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No. 54178-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

MARIALYCE ESSER

Appellant,

v

GERALD JEROME ESSER

Respondent.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A. Narrow Scope of this Case.

This case is an appeal of CR 11 sanctions. At the relevant hearing, the Trial Judge allowed argument only on the Motion to Allow 11th Day Filing and on the Motion for CR 11 Sanctions. The Trial Judge ordered “As to the CR 11 sanctions, that’s always a difficult thing. I think you were on notice Ms. Denton, that the case law is pretty strict. And I think that you will have to pay his attorney fees for being here today.” (9/23 RP 18)

(Note on naming in this reply - most legal arguments are written with the polite fiction that the parties in the underlying action are proponents of the assertion therein. This case is about CR 11 sanctions on me and thus my name has been referenced extensively. The respondent was legally incapacitated, and possibly not alive, during this case and this appeal and thus his name or title as respondent should not be described as a participant in this appeal. Since neither named party in this case has any role reading or influencing anything about this appeal, the names of attorneys who wrote or promoted concepts are used. This is not intended disrespectfully, but in recognition that the parties of the underlying case did not participate in this appeal.)

The trial court made no other finding to support the order of CR 11 sanctions. Mr. Hochhalter, appellate counsel for the respondent, argued new legal theories and arguments against the Motion to Allow 11th Day Filing. These new arguments made for the first time at the appellate level are irrelevant to the Trial Judge's basis for ordering CR 11 Sanctions and should not be considered in this appeal. This case is not an appeal of the ruling on the Motion to Allow 11th Day Filing. This is an appeal of CR 11 sanctions.

In Bryant v. Joseph Tree, Inc. 829 P.2d 1099, 119 Wash. 2d 210 (1992) (Bryant herein) at 232, 233 The Washington State Supreme Court upheld the Court of Appeals reversal of CR 11 sanctions and described the proper process for appellate review of such issues as follows:

The petitioners next assert that the Court of Appeals erred when it reviewed the record to determine whether the complaints had a factual and legal basis rather than remanding the matter for the trial court's determination. The trial court in this case failed to enter any finding regarding whether or not the complaints lacked a factual or legal basis. Because of this, the appellate court could not exercise any degree of deference to a trial court's finding, as no such finding even existed. In such situations, instead of remanding a matter to the trial court for a factual finding, an appellate court may independently review evidence consisting of written documents and make the required findings. See Lobdell v. Sugar 'N Spice, Inc., 33 Wn. App. 881, 887, 658 P.2d 1267, review denied, 99 Wn.2d 1016 (1983).

The trial court in this case did not hear testimony, only argument from counsel. The documents in the record therefore provide the only evidence regarding whether the complaints had a factual and

legal basis. The trial court was thus in no better position to evaluate the evidence than the appellate court. We conclude the Court of Appeals did not err in reviewing the documents in the record in order to determine if the complaints had a factual and legal basis.

We affirm the Court of Appeals reversal of the CR 11 sanctions against the respondents. If the respondents violated a court rule, they violated CR 12(e), not CR 11. CR 12(e) requires attorneys to comply with a court's order for a more definite statement. Judge Huggins imposed the proper sanction under this rule when she dismissed the amended complaint without prejudice. See CR 12(e). CR 11 sanctions are not appropriate where other court rules more properly apply. See *Clipse v. State*, 61 Wn. App. 94, 808 P.2d 777 (1991) (misleading discovery disclosures may not be sanctioned under CR 11, but can be sanctioned under CR 26(g)'s provisions which govern discovery requests).

The Trial Judge in this case said “the case law is pretty strict” as the basis for her ruling. This ruling indicated that the judge believed that the legal basis for the Motion to Allow 11th Day Filing was insufficient. In the relevant hearing, the only “case law” brought up by either side or by the judge related to whether the court could or would allow the 11th day filing and thus permit a hearing on the Motion to Reconsider.

If the appellate court finds that the Trial Judge’s basis for ordering sanctions is not clear, Bryant states that the Appellate Court can perform a de novo review of the trial court record to determine whether the Motion to Allow 11th Day Filing was signed in violation of CR 11's requirement that “attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and

belief, formed after an inquiry reasonable under the circumstances : ... warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law.”

New legal research and new arguments at the appellate level, which were not before the Trial Judge, could not have been the basis for the Trial Judge’s decision to award attorney fees for a violation of CR 11. This court is reviewing the decision of the Trial Judge about CR 11. This court is not making a de novo ruling on the Motion to Allow 11th Day Filing based upon new legal arguments. Thus these new legal arguments in opposition to, which is not the subject of this appeal, should be disregarded as irrelevant to this appeal.

Examples of Mr. Hochhalter’s new and irrelevant legal arguments against the Motion to Allow 11th Day Filing are described below, even though they are irrelevant to this appeal of CR 11 sanctions:

Example 1. Argument About “Session of Court” and Practice Tips

Mr. Hochhalter wrote argument, citing a few cases and sources as an attempt to conclusively and narrowly define the term “session of court.” After stating his opinion of that definition, he asserted that no rational attorney could disagree with his conclusions. He also claimed that CR 11 sanctions were warranted because of his interpretation of several practice tips from the Washington Practice Civil Procedure (3rd ed.). These

arguments should be disregarded because they have nothing to do with the trial court's decision to award CR 11 fees.

Example 2. Arguments About Presentation of Orders

Mr. Hochhalter also made irrelevant new arguments against the Motion to Allow 11th Day Filing with regard to the proposed orders emailed to me on the day before the presentation hearing. Again, citing practice tips from a volume of "Wash. Prac., Civil Procedure," Mr. Hochhalter made "But there is more." and "But there is still more." arguments divorced from the reality of complex divorce trial practice. While the trial lawyer, Mr. Lucenko, and appellate lawyer Mr. Hochhalter both argued that the (10 days pre-verdict) August 5 emailed proposed orders met the requirements of CR 54 (f) (2) as service of the significantly different¹ August 21 version of the proposed orders, Mr. Hochhalter's is the only and new argument that the hearing on August 15 was the same hearing as the hearing on August 22. He thus attempts to invoke CR 54 (f) (2) (C) by claiming that the orders were completed "after entry of verdict or findings and while opposing counsel is in open court." This new argument was not before the trial court and should not be considered by

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On August 22nd, Mr. Lucenko explained to the court that he had needed the transcript to prepare the orders and he noted that he had condensed his previously proposed Final Divorce Order by ten pages. (8/22 RP 11, 12)

the appellate court.

None of Mr. Hochhalter's irrelevant new arguments or Mr. Lucenko's arguments regarding CR 54 (b) justify an award of CR 11 sanctions against me. None of their arguments are compelling and clear statements of indisputable law, such that a court would be justified in finding it "patently clear that a (my client's CR 54) claim has absolutely no chance of success" as required for CR 11 sanctions in Bldg. Indus. Ass'n of Wash.v. McCarthy, 152 Wn.App. 720 (at 745), 218 P. 3d 196 (*quoted in full on page 7 below.*)

Appellate Courts must not consider information beyond the Trial Court record when determining whether the Trial Judge erred in awarding CR 11 sanctions, per Bryant. at 76

The Trial Judge did not order CR 11 sanctions because more than one document was filed and the misleading arguments of Mr. Hochhalter which confuse the content and purpose of those pleadings should be ignored by the appellate court because the hearing and the CR 11 ruling were clearly limited to the Motion to Allow 11th Day Filing and CR 11 sanctions. This was a specific order on a specific subject and this appeal is not about the many extra subjects raised in Mr. Hochhalter's Brief of Respondent.

Mr. Hochhalter also wrote argument about the standard of review

for appeals of CR 11 sanctions, about the warnings Mr. Lucenko issued in advance of the hearing regarding his intention to seek CR 11 sanctions and about the Trial Judge's calculation of the amount of the award of CR 11 attorney fees. These are issues in some appellate case law on CR 11. These issues are not raised by the appellant's brief and were/are not contested in this case and thus those parts of Mr. Hochhalter's responsive brief are not helpful or relevant to the appellate court in deciding this case.

This case is only about CR 11 fees awarded against me in a hearing and ruling denying the Motion to Allow 11th Day Filing. New legal arguments introduced by Mr. Hochhalter, other documents signed and filed in the trial court proceedings, and uncontested legal issues should be disregarded in considering this case.

B. Good Faith

The arguments in the Motion to Allow 11th Day Filing were both good faith arguments, as are the legal arguments in this appeal. First, CR 6 (c) states that "no proceeding in a court of justice in any action, suit, or proceeding pending therein is affected ...by the failure of a session of the court." The failure of a session in this instance was the early closing time of the court clerk's office (and there was never a dispute that the 4:30 p.m. closing time was known to all).

As I argued in the hearing on the Motion to Allow 11th Day Filing,

(9/23 RP 60) my client was denied access to justice due to the court clerk's early closing time. Some litigants in Washington State get access to justice where they can file until 5 p.m. on the 10th day and litigants in Mason County are relegated (along with other counties) to a 4:30 deadline and 30 crucial minutes less time to file under deadline. Mr. Hochhalter's new argument and description of some citations where the phrase "session of court" was used is not conclusive evidence that only one interpretation of that term is possible.

In the Motion to Allow 11th Day Filing, this limitation on access to the courts was compared to a closure for a holiday or due to a bomb threat. Mr. Hochhalter and Mr. Lucenko conceded the point by never arguing against my example that a bomb threat closure could be considered a failure of a session of court, enabling a day later filing of a Motion to Reconsider. These arguments were made in good faith and they are legal arguments, not disputes of any factual issue.

It is disingenuous for Mr. Hochhalter to argue that an issue of first impression regarding pre-5:00 p.m. closure of the clerk's office denying parties access to justice is not a good faith argument. This is especially true when the lateness of the filing was so very brief. The Motion for Reconsideration was filed at opening of the clerk's office the next day after filing between 4:30 and 5:00 p.m. on the 10th day was denied.

The other argument in favor of hearing the Motion to Allow 11th Day Filing was also undertaken in good faith. It was reasonable to argue that the Motion for Reconsideration should not have been required in lieu of the CR 54 (f) (2) required five day advance notice of proposed orders before a hearing for presentation of orders. It is a legitimate good faith argument that a Motion for Reconsideration and its attendant burdens should not have been required to obtain the CR 54 (f) (2) right to preparation time before presentation of orders from a four day trial.

No prior case law regarding the CR 6 (b) (2) 10 day time limit has ruled on the undisputed factual issues presented in this case and none of the several different fact pattern published appellate cases regarding CR 6 (b) (2) has involved CR 11 sanctions against counsel when they argued “for the extension, modification, or reversal of existing law or the establishment of new law” regarding that ten day rule.

Bldg. Indus. Ass’n of Wash.v. McCarthy, 152 Wn.App. 720 (at 745), 218 P. 3d 196 states:

The purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system. *Skimming v. Boxer*, 119 Wash.App. 748, 754, 82 P.3d 707 (2004) (citing *Biggs v. Vail*, 124 Wash.2d 193, 197, 876 P.2d 448 (1994)). A filing is baseless if it is not well grounded in fact, or not warranted by existing law or a good faith argument for altering existing law. *Skimming*, 119 Wash.App. at 754, 82 P.3d 707. " The burden is on the movant to justify the request for sanctions." *Biggs*, 124 Wash.2d at 202, 876 P.2d 448. **Because CR 11 sanctions have a potential chilling effect, the**

trial court should impose sanctions " only when it is patently clear that a claim has absolutely no chance of success."

Skimming, 119 Wash.App. at 755, 82 P.3d 707 (citing In re Cooke, 93 Wash.App. 526, 529, 969 P.2d 127 (1999)). The fact that a complaint does not prevail on its merits is not enough. Bryant v. Joseph Tree, Inc., 119 Wash.2d 210, 220, 829 P.2d 1099 (1992). (*emphasis added*)

The very fact that opposing trial counsel and Mr. Hochhalter came up with several different arguments against the Motion to Allow 11th Day Filing is proof that the issues raised in that motion were “warranted by existing law **or a good faith argument** for the extension, modification, or reversal of existing law or the establishment of new law;” as required by CR 11 (*emphasis added*). If no good faith argument existed, then the multiple and complicated arguments against the motion would not be needed. Such arguments would not be required because the standard of “patently clear that a claim has absolutely no chance of success” would be met without such myriad opposing research and arguments.

The Trial Judge, never said or implied that the arguments in favor of the Motion to Allow 11th Day Filing were not made in good faith. Mr. Lucenko only made the argument “And when you’re ready – or this is part of my argument, is filing a request for CR 11 sanctions for having to be here, Your Honor, and having to respond to, again, motions that were not I believe noted in good faith and that weren’t, does not serve any sort of legitimate or legal purpose, Your Honor.” (9/23 RP 66) This conclusory

statement at the trial court level is not a basis for the appellate court to find that the arguments in the Motion to Allow 11th Day Filing were not in good faith.

Mr. Hochhalter claimed approximately seven times in the Brief of Respondent that the arguments in the Motion to Allow 11th Day Filing were not in good faith. The only asserted basis for this claim was his allegation that no lawyer could disagree in good faith with the legal arguments put forward by Mr. Lucenko or with the new legal theories from Mr. Hochhalter. The ability of lawyers to disagree in good faith on legal arguments is the very basis of our legal system and Mr. Hochhalter's assertion that I was not/am not in good faith is not correct.

The "inquiry reasonable under the circumstances" required by CR 11 before making those arguments should also be taken into account. An extensive excerpt from Bryant v. Joseph Tree 119 Wn.2d 210, 829 p.2d 1099 (1992) (Bryant) is included in the argument C. of Appellant's Opening Brief. Detailed argument was not included in that brief and it is below.

The most salient parts of Bryant are as follows:

The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum 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. ... In making this determination, the court may consider such factors as: the time that was available to the signer

In this case, the time for making decisions and taking action was very short. By accident of technical difficulties in two law offices, the Motion for Reconsideration was too late to file by 4:30 p.m. on the 10th day. Because the Motion for Reconsideration had to provide written argument of every issue, 82 pages of documents were created and filed in very short order to attempt to make up for the court's denial of the opportunity to participate meaningfully in the presentation of orders hearing. Considering the circumstances, my inquiry into the law regarding the Motion to Allow 11th Day Filing was certainly reasonable as required by CR 11.

Per Bryant, “the rule (CR11) is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.” at 219 The arguments regarding early closure of the court, access to justice and the unfairness of denial of 5 day's notice of presentation were creative and appropriate legal theories, which are not the proper target of CR 11 sanctions.

At 219, Bryant also states “The purpose of CR 11 is to deter baseless filings and to curb abuses of the judicial system.” The filing of the Motion to Allow 11th Day Filing was not a baseless filing. It was the

only method of trying to secure accurate trial orders when presentation had occurred without an opportunity to prepare. My client was grossly injured by the very inaccurate final divorce documents that were entered with the court and trying to repair those harms was my duty. This work was not undertaken for frivolous or meritless reasons. The legitimate bases for that motion were clearly articulated in the motion and during oral argument. There was never an allegation that this pleading was an abuse of the judicial system.

C. Well Grounded in Fact

No disagreement on any issue of fact was at issue in the relevant proceedings. Mr. Lucenko, the Trial Judge and the record of proceedings at the trial court level do not show one instance of disagreement on any factual assertion in the pleadings considered at the hearing where CR 11 sanctions were ruled upon. There was no argument or claim of any kind before or at that hearing that any pleading had been signed when it was not “well grounded in fact.” It is very unfortunate that the body of the brief of Mr. Hochhalter claims, 26 times, that CR 11 sanctions were ordered because documents were signed and filed when they were not well grounded in fact. This is flat out false and misleading. Making this false claim 26 times over should not persuade the Appellate Court.

Mr. Hochhalter also repeatedly misstated the legal grounds for CR

11 sanctions throughout the Brief of Respondent. He conflated CR 11 (b) section (1) “it is well grounded in fact” into section (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...” Rather than clearly referring to the applicable court rule and the case law, Mr. Hochhalter claimed thirteen times in the body of his brief that motions or arguments were not “well grounded in fact or law.”

The only published CR 11 related cases using not “well grounded in fact or law” are Biggs, quoted below, which clarifies the term immediately and Eller v. East Sprague Motors, 244 P.3d 447, 159 Wash. App. 180 (at 452) (2010) where the term was clearly used only to distinguish CR 11 (1) and (2) from CR 11 (a) (3) as follows:

Mr. DeWitt correctly argues that the trial court erred in finding that an improper purpose was an additional prerequisite to imposing sanctions. Washington law does not require such a finding. CR 11 permits a trial court to impose sanctions against a litigant for filing claims not well grounded in fact or law or for filings made for an improper purpose:

CR 11 addresses two types of problems relating to pleadings, motions and legal memoranda: filings which are not "well grounded in fact and ... warranted by ... law" and filings interposed for "any improper purpose." Bryant, 119 Wash.2d at 217, 829 P.2d 1099 (emphasis added) (alterations in original); see also Biggs II, 124 Wash.2d at 201, 876 P.2d 448 ("[I]n imposing CR 11 sanctions, ... [t]he 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.").

It was improper for Mr. Hochhalter to proclaim a misleading legal standard of “grounded in fact or law” 13 times when arguing violations of CR 11. The court should disregard it.

D. Attorney Fees on Appeal

Mr. Hochhalter made a claim for attorney fees, complaining that the Brief of Appellant raised the same arguments for the Motion to Allow 11th Day Filing as were used at the trial court. Since those are the only arguments that are relevant to the appellate court decision, it was only appropriate to refer to them and explain how those arguments did not violate CR 11.

Just as CR 11 is meant to deter baseless filings and frivolous litigation, the parallel RAP 18.9, which punishes a frivolous appeal should be used only when bad faith is apparent and the arguments are devoid of merit that there was no reasonable possibility of reversal. The Brief of Appellant arguments about CR 11, which were not part of the trial court proceedings and the legitimate, if unsuccessful, arguments at the trial court level are and were not frivolous and the appeal was not filed for purposes of delay, as occurred in the case cited by Mr. Hochhalter, Streater v. White, 26 Wn. App. 430. That case was an appeal of wholly factual findings with no credible accusation of abuse of discretion on the part of the trial court and the appeal was clearly filed for purposes of

delay. The standards for considering RAP 18.1 awards of fees are set out in Streater as follows:

In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. SEE Jordan, IMPOSITION OF TERMS AND COMPENSATORY DAMAGES IN FRIVOLOUS APPEALS, Wash. St. B. News, May 1980, at 46.

No allegation has been made that this appeal has anything to do with delaying anything. This appeal is undertaken because an attorney's reputation has been besmirched due to an award of CR 11 sanctions based upon the trial court's decision that "case law is pretty strict" while failing to acknowledge the good faith arguments made for the extension, modification or reversal of existing law or the establishment of new law.

II. CONCLUSION

The Trial Judge ordered CR 11 sanctions against me when she denied my Motion to Allow 11th Day Filing. Besides sanctions, the refusal to accept the late filing was the only issue that the court ruled upon. All

case law presented to or considered by the court on that day related to the requirement to file a Motion for Reconsideration within 10 days of entry of the written order. The Trial Judge apparently ruled that my argument was not warranted by existing case law, but she did not find that I failed to make a good faith argument for the extension, modification or reversal of existing law or the establishment of new law.

Because CR 11 sanctions were not properly awarded in this case, I ask that the Court of Appeals reverse the Trial Court's order for CR 11 sanctions and direct that the attorney fees I paid to Mr. Lucenko's office be reimbursed. I also ask that this court deny Mr. Hochhalter's request for attorney fees on appeal since this appeal was not frivolous or devoid of all merit.

Date: July 22, 2020

Respectfully submitted,

Melissa Denton, Appellant, WSBA # 18503

ASCHER & DENTON

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