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CASE #: 70205-0-1

WASHINGTON COURT OF APPEALS
DIVISION ONE

RUSSELL JAMES JENSEN, JR. A/K/A JAMIE JENSEN,

Appellant

v.

REGINALD & BRENDA WREN,

Respondents

Appeal from Washington Superior Court
for Snohomish County
No. 10-2-03262-1
Hearing dated January 25, 2012
Judge Ellen J. Fair

APPELLANTS' OPENING BRIEF
(Amended for reference to Clerk's papers)

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COURT OF APPEALS
STATE OF WASHINGTON

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ASSIGNMENTS OF ERROR

1. The trial court erred in awarding Rule 11 CR sanctions against the appellant for noting a motion for summary judgment shortly before trial. The trial court should have noted that appellant also brought a contemporaneous motion to continue to trial to allow for the summary judgment motion and to obtain overdue discovery, as contemplated by Rule 56 CR.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Defendant brought a motion for summary judgment that was too near to the trial date to satisfy all of the timing requirements for summary judgment motion so defendant also brought a motion to delay the trial so that summary judgment could be heard, and to allow defendant to prepare for trial and to obtain long-overdue discovery. Can the trial court ignore the motion to delay the trial when it determines that summary judgment was brought in an untimely fashion? The answer should be “no”.
2. Are Rule 11 sanctions proper where the sanctioned party's actions are well grounded in fact, warranted by existing law, interposed for a proper purpose, and brought in good faith? The answer should be “no”.

STATEMENT OF THE CASE

Summary

The appellant, attorney Jamie Jensen (Mr. Jensen) brought a well-supported motion for summary judgment under Rule 56 CR on behalf of his client, Tammy S. Blakey and Flying T Ranch (collectively, “Ms. Blakey”). Due to the nearness of the trial he also brought a motion under Rule 40(e) CR to continue the trial to allow the summary judgment motion to be heard in the time constraints of the rules and also to obtain discovery responses that were overdue from the plaintiff. Mr. Jensen stated that if the motion to continue the trial was denied that he would withdraw the motion for summary judgment and proceed to trial. He would not ask for the time to be shortened.

In response the plaintiff brought a motion for sanctions since the summary judgment motion could not be heard in the normal fashion. No argument was made relative to the merits of the summary judgment motion. The motion for the trial continuance was heard first by Judge Downes. The trial continuance was denied. Judge Fair then heard the motion to dismiss the motion for summary judgment and for sanctions. Judge Fair ordered sanctions against Mr. Jensen for bringing the untimely motion.

Mr. Jensen's conduct throughout this matter was wholly supported

by law and court rule, without any evidence of bad faith. The sanction order by Judge Fair is unsupported by law or fact.

Facts

Ms. Blakey, the defendant in the underlying case, bought farm property near Arlington Washington in 1990. That year she repaired the post-and-barbed-wire fence that ran between her property and the property to the West, then owned by the Rollins. That fence remained in place until 2009 when she again commenced repairs to the fence. The repairs were completed in 2009.

The property to her West, which had been owned by the Rollins, has been purchased by the Wrens, who had lived on the property for approximately 5 years at the time that the fence was being repaired the second time. The Wrens demonstratively objected to the repair of the fence, claiming it was on their property. Ms. Blakey responded that under any circumstances the fence had been in place for over 10 years and was therefore the property boundary by adverse possession. The Wrens brought this case shortly after the fence was repaired. (CP 249-252) In response to the suit the Rollins provided declarations that the fence line had been the agreed property line for the previous 15 years. (CP 218-221)

Mr. Jensen was retained by Ms. Blakey in early 2010 to respond to a suit by the Wrens. An answer was made to the complaint. (CP 245-248)

Thereafter, the plaintiff did not go forward with the case in any meaningful manner. After a year had gone by the court clerk sent notice that the case would be dismissed for failure to prosecute. (CP 233-234) The Wrens sent a notice that they wanted the case open. (CP 231-232) Again, another year went by without any significant action on the part of the plaintiffs.

Tragically, at the end of the second year the counsel for the plaintiffs perished and was replaced by current counsel. The matter moved forward in a slow fashion.

It may be noted at this point that the plaintiffs did not request any discovery of the defendant at any time in this case. And the plaintiff did not request any other discovery except that the plaintiff deposed one former owner of the property. The plaintiff then set the matter on for trial.

Throughout the case Mr. Jensen kept Ms. Blakey informed regarding the cost of litigation. Shortly after Ms. Blakey's discovery was served on the Wrens Ms. Blakey informed Mr. Jensen that, due to the cost, she wished to proceed pro se. Mr. Jensen withdrew from the case in early November, 2012. (CP 226-227) However, by the end of December Ms. Blakey had not received the answers to her discovery and was concerned with the impending trial so she asked Mr. Jensen to reenter the case and bring a motion for summary judgment. (CP 224-225,189-193)

Summary judgment appeared appropriate at this point due to the declarations of the prior owners of the Wren parcel. However, summary judgment could not be brought within the time constraints of the rule. Summary judgment requires 28 days notice but it also requires that the motion be heard 14 days before trial. To address the time constraints Ms. Blakey could either:

- a. Request to shorten the time, pursuant to Rule 56 CR, or
- b. Ask for a continuance of the trial, pursuant to Rule 40(e) CR

Ms. Blakey chose to request a continuance to allow Mr. Jensen to become sufficiently prepared for the trial, if necessary, and to obtain the long overdue discovery from the plaintiffs. (CP 168-172) The motion for summary judgment was prepared and served. A motion to continue the trial was also prepared and served, as well as a motion to compel discovery. All parties were informed that if the trial was not continued then this summary judgment motion would be withdrawn since it could not be heard in a timely fashion. (CP 170)

In answer to the summary judgment motion and the motion to continue the trial the plaintiff brought a motion seeking Rule 11 sanctions, claiming that a request to continue the trial was improper and unlawful and that the motion for summary judgment was brought for improper purposes. (CP 176-188)

The motion to continue the trial was heard by Judge Downes and was denied. (CP 133-134) At that point Ms. Blakey withdrew her motion for summary judgment. However, the Wrens had brought the motion for sanctions before Judge Fair, who knew of the motion to continue the trial and knew that the parties had just come from Judge Downes' courtroom on the motion to continue. Judge Fair ordered sanctions in the amount of \$3,246.75. (CP 15-18) This appeal is from that order for sanctions.

Ms. Blakey then prepared for her motion to compel discovery. Time was now short between the motion date and the trial and Ms. Blakey had not received any of her discovery. Just before the hearing the Wrens produced some of the discovery but produced only incomplete answers to interrogatories and they made no response at all to the request for production of documents.

The motion was heard by a court commissioner. The motion was denied due to the proximity to the trial date. Appellant will acknowledge that he did not know that discovery could be denied based on the time of the trial. He has found no legal support for that decision. The parties then went to trial.

Rule

The rule in this case is Rule 11 . That rule states that any attorney signing a pleading must believe that

- (1) it is well grounded in fact;
- (2) it is warranted by existing law or 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.

This rule has been cited in many cases and requires a finding of a baseless claim.

Complaints which are "grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" are not "baseless" claims, and are therefore not the proper subject of CR 11 sanctions. The purpose behind the rule is to deter baseless filings, not filings which may have merit. The Court of Appeals therefore correctly determined that a complaint must lack a factual or legal basis before it can become the proper subject of CR 11 sanctions.

Bryant v. Joseph Tree, Inc., 829 P.2d 1099, 119 Wn.2d 210 (Wash. 1992) .

and

If a complaint lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim. The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions.

Bryant., supra.

And

Under well-settled case law, a trial court's inherent authority to sanction litigation conduct by assessing attorney fees and costs is properly exercised only upon a finding of bad faith.

Nonetheless, if the trial court fails to enter a finding that amounts to bad faith, remand is required. *State v. S.H.*, 8 P.3d 1058, 102 Wn.App. 468 (Wash.App. Div. 1 2000), quoting *Primus Automotive Fin. Servs., Inc. v. Batarese*, 115 F.3d 644, 649 (9th Cir.1997)

Argument

When the facts of a case are so clear that it appears, as a matter of law, that one party should prevail then that party should bring a motion for summary judgment in order to avoid the time and expense and difficulty of the trial that should be unnecessary.

When the rules of court, the Rules of Civil Procedure, make it difficult to bring the motion for summary judgment in a timely fashion then the party should work within the rules, if possible, in order to bring their motion.

Ms. Blakey had owned farming property for 19 years. The fence between her property and the neighboring property had stood for at least those 19 years. Ms. Blakey had openly exclusively, continuously and notoriously maintained the property on her side of the fence line. Her actions amounted to adverse possession of any land within the fence line on her side of the property.

When the new neighbor brought the underlying quiet title action Ms. Blakey obtained declarations from the former neighbor on the other side of the fence stating that the fence had been the property line for at

least the 30 years that they had lived on the adjoining property. This case should properly have been dismissed based on adverse possession.

Believing that the case should be dismissed on summary judgment Ms. Blakey brought her motion for summary judgment. However, due to the shortness of time, the summary judgment motion could not be heard with both the 28 day notice period plus the requirement that the motion be heard 14 days prior to trial. In order to address this concern Ms. Blakey served and filed her motion for summary judgment but she also brought a motion asking the court to continue the trial pursuant to Rule 40(e).

First, appellant would argue that there is nothing inherently wrong with bringing a motion to continue a trial. There is also nothing inherently wrong with bringing a motion for summary judgment. Further, there is nothing inherently wrong with a summary judgment motion even if that motion cannot be heard in a timely fashion if the movant takes steps to have the court approve a hearing in a timely fashion. Those are the actions of appellant here and they do not support an award of sanctions.

Well Grounded in Fact and Law

The first requirement for a Rule 11 sanction is that the action by the attorney must be "well grounded in fact and law". There were two motions brought by Ms. Blakey, summary judgment and a continuance of the trial. Both of the motions were standard common motions, supported

by declarations. The summary judgment motion should have terminated the action. The continuance motion would have allowed Ms. Blakey to obtain her discovery, to have her summary judgment motion heard, and to allow counsel to be prepared for trial. Those motions were well grounded in fact and law. There is no finding by either court that the motions were not well grounded in fact and law.

The only reason that Rule 11 sanctions were ordered in this case was because Ms. Blakey's proper and well supported summary judgment motion could not be heard in strict accordance with summary judgment rules, as viewed by the court. This is where the court made its error.

In its order for sanctions the court, in its findings of fact, stated that "CR 56(c). . . requires that motions for summary judgment be heard not less than 14 days before the scheduled trial date." That is an incorrect recitation of the law. CR 56(c) states "summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise." (Underline added) Ms. Blakey sought that "leave of court . . . to allow otherwise." She brought her motion for continuance of the trial.

Opposing counsel convinced the court that the 14 calendar day rule only allowed the court to shorten the time to less than 14 days but that is not what the rules states. If the rule had been meant to limit these issues to

14 days or less than 14 days then that is what the rule would have stated. Ms. Blakey moved to the court for “leave to allow otherwise.” This was a proper motion well grounded in fact and law. Rule 11 sanctions cannot be given if the motion is well grounded in fact and law. No sanctions should have been given here. *Bryant, supra*.

Warranted by Existing Law

The second necessary finding under Rule 11 is that the action is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law or the establishment of new law. Ms. Blakey's motion was brought under existing law and was not asking for any new law. Existing law, and particularly Rule 40(e) allows for a continuance of the trial when good cause is shown. In this case, Ms. Blakey had not received any of her discovery responses, including disclosure of expert witnesses and exhibits that would be used at trial.

Ms. Blakey had hoped that the court would continue the trial to allow her to, in part, obtain her discovery. Since no discovery had been answered until just before the motion to compel Ms. Blakey had a reasonable expectation that a continuance would be granted. “The party cannot simply ignore or fail to respond to the request. '[A]n evasive or misleading answer is to be treated as a failure to answer.’” CR 37(d) *Magana v. Hyundai Motor America*, 220 P.3d 191, 167 Wn.2d 570 (Wash.

2009). Unfortunately for Ms. Blakey, the earlier denial of a continuance cemented the plaintiff's' misconduct in failing to answer discovery.

The motion to compel discovery was brought by Ms. Blakey but was denied due to the shortness of time before trial. It is uncertain that an order to compel discovery would have done much good under any circumstances since there would be insufficient time, without the continuance, to review and incorporate the discovery into the trial.

Ms. Blakey had also recently re-retained her counsel, who needed time to prepare for trial. She wanted to bring her motion for summary judgment in the hopes of avoiding trial in its entirety. These are all good, valid and reasonable purposes for continuing the trial date.

By continuing the trial date Ms. Blakey would be able to have her motion for summary judgment heard in the normal fashion. Combining her summary judgment motion with a motion for continuance Ms. Blakey sought the "leave of court" stated in Rule 56 CR. All of her motions were brought under existing law and warranted by the facts and the misconduct of opposing counsel in failing to produce discovery.

In its order, the trial court fails to address the actions of Ms. Blakey in bringing these motions for a continuance and to compel discovery. By looking at only some of the facts and some of the law the court is bound to come to an incomplete understanding of the case, resulting in a decision

that does not reflect the actions of the parties. In order to grant Rule 11 sanctions the Court has to find that the action is not warranted by existing fact or law.

The court failed to make its determination on all the facts and all the law and was in error in granting any sanctions.

Not Imposed for Improper Purpose

Thirdly, the rule for sanctions requires that the action is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. By reviewing all of the facts and all of law in this case it is clear that not only was Ms. Blakey not harassing or delaying the case but rather was attempting to shorten and clarify the issues in order to reduce cost and delay and perhaps to avoid trial completely. There was no improper purpose on her part.

Bad Faith

In addition to the three requirements for Rule 11 sanctions there is also the overriding rule requiring a finding of bad faith. "Nonetheless, if the trial court fails to enter a finding that amounts to bad faith, remand is required." *State v. S. H.*, supra. In this case there was no such finding of bad faith by the court. Without that clear finding the court improperly granted Rule 11 sanctions and must be overturned.

CONCLUSION

The trial court improperly awarded Rule 11 sanctions against appellant. The order awarding sanctions should be overturned.

DATED this 19 day of August, 2013.

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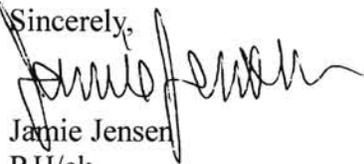
Re: Jensen v. Wren
Court File 70205-0-1

Dear Sirs:

Enclosed with this letter please find the Appellant's Reply Brief for this case. Also enclosed please find an amended Appellant's Opening Brief (Amended for reference to Clerk's papers) This document was presented using docket sub numbers rather than the Clerk's papers numbers. That error has been corrected. No other changes were intended to be made to that brief.

The Declaration of Service has also been included, showing service of each of these documents on the other counsel.

Sincerely,



Jamie Jensen
RJJ/ck

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COURT OF APPEALS
STATE OF WASHINGTON, CN

Court File No. 70205-0-1
WASHINGTON COURT OF APPEALS
DIVISION 1

Russell James Jensen, Jr. A/K/A Jamie
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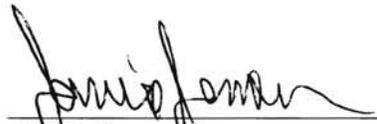
Reginald & Brenda Wren,

Respondents

DECLARATION OF SERVICE

I, Jamie Jensen, hereby certify under the penalty of perjury that on this 7th day of August, 2013, I mailed the **Appellant's Reply Brief** by US Postal Service, postage paid, to the parties listed below. I also mailed an amended **Appellant's Opening Brief** (Amended for reference to Clerk's papers)

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COURT OF APPEALS
STATE OF WASHINGTON



Jamie Jensen
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