

75063-1

75063-1
COURT OF APPEALS
STATE OF WASHINGTON
2016 SEP -5 PM 2:56

NO. 75063-1-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

RICHARD JOLLEY, ESQ., STEWART ESTES, ESQ., AND KEATING,
BUCKLING & MCCORMACK, INC.

Appellants,

v.

LYNN DALRING,

Respondent.

BRIEF OF APPELLANTS

Philip B. Grennan
Shannon M. Benbow
Of Attorneys for Appellants
Richard Jolley, Esq., Stewart Estes, Esq.,
and Keating, Buckling & McCormack, Inc.

WOOD, SMITH, HENNING, AND BERMAN, LLP
520 Pike Street, Suite 1525
Seattle, WA 98101
(206) 204-6803

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
A. Assignments of Error.....	2
B. Issues Pertaining to Assignments of Error	2
III. STATEMENT OF THE CASE	3
A. Background Facts.....	3
B. Civil Case Settlement Negotiations.....	5
1. A September 1, 2015, Mediation Was Unsuccessful	5
2. November 25 Through December 2 Settlement Negotiations.....	8
3. Mr. Maenhout's Testimony Regarding Settlement Negotiations.....	13
4. Plaintiff's Motion To Enforce Settlement.....	16
5. Appellants Offered A Reasonable And Good Faith Reason For The Manner In Which They Proceeded With Settlement Negotiations.....	18
6. The Trial Court Imposed Sanctions In The Amount Of \$32,000 Against Appellants.....	20
IV. STANDARD OF REVIEW	21
V. ARGUMENT.....	22
A. The Trial Court Abused Its Discretion In Awarding Sanctions Against Appellants	22
1. Appellants Were Not Afforded Due Process	22

B.	Only A Finding Of Bad Faith Or Conduct Amounting To Bad Faith Will Support An Award Of Sanctions.....	26
C.	An Award of Sanctions Must Be Supported By Clear Evidence Of Bad Faith	27
D.	The Trial Court's Orders Confirm That The Trial Court Did Not Find A Motive Or Intent That Would Support A Finding Of Bad Faith	28
E.	The Trial Court's Finding Of Bad Faith Was Based On An Erroneous Assessment Of The Evidence	30
	1. The Trial Court Focused On One Aspect Of Mr. Maenhout's Testimony, Which Was Contradicted By The Bulk Of His Own Testimony	30
	2. The Evidence Before The Trial Court Showed That Appellants' Transmission Of A Draft Agreement Was At Respondents' Request.....	32
	3. The Evidence Before The Trial Court Confirmed That Appellants "Repeatedly Hedged" On Whether Mr. Maenhout Had Accepted The Settlement.....	34
	4. The Sanctions Award Was An Abuse Of Discretion Because Respondents Were Never Misled	35
	5. Plaintiff Unreasonably Proceeded With Her Motion To Enforce Settlement.....	39
F.	The Trial Court Abused Its Discretion In Sanctioning Mr. Estes	41
G.	The Trial Court's Award Of \$32,000 Was Unreasonable And Not Supported By The Evidence	41
VI.	CONCLUSION	45

TABLE OF AUTHORITIES

Page

CASES

Ali v. Tolbert,
636 F.3d 622 (D.C. Cir. 2011)..... 27

Autorama Corp. v. Stewart,
802 F.2d 1284 (10th Cir. 1986) 27

Bldg. Indus. Ass'n of Washington v. McCarthy,
152 Wn. App. 720, 218 P.3d 196 (2009) 28

Burt v. Washington State Dep't of Corr., 191 Wn. App. 194, 361
P.3d 283 (2015)..... passim

Carlson v. Lake Chelan Cmty. Hosp.,
116 Wn. App. 718, 75 P.3d 533 (2003)..... 40

Chambers v. NASCO, Inc.,
501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)..... 25, 26

Cowles Pub'g Co. v. Murphy,
96 Wn.2d 584, 637 P.2d 966 (1981)..... 21

DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124 (2d Cir.
1998) 27

Fink v. Gomez,
239 F.3d 989 (9th Cir. 2001) 26, 29

Geonerco, Inc. v. Grand Ridge Properties IV, LLC, 159 Wn. App.
536, 248 P.3d 1047 (2011), as corrected (Feb. 1, 2011)..... 25

Grant Cty. Prosecuting Attorney v. Jasman,
183 Wn.2d 633, 354 P.3d 846 (2015)..... 28

Henry v. Gill Indus., Inc.,
983 F.2d 943 (9th Cir. 1993) 44

In re Recall of Pearsall–Stipek,
136 Wn.2d 255, 961 P.2d 343 (1998)..... 21

<u>Lahiri v. Universal Music & Video Distribution Corp.</u> , 606 F.3d 1216 (9th Cir. 2010)	27
<u>Lee ex rel. Office of Grant Cty. Prosecuting Attorney v. Jasman</u> , 183 Wn. App. 27, 332 P.3d 1106 (2014)	28
<u>Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co.</u> , 151 Wn. App. 195, 218 P.3d 196 (2009)	28
<u>Mark Indus., Ltd. v. Sea Captain's Choice, Inc.</u> , 50 F.3d 730 (9th Cir. 1995)	22
<u>Matter of Yagman</u> , 796 F.2d 1165 (9th Cir. 1986) (amended on other grounds by <u>In re Yagman</u> , 803 F.2d 1085 (9th Cir. 1986))	42
<u>Skimming v. Boxer</u> , 119 Wn. App. 748, 82 P.3d 707 (2004)	28
<u>State v. Gassman</u> , 175 Wn.2d 208, 283 P.3d 1113 (2012)	21
<u>State v. S.H.</u> , 102 Wn. App. 468, 8 P.3d 1058 (2000)	22
<u>Weissman v. Quail Lodge, Inc.</u> , 179 F.3d 1194 (9th Cir. 1999)	22
<u>Yagman v. Republic Insurance</u> , 987 F.2d 622 (9th Cir. 1993)	36, 37

STATUTES

CR 11	20, 21
CR 26	21
CR 27	20
CR 37	20
CrR 4.7(h)(7).....	21

OTHER AUTHORITIES

Washington Practice: Civil Procedure § 37:14, at 672-73 (2d ed.
2009) 26

I. INTRODUCTION

Defendant's trial counsel, Richard Jolley, Esq., Stewart Estes, Esq., and Keating, Buckling & McCormack, Inc. (collectively "Appellants"), seek review of a trial court order imposing sanctions against them of attorney fees totaling \$32,000, and denying their Motion for Reconsideration of the sanctions order. The trial court imposed sanctions sua sponte under its inherent authority after denying plaintiff, Lynn Dalsing's ("Plaintiff") Motion to Enforce Settlement against defendant, Pierce County ("Defendant"), Appellants' client.¹

The trial court imposed sanctions against Appellants for the manner in which they engaged in settlement negotiations, after finding that Appellants acted in bad faith by continuing to negotiate settlement with Plaintiff's counsel over a nine day period, which included the Thanksgiving holiday weekend, after having been told by Defendant that Defendant did not want to settle the underlying litigation.

However, the trial court abused its discretion by awarding attorney fees to plaintiff and her attorneys, Fred Diamondstone, Esq., and Gordon Woodley, Esq. (collectively "Respondents") because Appellants were not

¹ While Pierce County was the named defendant in the underlying litigation, it is not a party to this appeal.

afforded due process and because the evidence before the trial court did not support a finding of bad faith or conduct tantamount to bad faith.

Even if sanctions were appropriate, the trial court abused its discretion in setting the amount of sanctions at \$32,000 because that amount is unreasonable in light of the evidence before the trial court.

Thus, this Court should reverse the trial court's Order imposing sanctions in the amount of \$32,000 against Appellants and the Order denying Appellants' Motion for Reconsideration.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in imposing sanctions based on its inherent authority against Appellants.
2. The trial court erred in imposing sanctions against Mr. Estes.
3. The trial court erred in determining the amount of sanctions when it imposed sanctions based on its inherent authority in the amount of \$32,000 against Appellants.

B. Issues Pertaining to Assignments of Error

1. Did the trial court abuse its discretion in ordering Appellants to pay attorney fees and costs to Respondents where it

deprived Appellants of due process by imposing sanctions without giving Appellants a meaningful opportunity to be heard? (Assignment of Error Nos. 1-2).

2. Did the trial court abuse its discretion in ordering Appellants to pay attorney fees and costs to Respondents where the evidence before the trial court did not support a finding of bad faith or conduct tantamount to bad faith? (Assignment of Error No. 1).

3. Did the trial court abuse its discretion in ordering Appellants to pay attorney fees and costs to Respondents where the evidence before the court showed that Plaintiff unreasonably proceeded with her Motion to Enforce? (Assignment of Error No. 1).

4. Did the trial court abuse its discretion in imposing sanctions against Mr. Estes where the evidence before the court showed that Mr. Estes had only limited involvement in settlement negotiations? (Assignment of Error No. 2).

5. Did the trial court abuse its discretion in setting the sanctions award at \$32,000? (Assignment of Error No. 3).

III. STATEMENT OF THE CASE

A. Background Facts

The trial court's sanctions order arises out of an underlying litigation matter filed by Plaintiff against Defendant. Plaintiff was

represented in the underlying litigation by attorneys, Fred Diamondstone, Esq., and Gordon Arthur Woodley, Esq. Appellants represented Defendant in the underlying litigation.

Plaintiff's Amended Complaint alleged that Plaintiff was falsely arrested by members of Defendant's Sheriff's Department after a sex-crimes and child pornography investigation against her husband. (Clerk's Papers ("CP") at 2-6). She further alleged that the charges against her were dropped, but only after she had been imprisoned for seven months. (CP at 6). Plaintiff's Amended Complaint, filed on January 13, 2014, asserted causes of action for False Arrest, Malicious Prosecution, and Outrage against Defendant. (CP at 1-8).

In the fall of 2015, the parties engaged in settlement negotiations. (Verbatim Transcript of Proceedings ("RP") (Jan. 19, 2016) at 25). Settlement negotiations broke down and the parties never reached an agreement.² On February 17, 2016, as a result of those settlement negotiations, the trial court issued an order imposing sanctions in the amount of \$32,000 against Appellants, payable to Respondents. (CP at 332-337). On April 1, 2016, the trial court denied Appellants' Motion for

² After this appeal was filed and after Appellants submitted their Designation of Clerk's Papers, Plaintiff voluntarily dismissed the underlying litigation without a settlement payment by Defendant. However, the sanctions order was not affected by Plaintiff's dismissal of the underlying litigation.

Reconsideration of the sanctions order. (CP at 531-534). As set forth more fully below, the evidence before the trial court did not support a finding that Appellants acted in bad faith and the award of sanctions was unreasonable.

B. Civil Case Settlement Negotiations

1. A September 1, 2015, Mediation Was Unsuccessful

The parties attended mediation on September 1, 2015.³ (RP (Jan. 19, 2016) at 25). During the course of the Mediation, Defendant offered \$210,000 to settle the underlying litigation, which Plaintiff did not accept. (RP (Jan. 19, 2016) at 61-62). At the conclusion of the mediation, the mediator presented a mediator's proposal of \$250,000 to \$350,000, which neither of the parties accepted. (RP (Jan. 19, 2016) at 25-26, 95-96).

From Plaintiff's perspective, a material term for purposes of settlement discussions was whether Defendant would agree to drop a pending appeal of the dismissal of criminal charges against her.⁴ (RP (Jan.

³ Unless otherwise indicated, all date references are for the year 2015.

⁴ Plaintiff had been charged with sexual exploitation of a minor in 2012 based on a mistaken conclusion by Pierce County detectives that she was depicted in a photo found on her family's computer of an adult woman engaging in sex with a young child. (CP at 1-8). The charges were dropped in 2012 without prejudice but re-filed in 2015 based on different evidence uncovered after Plaintiff sued Defendant. (CP at 1-8, 315-316). The criminal trial court dismissed the charges in 2015 based on

19, 2016) at 97). In that regard, Mr. Jolley and Mr. Diamondstone spoke on September 24. (RP (Jan. 19, 2016) at 122). During that conversation, Mr. Jolley asked Mr. Diamondstone if Plaintiff would settle for \$250,000.00 with the dismissal of the criminal appeal. (RP (Jan. 19, 2016) at 122). Mr. Jolley did not tell Mr. Diamondstone that the proposal came from Defendant's risk manager. (RP (Jan. 19, 2016) at 122). However, Mr. Diamondstone made the assumption that it did. (RP (Jan. 19, 2016) at 105-106, 122).

Over the next several days, Mr. Diamondstone learned that the criminal appeal would not be dismissed, and settlement negotiations ended. (RP (Jan. 19, 2016) at 103).

However, on November 23, Defendant filed a Motion for Voluntary Withdrawal of Review of the criminal appeal. (CP at 46-49). Mr. Diamondstone viewed this development as a "game changer" and on November 24 attempted to restart settlement negotiations. (RP (Jan. 16, 2016) 104-105).

At 8:18 a.m. on Tuesday, November 24, Mr. Diamondstone emailed Mr. Jolley and Mr. Estes, stating, "We are prepared to settle based

prosecutorial vindictiveness. (CP at 313-316). Whether Defendant would drop the pending appeal of the prosecutorial vindictiveness ruling was a central part of the civil case settlement negotiations because Plaintiff postured that eventuality as a condition precedent to any settlement. (RP (Jan. 19, 2016) at 97).

on the number last proposed by the risk manager." (RP (Jan. 19, 2016) at 104-105; Ex. 3).⁵ That number was \$250,000.00, which Mr. Diamondstone believed had been proposed by the risk manager based on his conversation with Mr. Jolley two months earlier, on September 24. (RP (Jan. 19, 2016) at 105). Mr. Diamondstone also wrote, "Language that was previously seen as a barrier to settlement now removed." (RP (Jan. 19, 2016) at 106-107; Ex. 3). Mr. Diamondstone proposed "[a] standard release for all damage claims[,]" and asked that the communication "be immediately conveyed to the County's Risk Manager." (Ex. 3). He noted that "[t]his offer is time limited." (Ex. 3).

Approximately one hour later, Mr. Estes emailed Mr. Diamondstone, asking him to clarify the proposed settlement, and specifically to clarify whether Plaintiff would continue to litigate a related Federal matter. (Ex. 19). Mr. Diamondstone responded, stating that the settlement would be a global settlement of all cases. (Ex. 19).

Approximately one hour after Mr. Estes' email to Mr. Diamondstone, Mr. Woodley emailed Mr. Estes, asking, "If we were to dismiss both actions will this case settle at \$250,000?" (Ex. 26). Around

⁵ All citations to "Ex." refer to exhibits admitted during the January 19, 2016, Evidentiary Hearing, which have been designated by Appellants and were transmitted by the King County Superior Court to the Court of Appeal on July 27, 2016.

the same time, Mr. Diamondstone wrote to Mr. Estes, asking that he forward his 8:18 a.m. letter to Defendant's risk manager, Mark Maenhout, "who is the proper authority to decide what [Defendant] will do to settle this case." (CP at 461).

Later that afternoon, Mr. Estes wrote to Mr. Diamondstone stating that he thought the parties were getting close, but that "it is a significant decision for my clients and they would like a couple of days to think about it. Given the [Thanksgiving] Holiday, we will likely not be able to provide an answer until Monday." (RP (Jan. 19, 2016) at 122-123; Ex. 8). Mr. Estes also noted that one sticking point was the proposed release language, and asked Mr. Diamondstone to provide his thoughts regarding some proposed language. (Ex. 8). Finally, he advised Mr. Diamondstone that the risk manager did not have authority to settle without the Prosecutor's approval. (Ex. 8).

2. November 25 Through December 2 Settlement Negotiations

On Wednesday, November 25, Mr. Jolley and Mr. Diamondstone spoke over the telephone several times. (RP (Jan. 19, 2016) at 46-49). During their first conversation that day, Mr. Jolley stated that he was optimistic that the case could settle that day if Plaintiff conceded that there was probable cause to arrest her. (RP (Jan. 19, 2016) at 46-47). Mr.

Diamondstone stated, "That will never happen[,]" and the conversation ended. (RP (Jan. 19, 2016) at 46-47).

Mr. Diamondstone called Mr. Jolley approximately fifteen minutes later, and advised him that Plaintiff would not agree to a statement in the release regarding probable cause, but would agree that the prosecutors were acting in good faith. (RP (Jan. 19, 2016) at 47-48). Mr. Jolley told Mr. Diamondstone that he would check with his clients and would get back to him. (RP (Jan. 19, 2016) at 47-48).

Mr. Jolley and Mr. Diamondstone spoke a third time on November 25. (RP (Jan. 19, 2016) at 48-49). Mr. Jolley informed Mr. Diamondstone that there was an issue with the proposed language relating to the Sheriff's Office and that it needed to be changed. (RP (Jan. 19, 2016) at 48-49). He also advised him that he was optimistic that the parties could work it out, but that he needed approval from the risk manager before it went any further. (RP (Jan. 19, 2016) at 48-49).

However, Mr. Diamondstone followed the conversation with an email that had "RE: Dalsing Settled – CONFIDENTIAL" as its subject line. (Ex. 8). Mr. Jolley did not notice the subject line and would have called Mr. Diamondstone immediately if he had noticed it. (RP (Jan. 19, 2016) at 52). While he noticed in the body of the email that Mr. Diamondstone had written that the case had settled, Mr. Jolley did not

believe that he needed to again inform Mr. Diamondstone that it had not settled because he had already conveyed to Mr. Diamondstone that there was no settlement until he heard back from Mr. Maenhout, the Risk Manager. (RP (Jan. 19, 2016) at 51-52).

In fact, despite the comment in his November 25 email, Mr. Diamondstone knew that the case had not settled. Specifically, on November 27, Mr. Diamondstone spoke with a reporter from the News Tribune after hearing a rumor that the paper was planning to run a story on November 29 or 30 that the case had settled. (CP at 103-105 ¶2). On that date, Mr. Diamondstone advised the reporter that the case had not settled. (CP at 103-105 ¶2). He did so because he "did not want to upend pending settlement negotiations." (CP at 103-105 ¶2).

Thereafter, on Saturday, November 28, Mr. Jolley wrote to Mr. Diamondstone, informing him that his individual clients had approved and that he was waiting on Mr. Maenhout, who was out of town over the Thanksgiving weekend. (RP (Jan. 19, 2016) at 112-113; Ex. 9).

On Monday, November 30, Mr. Diamondstone emailed Mr. Jolley, stating, "We have a settlement." (Ex. 10). He also asked Mr. Jolley to forward a draft settlement agreement to him because his client would be available to sign the settlement agreement on December 1, with the understanding that Mr. Maenhout would still need to approve it. (Ex. 10).

Yet, even as of this date, and despite his statement in his email, he knew that the parties had not settled. (CP at 103-105 ¶2).

Mr. Jolley's colleague, Brian Augenthaler, then responded to Mr. Diamondstone, informing him that Mr. Jolley was not able to respond at the time and further informing him that silence should not be construed as acceptance. (Ex. 11). Thereafter, Mr. Jolley wrote to Mr. Diamondstone, stating, "I agree that it is unlikely that [Mr. Maenhout] will object Still need final confirmation from Mark Maenhout to finalize settlement." (Ex. 11).

On December 1, in the evening, Mr. Jolley emailed Mr. Diamondstone, stating that Mr. Maenhout wanted to see a complete agreement before signing off. (RP (Jan. 19, 2016) at 127-128; Ex. 29). Mr. Jolley's email also stated that he would prepare a draft and circulate it to Mr. Diamondstone and obtain his approval before sending it to Mr. Maenhout. (RP (Jan. 19, 2016) at 127-128; Ex. 29). He also advised Mr. Diamondstone that Mr. Maenhout wanted to speak with the County Executive before finalizing anything, and that she would be out of the office and unavailable until December 11. (RP (Jan. 19, 2016) at 127-128; Ex. 29).

At 3:01 p.m. on December 2, Mr. Jolley sent a proposed release to Mr. Diamondstone, advising him that it would still need to be sent to Mr.

Maenhout for his review. (Ex. 14). It was this email that apparently caused Mr. Diamondstone to believe that the parties had reached a settlement. (CP at 103-105 ¶2). However, four hours later, after learning that reporters had stated to Mr. Maenhout that they had heard that the case had settled, Mr. Jolley emailed Mr. Diamondstone, stating,

While I have indicated to you that I am optimistic, I cannot over-emphasize that we do not have a settlement until there is final approval from the county. The prosecutor's office is not telling anyone we've got a settlement and I think it would be irresponsible for anyone else to communicate that until a settlement is final. Your repeated references to the case being 'settled' are inaccurate.

(Ex. 15).

In response, Mr. Diamondstone stated that he "absolutely believe[s] this case is settled." (Ex. 15). However, in that same response, he acknowledged that Mr. Maenhout had not reached a final decision, as his agreement was "subject to his conferring with the county executive, who returns on December 10." (Ex. 15).

On December 3, at 8:29 p.m., Mr. Jolley informed Mr. Diamondstone that Defendant had rejected the settlement. (RP (Jan. 19, 2016) at 39-40; CP at 484).

3. Mr. Maenhout's Testimony Regarding Settlement Negotiations

Mr. Maenhout testified during the Evidentiary Hearing regarding settlement negotiations from his perspective as Defendant's Risk Manager. (RP (Jan. 19, 2016) at 61-92). During questioning by the trial court, Mr. Maenhout testified as follows:

The Court: Now, you said that you talked with him on the 25th of November about the \$250,000 amount.

[Mr. Maenhout]: Yes.

The Court: And now this document is after that, this document is December 2.

[Mr. Maenhout]: Um-hmm. I agree.

The Court: And—

[Mr. Maenhout]: It does not have my—it does not have my buy-off. I'm adamant about that. I never agreed to 250 ever.

The Court: And you told Mr. Jolley that on the 25th—

[Mr. Maenhout]: Yes.

The Court: —of November.

[Mr. Maenhout]: In a little more explicit terms than that."

...

The Court: In this conversation you had with Mr. Jolley on the 25th of November, did you give him a

number that you—tell him a number that you would be willing to settle for?

[Mr. Maenhout]: I wanted to defend it.

The Court: You did not want to settle at all.

[Mr. Maenhout]: No.

(RP (Jan. 19, 2016) at 82-84).

However, Mr. Maenhout's testimony also revealed that settlement was not foreclosed on November 25, and that Mr. Maenhout continued to consider settlement and comment on release language up to December 2.

(RP (Jan. 16, 2016) at 75-77, 79-80, 82).

Specifically, Mr. Maenhout testified that he attended mediation on September 1, at which time Defendant offered \$210,000.00 to settle Plaintiff's claims in the litigation. (RP (Jan. 19, 2016) at 61-62).

On November 25, Mr. Maenhout spoke with Mr. Jolley and questioned him regarding the settlement language that was being proposed between Plaintiff and Defendant. (RP (Jan. 19, 2016) at 75-76). Mr. Maenhout had concerns regarding the settlement language because he did not want the settlement language to point to any department other than the Prosecutor's office. (RP (Jan. 19, 2016) at 76). Mr. Maenhout ultimately approved amended settlement language, which he reviewed in an email, because it removed a concern regarding pointing the finger at the Sheriff's Department. (RP (Jan. 19, 2016) at 76-77). While he was aware that

Defendant's counsel was working on a release, he was not aware of a specific dollar amount to be included in the release. (RP (Jan. 19, 2016) at 82).

Prior to Thanksgiving, Mr. Maenhout also spoke with the County Executive and discussed with her that he had concerns regarding the settlement language. (RP (Jan. 19, 2016) at 79). She advised Mr. Maenhout not to make any decisions on the litigation until she returned from a trip on December 10 or 11. (RP (Jan. 19, 2016) at 79).

However, on December 2, Mr. Maenhout was told by the News Tribune that the case had settled. (RP (Jan. 19, 2016) at 80). He then spoke with Mr. Jolley on December 2 or 3 and stated that he did not want to settle because of new information that had been uncovered in further investigating the matter. (RP (Jan. 19, 2016) at 80).

Notably, upon learning that the trial court had sanctioned Appellants based on his testimony, Mr. Maenhout submitted a Declaration to the trial court that clarified that when he testified in January 2016 regarding his recollection of a November 25, 2015, conversation, he was mistaken. (CP at 362-363). In fact, Mr. Maenhout recalled that on November 25, he told Mr. Jolley that he wanted to think about the settlement over the holiday weekend, and that it was not until December 3

that he decided that he did not want to settle the litigation. (CP at 362-363).

Mr. Maenhout also confirmed that he continued to discuss release language with Mr. Jolley after November 25, which is consistent with his testimony during the Evidentiary Hearing, and also confirms that he had not rejected a settlement on November 25. (CP at 362-363).

4. Plaintiff's Motion To Enforce Settlement

On December 10, Plaintiff filed a Motion to Enforce Settlement. (CP at 16-21). On December 22, the trial court denied Plaintiff's Motion to Enforce Settlement, finding that "[t]here exists an issue of material fact over the existence and terms of the purported settlement." (CP at 112-114). The trial court set an evidentiary hearing for January 19, 2016. (CP at 112-114).

Plaintiff's Motion to Enforce Settlement proceeded to an evidentiary hearing on January 19, 2016. (RP (Jan. 19, 2016); CP at 200-211). Following the evidentiary hearing, the trial court denied Plaintiff's Motion and made certain findings of fact. (CP at 200-211).

Specifically, the trial court found as follows:

[D]efense counsel intentionally misled plaintiff's counsel about their client's intentions [regarding payment of \$250,000.00]. It may be that they thought they would be able to convince Mr. Maenhout to come around to paying \$250,000 given that he had previously offered to pay

\$210,000. But the fact remains that they gave [Plaintiff] and her attorneys the very real impression (albeit false) that a deal had been reached at that monetary level. . . . The emails from defense counsel to the plaintiff's attorneys consistently hedged on whether a final deal had been accepted by Mr. Maenhout, despite the misimpression they gave plaintiff's counsel. Thus, the Court reluctantly finds that the dollar amount of the proposed settlement agreement is a material term and [Defendant] never accepted [Plaintiff's] offer to settle the two cases for \$250,000.

(CP at 209).

Despite finding that Defendant's counsel had "consistently hedged" to Plaintiff's counsel on whether Mr. Maenhout had accepted the settlement, the trial court requested briefing from the parties on the issue of whether sanctions should be imposed against Defendant's counsel for "intentionally misleading" Plaintiff's counsel to believe that Defendant had agreed to payment of \$250,000. (CP at 209-210). Thus, while "reluctantly" finding that Defendant had not agreed to a settlement, the trial court sua sponte requested briefing on whether it "should impose sanctions against defense counsel for their intentionally misleading conduct." (CP at 209-210).

5. Appellants Offered A Reasonable And Good Faith Reason For The Manner In Which They Proceeded With Settlement Negotiations

Upon learning that the trial court had found that Appellants acted in bad faith and was considering an order of sanctions against Appellants, Mr. Jolley and Mr. Estes submitted declarations to the trial court that explained their reasons for the manner in which they proceeded with settlement negotiations. (CP at 298-312).

Specifically, Mr. Jolley did not intend to mislead Mr. Diamondstone. (CP at 298-299 ¶4). Instead, he recognized that the parties would not be able to reach a settlement if they could not agree on the settlement language. (CP at 298-299 ¶4). Settlement discussions occurred over the Thanksgiving holiday and Mr. Jolley did not believe that he needed to match Mr. Diamondstone "email for email and refut[e] every email [Mr. Diamondstone] sent." (CP at 299 ¶5). In fact, the evidence before the trial court at the Evidentiary Hearing confirmed that Mr. Jolley repeatedly informed Mr. Diamondstone that Mr. Maenhout had not approved the settlement. (See, supra, Section III(B)(2) at pp. 8-12).

Mr. Estes confirmed that he advised Mr. Diamondstone on November 24 that Defendant would not be in a position to respond to Plaintiff's settlement demand until November 30, at the earliest. (CP at

303 ¶2). As such, he was surprised to learn that Mr. Diamondstone had contacted Mr. Jolley the next day. (CP at 303 ¶2). However, after his November 24 email to Mr. Diamondstone, Mr. Estes had virtually no involvement in settlement negotiations. (CP at 303-304 ¶3).

Like Mr. Jolley, Mr. Estes felt that the parties could not discuss a settlement amount until they first agreed on settlement language. (CP at 304 ¶5).

Notably, in their briefing to the trial court on sanctions, Respondents did not attempt to explain how the facts supported a finding of bad faith, or how Appellants' conduct amounted to bad faith. (CP at 212-279). Respondents did not refute the declarations of Mr. Jolley and Mr. Estes in their briefing. (CP at 212-279). They did not dispute the fact that, in litigation such as this, negotiating settlement language first is a prudent way to proceed with settlement negotiations. (CP at 212-279). They did not claim to have been misled by Appellants. (CP 212-279). Instead, when asked by the trial court to brief *whether* it should impose sanctions against Appellants, they focused their briefing on *the amount* of sanctions that should be imposed.

6. The Trial Court Imposed Sanctions In The Amount Of \$32,000 Against Appellants

After the trial court requested briefing from the parties on the issue of sanctions, and without an opportunity for oral argument, the court ordered Appellants to pay sanctions to Respondents in the amount of \$32,000. (CP at 332-337).

In ordering payment of sanctions, the trial court noted that the sole basis for imposition of sanctions was under its inherent authority to maintain order in the proceedings before it, rejecting CR 11, 27, and 37 as a basis for sanctions. (CP at 333). The trial court further acknowledged that it may award attorney fees on equitable grounds when it finds that a party has acted in bad faith. (CP at 333).

The trial court also rejected Appellants' contention that their approach was to negotiate the language of the non-monetary terms before negotiating payment. (CP at 334). The trial court found that this version of events was inconsistent with the emails between the attorneys and that it did not explain why Defendant's counsel sent Plaintiff's counsel a draft settlement agreement containing the \$250,000.00 settlement amount. (CP at 334). The trial court then went on to state:

If, as the risk manager testified, [Defendant] was **unwilling** to make such a payment, why in the world would defense counsel prepare and send to plaintiff's counsel a draft

containing this very provision? The Court can reach no conclusion other than that defense counsel acted in bad faith.

(CP at 334 (emphasis in original)).

The trial court then awarded sanctions in the amount of \$32,000, the equivalent of 80 total hours of work at an hourly rate of \$400.00, for failing to disclose Mr. Maenhout's November 25 rejection of the settlement offer and for their misleading conduct between November 25 and December 3. (CP at 335).

IV. STANDARD OF REVIEW

Trial courts may impose sanctions under various court rules. State v. Gassman, 175 Wn.2d 208, 210-11, 283 P.3d 1113 (2012); see, e.g., CR 11, 26(g); CrR 4.7(h)(7). "Sanctions, including attorney fees, may also be imposed under the court's inherent equitable powers to manage its own proceedings." Gassman, 175 Wn.2d at 211 (citing In re Recall of Pearsall–Stipek, 136 Wn.2d 255, 266-67, 961 P.2d 343 (1998)).

Moreover, courts "are at liberty to set the boundaries of the exercise" of that inherent power to manage its own proceedings. Gassman, 175 Wn.2d at 211. "Trial courts have the inherent authority to control and manage their calendars, proceedings, and parties." Gassman, 175 Wn.2d at 211 (citing Cowles Pub'g Co. v. Murphy, 96 Wn.2d 584, 588, 637 P.2d 966 (1981)).

In deciding whether an award of sanctions under a trial court's inherent authority was appropriate, the courts apply an abuse of discretion

standard. State v. S.H., 102 Wn. App. 468, 473, 8 P.3d 1058 (2000). It is an abuse of discretion to award attorney fees as sanctions where the trial court finds only careless action by an attorney. Burt v. Washington State Dep't of Corr., 191 Wn. App. 194, 210 n.3, 361 P.3d 283 (2015). A court abuses its discretion in imposing sanctions when it bases its decision on an erroneous assessment of the evidence. Mark Indus., Ltd. v. Sea Captain's Choice, Inc., 50 F.3d 730, 732 (9th Cir. 1995) (quoting Cooter v. Gell, 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)).⁶

Thus, the Court must determine whether the trial court abused its discretion in imposing sanctions without clear evidence of bad faith or conduct tantamount to bad faith.

V. ARGUMENT

A. The Trial Court Abused Its Discretion In Awarding Sanctions Against Appellants

1. Appellants Were Not Afforded Due Process

Due process requires the court to provide the party against whom sanctions are contemplated notice and an opportunity to be heard.

Weissman v. Quail Lodge, Inc., 179 F.3d 1194, 1198 (9th Cir. 1999). The

⁶ Washington courts base their jurisprudence in assessing sanctions orders on federal case law. Gassman, 175 Wn.2d at 211.

party claiming attorney fees as a sanction has a "significant burden" to establish bad faith. Burt, 191 Wn. App. at 210 n.3.

Here, the trial court took evidence during the Evidentiary Hearing on Plaintiff's Motion to Enforce Settlement, which it ultimately denied. Based upon that evidence, the trial court concluded that Appellants "intentionally misled" Plaintiff's counsel about their client's intentions. (CP at 209). Relying on that finding, the trial court imposed sanctions against Appellants "for their misleading settlement negotiations[.]" In denying Appellants' Motion for Reconsideration and rejecting Appellants' due process challenge, the trial court stated,

The Court rejects defense counsel's due process challenge. One of the defense attorneys took the stand and testified under oath about statements made to him by his client on various dates during the negotiations. Whenever an attorney takes the stand to offer testimony, he should understand that his credibility is at issue. Indeed, the sole reason the Court ordered an evidentiary hearing was because the attorneys disputed what was said to whom and when. Credibility was always an issue in the proceeding and counsel knew or should have known it. (CP at 533).

The trial court based its credibility determination on the evidence submitted during the Evidentiary Hearing on Plaintiff's Motion to Enforce, and rejected the evidence submitted when Appellants briefed the sanctions issue. (CP at 334). The trial court determined that Appellants had

engaged in bad faith litigation conduct before providing Appellants with notice or an opportunity to be heard on the issue.

The trial court's actions are similar to those of the court in Weissman. In Weissman, the District Court held a hearing to address an attorney's objections to a proposed class action settlement, and thereafter sanctioned that attorney for filing the objections. Weissman, 179 F.3d at 1198 n.4 (9th Cir. 1999). In finding that the District Court had not afforded the attorney due process, the Ninth Circuit found that it was improper for the District Court to base its sanctions award on a hearing in which the issue under consideration was the propriety of the attorney's objections. Id. Here, while the trial court may have ordered briefing on the issue of sanctions, the trial court had already made up its mind regarding the imposition of sanctions before it requested briefing. It was not a matter of if sanctions would be imposed, but how much.

This is particularly clear where, as here, Respondents made no attempt in their briefing to establish bad faith. (CP at 212-215). While presenting some case law that addressed the bad faith standard, Respondents did not present any argument that demonstrated how the specific facts raised in the Evidentiary Hearing were sufficient to find bad faith or conduct tantamount to bad faith. (CP at 212-215). Instead, Respondents glossed over this issue. (CP at 212-215). It was

Respondents' burden to establish the requisite conduct, and they made no attempt to do so. Burt, 191 Wn. App. at 210 n.3.

In Geonerco, Inc. v. Grand Ridge Properties IV, LLC, the court noted that due process is required both in determining whether bad faith exists and in assessing sanctions. Geonerco, Inc. v. Grand Ridge Properties IV, LLC, 159 Wn. App. 536, 544, 248 P.3d 1047 (2011), as corrected (Feb. 1, 2011), as amended on reconsideration (May 3, 2011) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 50, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). The Geonerco court remanded to the trial court the determination of whether the party to be sanctioned had engaged in bad faith litigation conduct. Id. at 545. However, in doing so, the court cautioned that the trial court "may not issue such sanctions without affording [the party] notice and an opportunity to be heard on the issue." Id.

The issue addressed at the Evidentiary Hearing—whether Defendant had accepted Plaintiff's settlement offer—required a different set of evidence than any fact to be established in determining bad faith conduct. By basing its decision on evidence taken at the Evidentiary Hearing, without giving Appellants a meaningful opportunity to respond to the trial court's charge of bad faith, the trial court deprived Appellants of due process.

B. Only A Finding Of Bad Faith Or Conduct Amounting To Bad Faith Will Support An Award Of Sanctions

In imposing sanctions under its inherent authority, the trial court's powers are limited and must be exercised with restraint. Chambers, 501 U.S. at 42. In cases in which the trial court awarded sanctions pursuant to its inherent authority, a sanction of attorney fees must be based on a finding of conduct that was at least tantamount to bad faith. Gassman, 175 Wn.2d at 211; S.H., 102 Wn. App. at 475-76.

"In this context, 'the definition of *bad faith* is fairly narrow and places a significant burden on the party claiming attorney fees.'" Burt, 191 Wn. App. at 210 n.3 (emphasis in original) (quoting 14A Karl B. Tegland, Washington Practice: Civil Procedure § 37:14, at 672-73 (2d ed. 2009)). "[C]ourts may assess attorney fees and an exercise of inherent authority only where a party engages in willfully abusive, vexatious, or intransigent tactics designed to stall or harass." Gassman, 175 Wn.2d at 211 (citing Chambers, 501 U.S. at 45-47).

However, even reckless conduct, without more, does not justify sanctions under a court's inherent power. Fink v. Gomez, 239 F.3d 989, 993-94 (9th Cir. 2001). Instead, a sanctions award based on a finding of recklessness requires something more, such as frivolousness, harassment, or an improper purpose. Id.

C. **An Award of Sanctions Must Be Supported By Clear Evidence Of Bad Faith**

While Washington courts and the Ninth Circuit have not yet decided the standard of proof applicable to a finding of bad faith in the context of sanctions under the court's inherent authority, federal circuits that have decided the issue have held that a court must find bad faith by clear evidence before imposing sanctions under its inherent authority. Lahiri v. Universal Music & Video Distribution Corp., 606 F.3d 1216, 1219 (9th Cir. 2010) (noting that the Ninth Circuit has not resolved the issue); Ali v. Tolbert, 636 F.3d 622, 627 (D.C. Cir. 2011) (noting that to support a sanction under the court's inherent authority, the court must make a finding of bad faith by clear and convincing evidence); DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 136 (2d Cir. 1998) (holding bad faith must be shown by clear evidence or harassment, delay, or other improper purpose); Autorama Corp. v. Stewart, 802 F.2d 1284, 1288 (10th Cir. 1986) (holding attorney fees should be awarded only when there is clear evidence that the misconduct was in bad faith and pursued for harassment or delay).

Similarly, in the context of sanctions under CR 11, Washington courts have held that sanctions are available only when the evidence is "patently clear." Skimming v. Boxer, 119 Wn. App. 748, 754-55, 82 P.3d

707 (2004) (holding that the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success); see also, Bldg. Indus. Ass'n of Washington v. McCarthy, 152 Wn. App. 720, 745, 218 P.3d 196 (2009) (quoting Skimming, 119 Wn. App. at 755); Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co., 151 Wn. App. 195, 207-08, 218 P.3d 196 (2009) (quoting Skimming, 119 Wn. App. at 755); Lee ex rel. Office of Grant Cty. Prosecuting Attorney v. Jasman, 183 Wn. App. 27, 71, 332 P.3d 1106 (2014) (quoting Skimming, 119 Wn. App. at 755), aff'd sub nom. Grant Cty. Prosecuting Attorney v. Jasman, 183 Wn.2d 633, 354 P.3d 846 (2015).

D. The Trial Court's Orders Confirm That The Trial Court Did Not Find A Motive Or Intent That Would Support A Finding Of Bad Faith

When the trial court ordered Appellants to pay sanctions in the amount of \$32,000 it did not find a motive that would support a finding of bad faith on Appellants' part. Instead, the trial court stated, "If, as the risk manager testified, Pierce County was **unwilling** to make such a payment, why in the world would defense counsel prepare and send to plaintiff's counsel a draft containing this very provision? The Court can reach no conclusion other than that defense counsel acted in bad faith." (CP at 334) (emphasis in original).

However, that conclusion was based on the trial court's assessment that there was "no other conclusion" to reach. Even then, the trial court's own words belie that conclusion.

Specifically, in ruling on Plaintiff's Motion to Enforce Settlement, the trial court made various findings of fact. In making those findings of fact, the trial court acknowledged that Appellants may have "thought they would be able to convince Mr. Maenhout to come around to paying \$250,000 given that he had previously offered to pay \$210,000." (CP at 209). This motive, suggested by the trial court, does not support a finding of bad faith, but instead suggests that Appellants reasonably believed that the manner in which they approached negotiations would result in a resolution of the underlying litigation.

Neither the trial court's Order denying the Motion to Enforce Settlement nor its Order imposing sanctions against Appellants made a determination of intent sufficient to support a finding of bad faith. See, e.g., Fink, 239 F.3d at 993-94 (holding that a sanctions award based on a finding of recklessness requires frivolousness, harassment, or an improper purpose).

As such, the trial court's award of sanctions against Appellants was an abuse of discretion as the trial court did not find a level of intent sufficient to constitute bad faith or conduct tantamount to bad faith.

E. **The Trial Court's Finding Of Bad Faith Was Based On An Erroneous Assessment Of The Evidence**

1. **The Trial Court Focused On One Aspect Of Mr. Maenhout's Testimony, Which Was Contradicted By The Bulk Of His Own Testimony**

A court abuses its discretion in imposing sanctions when it bases its decision on an erroneous assessment of the evidence. Mark Indus., Ltd., 50 F.3d at 732 (quoting Cooter, 496 U.S. at 405).

Here, the trial court focused on Mr. Maenhout's testimony that he told Mr. Jolley that he did not want to settle for \$250,000.00, and in fact did not want to settle at all. (CP at 334 ("If, as the risk manager testified, [Defendant] was **unwilling** to make such a payment, why in the world would defense counsel prepare and send to plaintiff's counsel a draft containing this very provision? The Court can reach no conclusion other than that defense counsel acted in bad faith.") (emphasis in original)).

However, as discussed above, Mr. Maenhout's testimony confirmed that settlement was not foreclosed on November 25. On November 25, Mr. Maenhout spoke with Mr. Jolley regarding concerns he had about the settlement language that was being proposed. (RP (Jan. 19, 2016) at 75-76). He ultimately approved amended settlement language, which he reviewed in an email, because it removed a concern regarding

pointing the finger at the Sheriff's Department. (RP (Jan. 19, 2016) at 76-77). While he was aware that Defendant's counsel was working on a release, he was not aware of a specific dollar amount to be included in the release. (RP (Jan. 19, 2016) at 82).

Prior to Thanksgiving, he also spoke with the County Executive and discussed with her that he had concerns regarding the settlement language. (RP (Jan. 19, 2016) at 79). She advised him not to make any decisions on the litigation until she returned from a trip on December 10 or 11. (RP (Jan. 19, 2016) at 79).

However, on December 2, Mr. Maenhout was told by the News Tribune that the case had settled. (RP (Jan. 19, 2016) at 80). He then spoke with Mr. Jolley on December 2 or 3 and stated that he did not want to settle because of new information that had been uncovered in further investigating the matter. (RP (Jan. 19, 2016) at 80).

Mr. Maenhout's testimony contradicts the short portion that the trial court relied on in imposing sanctions. Yet, the trial court did not address any of this contradictory testimony in its sanctions order. (CP at 332-337). It would be nonsensical for Mr. Maenhout to continue reviewing and discussing settlement language after having decided that he did not want to settle. However, the trial court made no reference to this testimony in its Order imposing sanctions, and did not attempt to weigh

the competing conclusions that this testimony supports in its Order. (CP at 332-337).

In conclusion, the trial court erroneously assessed the evidence, including Mr. Maenhout's testimony, by drawing conclusions unsupported by the evidence as a whole. Thus, the trial court abused its discretion by imposing sanctions against Appellants based on its erroneous assessment of the evidence. See Mark Indus., Ltd., 50 F.3d at 732 (quoting Cooter, 496 U.S. at 405).

2. The Evidence Before The Trial Court Showed That Appellants' Transmission Of A Draft Agreement Was At Respondents' Request

Mr. Diamondstone indicated that it was Mr. Jolley's transmission on December 2 of a draft settlement agreement that led Plaintiff's counsel to believe that the parties had reached a settlement. (CP at 103-105 ¶2). However, it was Mr. Diamondstone who requested the draft agreement on November 30, and specifically requested that Mr. Jolley send it to him before Mr. Maenhout would have an opportunity to review it, despite knowing that Defendant had not agreed to all material terms. (Ex. 10 ("Please send me the final settlement document(s) that you wish Ms. Dalsing to sign, with the understanding that Mr. Maenhout will approve them, tomorrow.")).

While Mr. Diamondstone may have wanted to expedite Plaintiff signing the settlement agreement, he acknowledged that Defendant had not agreed to all material terms when he requested a copy of it. Mr. Jolley's inclusion of the \$250,000 settlement amount in the draft agreement did not mislead Mr. Diamondstone, as he knew, and acknowledged, that Mr. Maenhout would not make a final decision until December 10 or 11. (Ex. 14; Ex. 15).

Moreover, it was not unreasonable for Mr. Jolley to transmit a draft settlement agreement that included the \$250,000 amount. In fact, the trial court acknowledged a negotiation strategy under which that act was reasonable and geared toward reaching a resolution, stating, "It may be that they thought they would be able to convince Mr. Maenhout to come around to paying \$250,000 given that he had previously offered to pay \$210,000. (CP at 209).

Mr. Jolley's act of sending Mr. Diamondstone a draft settlement agreement was not in bad faith, done for an improper purpose, or intended to harass, but was instead at Mr. Diamondstone's specific request.

3. The Evidence Before The Trial Court Confirmed That Appellants "Repeatedly Hedged" On Whether Mr. Maenhout Had Accepted The Settlement

In denying Plaintiff's Motion to Enforce Settlement, the trial court found that Appellants "repeatedly hedged" on whether Mr. Maenhout had accepted the settlement. (CP at 209). In fact, the evidence before the trial court confirmed that Appellants made it abundantly clear to Plaintiff's counsel that Mr. Maenhout had not approved the settlement, that Plaintiff should not expect a final response until December 11, and that Plaintiff's counsel knew that the settlement had not been accepted by Defendant. (See, supra, Section III(B)(2), at pp. 8-12).

As discussed above, Appellants informed Mr. Diamondstone on November 24, November 27, November 28, November 30, December 1, and December 2 that Defendant had not yet agreed to the settlement. (RP (Jan. 19, 2016) at 46-49, 112-113, 127-128; Ex. 9, 11, 14, 15, 29; CP at 103, 484; see, supra, Section III(B)(2), at pp. 8-12). On December 1, Mr. Jolley informed Mr. Diamondstone that Mr. Maenhout would not make a decision until December 11. (RP (Jan. 19, 2016) at 127; Ex. 29; see, supra, Section III(B)(2), at pp. 8-12).

Thus, the evidence before the trial court confirmed that Appellants repeatedly informed Plaintiff's counsel that the settlement had not been approved.

4. The Sanctions Award Was An Abuse Of Discretion Because Respondents Were Never Misled

Additionally, the sanctions award was an abuse of discretion because Respondents were never misled by Appellants. Conduct that is merely careless and does not result in opposing counsel being misled is insufficient to support an award of sanctions under the court's inherent authority. Gassman, 175 Wn.2d at 213.

In Gassman, a prosecuting attorney moved at the last minute to change the date of the alleged crime at issue in the underlying case. Id. at 209-10. The defendant's counsel objected on the grounds that the defendant had an alibi for the original date of the alleged crime and had prepared alibi defenses on that basis. Id. The court granted the State's motion to amend and continued the trial. Id. However, in doing so the court called the State's conduct "careless" and awarded \$2,000 to each defense counsel as attorney fees for the additional time they were required to spend dealing with the alibi issue. Id. The appellate court upheld the sanctions award and the Washington Supreme Court granted the State's petition for review.

Although the Washington Supreme Court held that the trial court does not need to make an express finding of bad faith in order to award a sanction of attorney fees pursuant to its inherent authority, the Court held that the decision to issue sanctions must be based on a finding of conduct that was tantamount to bad faith. Id. at 211.

In that case, the trial court described the State's behavior as "careless" but not "purposeful." Id. at 213. Furthermore, defense counsel conceded during oral argument various facts, including that he was aware of a possible change of date, and that he failed to file a notice of an alibi defense. Id. This, together with the trial court's description of the State's behavior as careless, led the Washington Supreme Court to find that the record provided no basis for the court to infer bad faith or conduct tantamount to bad faith. Id.

The Ninth Circuit has also held that careless behavior that does not mislead *cannot* form a basis for sanctions under the court's inherent power. Yagman v. Republic Insurance, 987 F.2d 622 (9th Cir. 1993) ("Yagman II"). In Yagman II, the attorney sought to recuse the trial judge from his case, submitting a statement that declared, "Judge Real sued me *personally*[" Id. at 627. The court interpreted his statement to mean that the judge had brought a private legal action against the attorney, when in fact the judge had simply filed a petition for certiorari in the Supreme

Court that sought review of an opinion vacating a prior sanctions order and recusing Judge Real from another case involving Mr. Yagman. Id. at 628.

The district court held that Mr. Yagman's failure to clarify his statement was in bad faith and therefore sanctionable. Id. On appeal, the Ninth Circuit disagreed. While the Ninth Circuit indicated that Mr. Yagman's statement that Judge Real had sued him personally might have been careless, there was no indication in the record that it was intended to mislead or made in bad faith. Id. at 628-29. This was because, "taken as a whole, the motion which contained the correct citation to the petition for certiorari was not actually misleading." Id. at 628.

Similarly, here, the evidence, taken as a whole, does not suggest that Appellants attempted to mislead Plaintiff's counsel in any way, or that Plaintiff's counsel was in fact misled.

Appellants repeatedly cautioned Plaintiff's counsel that the settlement had not yet been approved by Defendant. While Mr. Diamondstone stated that Mr. Jolley's December 2 email led him to believe that the parties had reached a settlement, his subsequent email to Mr. Jolley suggests otherwise. (CP at 103-105 ¶2, Ex. 15). Specifically, Mr. Jolley sent a draft settlement agreement at 3:01 p.m., and just five hours later Mr. Diamondstone acknowledged that Mr. Maenhout would

not reach a final decision until he conferred with the county executive on December 10. (Ex. 14; Ex. 15).

Regardless of whether or not Respondents believed that Defendant had agreed to pay \$250,000, they were aware that Defendant had not agreed to a settlement because they knew that Defendant had not agreed to all material terms.

As in Gassman, Respondents were never misled into believing that the parties had reached a settlement. There was nothing in the record to suggest that Appellants told Mr. Diamondstone that he could expect a final decision before December 10. Nothing in the record suggests that Appellants made any statements between December 2 (when Mr. Diamondstone acknowledged that Defendant would not make a settlement decision until December 10), and December 3, when Mr. Jolley informed Mr. Diamondstone that settlement negotiations had failed, that would have led Plaintiff or her counsel to believe that Defendant had agreed to the settlement.

While in hindsight Appellants might have informed Plaintiff's counsel that both the release language and the settlement amount had not yet been approved, it was reasonable for Appellants to expect that the multiple times they informed Plaintiff's counsel that the settlement itself had not yet been approved should have been enough, particularly where,

as here, Plaintiff's counsel repeatedly acknowledged that the matter had not settled.

The trial court rejected the evidence submitted by Appellants explaining why, in this litigation, it was important to first come to an agreement on the settlement language, as the language had previously operated as a barrier to settlement. (RP (Jan. 19, 2016) at 46-47). However, the trial court acknowledged that the reason for Appellants to not inform Plaintiff's counsel that the settlement amount had been rejected was "unclear." (CP at 208-209). An "unclear" reason is not sufficient to justify an award of sanctions. Burt, 191 Wn. App. at 209 n.3.

Based on the above, the evidence before the trial court was insufficient to find bad faith or conduct tantamount to bad faith. As such, the trial court's award of sanctions was an abuse of discretion and must be reversed.

5. Plaintiff Unreasonably Proceeded With Her Motion To Enforce Settlement

While Plaintiff may have chosen to proceed with an unsuccessful Motion to Enforce, she did so despite the fact that her attorneys knew that Defendant would not make a decision until December 10, knew as late as 8:00 p.m. on December 2 that Defendant had not reached a decision on the settlement, and also knew, on December 3, that Defendant had rejected the

settlement. (RP (Jan. 19, 2016) at 39-40; Ex. 15; CP at 484). Despite this knowledge, Plaintiff filed her Motion on December 10, proceeding with her unsuccessful Motion at her own peril, knowing full well that Defendant had never agreed to the settlement.

It was not reasonably necessary for Plaintiff to file her Motion to Enforce Settlement. Plaintiff should not be rewarded for proceeding with a Motion that she knew or should have known would be unsuccessful, and that was ultimately denied. See, e.g., Carlson v. Lake Chelan Cmty. Hosp., 116 Wn. App. 718, 737, 75 P.3d 533 (2003) ("When choosing a sanction, the court may consider the wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate."). Her failure to consider the merits of her Motion before filing it, proceeding to a Motion hearing, and then proceeding to an Evidentiary Hearing should not be grounds for shifting her fees to Appellants.

Given the fact that there is no evidence that Respondents were ever under the mistaken belief that the case had settled, but chose to prepare the Motion even before Appellants advised Plaintiff that the settlement had been rejected, the award of sanctions was an abuse of discretion.

F. The Trial Court Abused Its Discretion In Sanctioning Mr. Estes

In sanctioning Appellants, the trial court awarded "Plaintiff the sum of \$32,000 against defense counsel as a sanction for their misleading settlement negotiations[.]" However, the evidence before the trial court showed that Mr. Estes had no involvement in settlement negotiations after November 24, and even on that date his only involvement was to ask for clarification regarding Plaintiff's settlement offer and then to advise Plaintiff's counsel that they should not expect a response until after the Thanksgiving holiday. (Ex. 8; Ex. 19).

Under no circumstances could Mr. Estes' emails be viewed as misleading. There was no evidence to suggest that Mr. Estes acted in bad faith or that his conduct was tantamount to bad faith. As such, it was an abuse of discretion for the trial court to sanction Mr. Estes.

G. The Trial Court's Award Of \$32,000 Was Unreasonable And Not Supported By The Evidence

The trial court awarded Plaintiff sanctions in the amount of \$32,000, the equivalent of 80 hours of her attorneys' work at a rate of \$400.00 per hour. (CP at 335 ("The Court finds that 20 hours of Mr. Diamondstone's time and 60 hours of Mr. Wooley's [sic] time, both

computed at an hourly rate of \$400 is an appropriate monetary sanction in this case.")).

While the courts have not set a specific rule for calculating sanctions based on attorney fees, the amount of sanctions and the manner in which they are imposed must be consistent with the purpose and directive of the authority on which the sanctions are based. Matter of Yagman), 796 F.2d 1165, 1183 (9th Cir. 1986) (amended on other grounds by In re Yagman, 803 F.2d 1085 (9th Cir. 1986)) ("Yagman I").

Furthermore, when the sanctions award is based on attorney fees and expenses, the court must inquire into the reasonableness of the claimed fees and recovery should not exceed those fees and expenses that were reasonably necessary to resist the offending action. Id. at 1184-85.

To substantiate Plaintiff's claim for sanctions, Plaintiff's counsel submitted billing records that purportedly identified work performed related to the Motion to Enforce as well as a Motion to Compel attendance at depositions. (CP at 238-239, 267-273). However, the billing records that Plaintiff's counsel submitted were not sufficiently detailed to provide an adequate basis for the trial court to determine the fees incurred in bringing Plaintiff's unsuccessful Motion to Enforce.

As noted in Plaintiff's brief regarding sanctions, Plaintiff sought sanctions against Appellants for both the unsuccessful Motion to Enforce

as well as an unsuccessful Motion to Compel. (CP at 212-215). The trial court denied Plaintiff sanctions for fees incurred related to the Motion to Compel. (CP at 333, n.2). However, despite denying sanctions for fees incurred related to the Motion to Compel, the trial court did not reduce Plaintiff's claimed sanctions to reflect the denial of those fees. (CP at 335). Instead, the only reduction by the trial court was a reduction to reflect the fact that Plaintiff's Motion to Enforce Settlement was ultimately unsuccessful. (CP at 335).

Additionally, the bulk of the billing records failed to specify whether time was charged in relation to the Motion to Enforce or in relation to an unsuccessful Motion to Compel. (CP at 237-240, 267-273). For instance, on December 17, Mr. Woodley billed 1.9 hours to "Rev Emails re Case Law; incorp auth." (CP at 268). He billed 6.1 hours on December 10 to "Revise Mtn & Declaration & TT FD times 3[.]" (CP at 267). On January 30, 2016, he billed 1.3 hours to "Make Revisions To Documents[.]" (CP at 272). While the trial court credited Mr. Woodley with 60 hours of time related to the Motion to Enforce, the above examples demonstrate just how vague and non-specific the billing records were.

Moreover, the accuracy of the billing records is questionable, as Mr. Diamondstone's billing records suggest that he began preparing the

Motion to Enforce on December 2, the day before Appellants informed Respondents that Defendant had rejected the settlement. (CP at 238, Ex. 15).

An award of attorney fees must be based on records that are sufficiently detailed to enable the court to consider all the factors necessary in setting the fees. Henry v. Gill Indus., Inc., 983 F.2d 943, 946 (9th Cir. 1993). In Henry, the Ninth Circuit upheld an award of fees where the Plaintiff submitted records that "disclosed the nature of the services rendered in connection with unavailing efforts to obtain discovery, the amount of attorney time so consumed, and the rates at which this time was billed to the client." Id.

In contrast, the bulk of the billing records submitted by Plaintiff did not even disclose whether the time spent was related to the unsuccessful Motion to Enforce or the unsuccessful Motion to Compel. Plaintiff presented the trial court with billing records that were not sufficiently detailed to enable the trial court to determine how much time Plaintiff's counsel spent in connection with the unsuccessful Motion to Compel. Confronted with these vague billing records, the trial court cut Plaintiff's counsel's time from 96.6 total hours to 80 total hours, making no reduction of time for Plaintiff's unsuccessful Motion to Compel. As such, the trial court's award of sanctions in the amount of \$32,000, the

equivalent of 80 hours of time spent on an unsuccessful Motion to Enforce Settlement, was unreasonable and an abuse of discretion.

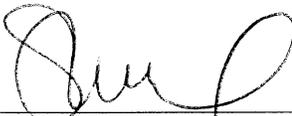
VI. CONCLUSION

After acknowledging that Defendant had not yet agreed to a settlement, Plaintiff proceeded with filing a Motion to Enforce Settlement, which the trial court denied. Despite denying Plaintiff's Motion, the trial court awarded plaintiff \$32,000 in sanctions for the fees incurred in connection with the Motion. The trial court entered this award despite ample evidence that Appellants repeatedly cautioned Plaintiff's counsel to not get ahead of themselves, and that Plaintiff's counsel repeatedly confirmed knowing that Defendant had not approved the settlement between the parties. The trial court's award of sanctions in the amount of \$32,000 was an abuse of discretion, and Appellants respectfully request that the Court vacate the sanctions award.

In the alternative, Appellants respectfully request that the Court remand for an evaluation by the trial court to determine the sufficiency of the billing records offered by Respondents and a reevaluation of the reasonable and necessary amount of attorney fees incurred that are attributable to Appellants' sanctioned conduct.

RESPECTFULLY SUBMITTED this 2nd day of September,
2016.

WOOD, SMITH, HENNING, & BERMAN, LLP



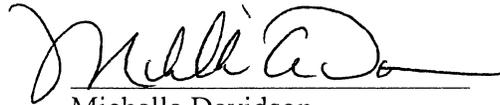
Shannon M. Benbow, WSBA #48761
Of Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned declares under penalty or perjury under the laws of the State of Washington, that on the below date, I caused to be served, via First Class Mail, a true and accurate copy of Brief of Respondents Soleil Real Estate and Burns to the following:

Fred Diamondstone Law Offices of Fred Diamondstone 1218 3 rd Ave., Ste. 1000 Seattle, WA 98101-3290	Gordon Arthur Woodley Woodley Law 10900 N.E. 4 th Street, Suite 2300 Bellevue, WA 98004
---	---

Dated this 2nd day of September, 2016, at Seattle, Washington.



Michelle Davidson
Legal Assistant