

NO. 61817-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

(Snohomish County Court Case No. 04-2-05628-2)

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**MICHAEL J. CIOCCO and KAREN T. CIOCCO,**

**Plaintiffs/Appellants,**

vs.

**FUMIO DOUGLAS IKEGAMI, et al,**

**Respondents/Defendants.**

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**REPLY BRIEF OF SHEPHERD ABBOTT CARTER**

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Douglas R. Shepherd  
Edward S. Alexander  
SHEPHERD ABBOTT CARTER  
1616 Cornwall Ave., Suite 100  
Bellingham, WA 98225  
(360) 733-3773 or 647-4567

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COURT OF APPEALS  
STATE OF WASHINGTON



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July 6, 2009

ORIGINAL

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## I – ARGUMENT

### A. There is no statute, rule, or common law principle permitting the trial court’s sanction against SAC.

Shepherd Abbott Carter (SAC) argued in its opening brief that “no statute, rule, or common law principle allows the award of attorney’s fees against SAC.” Opening Brief, Page 7. In response, Adzam, Inc., Fumio and Patricia Ikegami (together, “Ikegami”) cite four opinions and two civil rules; none of which support the imposition of the sanction in this case. Rather, the authority cited by Ikegami stand for the following unremarkable propositions:

- **CR 56(c)**: “The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. . .”
- ***State v. S.H.***, 102 Wn.App. 468, 476, 8 P.3d 1058 (2000): “[I]f the trial court fails to enter a finding that amounts to bad faith, remand is required.”
- ***Chambers v. NASCO, Inc.***, 501 U.S. 32, 45 – 46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991): The exceptions to the “American Rule” prohibition of fee shifting fall into three narrowly defined circumstances in federal courts: (1) the “common fund exception;” (2) “willful disobedience of a court order;” and (3) where a party has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”
- ***Wilson v. Henkle***, 45 Wn.App. 162, 169, 175, 724 P.2d 1069 (1986): A trial court’s finding that the fraudulent procurement of a judgment was “inappropriate and improper” is “tantamount to a finding of bad faith.”

**B. This court should reject Ikegami's invitation to adopt a new standard allowing sanctions for dispute of procedural facts.**

Relying upon the above authority, Ikegami asks this Court to reach a jarringly unjust conclusion: the trial court's finding that SAC's "spinning of the facts" regarding what happened at the February 22, 2008, hearing was "unprofessional" is "tantamount to a finding of bad faith. . ." Brief of Respondents, p. 47. Minimal due process includes the opportunity to present facts and argument. *State v. C.D.C.*, 145 Wn.App. 621, 627, 186 P.3d 1166 (2008). Informing the court of facts in opposition to a motion for sanctions can not constitute unprofessional, bad faith conduct.

Ikegami would have this Court deem the following facts "unprofessional" in relation to the motion for sanctions:

- **February 11, 2008:** In opposition to a motion to summarily dismiss Ciocco's claims, and in full compliance with CR 56, SAC filed the following documents with the Snohomish County Superior Court and served them upon Ikegami:
  1. Declaration of Douglas R. Shepherd Regarding Deposition of Catherine Hart;
  2. Declaration of Douglas R. Shepherd Regarding Deposition of Doug Ikegami;
  3. Declaration of Douglas R. Shepherd Regarding Deposition of Heidi Roth;

4. Declaration of Douglas R. Shepherd Regarding Deposition of Patricia Ikegami;
5. Declaration of Edward S. Alexander;
6. Declaration of Edward S. Alexander Regarding Deposition of James Knudson;
7. Declaration of John Conner;
8. Declaration of Karen Ciocco;
9. Declaration of Michael J. Ciocco. CP 2434 – 2729.

- **February 11, 2008:** The above declarations were responsive to both the partnership issue and the employment issue. CP 2434 – 2729.
- **February 20, 2008:** Two days prior to the summary judgment hearing, the trial court received the working papers, including declarations, at 12:27 P.M. CP 3072.
- **February 22, 2008:** At the summary judgment hearing, SAC argued that under RCW 25.05.055(3) the filed declarations raised a presumption that a partnership between Ciocco and Ikegami was formed. CP 2424.
- **February 22, 2008:** At the summary judgment hearing, the trial court found Ciocco's declarations "incredible." CP 3059, 3067 (emphasis added).
- **February 22, 2008:** At the summary judgment hearing, the trial court granted summary judgment on the partnership claim, but ruled that disputed facts required a trial on the employment agreement. CP 3144; 2373.
- **February 22, 2008:** The trial court did not transcribe the summary judgment hearing. CP 3059.
- **February 22, 2008:** The clerk made a Minute Entry recording the events of the hearing. CP 3144. The entry stated, "there existed no partnership between plaintiff and defendant; the accounting and wage issues are

reserved for trial." *Id.* The minute entry said nothing about the absence of Ciocco pleadings responsive to Ikegami's summary judgment motion. CP 3144.

- **February 22, 2008:** All parties signed, and the trial court entered a summary judgment order stating that it had considered Ciocco's filed and served declarations in deciding Ikegami's summary judgment motion. CP 2373 – 2375.
- **March 10, 2008:** The trial court entered an order stating, "Having now reviewed the previously unavailable declarations supporting Plaintiff's brief, the court concludes that there are disputed issues of material fact relating to the partnership allegation which cannot be resolved on summary judgment **because they raise issues of credibility.**" CP 2324 (emphasis added).
- **April 15, 2008:** SAC filed two declarations of counsel and declaration from a legal assistant. CP 3058 – 3074. In these declarations, two attorneys and a legal assistant provided testimony, under penalty of perjury, that the court did receive a second copy of Ciocco's declarations two days before the hearing, and that the court had stated that it found Ciocco's declarations "**incredible.**" *Id.*
- **June 3, 2008:** The trial court entered an order stating that Ikegami, in moving for sanctions, failed to explain how it incurred any additional fees "SOLELY as a result of the need to re-prepare for trial on the partnership." CP 3045 – 3046. In the order, the court sanctioned SAC \$12,020. CP 3046.

Presenting material facts, in declarations under penalty of perjury, in a case where the court has no other record of the facts, in opposition to a motion for sanctions cannot be tantamount to

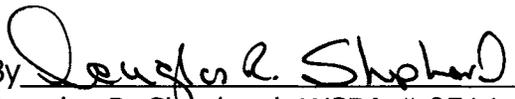
bad faith. In this matter, the facts included in the declarations are consistent with the order presented by Ikegami and entered by the trial court. CP 2373; CP 3076; CP 3065; CP 3058.

## **II – CONCLUSION**

SAC was improperly sanctioned, not for any alleged filing error prior to entry of the Summary Judgment Order, but for the manner SAC defended against Ikegami's motion for sanctions. The trial judge wrongfully sanctioned SAC because the witnesses' memories were consistent with the written record, as filed, including the order, before March 10, 2008. SAC could find no case which allowed for sanctions because counsel's understanding of the facts and counsel's records were inconsistent with the trial court's understanding of the facts. The award of sanctions must be reversed.

Respectfully submitted this 6<sup>th</sup> day of July 2009.

SHEPHERD ABBOTT CARTER

By   
Douglas R. Shepherd, WSBA # 9514  
Edward S. Alexander, WSBA # 33818  
Of Attorneys for Shepherd Abbott Carter

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

MICHAEL J. CIOCCO and KAREN  
T. CIOCCO, husband and wife,  
and the marital community  
composed thereof,

Plaintiffs,

vs.

FUMIO DOUGLAS IKEGAMI and  
PATRICIA IKEGAMI, husband and  
wife, and the marital community  
composed thereof, and ADZAM,  
INC., a Washington Corporation  
d/b/a Doug's Lynnwood Mazda,

Defendants.

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Superior Court  
Case No. 04-2-05628-2**

**CERTIFICATE OF SERVICE**

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**SHEPHERD ♦ ABBOTT ♦ CARTER**

ATTORNEYS AT LAW  
1616 CORNWALL AVENUE, SUITE 100  
BELLINGHAM, WASHINGTON 98225  
TELEPHONE: (360) 733-3773 ♦ FAX: (360) 647-9060  
[www.saclawfirm.com](http://www.saclawfirm.com)

I, Heather Shepherd, certify that on July 6, 2009, I caused to be served copies of the following documents: **Reply Brief of Shepherd Abbott Carter**; and this **Certificate of Service** in the above matter, on the following persons, at the following address, in the manner described:

David J. Lenci, Esq.	<input checked="" type="checkbox"/>	U.S. Mail
Michael K. Ryan, Esq.	<input type="checkbox"/>	Certified Mail
Kirkpatrick & Lockhart, et al.	<input type="checkbox"/>	Fax
Attorneys at Law	<input type="checkbox"/>	Messenger Service
925 Fourth Avenue, Suite 2900	<input type="checkbox"/>	Personal Service
Seattle, WA 98104-1158	<input type="checkbox"/>	E-Mail
Phil Buri, Esq.	<input checked="" type="checkbox"/>	U.S. Mail
Buri Funston Mumford	<input type="checkbox"/>	Certified Mail
1601 F Street	<input type="checkbox"/>	Fax
Bellingham, WA 92825	<input type="checkbox"/>	Messenger Service
	<input type="checkbox"/>	Personal Service
	<input type="checkbox"/>	E-Mail

DATED this 6 day of July 2009.

  
Heather Shepherd