101227-6

Court of Appeals No. 82245-4-I
Supreme Court No.

COURT OF APPEALS, DIVISION I, OF STATE OF WASHINGTON

MARJORIE CARROLL, as Personal Representative of the Estate of LAWRENCE W. CARROLL, Deceased, Respondent,

v.

NISSAN MOTOR CO., LTD. and NISSAN NORTH AMERICA, INC., Petitioners,

and

THOMAS J. OWENS, Respondent,

and

AKEBONO BRAKE CORPORATION; HONEYWELL INTERNATIONAL, INC.; and OLYMPIC BRAKE SUPPLY, INC., Defendants.

RESPONDENT THOMAS J. OWENS'S ANSWER TO PETITION FOR REVIEW

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Non-Party Attorney/Respondent is Thomas J. Owens.

II. CITATION TO COURT OF APPEALS DECISION

Carroll v. Akebono Brake Corp., __ Wn. App. 2d __, 514 P.3d 720 (2022).

III. ISSUES PRESENTED FOR REVIEW

The only issue before this Court pertaining to Mr. Owens is whether this Court should deny the Petition for Review of Nissan Motor Co., Ltd. and Nissan North America, Inc. ("Nissan") under RAP 13.4(b)(1) or (4), where:

1. Division I's decision affirming the award of $1,000 in sanctions against Mr. Owens does not conflict with any decision of this Court that would warrant review under RAP 13.4(b)(1); and
2. Division I's decision, which considers the discretionary versus strict vicarious liability for sanctioned attorneys, does not involve an issue of substantial public interest under RAP 13.4(b)(4).

IV. STATEMENT OF THE CASE

Mr. Owens adopts by reference his Statement of the Case in his Brief of Respondent Owens to Division I of the Court of Appeals, a copy of which is attached at Appendix 1.

Notably, Nissan's Petition for Review seeks this Court's review of the sanction against Mr. Owens only as an afterthought. Nissan's 37-page Petition fails to mention Mr. Owens at all until page 34. The petition otherwise focuses exclusively on the adequacy of the sanctions against Ms. Carroll and her pro hac vice attorneys.

V. ARGUMENT

Nissan seeks review under RAP 13.4(b)(1) and (4). Neither applies. No precedent of this Court conflicts with Division I's decision, and this is not a matter of public interest. Nor does Nissan seek review under RAP 13.4(b)(2) or (3).

Division I did not err at all. Nothing in APR 8(b)(ii) mandates strict vicarious liability of Mr. Owens for sanctionable conduct of his pro hac vice co-counsel. Nissan

does not state or even imply the trial court abused its discretion in not awarding vicarious liability if APR 8(b)(ii) permits but does not require the sanctions it urges. Nor does Nissan seek this Court's review of that Division I's interpretation of APR 8(b)(ii) under RAP 13.4(b)(2) or (3).

A. No grounds for review support reviewing Division I's interpretation of APR 8(b)(ii).

Nissan seeks Supreme Court review under RAP 13.4(b)(1) and (4). This Court may grant a petition for review only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> …
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Nissan's petition for review should be denied because it fails to satisfy either basis for Supreme Court review.

Furthermore, nothing in RAP 13.4(b) or in Washington law entitles Nissan to review by this Court simply because it disagrees with the Division I's decision:

> [I]t is a mistake for a party seeking review to make the perceived injustice the focus of attention in the petition for review. RAP 13.4(b) says nothing in its criteria about correcting isolated instances of injustice. This is because the Supreme Court, in passing upon petitions for review, is not operating as a court of error. Rather, it is functioning as the highest policy-making judicial body of the state. ...
>
> The Supreme Court's view in evaluating petitions is global in nature. Consequently, the primary focus of a petition for review should be on why there is a compelling need to have the issue or issues presented decided *generally*. The significance of the issues must be shown to transcend the particular application of the law in question. Each of the four alternative criteria of RAP 13.4(b) supports this view. The court accepts review sparingly, only approximately 10 percent of the time. Failure to show the court the "big picture" will likely diminish the already statistically slim prospects of review.

Wash. Appellate Prac. Deskbook § 27.11 (1998) (italics in original).

1. Division I's holding does not conflict with the precedent of this Court.

Nissan's petition for review cites *Hahn v. Boeing Co.*, 95 Wn.2d 28, 621 P.2d 1263 (1980), as supposedly conflicting with Division I's decision as a ground for review under RAP 13.4(b)(1). There is no such conflict. *Hahn* addresses the standards of a trial court's discretion for **admission** of pro hac vice attorneys. *Hahn* has no precedential value as to liability for the sanctionable **conduct** of a pro hac vice attorney; *Hahn* does not even refer to sanctions. Therefore, *Hahn* and Division I's decision do not conflict. *Hahn* is no basis for this Court to accept review under RAP 13.4(b)(1).

Indeed, to the limited extent *Hahn* is relevant to Mr. Owens's conduct, it weighs against review of the present case. This Court rightly held in *Hahn* that local counsel (here Mr. Owens) must provide only a "reasonable assurance that local rules of practice and procedure will be followed." *Hahn*, 95 Wn.2d at 34. It is inconsistent with *Hahn* that local counsel is strictly vicariously liable when local counsel's duty to assure

good behavior is only a negligence standard. *Hahn*, if relevant here at all, undermines Nissan's argument for strict vicarious liability. This Court should deny review as there is no conflict with precedent.

2. Nissan has not met its burden to show a substantial public interest.

Under RAP 13.4(b)(4), Nissan has the burden of persuading the Court that its petition involves an issue of substantial public interest because "the issue is recurring in nature or impacts a large number of persons." *Wash. Appellate Prac. Deskbook* at § 27.11. No reported Washington Supreme Court decision includes a detailed analysis of the "substantial public interest" criterion of RAP 13.4(b)(4), but this Court weighed what amounts to "public interest" when considering the related question of whether to decide a moot issue:

> When determining the requisite degree of public interest, courts should consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question.

In re Mines, 146 Wn.2d 279, 285, 45 P.3d 535 (2002) (internal quotation marks omitted); *Matter of Dependency of L.C.S.*, __ Wn.2d __, 514 P.3d 644, 648 (2022). Where the Court has directly addressed the "substantial public interest" criterion of RAP 13.4(b)(4), it has used these principles. *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). In *Watson*, the issue was whether a prosecutor's office's delivery of a memo to all members of the bench regarding its decision not to recommend drug offender sentencing alternative (DOSA) sentences was an improper ex parte communication. This Court held that the Court of Appeals' decision was reviewable under RAP 13.4(b)(4) because the ruling (1) could affect every sentencing proceeding involving a DOSA sentence, (2) created confusion and invited unnecessary litigation, and (3) could chill policy actions taken by both attorneys and judges in the future. *Id.*

Nothing of that significance exists here. The three *Watson* factors warrant denying review of this case under RAP

13.4(b)(4). First, this action involves a purely private dispute. Second, there is no need for any authoritative determination, since a trial court still has discretion to find local counsel liable for all, part, or none of the conduct of a pro hac vice attorney. Third, the issue is unlikely to recur. Several conditions must exist for this issue to arise; logically, each condition makes reoccurrence less likely.

Nissan fails to offer any argument to the contrary. Nissan is concerned only with what it believes should be the responsibilities of local counsel. This is merely dissatisfaction with Division I's decision. Mere dissatisfaction with the decision is not a basis for Supreme Court review; if it were, then every decision in the Court of Appeals would be reviewable by this Court as a matter of right.

B. Division I correctly held that APR 8(b) does not mandate strict vicarious liability.

Nissan argued to Division I that the trial court erred by limiting the sanction against Mr. Owens to $1,000 and holding that he was severally liable only. Division I responded to this

argument by holding, "Both because the trial court was not required to hold Owens jointly and severally liable and because the trial court's sanction was reasonably proportional to Mr. Owens's participation in his co-counsel's misconduct, we disagree." *Carroll*, 514 P.3d at 754. Nissan's Petition for Review never states why this holding was in error. Nissan implies that Division I erred in holding that APR 8(b)(ii) did not mandate strict vicarious liability.

1. APR 8(b)'s text does not mandate strict vicarious liability.

APR 8(b)(ii) provides that an attorney admitted in another state may practice "in association with an active lawyer member of the Bar, who shall be the lawyer of record therein, responsible for the conduct thereof, and present at proceedings unless excused by the court or tribunal." Nissan would have this Court interpret the clause "responsible for the conduct thereof" to mean that local counsel is strictly liable for all sanctions against pro hac vice counsel.

Division I rejected Nissan's interpretation and held, "[N]othing in APR 8(b)(ii) requires a trial court to hold a lawyer who is an active member of the Washington bar jointly and severally liable for the misconduct of an attorney for whom he or she has assumed responsibility." Division I followed the plain reading of the rule. APR 8(b)(ii) does not discuss sanctions and does not discuss liability. *Compare* APR 8(b)(ii) (making no mention of sanctions), *with* CR 26(g) ("an appropriate sanction") *and* CR 11 ("an appropriate sanction"). Therefore, APR 8(b)(ii) does not mandate strict vicarious liability for sanctions.

Even if APR 8(b)(ii) mandated strict vicarious liability, which it does not, it would not mandate vicarious liability for local counsel when a pro hac vice attorney engages in discovery misconduct. Nissan urges essentially a sweeping reading of APR 8(b)(ii) that would require that a Washington lawyer's "responsibility" applies to all conduct of pro hac vice counsel, even where, as here, local counsel was unaware of any

misconduct. APR 8(b)(ii). However, this reading misinterprets the rule.

In *Dorsey v. King County*, 51 Wn. App. 664, 670-71, 754 P.2d 1255 (1988), Division I held that APR 8(b)'s indication that Washington counsel is "responsible for the conduct thereof" refers to the "conduct of the trial of an action or proceeding." It follows that misconduct in discovery, as was found here, is not misconduct for which a local counsel would be responsible as it did not occur in a trial or proceeding. Local counsel's role is to provide "reasonable assurance" that the court's rules are followed in court, not to stand as a guarantor for pro hac vice counsel's conduct, or audit discovery to ensure that pro hac vice counsel had not omitted evidence that local counsel was unaware existed. It is plain that APR 8(b)(ii) does not provide local counsel as an insurer against a pro hac vice attorney's misconduct in discovery. Nissan's reading of APR 8(b)(ii) is wrong and inconsistent with precedent.

2. The strict liability that Nissan urges would be inconsistent with the purpose of sanctions.

To find Mr. Owens liable based on strict vicarious liability would be inconsistent with the purpose of sanctions. The purpose of sanctions is "to deter, to punish, to compensate and to educate." *Wash. State Physicians Ins. Exch.& Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993). A trial court has broad discretion to create appropriate remedies absent mandatory authority. *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 316, 202 P.3d 1024 (2009). This broad authority is vested with the trial court, as opposed to appellate courts, because trial courts are better positioned to analyze the circumstances of the alleged violation. *Fisons*, 122 Wn.2d at 339. To overbear on this authority could chill the trial court's willingness to impose sanctions, which should be avoided. *See id.*

By Nissan's interpretation, APR 8(b)(ii) would force the trial court to punish local counsel no matter their diligence, and

even when the local counsel has no knowledge of pro hac vice counsel's errors. Sanctions in these circumstances would not educate, rightly punish, or deter a diligent local counsel – it would instead be grossly unfair. And if, as Nissan alleges, pro hac vice acted intentionally, the unfairness would be all the more pronounced.

Further, strict vicarious liability could chill a trial court's willingness to award sanctions in a pro hac vice situation. It is easy to see how a trial court would be reluctant to sanction a pro hac vice attorney's misconduct when the court knows that a local attorney, however diligent, will be jointly responsible for the tab.

Undermining the broad discretion of trial courts by imposing strict vicarious liability on local counsel will fundamentally change sanctions, run contrary to their purpose, and result in unfair and unintended consequences.

VI. CONCLUSION

Nissan has no plausible basis for Supreme Court review of the sanctions order against Mr. Owens under either RAP 13.4(b)(1) or (4). Division I correctly interpreted APR 8(b)(ii)'s plain language, and Nissan offers zero authority to the contrary. This case presents none of the unusual or extraordinary circumstances that must be present for Supreme Court review. The Court should deny review.

Respectfully submitted this 24th day of October, 2022.

I certify that this memorandum contains 2244 words, in compliance with RAP 18.7.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on October 24, 2022, I caused service of the foregoing pleading on each and every attorney of record herein:

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DATED this 24th day of October, 2022, at Kent, Washington.

__*/s/ Krystal Campbell*_____
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APPENDIX

Appendix 1: Brief of Respondent Owens to Division I of the Court of Appeals

APPENDIX 1

NO. 82245-4-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

MARJORIE CARROLL, as Personal Representative of the Estate of LAWRENCE W. CARROLL, Deceased,
Appellant,

v.

NISSAN MOTOR CO., LTD. and NISSAN NORTH AMERICA, INC.,
Respondents/Cross-Appellants.

and

Thomas J. Owens,
Appellant/Cross-Respondent,

and

AKEBONO BRAKE CORPORATION; HONEYWELL INTERNATIONAL, INC.; and OLYMPIC BRAKE SUPPLY, INC.,
Defendants.

BRIEF OF CROSS-RESPONDENT THOMAS J. OWENS

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I. INTRODUCTION

In ruling on Cross-appellants Nissan Motor Co., Ltd.'s And Nissan North America, Inc.'s (collectively "Nissan") motion for fees and costs, the trial court ordered that cross-respondent Thomas J. Owens[1] be assessed only a $1,000 sanction; in making that ruling, the trial court referred to Mr. Owens's limited role in the case and his justifiable reliance upon co-counsel. Nissan, without any legitimate basis in law or fact, argues that the trial court's discretionary ruling should be overturned and Mr. Owens should be held jointly and severally liable for the larger, $76,477.46 sanction imposed against appellant Marjorie Carroll and her lead counsel, appellants Erik P. Karst and George Kim.

Nissan misstates the record and Mr. Owens's limited role in the case as local counsel. Contrary to Nissan's assertions, the trial court did not enter findings of fact that Mr. Owens

[1] Mr. Owens is no longer an appellant in this case and is only a cross-appellant responding to Nissan's cross-appeal. Mr. Owens, through previous counsel, initially appealed the trial court's order granting Nissan's Motion to Strike Complaint. After the

committed any misconduct. No evidence exists that Mr. Owens committed any misconduct.

Nissan argues that Mr. Owens, by signing and submitting *pro hac vice* applications for Mr. Kim and Mr. Karst, is judicially estopped from denying responsibility for their alleged misconduct. That argument is baseless. Nissan cannot come close to proving the elements of judicial estoppel, a doctrine that Washington courts follow in only extreme circumstances that are absent here. Nissan would have this court impose strict liability on Mr. Owens simply because he signed Mr. Kim's and Mr. Karst's *pro hac vice* applications; such argument is contrary to law and would lead to absurd and grossly unfair results.

This court should affirm the trial court's decision that the sanction award against Mr. Owens would be far less than entered against Mrs. Carroll, Mr. Karst, and Mr. Kim. The trial court was well within its discretion in holding, based on Mr.

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trial court ruled on Nissan's motion for fees against him, Mr. Owens chose not to appeal

Owens's limited role in the case, and his justifiable reliance on his co-counsel, that any sanction imposed against him would be modest.

The trial court's sanction award against Mr. Owens was clearly within its sound discretion and Nissan has shown no legitimate grounds to overturn it. Nissan's contention that Mr. Owens should be held vicariously liable simply by submitting Mr. Kim's and Mr. Karst's *pro hac vice* applications is baseless. Mr. Owens seeks costs and attorney fees against Nissan under RAP 18.9(a) for bringing this frivolous appeal.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Mr. Owens assigns no error to the trial court's decisions.

Issues Pertaining to Assignments of Error

Nissan misstates the issues on appeal. Mr. Owens believes this appeal presents two issues, which are more correctly stated as:

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any of the trial court's rulings.

1. Whether the trial court acted within its broad discretion in entering a $1,000.00 sanction against Mr. Owens where:

A. Mr. Owens reasonably relied on Mr. Karst and Mrs. Carroll when signing her answers to style interrogatories;

B. Mr. Owens had no knowledge of Mr. Carroll's April 2016 autopsy until he received a copy of Nissan's Motion to Strike Complaint, or of any claims filed by or on behalf of Mrs. Carroll with any bankruptcy trust until copies of them were produced by Mr. Karst's office to defense counsel in July 2019;

C. The findings of fact and conclusions of law do not state any specific misconduct against Mr. Owens;

D. Under Washington law, Nissan cannot meet the elements of judicial estoppel;

E. Under Washington law, local counsel is not vicariously liable for the conduct of co-counsel admitted under APR 8(b); and

F. Mr. Owens is not retroactively responsible for the alleged misconduct of co-counsel.

2. Whether this court should award attorney fees and costs against Nissan under RAP 18.9 where:

A. Nissan has presented no legitimate basis for reversal of the trial court's determination on the amount of sanctions against Mr. Owens, which was based upon her recognition of his limited role in the case and his justifiable reliance upon co-counsel;

B. Nissan presented no evidence of misconduct by Mr. Owens;

C. Under Washington law, this court gives great deference to the discretion of the trial court in such rulings; and

D. Nissan claims that Mr. Owens should be judicially estopped from denying liability under APR 8(b) for Mr. Karst and Mr. Kim's alleged misconduct but offers no legitimate basis in law or fact for application of judicial estoppel.

III. STATEMENT OF THE CASE

Nissan's Statement of the Case is selective, incomplete, and inaccurate. The following Statement of the Case sets the record straight.

A. Mrs. Carroll retained Mr. Karst in 2015 to represent herself and her husband's estate.

In December 2015, decedent Lawrence Carroll and his wife Mrs. Carroll retained Mr. Karst, an attorney in Spring, Texas, to investigate a possible lawsuit arising from Mr. Carroll's diagnosis of mesothelioma. CP 649-50. On April 18, 2016, Mr. Carroll died of mesothelioma.

On April 10, 2018, Mrs. Carroll, on behalf of herself and as representative of her husband's Estate, sued Nissan and related other defendants in King County Superior Court alleging the wrongful death of Mr. Carroll resulting from asbestos exposure while working at Nissan repair shops. CP 1-8.

B. Mr. Karst retained Mr. Owens in 2018 to serve as local counsel for Mrs. Carroll's lawsuit.

Mr. Karst retained Mr. Owens to serve as Mrs. Carroll's local counsel shortly before the case was filed in April 2018. CP 657, 784. Mr. Owens had served as local counsel for plaintiffs in asbestos cases many times over fifteen years, including other cases with appellant George H. Kim and the Karst & Von Oiste firm, Mrs. Carroll's lead counsel in this case. *Id*. Mr. Owens's office is located in Seattle, Washington. CP 785. Mr. Kim's office is located in California. *Id.* The main office of Mr. Karst and the Karst & van Oiste firm is located in Texas. *Id*.

As local counsel, Mr. Owens's duties in this and other cases primarily included advising lead counsel regarding local rules and procedures, providing forms of pleadings such as the complaint, style interrogatories, and jury instructions, covering occasional hearings, and editing and filing motions, responses to motions, and other papers with the clerk. CP 658, 784-85.

C. Mr. Owens reasonably relied upon Mr. Karst and his firm to perform a reasonable inquiry of the evidence in preparing Mrs. Carroll's answers to style interrogatories and other responses to discovery; Mr. Owens had no knowledge that any of Mrs. Carroll's answers to style interrogatories were inaccurate or incomplete when he signed them.

In September 2018, Mr. Karst reviewed and approved Mrs. Carroll's answers to Nissan's style interrogatories which were prepared by his office. CP 651, 785. The style interrogatories were thereafter verified by Mrs. Carroll without any changes. CP 785. Unbeknownst to Mr. Owens, these answers omitted information regarding Mr. Carroll's 2016 autopsy, and regarding Mrs. Carroll's bankruptcy trust claims, which alleged that Mr. Carroll had been exposed to shipyard asbestos as a child. CP 651-52, 787-812.

In September 2018, Mr. Owens signed Mrs. Carroll's answers to style interrogatories. CP 785, 806. When Mr. Owens signed Mrs. Carroll's answers to style interrogatories, he had no knowledge that any answer thereto was incomplete or inaccurate. CP 785. Mr. Owens relied upon the attorneys and

staff of Karst & von Oiste to perform a reasonable inquiry of the evidence in preparing Mrs. Carroll's answers to style interrogatories and other responses to discovery. *Id*.

Mr. Karst did not communicate to Mr. Owens or Mr. Kim at any time that an autopsy had been performed. CP 651. Mr. Owens had no knowledge of Mr. Carroll's April 2016 autopsy until he received a copy of Nissan's Motion to Strike Complaint in September 2020. CP 785. Mr. Owens had no knowledge of any claims filed by or on behalf of Mrs. Carroll with any bankruptcy trust until copies of them were produced by Mr. Karst's office to defense counsel in July 2019. *Id*. There is no evidence to the contrary.

D. Mr. Owens never saw Nissan's counsel's December 21, 2018 letter because it was sent to Mr. Owens's old e-mail address.

Nissan points out that its counsel, Virginia Leeper, sent an e-mail to Mr. Owens in December 2018 attaching a letter, requesting that the Estate's counsel preserve any tissue from the

decedent[2]; that such letter was never responded to; that the Estate's counsel has not denied that they did not respond; and that such facts are now a "verity" on appeal. Nissan deploys half-truths to give the court a distorted version of the facts. Nissan fails to point out that this correspondence was sent to Mr. Owens's old AOL e-mail account. CP 785, 816. Two months prior, on October 25, 2018, Mr. Owens had informed Nissan's counsel Virginia Leeper that he no longer uses or monitors his old AOL e-mail account and directed her to use only his Gmail address. CP 785, 813-15. Ms. Leeper acknowledged Mr. Owens's October 25, 2018 e-mail. CP 813. Thereafter, she mistakenly sent the letter to his defunct AOL email address. CP 813. Thus, Mr. Owens was unaware of the existence of this letter until he received Nissan's Motion to Strike Complaint. CP 785. For Nissan to skirt these facts is highly misleading.

[2] This letter, CP 118, was sent two and a half years after Mr. Carroll's autopsy, and thus, even if received, would have had no impact on the case.

E. Nissan incorrectly asserts that the trial court found that Mr. Owens "violated both his supervisory duty over Mr. Karst and engaged in his own violations of CRs 26 and 37 in representing the Estate;" there is no finding that Mr. Owens committed any misconduct, and no evidence of any such misconduct.

On January 19, 2021, the trial court granted Nissan's Motion to Strike Complaint. CP 876-891. On April 1, 2021, the trial court granted Nissan's Motion for the Imposition of Reasonable Attorney Fees and Costs Against Plaintiff Counsel Thomas Owens in the amount of $1,000.00. CP 1373-77. On April 23, 2021, the trial court entered judgment against Mr. Owens in that amount. CP 1379-80.

In its brief, Nissan falsely asserts that the trial court "correctly determined that attorney Owens violated both his supervisory duty over *pro hac vice* attorney Karst and engaged in his own violations of CR 26/37 in representing the Estate, the appropriate sanction for such violation was $1,000 in fees." *Id.* There is no such finding in the trial court's order granting Nissan's Motion to Strike Complaint. CP 876-891. The April

23, 2021 judgment, cited by Nissan in support of its assertion, also says no such thing. *Id*.

Instead, the trial court's order on Nissan's motion for fees against Mr. Owens states:

> Having considered the foregoing, Nissan Motor Co., Ltd.'s and Nissan North America, Inc.'s Motion for the Imposition of Reasonable Attorney Fees and Costs Against as to Plaintiff's local counsel Thomas J. Owens; attorney Owens' limited role in this case; and his justifiable reliance on co-counsel, is GRANTED in the amount of $1,000.00.

CP 1373-77.

Neither the findings of fact in the January 19, 2021 order granting Nissan's Motion to Strike Complaint, nor the order granting Nissan's motion for fees, specify any individual misconduct by Mr. Owens. CP 876-891; 1373-77.

F. Mr. Owens submitted Mr. Kim's *pro hac vice* application without any knowledge of alleged misconduct by him; Mr. Owens submitted Mr. Karst's *pro hac vice* application shortly before the hearing on Nissan's Motion to Strike Complaint.

Mr. Owens submitted Mr. Kim's *pro hac vice* application on August 21, 2019; at that time, Mr. Owens had no knowledge of any alleged misconduct by Mr. Kim. Mr. Owens submitted Mr. Karst's *pro hac vice* application on October 12, 2020, which was four days before the hearing on Nissan's Motion to Strike, CP 715-17, so that Mr. Karst could participate in that hearing if he chose.

IV. SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in determining that only a modest sanction was appropriate for Mr. Owens based upon his minor role in the case and justifiable reliance on co-counsel.

Mr. Owens did not violate CR 26(g) simply by signing Mrs. Carroll's answers to style interrogatories. Those answers were drafted by Mr. Karst's office, reviewed and approved by

Mr. Karst, and verified by Mrs. Carroll. There was nothing in those answers to indicate that any information was missing or inaccurate. Mr. Owens had no knowledge of the bankruptcy claims or autopsy and relied on Mr. Karst and Mrs. Carroll to complete them accurately. The trial court found that Mr. Owens's reliance was reasonable.

The trial court did not find that Mr. Owens personally committed any misconduct, and Nissan has presented no evidence that he committed any misconduct.

Mr. Owens is not vicariously responsible for any alleged misconduct by co-counsel. Nissan cannot meet any of the elements of judicial estoppel. Nissan has failed to provide any legal authority that creates strict liability on a Washington attorney for the misconduct of an out-of-state attorney under APR 8(b), particularly where the Washington attorney is unaware of any such alleged misconduct.

Mr. Owens is entitled to costs and attorney fees against Nissan under RAP 18.9(a) for bringing this frivolous appeal.

Nissan seeks reversal of the trial court's decision on the amount of sanctions against Mr. Owens, which is entitled to a high level of deference, without presenting any proof of misconduct by Mr. Owens. Nissan's argument that he should be held vicariously liable simply because he submitted *pro hac vice* applications for Mr. Kim and Mr. Karst is baseless.

V. ARGUMENT

A. The trial court acted well within its broad discretion in imposing only a modest sanction against Mr. Owens based on his limited role in the case and justifiable reliance on co-counsel.

Reviewing courts employ a highly deferential standard to trial court sanction decisions because trial judges are in the best position to make such decisions. *Wash. State Physician's Ins. Exchange & Ass'n v. Fisons Corp*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) A sanction decision should not be disturbed on appeal absent a clear abuse of discretion; an abuse of discretion is present only when the trial court's decision is manifestly unreasonable, or based on untenable grounds. *Id*.; *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d

1036 (1977); *Teter v. Deck*, 174 Wn.2d 207, 215, 274 P.3d 336 (2012). A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices, based on the facts and applicable legal standard. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1955). A trial court's decision is based on untenable grounds if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Id*. An appellate court "can disturb a trial court's sanction only if it is clearly unsupported by the record." *Burnet*, 131 Wn.2d at 494; *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 583, 220 P.3d 191 (2009)

The trial court awarded $1,000.00 in attorney fees and costs against Mr. Owens. CP 1373-77. The trial court correctly found that Mr. Owens had a limited role in the case and justifiably relied on co-counsel. CP 1379-80. There is no finding by the trial court of misconduct committed by Mr. Owens personally, and no evidence that he committed any misconduct at all. There is no basis to overturn the trial court's

determination that only a modest sanction be entered against him.

B. Mr. Owens did not violate CR 26 by signing Mrs. Carroll's responses to style interrogatories.

CR 26(g) provides that an attorney's signature on a response to discovery requests constitutes a certification that he or she has read the response, and that to the best of his or her knowledge, information and belief formed after a reasonable inquiry is consistent with the discovery rules, not interposed for any improper purpose, and not unreasonable or unduly burdensome or expensive given the needs of the case. Nissan contends that Mr. Owens violated CR 26(g) simply by signing Mrs. Carroll's answers to style interrogatories. However, the trial court made no such finding, and Mr. Owens did not violate such rule. CP 876-91, 1373-77.

Mr. Owens had no knowledge that any of Mrs. Carroll's answers to style interrogatories were inaccurate or incomplete when he signed them, and there is no evidence to the contrary.

The record shows that the answers were prepared by Mr. Karst's office, and were verified without any changes by Mrs. Carroll. CP 651, 785. There was nothing on the face of Mrs. Carroll's answers to style interrogatories that would have alerted Mr. Owens that any answer was inaccurate or incomplete. Mrs. Carroll's answers to style interrogatories included 40 questions. CP 787-812. None of the answers appeared to be inaccurate or incomplete, and Mr. Owens had no knowledge that they were in fact inaccurate or incomplete. CP 651. There is no evidence to the contrary, and the trial court found no basis that Mr. Owens violated CR 26(g) or any other discovery rule.

Nissan relies on *Miller v. Badgley*, 51 Wn. App. 285, 302, 753 P.2d 530 (1988), to argue that an attorney's "blind reliance on a client will seldom constitute a reasonable inquiry." However, the Court of Appeals in *Miller* also held that whether or not a reasonable inquiry has been made depends on the circumstances in a particular case. *Id.* The Court of Appeals

also did not address whether it is reasonable to rely on co-counsel prior to providing a signature. The Court of Appeals found that courts should consider whether "a signing attorney accepted a case from another member of the bar or forwarding attorney." *Id.*

The Advisory Committee Notes to Fed. R. Civ. P. 26(g), which is virtually identical to and the basis for CR 26(g), state that, in making a reasonable inquiry, "[t]he attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances." *Fisons,* 122 Wn.2d at 341. (CR 26(g) parallels Fed. R. Civ. P. 26(g), and Washington courts may look to federal interpretations); *Clipse v. State*, 61 Wn. App. 94, 98, 808 P.2d 777 (1991) (citing Advisory Committee Notes).

"The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading … was submitted." *Bryant v. Joseph Tree, Inc*., 119 Wn.2d 210, 220,

829 P.2d 1099 (1992) (discussing CR 11); *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 531, 20 P.3d 447 (2001)(CR 26(g) parallels CR 11). A court must avoid hindsight and resolve all doubts in favor of the signer. *Bergeson v. Dilworth*, 749 F. Supp. 1555, 1566 (D. Kan. 1990), citing *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d. Cir. 1986), cert. denied, 480 U.S. 918 (1987). Explaining Bankruptcy Rule 9011, the language of which parallels FRCP 26(g) and CR 26(g), the Third Circuit Court of Appeals stated that "a lawyer need not routinely assume the duplicity or gross incompetence of her client in order to meet the requirements of Bankruptcy Rule 9011. It is therefore usually reasonable for a lawyer to rely on information provided by a client, especially where that information is superficially plausible and the client provides its own records which appear to confirm the information." *In re Taylor*, 655 F.3d 274, 284 (3d. Cir. 2011).

While Nissan asserts that the federal version of the rule does not apply, Nissan has provided no authority to suggest that

Mr. Owens's reliance on both co-counsel and his client in signing the style interrogatories was unreasonable based on the circumstances. Moreover, as stated above, it is appropriate for Washington courts to look to federal interpretations of CR 26(g).

Nissan's position would impose a duty on Mr. Owens to second-guess his co-counsel and his client, and independently conduct his own reasonable inquiry of discovery responses prepared by lead counsel and verified by the client. Such a duty would make little sense. The logical extension of Nissan's argument is that Mr. Owens would have a duty to call Mr. Karst, who had just reviewed and approved the responses, and Mrs. Carroll, who verified her responses, and ask whether they were sure they were all correct. This would be a pointless exercise and could not be expected to have made any difference. Nissan has failed to address how these inquiries would work in practice. CR 1354-61. CR 26(g) allows an

attorney to rely upon lead counsel, who prepared the answers to interrogatories, to have conducted a reasonable inquiry.

C. Mr. Owens is not vicariously liable for any alleged misconduct by Mr. Karst or Mr. Kim under APR 8(b); judicial estoppel does not apply.

Sanctions for discovery rule violations are not based upon strict liability. The purpose of such sanctions is "to deter, to punish, to compensate and to educate." *Fisons*, 122 Wn.2d at 356. Imposing sanctions upon an attorney who has committed no misconduct would not further their purpose – to the contrary, it would cause a fundamental injustice. Nissan's contention, based upon a theory of judicial estoppel, that Mr. Owens should be held vicariously liable for the conduct of co-counsel simply because he signed their *pro hac vice* applications, has no support in law or fact and would lead to absurd and grossly unfair results.

1. Nissan cannot meet any of the elements of judicial estoppel.

Judicial estoppel applies when (1) a party asserts a position that is "clearly inconsistent" with an earlier position; (2) judicial acceptance of the inconsistent position would indicate that either the first or second court was misled; and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party. *Baldwin v. Silver*, 147 Wn. App. 531, 535, 196 P.3d 170 (2008). The three core factors are not an exhaustive formula and additional circumstances can be considered. *Chonah v. Coastal Villages Pollok, LLC*, 5 Wn. App. 2d 139, 149, 425 P.2d 895 (2018) (citing *Arkinson v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539, 160 P.3d 13 (2007)).

Nissan cannot meet the three elements of judicial estoppel, and it clearly does not apply to the simple act of local counsel signing a *pro hac vice* application for out-of-state counsel.

To begin with, Mr. Owens did not assert, when he signed the pro hac vice applications of Mr. Kim and Mr. Karst, that he

would somehow be responsible for their conduct. Sponsoring an out-of-state attorney to appear pro hac vice does not make the Washington attorney vicariously liable. Under APR 8(b), an out-of-state attorney "may appear as a lawyer in any action or proceeding only … in association with a lawyer active member of the Bar, who shall be the lawyer of record therein and responsible for the conduct thereof and shall be present at proceedings unless excused by the court or tribunal." The emphasized phrase, "responsible for the conduct thereof," refers to the "conduct of the trial of an action or proceeding," not the conduct of the out-of-state counsel. *Dorsey v. King County*, 51 Wn. App. 664, 670, 754 P.2d 1255 (1988).[3]

Second, because Mr. Owens did not assert that he would be responsible for out-of-state counsel's conduct, he is not taking a contrary position now, and Nissan cannot show that any court has been "misled."

[3] *Dorsey* is cited by Nissan's appellate counsel, who thus had ample opportunity to know that their argument was groundless, but failed to advise the court of this contrary authority.

Third, for the same reason, Nissan cannot show that Mr. Owens gained an unfair advantage or that it has somehow suffered an unfair detriment.

2. Imposing vicarious liability on Mr. Owens because he signed Mr. Kim's and Mr. Karst's *pro hac vice* applications is without support in law and would lead to an absurd and grossly unfair result.

Nissan's argument is not only contrary to *Dorsey*, it also would lead to absurd and grossly unfair results. Nissan's position would mean that, every time a Washington attorney signed and submitted an out-of-state attorney's *pro hac vice* application, the local attorney would be vicariously liable for the out-of-state attorney's conduct, even, as here, where the local counsel has no knowledge of the out-of-state attorney's actions. If that were the law, few if any Washington counsel would ever file a *pro hac vice* application. To further illustrate the baselessness of Nissan's argument, it asks this Court to hold Mr. Owens vicariously liable for Mr. Karst's conduct, despite the fact that his *pro hac vice* application was not submitted until

four days before the hearing on Nissan's Motion to Strike Complaint – thus, Nissan would have this Court impose liability not only vicariously, but retroactively.

As stated above, sanctions are not based upon strict liability. To so hold would be fundamentally unjust, and completely inconsistent with their purpose, which is to deter, punish, compensate and educate.

D. Mr. Owens is entitled to attorney fees from Nissan under RAP 18.9(a) for bringing this frivolous appeal.

Mr. Owens hereby moves for an award of reasonable attorney fees and costs under RAP 18.9(a). RAP 18.9(a) authorizes this court to order a party or counsel who files a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." *Kinney v. Cook*, 150 Wn. App. 187, 195, 208 P.3d 1 (2009). An appeal is frivolous if, considering the entire record, it has little or no merit, that there is no reasonable possibility of reversal and reasonable

minds could not differ about the issues raised. *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 906, 906, 151 P.3d 219 (2017). Appropriate sanctions may include an award of attorney fees and costs to the opposing party. *Yurtis v. Phipps*, 143 Wn. App. 680, 696, 181 P.3d 849 (2008) (citing *Rhinehart .v Seattle Times, Inc*., 59 Wn. App. 332, 342, 798 P.2d 1155 (1990)).

Mr. Owens requests that this court grant attorney fees and costs against Nissan and its counsel in bringing this appeal. Nissan seeks reversal of the trial court's decision on the amount of sanctions against Mr. Owens, but has provided no legitimate basis for that request. As Nissan recognizes in its own brief when arguing for the upholding of the dismissal of the complaint, this court should give great deference to the trial court's decisions regarding such sanctions. *Magana*, 167 Wn.2d at 584. Nissan has presented no evidence of any misconduct by Mr. Owens. It is undisputed that Mr. Owens had no knowledge of the bankruptcy claims until they were produced to defendants in July 2019, and that he had no

knowledge of Mr. Carroll's autopsy until he was served with Nissan's Motion to Strike Complaint. The trial court found that Mr. Owens reasonably relied on co-counsel in signing the answers to style interrogatories. CP 1373-77.

Nissan improperly alleges that Mr. Owens should be judicially estopped from denying liability under APR 8(b) for Mr. Karst and Mr. Kim's alleged misconduct, and thus be held strictly liable. This argument has no basis in law or fact. Nissan would even have this court impose strict liability on Mr. Owens retroactively.

Nissan's persistence in seeking very significant sanctions against Mr. Owens, when Nissan has no evidence that he committed any misconduct, violates RAP 18.9. Mr. Owens has suffered substantial cost due to this appeal.

V. CONCLUSION

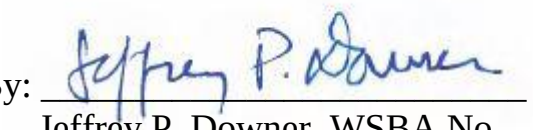
Based on the foregoing, Mr. Owens requests that Nissan's cross-appeal be denied. The trial court did not abuse its discretion in determining that Mr. Owens had a limited role

in the case and justifiably relied on co-counsel. Nissan presents no evidence of wrongdoing by Mr. Owens. The trial court found none because none exists. The court should award Mr. Owens his reasonable attorney fees and costs on appeal.

Respectfully submitted this 8th day of September, 2021.

I certify that this memorandum contains 5,561 words, in compliance with RAP 18.7.

LEE SMART, P.S., INC.

By: 

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on September 8th, 2021, I caused service of the foregoing pleading on each and every attorney of record herein:

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