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STATE OF WASHINGTON

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NO. 34815-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JUST DIRT, INC.,

Respondent,

vs.

KNIGHT EXCAVATING, INC.

Appellant.

REPLY BRIEF OF RESPONDENTS
JUST DIRT, INC.

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A. INTRODUCTION

Knight Excavating, Inc., (Knight) appeals the award of over \$20,000 in attorney fees the trial court awarded against Knight and in favor of Just Dirt Inc. (Just Dirt).

Knight argues the absence of formal written Findings of Fact and Conclusions of Law issued by the court explaining the basis for its award bars appellate review.

Knight further argues the trial court abused its discretion when it imposed sanctions against the Appellant for the acts or omissions of its attorney.

The trial court ordered Knight to pay to Just Dirt \$20,240.79 in attorney fees, and ordered Mr. Siefkes, counsel for Knight, to pay \$3,000.00 as sanctions, for a total award of \$23,240.79.

B ASSIGNMENT OF ERROR:

(1) Assignment of Error:

1. The absence of formal written Findings of Fact and Conclusions of Law is not fatal to review.

(2) Issues Pertaining to the Assignment of Error:

Is the fact that the Court failed to issue formal written Findings of Fact and Conclusions of Law serve as a bar to appellate review, where the

oral opinion of the court is substantiated and evidence supporting the courts opinion exists in the record?

2. The trial Court did not abuse its discretion in awarding attorney fees for sanctionable conduct on the part of that party's counsel.
3. The award of attorney fees for violation of CR 56 and CR 26 by the trial court was proper.

C. STATEMENT OF THE CASE

On or about October, 2002 Knight entered into an agreement for the use of equipment owned by the plaintiff, Just Dirt, the delivery and pickup of plaintiffs equipment, as well as the payment for permits for a total of \$34,875.80. (CP Declaration of Shipman, President of Just Dirt Inc., at page 1, line 18-20). Pursuant to the agreement of the parties, in October, 2002, the plaintiff provided its equipment for the defendants' project. (CP Declaration of Shipman at page 2, lines 2-3). Knight used Just Dirt's equipment without question or comment for the benefit of defendants' construction project. (CP Declaration of Shipman at page 2, lines 2-5).

On or around December 11, 2002, the defendant paid plaintiff the sum of \$5,000.00 as an installment on the obligation owing. On or around March 19, 2003, the defendant paid plaintiff, the sum of \$3,000.00 as a second installment on the obligation owing pursuant to the parties agreement. On or around May 1, 2003, the defendant paid Just Dirt the sum of \$2,000.00 as a third installment on the amount owed plaintiff. Just Dirt did not receive any additional payments pursuant to the agreement of the parties after May 1, 2003.

At the time of hearing on Summary Judgment, Jacqueline McMahon, attorney for Just Dirt, in support of its Motion, argued that the court should award Just Dirt attorney fees and sanctions based on the actions of opposing counsel, based on violation of the rules of civil procedure, based on Siefkes violation of the Rules of Professional Conduct and based on Knight's failure to provide any evidence in support of its counter claims submitted in its Answer to the Complaint. (RP p. 69 lines 1-7).

D. SUMMARY OF ARGUMENT

The trial court's failure to enter findings is not an error of substance, but rather an inadvertent oversight and a clerical error, mechanical in nature, which is apparent from the record. A trial court's inadvertence in failing to memorialize part of its decision does not alter or amend the Judgment; rather, it is a clerical error of omission correctable under CR 60(a). The record contains evidence of sufficient quantity to persuade a fair minded, rational person of the truth of the declared premise. The failure to issue or the absence of written Findings of Fact and Conclusions of Law does not preclude the court on appeal from looking to the oral opinion of the trial court to determine the basis for the trial's court's resolution on the issue in question. In the absence of some indication in

the record that the failure to make specific finding was intentional, it is unrealistic to treat the absence of a finding as the equivalent of a negative premise on the issue.

It was not inappropriate for the court to compel a client to pay for counsel's procedural violations of RPC's, CR 26(5)(A)(i) and CR 56(g) as asserted by Knight. In fact, conduct on the part of an attorney may, in fact, be charged to the client, and constructive, not actual knowledge by a party regarding intransigence or misconduct on the part of his/her attorney is all that is necessary to support an order for attorney fees against the unsuccessful litigant based on misconduct on the part of their counsel. The unsuccessful litigant in this case **either knew or had the means of knowing (emphasis added)** the nature or extent of its attorney's actual skill and experience, and that party's tactics made litigation more difficult, and was the proximate cause of additional costs incurred by Just Dirt.

Additionally, substantial evidence exists in the record to support a finding that the court sufficiently identified the basis for the award of attorney fees. Remand to the trial court is therefore unnecessary.

(1) Assignment of Error:

The absence of formal written Findings of Fact and Conclusions of Law is not fatal to review.

E. ARGUMENT

In re Marriage of Stern, 68 Wn. App. 922, 846 P.2d 1387 (1993), the court determined that a trial court's inadvertence in failing to memorialize part of its decision does not alter or amend the judgment, rather, it is a clerical error of omission correctable under CR 60(a).

Additionally, in *Goodman v. Darden, Doman & Stafford Associates*, 100 Wn. 2d 476, 670 P.2d 648 (1983) and *in re Marriage of Booth*, 114 Wn. 2d 772, 791 P.2d 519 (1983), the court on review determined that the lack of specific findings of fact is not fatal. In the absence of a written finding on a particular issue, and contrary to argument of the Appellants, an appellate court may look to the oral opinion of the court to determine the basis for the court's resolution of the issue where substantial evidence exists in the record.

Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair minded, rational person of the truth of the declared premise. *Inland Foundation v. Labor & Industries*, 106 Wn. App. 333, 24 P.3d 424 (1998); *Douglas Northwest, Inc., v. O'Brien & Sons Construction, Inc.*, 64 Wn. App. 661, 828 P.2d 565 (1992).

While it is common practice for the attorney of the prevailing party to prepare Findings of Fact and Conclusions of Law, if a material finding is not made, it may be due to inadvertence, and in the absence of some

indication in the record that the failure to make specific finding was intentional, it is unrealistic to treat the absence of a finding as the equivalent of a negative finding on the issue. *Douglas Northwest, Inc., v. O'Brien & Sons Construction, Inc.*, 64 Wn. App. 661, 828 P.2d 565 (1992).

In the present case, there was no such finding by the trial court that the failure to prepare Findings of Fact and Conclusions of Law was in any way intentional.

ASSIGNMENT OF ERROR:

- (2) The trial Court did not abuse its discretion in awarding attorney fees for sanctionable conduct on the part of that party's counsel.
- (3) The award of attorney fees for violation of CR 56 and CR 26 by the trial court was proper.

Issues Pertaining to Assignment of Error:

May the Court award attorney fees to the prevailing party against the non-prevailing party for sanctionable conduct on the part of the party's counsel?

ARGUMENT:

Counsel for the Knight argues it was inappropriate for the court to compel a client to pay for counsel's procedural violations of RPC's, CR 26(5)(A)(i) and CR 56(g). Further, Knight argues that the court abused its discretion in failing to specifically identify the basis for the award of attorney fees, and requests remand to the trial court,

At the time of hearing on Summary Judgment, Jacqueline McMahon, Attorney for Just Dirt, in support of its Motion argued the court should award to Just Dirt, attorney fees and sanctions based on actions of opposing counsel, for violation of the rules of civil procedure, for opposing counsel's violation of the Rules of Professional Conduct and for Knight's failure to submit any evidence in support of its counterclaims asserted in its Answer. (RP p. 69 lines 1-7).

Counsel for Just Dirt argued the case had been continued three different times (RP p. 69 lines 8-9), that there had been numerous discovery violations on the part of counsel for Knight (RP p. 69 lines 10-11), that Knight had filed multiple repetitive and cumulative motions through its counsel (RP p. 69 lines 13-14), and refusal by Knight's counsel to accept service of pleadings by fax from counsel for Just Dirt after a lengthy period of exchange of pleadings between the parties by such means (RP p. 69 lines 14-20), as well as Knight's identification, on the eve of trial after two previous continuances, of witnesses to be called to testify at trial, violated Just Dirt's right to conduct depositions, and to conduct appropriate discovery (RP p. 69 lines 22-25; p. 70 lines 1-2), and failure on the part of counsel to provide any response to opposing counsel's motion for sanctions resulting therefrom. (RP p. 70 lines 15-22).

While at the time of hearing on Summary Judgment, counsel for the Knight argued that he, in fact, did timely file and serve his responsive pleading (RP p. 64 lines 16, 20-22; p. 70 lines 24-25; p. 71 lines 1).

Counsel for Knight did not deny, and in fact, stipulated that multiple continuances were requested and granted by the court in this case.

Counsel for Knight also did not deny and, in fact stipulated, that he submitted additional witnesses not previously identified, on the eve of trial (RP p. 71 lines 9-11), but simply argued that he disclosed his Witness List by the January 31st, 2006, due date as ordered by the Court. (RP p. 71 lines 11-15).

At the time of hearing, the court acknowledged the actions alleged, (RP p. 69 lines 2-7), and in its oral ruling the court found that responsive documents alleged to have been timely filed and served by counsel for Knight had not been received by the court, and were not before the court at the time of hearing (RP p. 64 lines 23-25). The court further found that counsel for Knight refused to accept faxes from counsel for Just Dirt, even though he continued to fax documents to the other side.

Substantial evidence exists in the record to support the oral opinion of the court regarding the basis for its determination in resolution of the issue of the award of attorney fees together with the amount awarded. The record contains evidence of sufficient quantity to persuade a fair minded,

rational person of the truth of the declared premise, (i.e., that counsel for Knight did, in fact, engage in a pattern of misconduct in violation of the Rules of Professional Conduct, and that he acted in a manner, which constituted a violation of the rules of civil procedure, thereby proximately causing the Respondents to incur additional costs of litigating the cause). Additionally, the record contains evidence of sufficient quantity to persuade a fair minded, rational person of the truth of the declared premise that Knight, over the course of the two years of litigation, had the ability to attend hearings but failed to do so and further, that Knight did not provide its attorney with sufficient evidence to support any of the counterclaims asserted in Answer to Just Dirt's Complaint.

Knight essentially stipulated to all evidence at trial. Consequently, the trial court's findings are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Counsel for Knight argues the award of attorney fees against a party for and based upon the conduct of counsel requires an explicit finding by the court as to knowledge, authorization or participation by the parties in the conduct of counsel, and relies upon *Calloway v. Marvel Entm't Group*, 854 F.2d 1452, 1474 (2d Cir. 1988), rev'd on other grounds and *Allender v. Raytheon Aircraft Co.*, 220 F.R.D., 661, 667, (D. Kan. 2004), in support of this argument.

In response, counsel for Just Dirt argues not only is the authority relied upon by Knight not binding upon this Court, but that the argument of counsel is without merit. For instance, in *Henderson v. Tyrell*, 80 Wn. App. 592, 910 P.2d 522, the court determined that conduct on the part of an attorney may, in fact, be charged to the client.

In fact, *In Re Marriage of Dalthorp*, 23 Wn. App. 904; 598 P.2d 788 (1979), the trial court determined that constructive, not actual knowledge, by a party regarding intransigence or misconduct on the part of his/her attorney, is all that is necessary to support an order for attorney fees against the unsuccessful litigant based on misconduct on the part of their attorney. Thereafter determining that the unsuccessful party **either knew or had the means of knowing (emphasis added)** the nature or extent of their attorney's actual skill and experience, and that the party's tactics made litigation more difficult, the court ordered the unsuccessful litigant to pay attorney fees to the other party based upon intransigence and misconduct on the part of his attorney. Moreover, on appeal, the Appellate Court held that the trial court was entitled to consider the fact that a challenge to an award of attorney fees was mounted by an unsuccessful litigant who **either knew or had the means of knowing** the nature or extent of their attorney's actual skill and experience as an attorney, and that, with the guidance of his attorney, that party's tactics

made litigation more difficult. The court further determined that costs of appeal and award of attorney fees may be awarded without need for remand for further proceedings in the trial court.

Similar to the court *In re Marriage of Dalthorp*, 23 Wn. App 904; 598 P.2d 788 (1979), Knight, by the very length of the litigation in superior court, either knew or had the means of knowing that its attorney was making litigation more difficult. Even more compelling, Knight had actual knowledge that it had not provided its attorney any evidence to support the counterclaims asserted in its Answer to Just Dirt's Complaint.

Counsel for Knight once again argues, that failure by the court to issue Findings of Fact and Conclusions of Law regarding knowledge, authorization or participation by Knight in the conduct of counsel not only constituted an abuse of discretion, but serves as a bar to review on the issue. While it is true that the trial court did not issue written Findings of Fact and Conclusions of Law specifically on the issue of the Appellants knowledge, authorization or participation, substantial evidence exists in the record from which it can reasonably be inferred that the unsuccessful litigant **either knew or had the means of knowing** the nature or extent of its attorney's actual skill and experience and that, with the guidance of its attorney, that party's tactics made litigation more difficult. *In Re Marriage of Dalthorp*, 23 Wn. App. 904; 598 P.2d 788 (1979).

The record in this case indicates that the cause of action was filed by Just Dirt against Knight on or about November 1, 2004 (RP p. 65 lines 21-25). Final orders of the trial court were not entered until April, 2006 (RP p. 74 lines 11-12). The Appellant therefore had two years of dealings with its attorney and plenty of time in which to know of or to learn about, and/or to access the means necessary to know of, the nature or extent of the actual skill and experience of their attorney. It cannot be disputed that Knight had time to learn about, and/or to gain access to the means necessary to know whether or not the acts and/or omissions in respect to its dealings with, and based upon advice of their attorney, contributed to or were making litigation more difficult.

It is true that the trial court did not issue written findings specifically regarding the Appellants knowledge, authorization or participation in the conduct of its attorney. However, Just Dirt argues first, the trial court's failure to enter findings was not an error of substance, but rather an inadvertent oversight, and was a clerical error, mechanical in nature, which is apparent from the record. A trial court's inadvertence in failing to memorialize part of its decision does not alter or amend the judgment; rather, it is a clerical error of omission correctable under CR 60(a), *In re Marriage of Stern*, 68 Wn. App. 922, 846 P.2d 1387 (1993).

Counsel for Knight did not seek to invoke the remedies

available to it under CR 60(a).

Evidence of sufficient quantity to persuade a fair minded, rational person of the truth of the declared premise of Just Dirt exists. Thus, even in the absence of a written finding on a particular issue, this Court may look to the oral opinion of the trial court to determine the basis for its resolution of the issue.

Again, in the absence of some indication in the record that the failure to make a specific finding was intentional, it is unrealistic to treat the absence of a finding as the equivalent of a negative finding on the issue. *Douglas Northwest, Inc., v. O'Brien & Sons Construction, Inc.*, 64 Wn. App. 661, 828 P.2d 565 (1992).

Although the burden of preparing written Findings of Fact and Conclusions often falls upon the prevailing party, there is no indication in the record on the case now before this Court, that Just Dirt bore that burden, or that any failure to make specific findings was intentional.

The trial court did not abuse its discretion in imposing sanctions against Knight for the sanctionable conduct of its trial counsel. Additionally, the trial court did not abuse its discretion in awarding the sum of \$23,240.79 in attorney fees and sanctions.

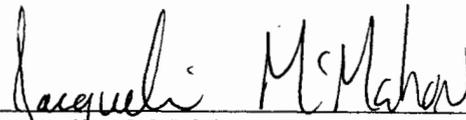
F. CONCLUSION

The trial court did not abuse its discretion in awarding Just Dirt

attorney fees against Knight for sanctionable conduct on the part of that party's counsel. The award of attorney fees for violation of CR 56 and CR 26 by the trial court was proper, and remand is unnecessary.

DATED this 26th day of October, 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: Brief of Respondent in Court of Appeals No. 34815-2-II, to the following:

Anne E. Melley
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Original filed with:
Court of Appeals, Division II
Clerk's Office
Tacoma, WA

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: October 27th, 2006 at Orting, Washington.

Rhonda Ryan

Rhonda Ryan
Legal Assistant
Law Offices of J. McMahon

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