Cause No.: 317226

COURT OF APPEALS
STATE OF WASHINGTON
(Div. III)

STATE OF WASHINGTON

Respondent

v.

LUCAS JAMES MERRILL

Appellant,

SUPERIOR COURT No. 09-1-041904
SPOKANE COUNTY
HONORABLE MARYANN C. MORENO

FOLLOWING REMAND

APPELLANT REPLY BRIEF

Jeffry K. Finer
Law Offices of JEFFRY K FINER, P.S.
35 West Main • Suite 300
Spokane, WA • 99201
(509) 464-7611
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE AUTHORITY

STATUTORY and RULE AUTHORITY

ARGUMENT

Standard of Review This Court reviews the interpretation of statutes and court rules under the *de novo* standard. *State v. Armendariz*, 160 Wn.2d 106, 110 (2007). The parties agree that the review standard for the imposition of sanctions in discovery disputes is abuse of discretion. *Washington State Physicians Insurance Exchange v. Fisons*, 122 Wn.2d 299, 338 (1993). The State offers a separate standard for review governing the terms of a sanction order, but Harget takes no issue with the requirements of the sanction itself (CLE attendance and $100) as he only challenges the lower court's determination that he was acting in bad faith when he re-contacted the victims on his own behalf.

I. THE LOWER COURT'S IMPOSITION OF SANCTIONS AGAINST HARGET FOR CONTACTING VICTIMS IN ORDER TO DEFEND *HIMSELF* — AS DIRECTED BY HIS SUPERVISORS — WAS MANIFESTLY UNREASONABLE OR BASED ON UNTENABLE GROUNDS

The State fails to address any of Harget's arguments head on.[1] The State does not address Harget's reliance on the fact that prior to *Harget I* there was no decision, published or unpublished, that broadened the

[1] The State blythly ignores Harget's legal argument, e.g., that *State v. SH* is inapplicable (Opening Brief at 13-15), that Harget acted in good faith by taking direction from his supervisors, that the statute's bar on interviews was uninterpreted prior to Harget I, etc.

scope of RCW 7.69.030(10)'s ban on interviews-without-an-advocate to include ancillary matters such as a sanctions motion. The State does not address Harget's seeking direction from his superiors (who advised him to re-contact the Gertlars to prepare his defense to the sanctions motion). The State does not address the fact that it asked for, and got, an apology from Harget and then moved for sanctions on the first (lawful) contact. The State simply argues, *ipse dixit*, that Judge Moreno has imposed sanctions twice and her decision should be upheld.

a. Harget's sole purpose in re-contacting the victims was on his own behalf, to address the state's motion against him.

The record is uncontested: Harget's sole purpose in contacting the Gertlars on the second occasion was to prepare his response to the motion for sanctions. CP 43 (the contact was "an attempt to defend himself from the threat of sanctions"). It was not to advance the interests of the accused in the criminal case, nor to delve into the facts of the Gertlars' accusations against the accused.

Harget knew from his first (vindicated) contact that the Gertlars were unopposed to the offer approved by Tucker, knew that the deputy prosecutor had represented otherwise, and believed that his first contact was taken under exigent circumstances. CP 7:22-23 and see CP 7:18-25

and CP 30 (email summarizing the conversation). All three premises are unchallenged on the record and the final one — the legitimacy of the safe harbor exception for the first contact — is the law of the case.

The lower court referenced the fact that Harget was solely re-contacting the Gertlars on his own behalf, but the court did so only in the context of its analysis that there was no exigency to trigger the safe-harbor defense for the second contact. CP 43. Harget has never argued that the safe-harbor applied to the second contact and the court's analysis of the safe-harbor rule with respect to the second contact is gratuitous. The defense on the second contact has always been Harget's reasonable reliance on the direction by two of his superiors and the belief that the statute's ban on interviews did not logically apply to an interview for the purpose of marshalling his *own* defense to a sanctions motions by zealous opposing counsel. That defense has been ignored both by the State and by the court below. It is as if the testimony at the hearing on March 8, 2013 never happened.[2]

---

[2] In fact, the court below only references *argument* taking place on March 8, 2013. CP 42, first paragraph. The testimony of supervisor Boe, and the references to the affidavit of Mason (see in particular CP 2) are given zero consideration.

b. Harget's good faith in re-contacting the Gertlars was evidenced by his following the recommendation of two senior supervisors.

The record is uncontested: after his apology was rejected and the State filed for sanctions, Harget sought the advice of his two supervisors who supported his re-contacting the Gertlars, with an investigator present, to prepare his defense. CP 2:2 to 3:1.

The lower court failed to make mention of this fact or to even acknowledge the testimony of Boe and the affidavit of Mason. The lower court, in fact, states that "It is difficult to accept by any stretch of the imagination that after learning that the Gertlars did not want contact with him without the victim advocate and that the state was seeking sanctions for his previous contact, that Mr. Harget could possibly believe that it would be acceptable to ignore the statute and its requirements."

In fact, the imagination requires little stretching to understand Harget's beliefs and the basis for them. First the background:

1. Harget had a well-grounded reasonable belief that he he was acting within the safe-harbor during his first contact and, on that point, he has been fully vindicated. CP 42. He also reasonably feared that the safe-harbor issue was generated, in part, by the deputy's

disinclination to accept the Harget-Tucker approved plea approach (CP 24) and was using the trial calendar and the court's recent "no further continuances" order to gain an improper advantage over the defendant. CP 42, CP 4-11 (in particular CP 7:22-23).

2. Harget had a well-grounded resonable belief that the deputy had mis-reported the Gertlar's lack of objection to the Harget-Tucker plea proposal. CP 7:22-23.
3. Harget knew, at first hand and with no imagination necessary, that the Gertlars waived their right to having the advocate present and did not object to him when he first contacted them, but evidently, according to an uncorroborated hearsay declaration prepared by the prosecutor's in-house victim's advocate, later said they were unwilling to to speak with him.

And then, the specifics at the time Harget re-contacted the Gertlars:

4. Harget knew, without stretching his imagination, that his supervisors believed he should re-contact the Gertlars on his own behalf and Mason in particular okayed the contact. CP 1-3, RP 36, 37.
5. Harget knew, without stretching his imagination, that the statute was directed to "interviews" but believed, in good faith and

months before the decision in *Harget I*, that the ban did not appear to apply to an interview of a witness in a matter involving a non-violent dispute over attorney-sanctions.[3]

c. The lower court failed to consider Harget's or the Public Defender's good faith belief that the term "interview" in RCW 7.69.030 did not cover interviews in response to a sanction motion against an attorney.

The lower court's chief error, raised in detail in the Opening Brief but simply side-stepped by the State, was to apply the safe-harbor test to the second contact. This Court did, specifically, set forth in Harget I a set of issues for the lower court to consider with respect to the safe-harbor question. This is covered in the Opening Brief at pages 10-11. Harget makes no complaint about the lower court's application of the decision to the analysis of his first contact. But the lower court took the safe-harbor test and obtusely applied it to the second contact.

This was unreasonable and an abuse of discretion. Harget never, not once, argued in any court that the second contact was governed by the

---

[3] This court has commented in *Harget I* that his belief was "hypertechnical" at best but had not stated it was contumate or in bad faith. Given the directive of his supervisors to specifically make the second contact, it stretches the imagination to understand why Harget was sanctioned when his bosses made the decision to make the call.

safe harbor. It is conceeded that the sanctions motion did not trigger any emergent impracticality.

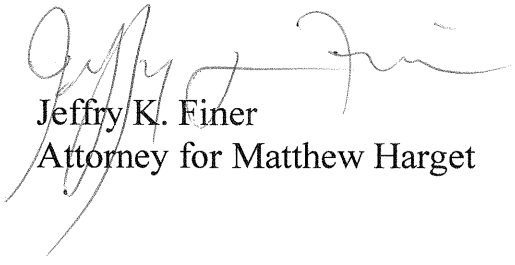
The problem with the sanctions motion was that the State had opened an attack on Harget for the first conduct, conduct that it now must acknolwedge was proper under the statute. Harget's defense of his second contact, from the get go, was simply that the statute did not plainly govern ancillary matters such as the sanctions hearing and that he took the reasonable steps of meeting with two supervisors and followed their directions in an effort to protect himself. This behavior was not contumacous, disrepectful or likely to be repeated. Sanctions are inappropriate.

CONCLUSION

For the reasons set forth above, Attorney Harget respectfully asks this Court to reverse the lower court's order regarding sanctions.

DATED THIS 8th day of January, 2014.

Law Offices of JEFFRY K FINER



Jeffry K. Finer
Attorney for Matthew Harget