

FILED
COURT OF APPEALS

APPELLANT'S BRIEF

NO. 34815-2-II

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Original

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JUST DIRT, INC.,

Respondent,

vs.

KNIGHT EXCAVATING, INC.,

Appellant.

REPLY BRIEF OF APPELLANT
KNIGHT EXCAVATING, INC.

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A. INTRODUCTION

In its opening brief, appellant Knight Excavating (Knight) enumerated several reasons, fully supported by statutory and case law, why the trial court's award of over \$20,000 in attorney fees against Knight and in favor of respondent Just Dirt, Inc., is error. In response, Just Dirt filed a "reply" brief that fails to address a number of the arguments Knight raised in its opening brief, addresses issues not relevant to the issues on appeal, and misleads this Court as to the holdings and relevance of cases Just Dirt claims support its position. As requested in Knight's opening brief, this Court should reverse the trial court's fee award.

B. REPLY TO JUST DIRT'S STATEMENT OF THE CASE

Just Dirt's three-paragraph statement of the case is incomplete and contains discussions of matters of no relevance to the issues before this Court. Further, most of Just Dirt's purported factual statements are not accompanied by a citation to the record, as required by RAP 10.3.¹

Knight refers this Court to the statement of the case contained in its opening brief for a complete and accurate discussion of the facts relevant

¹ In those few instances where Just Dirt attempts to cite to the record, the citations are not in the proper format. Specifically, in the first paragraph of its statement of the case, Just Dirt cites to "CP Declaration of Shipman" and cites to pages of the declaration itself, rather than to pages of the clerk's papers where this declaration appears. This failure to provide meaningful citations to the record is particularly bothersome here in that the clerk's papers total 1182 pages and contain four declarations of Craig Shipman, president of Just Dirt.

to the issues presented in this appeal. Just Dirt's discussion of the details of the underlying litigation between it and Knight is not relevant to the issues on appeal. Relevant facts, which Just Dirt fails to discuss, include that the underlying litigation was for breach of an oral contract for the rental of equipment containing no provision for the payment of the other party's attorneys fees should a dispute arise under the contract. Also of relevance is the acrimony, discord, and lack of cooperation between trial counsel for Just Dirt and Knight that permeated this litigation and turned it into a much more protracted and costly litigation than an ordinary breach of contract case. Just Dirt, in failing to respond to Knight's descriptions of the underlying litigation and of the ancillary proceeding on attorney fees, has conceded the accuracy of the descriptions. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 271, 840 P.2d 860 (1992).

C. ARGUMENT IN REPLY²

(1) Just Dirt Fails to Identify the Proper Standard of Review

The trial court failed to identify the grounds for its award of over \$20,000 in fees against Knight and for awarding Just Dirt \$2,500 more in

² Just Dirt includes in its brief a section entitled "Assignment of Error" and sets forth what it claims to be its assignment of error and the issues pertaining to this assignment of error. However, Just Dirt is the respondent and did not file a notice of cross-appeal in this case. Accordingly, Just Dirt is not entitled to assign error here. *See* RAP 5.1(d), 10.3(b). This Court should disregard Just Dirt's claimed assignment of error and its issues pertaining to the assignment of error.

fees than it requested. Not only is this reversible error, but it also forced Knight to hypothecate as to the trial court's basis for its award and to present arguments addressing each possible ground for the award. However, as discussed in Knight's opening brief,³ regardless of which ground formed the basis of the trial court's fee award, the award is reviewed under an abuse of discretion standard, except if the fee award was based on the court's conclusion that Knight's trial counsel violated one or more of the Rules of Professional Responsibility (RPCs). If that is the case, then the applicable standard of review is irrelevant because an award of sanctions for an attorney's violation of the RPCs is wholly unupportable. Under the abuse of discretion standard of review, the trial court's fee award against Knight must be vacated.

In its brief, Just Dirt repeatedly cites the substantial evidence standard of review. This standard of review is not, however, applicable to review of the trial court's fee award. *See* Br. of Appellant at 15-17. Moreover, Just Dirt makes sweeping, conclusory statements that the record contains substantial evidence to support various points. *See, e.g.,* Br. of Resp't at 8, 9. Notably absent from Just Dirt's discussion, however, are citations to the record where this substantial evidence supposedly is found. At one point, Just Dirt asserts that a matter is "apparent from the

³ Br. of Appellant at 15-17.

record,” Br. of Resp’t at 12, yet fails to provide citations to the record where this Court might find such revealing evidence.

(2) The Trial Court’s Failure to Enter Findings of Fact and Conclusions of Law on Its Fee Award Is Reversible Error, Not Just a Simple “Clerical Error of Omission”

Just Dirt argues the trial court’s failure to enter findings of fact and conclusions of law in support of its fee award against Knight is an “inadvertent oversight,” a “clerical error of omission,” and a “clerical error, mechanical in nature.” Br. of Resp’t at 5, 12. In its argument, Just Dirt wholly ignores admonitions of this Court and the Supreme Court as to the need for an adequate record, including findings of fact and conclusions of law, to support a trial court’s award of attorney fees:

Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record. *Smith v. Dalton*, 58 Wash. App. 876, 795 P.2d 706 (1990); *Rhinehart v. Seattle Times*, 59 Wash. App. 332, 798 P.2d 1155 (1990); *Bentzen v. Demmons*, 68 Wash. App. 339, 842 P.2d 1015 (1993); *State Farm Mut. Auto. Ins. Co. v. Johnson*, 72 Wash. App. 580, 871 P.2d 1066, *review denied*, 124 Wash. 2d 1018, 881 P.2d 254 (1994). Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, we hold *findings of fact and conclusions of law are required to establish such a record.*

Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998) (emphasis added); *see also MacDonald v. Korum Ford*, 80 Wn. App. 877, 893, 912 P.2d 1052 (1996) (remanding a fee award under CR 11 for a recalculation

of the appropriate amount of fees and for entry of findings of fact and conclusions of law supporting the fee award). Here, the trial court failed to abide by the requirement of entering findings of fact and conclusions of law.

Further, with respect to sanctions imposed under CR 11, the trial court must specify the sanctionable conduct in its order, make a finding that either the claim is not grounded in fact or law and the attorney failed to make a reasonable inquiry into the law or facts or the paper was filed for an improper purpose, identify the specific filings that violate CR 11, and enter findings of fact and conclusions of law to support the imposition of sanctions. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 904, 969 P.2d 64 (1998); *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994); *MacDonald*, 80 Wn. App. at 892; *Blair v. GIM Corp., Inc.*, 88 Wn. App. 475, 483, 945 P.2d 1149 (1997). Again, the trial court here failed to abide by these requirements.

Just Dirt ignores these firmly established bodies of case law and instead relies on cases having nothing to do with an award of attorney fees. *See, e.g., Goodman v. Darden, Doman & Stafford Assocs.*, 100 Wn.2d 476, 670 P.2d 648 (1983) (discussing the absence of a finding as to whether the parties intended to look solely to a corporation for performance of a contract); *In re Marriage of Booth*, 114 Wn.2d 772, 791

P.2d 519 (1990) (discussing the absence of a finding of fact regarding a father's reasons for deviating from the child support schedule). These cases are not relevant to the issue of the necessity of findings of fact and conclusions of law to support an award of attorney fees. As discussed, both this Court and the Supreme Court have held that such findings and conclusions are absolutely necessary in order to permit appellate review of a fee award. The absence of findings and conclusions requires remand, regardless of whether the absence is due to inadvertence, clerical error, or the failure of counsel to be cognizant of applicable law.⁴

Just Dirt appears to argue that the trial court's oral opinion is sufficient to permit appellate review of the fee award, without, however, citing or discussing the opinion. In some cases, the trial court's oral

⁴ Just Dirt notes the trial court did not enter a finding that its counsel's failure to prepare findings of fact and conclusions of law on the fee award was intentional. Br. of Resp't at 6. Whether the failure to prepare findings and conclusions was intentional or negligent, and whether the trial court made a finding as to this matter, is of no relevance whatsoever to whether the fee award must be remanded for the creation of an adequate record for review.

Just Dirt also argues, with no analysis at all, that, although the burden of preparing written findings and conclusions "often falls upon the prevailing party," there is no evidence that Just Dirt, *the prevailing party*, bore this burden here. Br. of Resp't at 13. This Court has held the prevailing party has a duty to procure formal written findings of fact supporting its position. *Peoples Nat'l Bank of Wash. v. Birney's Enters., Inc.*, 54 Wn. App. 668, 670, 775 P.2d 466 (1989). Even assuming, however, the existence of any merit to Just Dirt's assertion, the salient fact remains that the record supporting the trial court's fee award is insufficient to permit appellate review because the trial court failed to abide by principles governing fee awards.

Finally, Just Dirt argues it was Knight's burden to move under CR 60 for the entry of findings and conclusions, again with no citation to supporting authority. This argument is meritless.

opinion or the record may be sufficient to permit appellate review. *See e.g., Talieson Corp. v. Razore Land Co.*, ___ Wn. App. ___, ___ P.3d ___ (Div. I, Sept. 25, 2006). Here, however, the trial court's opinion is far from a sufficient explanation of the award. *See* RP 73. As discussed in Knight's opening brief,⁵ although the trial court indicated it found some documents Knight filed were improper, it failed to identify which documents. The only sanctionable conduct the trial court identified with specificity was the refusal of Knight's trial counsel, Michael Siefkes, to accept service by facsimile. This conduct cannot be attributed to Knight. And, importantly, the trial court gave no explanation whatsoever of the amount of fees it awarded, why it awarded Just Dirt fees in an amount greater than it asked for, and why it imposed the overwhelming amount of sanctions against Knight when Just Dirt's arguments in favor of sanctions were almost exclusively based on the acts and omissions of Siefkes of which Knight had no knowledge or reason to know.

(3) The Trial Court Abused Its Discretion in Awarding Fees Against Knight, Where the Sanctionable Conduct Was that of Knight's Trial Counsel

Remarkably, Just Dirt's recitation in its brief of the conduct it claims justifies the trial court's substantial fee award is *conduct of*

⁵ Br. of Appellant at 19-20.

Knight's trial counsel, not Knight. See, Br. of Resp't at 7-8 (citing numerous discovery violations "on the part of counsel for Knight"; arguing that Knight filed repetitive and cumulative motions "through its counsel"; citing the refusal "by Knight's counsel" to accept service by facsimile; failure "on the part of counsel" to provide a response to Just Dirt's motion for sanctions; arguing that "counsel for Knight" argued that he timely served and filed responsive pleadings; "[c]ounsel for Knight" stipulated to requesting multiple continuances; "[c]ounsel for Knight" stipulated to submitted previously unidentified witnesses on the even of trial). Further, as discussed in Knight's opening brief,⁶ Just Dirt's motion for attorney fees and supporting documents also cite, as the bases for its request for a fee award, actions and omissions of Siefkes, not Knight. See CP 919.

The record amply supports Knight's argument, with which Just Dirt apparently agrees, that the sanctionable conduct here is that of Siefkes, Knight's trial counsel. Despite Just Dirt's unsupported, conclusory allegation that Knight knew or somehow should have known of the unprofessionalism and inappropriate conduct of its counsel, Just Dirt cites to nothing in the record to show any knowledge on the part of Knight that its counsel was engaging in sanctionable conduct. Nor should

⁶ Br. of Appellant at 27.

Knight, an excavation company whose principals have not been shown to have any legal training, have known this. Under these circumstances, sanctions should not be imposed against the client, but rather are properly imposed against the attorney whose conduct gave rise to the sanctions. See, Br. of Appellant at 24-26 (citing and discussing *Calloway v. Marvel Entm't Group*, 854 F.2d 1452, 1474-75 (2d Cir. 1988), *rev'd on other grounds*, *Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 110 S. Ct. 456, 107 L.Ed.2d 438 (1989); *Friesing v. Vandergrift*, 126 F.R.D. 527, 529 (S.D. Tex. 1989); *Allender v. Raytheon Aircraft Co.*, 220 F.R.D. 661, 667 (D. Kan. 2004)).⁷

Just Dirt argues that the foregoing cases are not binding on this Court. While this is, of course, true, Just Dirt fails to acknowledge that this Court looks to federal courts for guidance in construing CR 11. *Splash Design, Inc. v. Lee*, 104 Wn. App. 38, 44 n.6, 14 P.3d 879 (2000), *review denied*, 143 Wn.2d 1022 (2001).

Further, Washington courts have also affirmed the imposition of sanctions against the attorney and not the client where the attorney's conduct gave rise to the decision to impose sanctions. For example, in *In*

⁷ Just Dirt claims Knight relies on these cases to argue that, in order to impose sanctions against a party for conduct of its attorney, the court must make an explicit findings as to knowledge, authorization, or participation of the party. Br. of Resp't at 9. Knight makes no such argument.

re Guardianship of Lasky, 54 Wn. App. 841, 776 P.2d 695 (1989), the trial court imposed sanctions against an attorney and remanded for the imposition of an even greater amount of sanctions, where the attorney accepted the word of his mildly developmentally disabled client that the client's brother was mistreating her in his capacity as trustee of a trust of which the client was a beneficiary and, without investigation, filed an action for removal of the brother as trustee. The attorney sought to have himself appointed as the client's guardian and to cause trust disbursements which would have nearly depleted the trust's assets. The attorney so acted despite evidence that the trust was being run properly. This Court affirmed the imposition of sanctions against the attorney, not the client, and held that an attorney's blind reliance on a client will seldom constitute a reasonable inquiry for purposes of CR 11. Also, in *Watson v. Maier*, 64 Wn. App. 889, 827 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992), an attorney filed a medical malpractice action against a dentist who was not present during the operation where the alleged malpractice occurred. Instead of undertaking an investigation into the facts, the attorney simply sent his client's medical records to a medical/legal consulting firm and took the firm's recommendation that the attorney sue the dentist. The trial court imposed CR 11 sanctions against the attorney, not the client, and this Court affirmed.

Just Dirt cites two cases it claims show that the award of fees against Knight under these circumstances was not error. Just Dirt distorts the facts and holdings of these cases. In fact, the cases are not relevant to the issue of whether the trial court erred in imposing most of the sanctions against Knight, rather than Siekfes.

One case on which Just Dirt relies is *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996). Just Dirt claims the court in *Henderson* “determined that conduct on the part of an attorney may, in fact, be charged to the client.” Br. of Resp’t at 10. First, as explained in Knight’s opening brief, under some circumstances, a court may indeed properly impose sanctions against a client.⁸ The circumstances of this case, however, are vastly different from those under which the client, rather than the attorney, can properly be sanctioned. Second, *Henderson* does not stand for the proposition for which Just Dirt cites it. *Henderson* was an action by the owner of an automobile (Tyrrell) who was injured when his automobile was involved in a single-vehicle accident against the person he alleged was driving at the time of the accident (Henderson). The jury determined that Henderson was driving the automobile at the time of the accident. On appeal, Henderson argued he was denied a fair

⁸ See Br. of Appellant at 24-25.

trial by Tyrrell's destruction of the wrecked automobile two years after the accident and one year after Henderson's attorney wrote to Tyrrell's attorney asking him to preserve the automobile until further notice. The court held that the trial court did not abuse its discretion in refusing to dismiss Tyrrell's case or limit his evidence at trial because he destroyed the automobile. The court noted Henderson had a year to obtain the evidence he claimed was essential to his case. The only mention of Tyrrell's counsel in the court's analysis was the court's statement that Tyrrell could be charged with knowledge of Henderson's request not to destroy the automobile through his attorney.

As evident, *Henderson* does not stand for the proposition asserted by Just Dirt. While the court held that Tyrrell's attorney's knowledge of Henderson's request not to destroy the automobile was imputable to Tyrrell, this holding has no relevance to the issue presented here of whether Knight should be sanctioned for Siefkes' conduct. The attorney's conduct in *Henderson* was not sanctionable. In fact, the court, in affirming the trial court's refusal to impose sanctions, found that nobody's conduct was sanctionable. *Henderson* is not a case where an attorney's conduct was sanctionable and the trial court properly imposed sanctions against the client rather than the attorney. Just Dirt's statement of the proposition for which *Henderson* stands is wrong and misleading.

Just Dirt also relies on *In re Marriage of Dalthorp*, 23 Wn. App. 904, 598 P.2d 788 (1979), citing it repeatedly and arguing it supports the award of substantial attorney fees against Knight for sanctionable conduct committed by Siefkes. Again, Just Dirt's characterization of the proposition for which the case stands is wrong and misleading. In *Dalthorp*, the wife requested an award of attorney fees pursuant to RAP 18.1(e) in an appeal by the husband of a decree of dissolution. The husband raised several issues on appeal, and the court determined that only one issue, having to do with the qualifications of the judge pro tempore who was on inactive status when he tried the case, had arguable merit. The court concluded that, had the outcome of the trial court proceedings been more favorable to the husband, it was doubtful the husband would have raised the jurisdictional issue at all. The court also noted the "strong suggestion that [the husband's] post-decree conduct has been intransigent in many respects," and stated the trial court could take this factor into account in setting the amount of fees to award the wife. *Id.*, 23 Wn. App. at 912.

In awarding the wife attorney fees under RAP 18.1(e) and remanding to the trial court to fix the amount of fees, the court on appeal made no mention whatsoever of whether the trial court should impose fees against the husband or his attorney. Contrary to Just Dirt's inaccurate

discussion of *Dalthorp*, there is no mention at all in the court's opinion of misconduct or intransigence on the part of the husband's attorney. The only mention of the husband's attorney was the court's statement: "this is a challenge mounted by an unsuccessful litigant who, with the guidance of his attorney, knew or had the means of knowing, the nature and extent of [the judge pro tempore's] actual skill and experience as an attorney." *Id.* Just Dirt, either intentionally or negligently, would have this Court believe that the attorneys whose skill and experience was at issue in *Dalthorp* was one of the parties' attorneys. In fact, however, it is clear from the court's opinion that the attorney the court was referring to was the judge pro tempore who was on inactive status at the time he tried the dissolution case. And, Just Dirt is absolutely wrong in asserting that the court held that both an award of costs and an award of attorney fees may be made without remand in the trial court. The court on appeal awarded the wife costs without remand for further proceedings, but explicitly remanded the matter "for the limited purpose of fixing attorney's fees for this appeal." *Id.*, 23 Wn. App. at 913.

This Court should entirely disregard Just Dirt's complete distortion of the decisions in *Henderson* and *Dalthorp* and take note of Just Dirt's attempt to mislead this Court as to the holdings in these cases and its

citation of these cases for propositions for which they most certainly do not stand.

(4) Just Dirt Fails to Respond to Several Arguments Knight Raises

As evident from reading Just Dirt's brief, it failed to respond to a number of the issues Knight raised in its opening brief. Knight will briefly identify the issues to which Just Dirt has failed to respond.

A trial court must guard against allowing provisions such as CR 11 to become fee-shifting mechanisms. *Biggs*, 124 Wn.2d at 201-02. Accordingly, when imposing attorney fees as a sanction, a trial court must limit the amount of fees awarded to an amount reasonably expended in responding to the sanctionable filings. *Id.*, 124 Wn.2d at 201. Knight enumerated in its opening brief a partial list of matters for which Just Dirt requested and was awarded attorney fees that cannot possibly be construed as work performed in responding to sanctionable filings.⁹ By her own admission, Just Dirt's counsel requested, as part of the sanction award, fees for "general trial preparation." CP 1056. The trial court awarded Just Dirt fees for this as well as numerous other matters unrelated to responding to any sanctionable filings. In fact, the trial court awarded Just Dirt over \$2,500 more in attorney fees than it asked for. The trial court

⁹ See Br. of Appellant at 22-23.

was obviously attempting to use sanction provisions as a fee-shifting mechanism. This was entirely improper. *See MacDonald*, 80 Wn. App. at 892-93 (holding the trial court abused its discretion in imposing a sanction equal to the entire amount expended by a party in attorney fees, including time spent by counsel acquainting herself with and organizing the file, initiating discovery, and preparing for trial, because such an award improperly turned CR 11 into a fee-shifting mechanism).

Just Dirt does not respond to this argument. Nor does it even mention the fact that the court awarded it fees for the time its counsel spent in “general trial preparation,” traveling to court for a hearing, preparing discovery and a summary judgment motion, communicating with Just Dirt, and other matters unrelated to responding to any sanctionable filings. Further, Just Dirt provides no reason why an award of sanctions greater than the amount it requested does not constitute an abuse of the trial court’s discretion.

Just Dirt also fails to respond to the argument that any award of attorney fees, particularly against Knight, for Siefkes’ violation of one or more of the RPCs is improper. Breach of an RPC provides only a disciplinary remedy, not a private remedy. *Hizey v. Carpenter*, 119 Wn.2d 251, 259, 830 P.2d 646 (1992). Also, although it mentions sanctions for Siefkes’ alleged violation of CR 56(g), Just Dirt ignores Knight’s

argument that an award of sanctions for violation of CR 56(g) against Knight is inappropriate not only because Knight cannot reasonably be held responsible for Siefkes' violation, but also because Just Dirt failed to identify the affidavits it claims Siefkes presented in violation of CR 56(g). Nor does Just Dirt explain why Knight, rather than Siefkes, should be sanctioned for any violation by Siefkes of CR 26(b)(5)(A)(i), a discovery rule, where discovery is wholly within the province of the attorney, not the client.

D. CONCLUSION

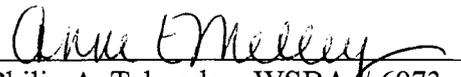
The trial court's award against Knight of over \$20,000 in attorney fees was an abuse of discretion for the several reasons discussed here and in Knight's opening brief. For these reasons, this Court should vacate the fee award against Knight. At a minimum, this Court should remand the fee award to the trial court for a recalculation of an appropriate amount and the entry of findings of fact and conclusions of law.

The trial court here has clearly demonstrated its belief that Just Dirt is entitled to recover the entire amount of attorney fees it spent in this litigation and its intent, in the absence of a contractual attorney fee provision, to use the various sanction provisions as fee-shifting mechanisms. For this reason, Knight requests, should this Court remand rather than vacate the fee award, that this Court provide explicit and firm

instructions to the trial court to strictly adhere to the well-established principles governing sanction awards discussed here and in Knight's opening brief.

DATED this 20th day of November, 2006.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I deposited in the U.S. Mail a true and accurate copy of the following document: Reply Brief of Appellant in Court of Appeals No. 34815-2-II, to the following:

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Clerk's Office
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 22, 2006, at Tukwila, Washington.

Christine Jones

Christine Jones
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