the one who measured the sill step, did not know how to take measurements under the SAA, has never been qualified as an expert in any case, and has suffered some strokes in his eyes resulting in loss of vision in both eyes. CP 108, 124, 127-130. The City’s expert notes that Johnson’s expert George Gavalla never made his own measurements or inspected the railcar in-person, but relied solely on the non-expert Mr. Riesinger’s observations. CP 154, Brief of Appellant Johnson at 6. Johnson’s own photo from Mr. Riesinger’s inspection in May 2016 shows that the sill step was in compliance. CP 156, 178.

The record before the trial court showed that Johnson had not conducted a reasonable inquiry into the facts. Not only did he fail to make reasonable inquiry, he ignored evidence within his own possession that

refuted his claims. In addition, the City pointed out that Johnson's actions caused undue delay, including extending the discovery cutoff and pushing out the trial date by several months. CP 31, 71. Instead of conducting their own in-person investigation of the railcar with a legitimate expert, Johnson pressed forward with an Amended Complaint and Motion for Partial Summary Judgment on the SAA claim. This kind of blind reliance on an inspection by a non-expert (ironically, with vision loss) does not meet the threshold for an objectively reasonable inquiry. *Watson, supra*, at 315-316. This is the type of "shoot-first-ask-questions-later" approach that CR 11 is designed to prevent. *Id* at 316. Other factors that may be considered when determining whether an attorney made a reasonable inquiry are: the extent of reliance on the client for factual support, complexity of the factual and legal issues, and the need for discovery to develop the facts supporting a claim. *Miller v. Badgley, supra* at 301-302. A "blind reliance" on a client's assurance that facts exist, when a reasonable inquiry would reveal otherwise, does not satisfy the reasonable inquiry obligation. *Id* at 302.

In the instant case, Johnson relies fully on Mr. Johnson's claim that he "slipped" on the railcar due to defects in equipment. CP 8. No other facts, other than Johnson's own self-serving statements suggest that this is true. RP1 at 13:1-3. This full reliance on Mr. Johnson's version of events,

without supporting facts, is not reasonable. The SAA claim is a complex one, requiring close inspection and measurements. Johnson, however, relied on a non-expert with no knowledge of the SAA to bring the additional claim. Johnson waited until nearly the end of the discovery period and then failed to complete sufficient discovery to qualify as having done a reasonable inquiry into his claim. CP 28. Failure to adequately investigate a complex claim within the discovery period is not reasonable inquiry.

Johnson also argues that the trial court erred by mentioning good faith in its ruling, but fails to mention that Johnson's attorney at the initial CR 11 hearing argued the good faith standard no fewer than eight times on the record. RP1 at 16-17, 19-20, 23. Johnson has now disingenuously engaged in an argument with himself over the proper standard. The record is sufficient to show that Johnson did not conduct a reasonable inquiry into the law and facts of his claim.

B. The trial court did not violate Johnson's due process rights by granting CR 11 sanctions after thorough and multiple hearings, then acted within its broad discretion in awarding the full amount of attorney's fees and costs.

Johnson argues that his due process rights were violated during the imposition of CR 11 sanctions, but fails to cite to any legitimate authority

for that proposition.³ Johnson was provided due process throughout the hearings in which CR 11 sanctions were argued. Johnson attended two hearings on this issue and was given ample opportunity by the trial court to be heard. Johnson implies that the trial court cut him off in the initial hearing, but a basic review of the record reveals a different story. Within the 25 page report of proceedings, Johnson was given at least 11 opportunities to be heard, amounting to approximately 10 pages of the transcript. RP1. Johnson had more opportunity to be heard during his Motion for Reconsideration. RP2. Johnson had ample opportunity to be heard by the trial court. RP2 at 14:12-14. Johnson's due process rights were not violated by the trial court.

Johnson also now claims that he was not properly notified that the City would be seeking CR 11 sanctions. Johnson knew in May of 2016 that his SAA claim contradicted his own physical evidence. CP 116. At mediation on December 6, 2016, the City reminded Johnson of his own photo showing that the railcar was in compliance and asked Johnson to withdraw his summary judgment motion, which was refused. RP2 at 13.

³ Johnson cites to *Biggs v. Vail, supra* at 201, but this cite does not refer to anything dealing with due process violations. Similarly, Johnson cites to *Mueller v. Miller*, 82 Wn. App. 236, 917 P.2d 604 (1996) for the proposition that the court should allow an attorney to submit "declarations," but this case does not discuss due process or declarations. Johnson cites to one federal case in which sanctions were improperly imposed because the court did not provide the parties any hearing at all. Brief of Appellant Johnson at 19-21.

On January 4, 2017, the City asked Johnson again to strike the motion and SAA claim after the inspection by experts from both parties, and Johnson continued to refuse. *Id.* The City threatened CR 11 sanctions on January 6, 2017, and Johnson still refused. *Id.* at 13-14. The City warned Johnson again of CR 11 sanctions in an email on January 16, 2017, after which the City brought its own motion for summary judgment and CR 11 sanctions. CP 138. Johnson was repeatedly warned and notified of his flawed SAA claim, but refused to withdraw the claim or summary judgment motion. Johnson now complains about lack of notice to allow him to mitigate, but his behavior indicates that he was not willing to cooperate until forced to do so. Simply withdrawing his motion at the last moment does not expunge the violation of CR 11. *Biggs, supra*, at 199-200.

The City gave Johnson general and specific warnings regarding his unsubstantiated SAA claim. General notice of sanctions is sufficient notice. *Biggs, supra*, at 199. A trial court should consider evidence of informal notice when imposing sanctions. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 892, 912 P.2d 1052 (1996). The trial court recognized in its ruling that Johnson received early notice regarding the faulty claim. RP1 at 23.

The trial court retains broad discretion to impose appropriate sanctions, including the awarding of the full amount of attorney's fees. *Watson, supra*, at 898, citing to *Cascade Brigade v. Economic Dev. Bd.*, 61 Wn. App. 615, 619, 811 P.2d 697 (1991). Johnson argues that the "lodestar" method should have been applied here, but the case he cites addresses attorney's fees awarded under the Consumer Protection Act, which is not applicable here. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983). Other unpublished cases demonstrate that the lodestar analysis is not appropriately applied to CR 11 sanctions and Johnson has not provided any precedent for doing so.⁴

In the instant case, the City laid out its costs and fees to the trial court, which agreed that they were reasonable and appropriate. CP 139-149. The trial court acted within its broad discretion in awarding costs and fees under CR11, which is detailed in the record. RP1 at 23-25. Johnson makes late arguments regarding lodestar, and even pleads poverty, but has not really asserted that the calculation of this award was unreasonable. RP2 at 9. The City submits that the award was entirely reasonable under the circumstances, being forced to oppose an unsubstantiated and flawed

⁴ See *Rockefeller v. Landau*, 137 Wn. App. 1021, *7 (2007)(award of \$225,000 in CR 11 sanctions was affirmed and lodestar did not apply); *RSUI Indemnity Company v. Vision One, LLC*, 165 Wn. App. 1020, *26 (2011)(lodestar analysis was not appropriate for CR 11; fees and costs were reasonable); *Bert Kutty Revocable Living Trust v. Mullen*, 174 Wn. App. 1064, *13, 16 (2013)(lodestar not appropriate for CR 11 sanctions and an oral decision from the trial court is sufficient to review for reasonableness).

strict liability SAA claim, a claim that was designed to bolster Johnson's initial tort claim of six million dollars. CP 5-6.

C. The Court of Appeals should independently review the record and make a finding that Johnson violated CR 11 for failing to conduct reasonable inquiry into the factual and legal basis of pleadings filed.

The Washington State Supreme Court has recognized that where a trial court fails to enter adequate findings regarding a factual or legal basis for a CR 11 violation, that the Court of Appeals may independently review evidence, including written documents, and make the required findings instead of remanding to the trial court for fact finding. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992), *citing to Lobdell v. Sugar 'N Spice, Inc.*, 22 Wn. App. 881, 887, 658 P.2d 1267, *review denied*, 99 Wn.2d 1016 (1983). Where the trial court did not take testimony of witnesses, only argument from counsel, documents in the record provide the only evidence of whether documents had a factual and legal basis. *Id.*

In the instant case, the parties presented no testimony to the trial court during the CR 11 hearings, but relied on argument from counsel and documents submitted. The trial court specifically indicated that it had reviewed the pleadings related to the CR 11 issue. RP1 at 3:4, 16:7-10. The trial court then proceeded to make specific findings on the record.

RP1 at 23-25. The Court of Appeals has the discretion to make findings based on the record, if the trial court findings are found to be inadequate. Johnson makes the untimely argument that he is entitled to a more specific written order, but the trial court noted that this request was made by Johnson without having even reviewed the transcript of that hearing. RP2 at 17:1-4. A proper review of the record suggests that no further order is required.

The Court of Appeals should review the record and, if inadequate, make findings of a CR 11 violation by Johnson for failure to conduct reasonable inquiry into the facts and laws relating to the SAA claim.

VI. CONCLUSION

The trial court's order in this case should be affirmed. The trial court did not abuse its discretion by imposing CR 11 sanctions for failure by Johnson to conduct reasonable inquiry into the factual and legal basis of his claims. The trial court did not violate Johnson's due process rights and acted within its broad discretion when awarding attorney's fees and costs. The Court of Appeals may independently review the record and make findings, instead of remand to the trial court, should it determine that the trial court's order was inadequate. The trial court was in the best position to determine CR 11 violations by Johnson.

For these reasons, the City respectfully asks this Court to affirm the trial court's rulings on all grounds.

Dated this 11th day of October, 2017.

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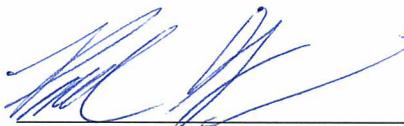
CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2017, I filed, through my staff, the foregoing with the Clerk of the Court for the Court of Appeals, Division II, for the State of Washington via electronic filing.

A copy of the same is being emailed and mailed, via U.S. mail, to:

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