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No. 36196-9-III

COURT OF APPEALS,
DIVISION THREE
OF THE STATE OF WASHINGTON

Jennifer Tyler, *Appellant*

v.

Chelan County, *Respondent*.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT IN REPLY

1. CCSO has not yet been sanctioned for its discovery violations; sanctions are appropriate on remand.

In its response brief, Chelan County Sheriff's Office (CCSO) argues that the trial court "did not refuse to impose sanctions" against it. *See* Br. of Resp. at 18, 21. Disregarding the language of the trial court's written decision which specifically declined to award sanctions¹, CCSO attempts to create a legal fiction: "Tyler simply ignores the fact that *sanctions were awarded in the form of Attorney fees and costs.*" *See* Br. of Resp. at 12 (emphasis added) (appearing twice); *see also id.* ("The total amount of the sanction imposed was \$17,261.10); *id.* at 14 ("The amount of the sanction imposed against CCSO was \$17,261.10 well within a reasonable sanction."); *id.* at 15 ("The Trial Court's award of attorney fees and costs in the amount of \$17,261.10 is not an abuse of discretion."); *id.* at 7 ("The total amount of sanctions imposed against CCSO in connection with the discovery dispute amounted to \$17,261.10.").

CCSO's argument is both incorrect and a distortion of the record. That is, CCSO is attempting to characterize a portion of the fees awarded to Tyler under her petition for reasonable attorney's fees pursuant to RCW

¹ Recall the language of the trial court's decision: "As the Court has already awarded attorney fees, the Court does not feel any further sanctions are necessary or appropriate." *See* CP at 990.

49.60.030 and RCW 49.48.030, *e.g.*, as prevailing Plaintiff,² as “sanctions” simply because 47.8 hours of the 763.99 total hours performed by then co-counsel³ for Plaintiff in her fee declaration encompassed work done on the motion for sanctions.⁴ Following CCSO’s rationale, 47.8 hours of work done on the motion for sanctions multiplied by \$350.00/hr.—the “appropriate” hourly rate allowed by the trial court⁵—(along with \$531.10 in costs) yields a total “sanction” amount of \$17,261.10. This calculation as a “sanction” award, while convenient in hindsight, is not supported by the record below.

As argued in her opening brief to this Court and in her petition for fees and costs to the trial court, Plaintiff was entitled to fees and costs because she proved at trial that CCSO violated the Washington Law Against Discrimination (“WLAD”), which entitles a prevailing plaintiff to attorney fees and costs. *See* RCW 46.60.030; *see also* Br. of App. at 24-25; CP at 560-577. Followed to its logical conclusion, CCSO’s rationale and argument here would render CR 26(g) meaningless in any fee-shifting statute or contract case where the plaintiff prevailed on the merits despite the defendant’s discovery violations.

² *See* CP at 560.

³ Judge Messitt is now a judge of the King County Superior Court.

⁴ *See* CP at 26-27, 231, 578, 584 and 612-613.

⁵ *See* CP at 987. Recall that Ms. Messitt requested \$400.00/hr. in her fee declarations related to the motion for sanctions. *See* CP at 26, 231.

While they may be tempting to repeat in these settings, case law teaches us that familiar sports axioms such as “no harm, no foul” are not appropriate in the context of discovery violations. *See, e.g., Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 342 (1993) (“The Supreme Court has noted that the aim of the liberal federal discovery rules is to ‘make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.’”) (emphasis added).

Indeed, the impropriety of the “game” model of discovery is illustrated by a recent case from this Division cited by CCSO in its response brief, *Washington Motorsports Ltd. P'ship v. Spokane Raceway Park, Inc.*, 168 Wash. App. 710 (2012). In this case, this Court resisted the argument of counsel that he should be not be sanctioned for his own discovery violation because his client was already sanctioned for the same conduct months before him by responding as follows: “We know of no rule that immunizes a party or its representatives from sanctions for subsequent rule-breaking merely because there has been a prior offense.” *See Wash. Motorsports Ltd. P'ship*, 168 Wn. App. at 716.

Despite the well-known, understood and settled rule of *Fisons* that sanctions are mandatory upon a violation of CR 26(g), the trial court appears to have adopted a game model of discovery in its ruling on

sanctions, to wit: “As the Court has already awarded attorney fees, the Court does not feel any further sanctions are necessary or appropriate.” *See* CP at 990. And while it did not expressly include the language “no harm, no foul,” the trial court’s ruling nonetheless embodies this concept. The choice is not binary. The plaintiff in a fee-shifting case is not required to first “lose” in order for sanctions to be imposed in situations where they are otherwise appropriate.

The choice of sanctions is, of course, left to the discretion of the trial court. Considering that Tyler prevailed on her fee-shifting claims and was awarded fees on them, the trial court could have considered and imposed a wide array of sanctions, such as, interest on the amount which could have been awarded at the time⁶ or, perhaps, using \$400.00/hour as the reasonable hourly rate for the motion for sanctions instead of the \$350.00/hour which was ultimately approved in the post-verdict fee petition⁷ and awarding the difference between the two rates (\$50 multiplied by the hours worked on the motion (47.8) or \$2,390.00.

⁶ *See, e.g., Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 692 (2006) (“[T]he restrictions on prejudgment interest should have no applicability in the context of discovery sanctions.”). In this case, 12% interest on a \$17,261.10 sanctions total entered on December 29, 2017 (date of the trial court’s decision on sanctions) would produce an award of approximately \$941.22 on June 14, 2018 (date of the trial court’s decision on fees.)

⁷ *See* note 5, *supra*.

In sum, while the trial court certainly had wide discretion to the determine the amount, type and character of sanctions, it did not have discretion to simply “waive” them upon a finding that attorney’s fees and costs had been awarded via some other mechanism. This is so because CR 26(g) requires the trial court to impose sanctions once a violation has been found. As such, remand is appropriate to determine what sanctions are appropriate in this case.

2. **The trial court clearly abused its discretion in failing to award past-verdict fees and costs.**

In its response brief, CCSO argues, as it must, that the trial court did not abuse its discretion in denying further costs and fees for post-trial motions in the amount of \$38,561.10⁸ for two reasons: (1) the trial court made “specific findings, supported by the record[;]” and (2) “Tyler’s block billing made it impossible to tell how much time was devoted to wasted duplicated efforts.” See *See* Br. of Resp. at 38, 45. CCSO’s arguments lack merit.

First, with respect to the “*specific findings*” alleged by CCSO, the trial court stated the following in a one-paragraph letter ruling dated June 27, 2018:

⁸ See CP at 1028.

The Court denies any further costs and fees for post-trial motions for a number of reasons, one of which is because of the blocked billing submitted by Plaintiff's Counsel, the Court was not able to determine how much time and effort was spent on motions concerning the arbitration, which were denied on several occasions, including the motion submitted post-trial. The Plaintiff lost all of those motions, no matter how many times they submitted them and, as such, should not receive attorney fees and costs for submitting motions for which they did not prevail.

See CP at 1032 (emphasis added).

The trial court “must supply findings of fact and conclusions of law sufficient to permit a reviewing court to determine why the trial court awarded the amount in question.” *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 144 (2014). The 6/27/18 letter ruling clearly does not provide this Court or counsel with a “record sufficient to permit meaningful review.” See *White v. Clark County*, 188 Wn. App. 622, 639 (2015). Indeed, there are apparently more reasons the trial court relied upon to deny the petition for post-trial fees and costs which are unknown to this date. See CP at 1032 (“The Court denies any further costs and fees for post-trial motions *for a number of reasons*[.]”). This is an abuse of discretion. The appellate courts exercise a supervisory role to ensure that discretion is exercised on articulable grounds. *224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 741 (2012).

Secondly, the complaint of “block billing” which would preclude and/or place an undue burden on the trial court in determining an award is not supported by the record before this Court. “Documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (i.e., senior partner, associate, etc.)” *See 224 Westlake, LLC*, 169 Wn. App. at 740.

Here, Plaintiffs’ counsel specifically listed the post-trial motions for which fees were sought. *See* CP 996-997, CP 1002-1003. Each of the motions listed by counsel were successful motions for Tyler. CP 993-994, 996-997. Indeed, Plaintiff’s counsel went so far as to state that they had “specifically removed all time spent on (a) Plaintiff’s Motion for Supplemental Awards, (b) Plaintiff’s Motion for Adverse Tax Consequences, and (c) Plaintiff’s Request for Award on Motion for Sanctions.” *See* CP 997, CP 1003. Moreover, the time entries provided by Plaintiff’s counsel are not only detailed, they are also broken down by date and in reasonable increments of time, both by date and then again within the task entries. *See* CP 1000-1001, 1006-1007. This level of detail is more than sufficient under *224 Westlake, LLC* to allow a court to determine whether the time spent was reasonable. The trial court’s failure to do so amounts to a clear abuse of discretion.

3. **CCSO is not entitled to costs and fees on appeal**

Citing only to RAP 18.9 in the “conclusion” section of its brief, the county makes a cursory, one-sentence request for “sanctions” (presumably attorney’s fees and costs) on appeal. *See* Br. of Resp. at 45 (“The Court should ... award sanctions in favor of CCSO and against Ms. Tyler’s counsel pursuant to RAP 18.9.”).

Presumably, the county’s request is based upon an argument that Tyler’s appeal is frivolous. The county’s request is wholly without merit and should be summarily denied. A request for attorney fees and costs will be denied where the requesting party devotes only one sentence in its brief’s concluding paragraph to the issue. *See, e.g., Wilson Court Ltd. P’ship v. Tony Maroni’s, Inc.*, 134 Wn.2d 692, 710-11 n.4 (1998). That is, “[a]rgument and citation to authority are required” to advise the appellate court of the appropriate ground for an award of fees and costs; the parties must make “more than a bald request for attorney fees.” *Wilson Court*, 134 Wn.2d at 710-11, n.4.

Moreover, an appeal is frivolous only "if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there [is] no reasonable possibility of reversal." *See Satterlee v. Snohomish Cty.*, 115 Wn. App. 229, 237 (2002). To be sure, “[i]n determining whether an appeal is frivolous, the court considers, in addition

to the foregoing definition of ‘frivolous appeal,’ the following principles: [1] RAP 2.2 gives a civil appellant the right to appeal, [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, and [4] an appeal that is affirmed simply because the court rejects the arguments is not frivolous.” *See Satterlee*, 115 Wn. App. at 237-38 (brackets added).

As shown in her opening brief and this reply, this appeal and the issues raised within it are not frivolous. And other than its very brief reference to RAP 18.9, CCSO makes no serious attempt to classify this appeal as frivolous. The reason for this is simple: this appeal is not frivolous. As such, this Court should reject CCSO’s request for attorney’s fees and costs on appeal.

II. CONCLUSION

For all the foregoing reasons and reasons set forth in her opening brief, the appellant, Jennifer Tyler, respectfully requests that this Court reverse and:

1. Remand to the trial court to determine the amount of sanctions that should be imposed;
2. Award \$19,084.00 for adverse tax consequences;
3. Award \$38,561.00 in post-verdict attorney fees and costs based upon the record before the court; and

4. Award attorney fees and costs on appeal pursuant to the procedure set forth in RAP 18.1(f).

Respectfully submitted this 17th day of May, 2019.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing REPLY BRIEF OF APPELLANT on the following individuals specified below on May 17, 2019. Service was made by electronic filing and service.

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