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**Court of Appeals, Div. II,
of the State of Washington**

In re Marriage of Esser:

Marialyce Esser,

Appellant,

v.

Gerald Jerome Esser,

Respondent.

Brief of Respondent

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1. Introduction

Ms. Denton's attempts to justify her baseless filing of multiple untimely motions for reconsideration were not well grounded in fact or warranted by existing law or a good faith argument for the extension of law. The trial court reasonably concluded that Ms. Denton violated CR 11 and reasonably imposed a sanction, including a portion of Gerald Esser's reasonable attorney's fees in responding to the motions. This Court should affirm.

2. Restatement of the Issues

1. Whether the trial court was within its discretion in sanctioning Ms. Denton under CR 11 for noting a hearing on multiple untimely motions when her only arguments for the motions being timely were so devoid of merit that they could not be considered "good faith arguments" under CR 11.

3. Statement of the Case

3.1 Background of the underlying litigation.¹

Gerald and Marialyce Esser were married on June 11, 1989. CP 8. The parties separated September 14, 2016, after an

¹ This paragraph is provided for context. Citations to the record are scant here due to the limited record designated by Ms. Denton for this appeal of sanctions arising from post-trial conduct. A much more complete record of the dissolution case is available in No. 53648-0-II,

incident of domestic violence that left both parties injured. *See* CP 8. The divorce was hotly contested. By the time of trial, Gerald was mentally incapacitated due to dementia, and his interests were being represented by a litigation guardian ad litem. Marialyce wanted to stay married. The “combative nature of the parties’ relationship” spilled over into the litigation as the parties contended whether the divorce could go forward despite Gerald’s incapacity. *See* CP 8 (“combative nature”), 12 (findings related to discovery violations and contempt orders; “best interest” findings due to Gerald’s incapacity); 1 RP 13 (alluding to the contentious nature of the advocacy at trial). The attorneys on both sides fought zealously for their respective clients’ positions. Gerald was represented by Leonard Lucenko. Marialyce was represented by the Appellant herein, Melissa Denton.

3.2 Presentation of final orders began on August 15 and was continued to August 22.

After the conclusion of trial, Mr. Lucenko filed a proposed Final Divorce Order and proposed Findings about a Marriage and provided electronic copies to Ms. Denton, on August 5, 2019. CP 144. Two days later, the trial court notified the parties of a

an appeal of the substantive issues in the case. The background in this paragraph is drawn from that record.

hearing, set for August 15, for “Court’s Decision and entry of Final Documents.” CP 144.² The trial court announced its oral ruling at the August 15 hearing. CP 144.

After hearing the trial court’s ruling, Ms. Denton and Mr. Lucenko attempted to use the August 5 proposed orders to prepare final versions for entry by the trial court that day. CP 144. It was the original intent of the trial court and the parties to have the orders entered that day. *See* 1 RP 12-13. However, because Mr. Lucenko was scheduled for a mediation that day, the final orders could not be completed in time. CP 144. Instead, the trial court signed an agreed order to continue the presentation one week, to August 22. CP 144.³

When the parties returned on August 22, Ms. Denton claimed not to be ready for the hearing due to having received a revised proposed order from Mr. Lucenko only one day before. 1 RP 8-9. She asserted that she was entitled to five days’ notice under CR 54(f). 1 RP 8. Mr. Lucenko argued that the five-day requirement was satisfied by his service of the original proposed orders ten days before the August 15 hearing. 1 RP 13, 15.

The trial court commented that since there was little difference between her oral ruling and the original, August 5,

² The notice itself will be provided in supplemental clerk’s papers. A transcript of the August 15 hearing will also be provided.

³ This order will also be in the supplemental clerk’s papers.

proposed orders, there was no reason not to enter final orders that day. 1 RP 15-16. The trial court proceeded over Ms. Denton's objection. 1 RP 21. Ms. Denton, despite her claim of not being ready, challenged the proposed orders on a number of issues. 1 RP 21-29, 34-36, 48-53. The trial court signed the final orders. 1 RP 53.

3.3 Ms. Denton filed untimely motions for reconsideration despite Mr. Lucenko's warnings that doing so would be sanctionable.

The ten-day deadline for a motion for reconsideration fell on Monday, September 3, 2019 (actually 12 days due to the weekend). CP 63. Ms. Denton failed to get her motion filed before the court clerk's office closed at 4:30pm. CP 62-63. She contacted Mr. Lucenko asking him to agree to an extension of the deadline. *See* CP 138. Mr. Lucenko declined, noting "the court rules and caselaw are clear and unambiguous" about the 10-day deadline. CP 138. He warned, "Please be advised that if you file and note your Motion for Reconsideration for a hearing without leave of the court to extend the filing deadline, I will ask for attorney fees and sanctions." CP 138.

Ms. Denton did not wait for Mr. Lucenko's response, and went ahead and filed the motion the next morning, September 4, at 8:15am. CP 26. The motion she filed was incomplete. *See* CP 38. Together with the motion, Ms. Denton filed a notice setting

the motion for a hearing. CP 144.⁴ She did not seek leave of the court for the late filing or the hearing.

The next day, Ms. Denton filed an amended notice, resetting the hearing for September 23. CP 140.⁵ Mr. Lucenko responded, providing case law holding that a trial court has no authority to extend the 10-day deadline for a motion for reconsideration. CP 140. Mr. Lucenko again warned Ms. Denton that if she did not strike the hearing, he would move for CR 11 sanctions. CP 140.

One week later, Ms. Denton filed multiple additional motions. She filed a motion asking the trial court to reconsider its decision to enter final orders over her CR 54(f) objection, arguing that the trial court had denied her due process. CP 59-60. She filed a “motion to accept 11th day filing,” asking the trial court to extend the deadline and accept her prior motion for reconsideration despite acknowledging the CR 6(b)(2) prohibition against doing exactly that. CP 61, 63. She filed an amended motion for reconsideration, hoping to supplement her arguments while relating back to the date of the original, 11th-day filing. *See* CP 62. The “amendment” included new issues that were not raised in the original motion. *E.g.*, CP 64-67.

⁴ *See* supplemental clerk’s papers.

⁵ *See* supplemental clerk’s papers.

3.4 The trial court imposed CR 11 sanctions.

In response, Mr. Lucenko filed his motion for CR 11 sanctions. He argued that because the trial court did not have authority to extend the 10-day deadline for motions for reconsideration, all of Ms. Denton's motions were untimely. CP 147. He argued that there was no failure in the clerk's office closing at 4:30pm. CP 148. He argued that there was no factual or good faith basis for Ms. Denton's argument on this point. CP 148-49. He argued that Ms. Denton's refusal to strike her original motion and her subsequent filing of additional untimely motions and noting them for hearing violated CR 11. CP 150.

The trial court granted Mr. Lucenko's motion and sanctioned Ms. Denton. CP 155-57. The trial court noted that it generally favors looking at motions to reconsider. 2 RP 69. However, the trial court researched the issue of extending the deadline and concluded that it had no authority to do so. 2 RP 69-70. The trial court noted that Mari's counsel was on notice of the clerk's 4:30 closing time and should have filed the motion on time. 2 RP 70. The trial court concluded that the motions were not well grounded in fact or law, explaining, "I think that you were on notice Ms. Denton, that the case law is pretty strict." 2 RP 71. The trial court denied all of Ms. Denton's motions for reconsideration as untimely, based on the August 22 filing of the final orders. CP 156.

4. Argument

4.1 The trial court's imposition of sanctions was reasonable because Ms. Denton's motions were not well grounded in fact or law or a good faith argument for a change in the law.

Appellate review of a decision on CR 11 sanctions is for abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). A trial court abuses its discretion only where it can be said that the decision was patently unreasonable—that is, that no reasonable person would take the view that the trial court adopted—or was based on untenable grounds or untenable reasons. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993); *Bldg. Indus. Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 745, 218 P.3d 196 (2009) (“*McCarthy*”).

CR 11 permits a trial court to impose sanctions against a litigant for filings not well grounded in fact or law. *Eller v. E. Sprague Motors & R.V.'s, Inc.*, 159 Wn. App. 180, 191, 244 P.3d 447 (2010). The rule provides,

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or 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: (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;

...

If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

CR 11(a).

In determining whether a filing is not well grounded in fact or warranted by existing law or a good faith argument for a change in the law, a trial court should consider whether a reasonable attorney in like circumstances could have believed their actions to be factually and legally justified. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). A trial court may impose sanctions when it is clear the argument has no chance of success. *McCarthy*, 152 Wn. App. at 745.

Here, the trial court reasonably concluded that Ms. Denton's arguments for her late filings had no chance of success because the rules and case law are both clear and strict against consideration of an untimely motion for reconsideration. Even

though CR 11 does not expressly authorize sanctions for a late filing, it does authorize sanctions where the act of signing and filing the late papers is itself not warranted by fact or law.

Ms. Denton presents two arguments in support of her filings, but neither argument was factually or legally justified. The trial court was correct to conclude that these arguments had no chance of success. First, there is no factual or legal support for the notion that a court clerk's office closing at 4:30pm is improper or a "failure of a session of the court." Second, there is no factual or legal support for the notion that Ms. Denton did not receive proper notice of proposed orders under CR 54(f).

4.1.1 There is no factual or legal support for the notion that a court clerk's office closing at 4:30pm is improper or a "failure of a session of the court."

Ms. Denton's argument that her late-filed motion for reconsideration should have been considered timely lacks any factual or legal support. Because it had absolutely no chance of success, it was not a good faith argument for the extension of law.

A motion for reconsideration must be filed within ten days of entry of the order and judgment to be reconsidered. CR 59(b). "The 10-day time limit means exactly what it says, no more and no less, and is strictly enforced." 15 **Wash. Prac., Civil Procedure** § 38:20 (3d ed.). Although a trial court may extend some other

deadlines, “it **may not** extend the time for taking any action under rules 50(b), 52(b), **59(b)**, 59(d), and 60(b).” **CR 6(b)** (emphasis added). “A trial court may not extend the time period for filing a motion for reconsideration.” *Schaefco, Inc. v. Columbia River Gorge Comm’n*, 121 Wn.2d 366, 367–68, 849 P.2d 1225 (1993).

Although it is unclear whether Ms. Denton knew of the strictness of this rule at the time she filed her original motion for reconsideration on the morning after the deadline, *see* CP 138, she most certainly **was aware** of the rule by the time of her subsequent untimely motions, CP 63 (acknowledging the strictness of the rule but proposing a new theory for timeliness). Even if the original filing was not sanctionable (to be clear, we think it was), the subsequent filings were unquestionably not well grounded in fact or warranted by law.

Ms. Denton’s new theory was based on a strained reading of CR 6(c). The rule provides, “No proceeding in a court of justice in any action, suit, or proceeding pending therein, is affected by a vacancy in the office of any or all of the judges or by the failure of a session of the court.” **CR 6(c)**. She focuses on the phrase, “failure of a session of the court,” and suggests that the designated closing time of the court clerk’s office could somehow constitute a “failure of a session of the court.”

Ms. Denton is unable to point to any rule or statute that requires a court clerk's office to be open until 5:00pm. In fact, the vast majority of court clerk's offices across the state close prior to 5:00pm, with 4:30pm being the most common closing time. *See* CP 142. Ms. Denton's argument was not well founded in fact.

Her argument was also not warranted by existing law. Learned commentary on CR 6(c) explains that the rule has nothing to do with when the court clerk's office is open for filing: "The rule establishes the commonsense rule that a vacancy on the bench (by death, retirement, or otherwise) does not affect pending cases. The rule also says pending cases are not affected 'by the failure of a session of the court.' Apparently the connection to the subject of time is the implication that time limits are not tolled upon the death or retirement of the judge assigned to the case." 3A **Wash. Prac., Rules Practice** CR 6 (6th ed.). The same rule language—"failure of a session of the court"—appears in caselaw in reference to vacancy and succession in judicial office. *See Carkonen v. Columbia & P.S.R. Co.*, 102 Wash. 11, 13, 172 P. 816 (1918).

A "session of the court" refers not to the clerk's office but to those times when a superior court judge takes the bench in open court to perform judicial duties. This is the reason for the familiar refrain in courts across the state as a judge takes the

bench, “The Superior Court ... is now in session.” Under the statutes governing superior courts, a “session” of the superior court is inseparably connected with the presence of at least one superior court judge. *See* **RCW 2.08.160** (“there may be as many sessions of the superior court at the same time as there are judges thereof”). “Superior courts ... shall hold regular and special sessions in the several counties of this state at such times as may be prescribed by the judge or judges thereof.” **RCW 2.08.030; CR 77(f)**.

Ms. Denton could have easily obtained all of these authorities prior to filing her untimely motions. With these authorities in mind, a reasonable attorney could not have believed that Ms. Denton’s argument was warranted by existing law. Because there was no chance that her argument could succeed under the plain language of the rule, it cannot be said to have been a “good faith” argument for extension of the law.

It is also of note here that Ms. Denton had other options under the rules. Rather than filing her untimely motions and noting them for hearing, requiring Mr. Lucenko to respond and appear at the hearing, Ms. Denton could have filed a single motion, requesting an extension of the deadline to file her motions for reconsideration. *See* **3A Wash. Prac., Rules Practice CR 6** (6th ed.) (“If the request for enlargement is made after the time period has expired, a motion is required and the party

seeking the extension must, in addition to showing cause, show that the failure to act was the result of excusable neglect.”). Such a motion could have been decided by the trial court without a hearing, or at least without requiring Mr. Lucenko to review and respond to the substance of the motions for reconsideration.

Ms. Denton’s unjustified filing of the motions for reconsideration, and noting them for hearing, was not well grounded in fact and was not warranted under existing law or a good faith argument for the extension of law. The trial court correctly concluded that Ms. Denton violated CR 11. This Court should affirm the sanctions.

4.1.2 There is no factual or legal support for the notion that Ms. Denton did not receive proper notice of proposed orders under CR 54(f).

In support of her untimely motion for reconsideration of her CR 54(f) objection (CP 59-60), Ms. Denton argued that she had not received proper notice of presentation under CR 54(f). This argument is also not well grounded in fact or warranted by law.

Civil Rule 54(f) provides,

(f) Presentation.

...

(2) Notice of Presentation. No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment unless:

(A) Emergency. An emergency is shown to exist.

(B) Approval. Opposing counsel has approved in writing the entry of the proposed order or judgment or waived notice of presentation.

(C) After Verdict, etc. If presentation is made after entry of verdict or findings and while opposing counsel is in open court.

CR 54. "The purpose of the rule is to give opposing counsel an opportunity to object to the form or content of the judgment before it is entered." 14A **Wash. Prac., Civil Procedure** § 35:5 (3d ed.).

Here, both the requirements and the purpose of the rule were satisfied in the August 15 and 22 hearings on presentation. The proposed orders were served on August 5, well in advance of the initial presentation hearing on August 15. This was enough, in itself, to satisfy the notice requirement.

But there is more. The initial presentation hearing was **continued** to August 22 to give the parties more time to work out their differences and finalize the orders. With the hearing being continued, the rule did not require any further notice than what Ms. Denton had already received on August 5. Because there was very little difference between the trial court's oral ruling

and the August 5 proposed order, Ms. Denton had all the information she needed to have a fair opportunity to object to the content and form of the orders. Despite her claim that she was not prepared, Ms. Denton did, in fact, object, in detail, to the content and form of the orders. Both the requirements and the purpose of the rule were satisfied.

But there is still more. The rule also provides that notice is not required, “If presentation is made after entry of verdict or findings and while opposing counsel is in open court.” **CR 54(f)(2)(C)**. The August 22 hearing was after the trial court’s oral ruling and findings (the functional equivalent of a jury verdict). At the August 22 hearing, Ms. Denton was present in open court when the orders were presented. Thus the presentation on August 22 satisfied both the requirements and the purpose of the rule. Presentation was made after the oral ruling, while opposing counsel was in open court, with the opportunity to review the proposed orders and object to their form or content.

Ms. Denton’s arguments seeking to justify this motion for reconsideration were not well grounded in fact or warranted by law. The fact is that she had a fair opportunity to review and object to the orders. She did object, at length, to specific provisions in the orders. She received five-day notice under the rule when she was served on August 5. Moreover, five-day notice

was not even required because Ms. Denton was present in open court on August 22.

To make things worse, Ms. Denton's motion for reconsideration on this issue was also untimely. Her argument that there was no written order to trigger the 10-day deadline is itself not well grounded in fact or warranted by law. At the August 22 hearing, Ms. Denton objected to entry of the final orders. The trial court overruled her objection and signed the orders. Just like an objection at trial, there was no reason for the trial court to enter a separate, written order on Ms. Denton's CR 54(f) objection. The final orders themselves, entered over Ms. Denton's objection, were the written orders that memorialized the trial court's decision overruling the objection. *See* 2 RP 69. As such, the final orders triggered the ten-day deadline for a motion for reconsideration. Ms. Denton did not file this motion for reconsideration until 20 days after entry of the final orders. Her argument that the motion was timely was not well grounded in fact or warranted by law.

The trial court reasonably concluded that Ms. Denton's motion was not well grounded in fact or warranted by law. The trial court correctly concluded that Ms. Denton violated CR 11. This Court should affirm the sanctions.

4.2 The trial court was within its discretion to award reasonable attorney’s fees as a sanction.

Ms. Denton’s argument that an award of attorney’s fees was improper is directly contradicted by CR 11 itself. The rule provides that “an appropriate sanction ... may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, **including a reasonable attorney fee.**” CR 11 (emphasis added). The trial court was well within its discretion when it reviewed Mr. Lucenko’s fees and awarded a reasonable fee, limited to fees reasonably incurred in responding to the motions. *See* 2 RP 71-72. The trial court awarded less than the amount requested. *Compare* 2 RP 71-72 *with* CP 153-54.

4.3 This Court should award Gerald Esser his reasonable attorney’s fees for responding to this appeal, under RAP 18.9

Under RAP 18.9, this Court may order a party to pay sanctions or compensatory damages, including reasonable attorney’s fees, if the party filed a frivolous appeal or used the rules for the purpose of delay. A frivolous appeal is one that is so devoid of merit that there is no reasonable chance of success. *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980).

Ms. Denton’s appeal raises the same arguments that she made in trying to justify her untimely motions for

reconsideration. The arguments were wholly without merit at the time, resulting in CR 11 sanctions. They are still wholly without merit. This Court should award Gerald Esser his reasonable attorney's fees in responding to this appeal, as a sanction under RAP 18.9.

5. Conclusion

Ms. Denton's attempts to justify her baseless filing of multiple untimely motions for reconsideration were not well grounded in fact or warranted by existing law or a good faith argument for the extension of law. The trial court reasonably concluded that Ms. Denton violated CR 11 and reasonably imposed a sanction, including a portion of Gerald Esser's reasonable attorney's fees in responding to the motions. This Court should affirm.

Respectfully submitted this 8th day of June, 2020.

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I certify, under penalty of perjury under the laws of the State of Washington, that on June 8, 2020, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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