

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 40459-1-II

STATE OF WASHINGTON,

Real Party of Interest – The Clallam County Prosecuting Attorney’s Office

Appellant,

vs.

LOVERA MARJORIE BLACKCROW,

Real Party of Interest – Ms. Karen Unger

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 09-1-00342-3

REPLY BRIEF

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COURT OF APPEALS
BY [Signature]

<p>SERVICE</p>	<p>Ms. Karen Unger 332 E. 5th Street, Suite 100 Port Angeles, WA 98362</p>	<p>This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: October 27, 2010 at Port Angeles, WA [Signature]</p>
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I. ARGUMENT.¹

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED A \$500 SANCTION BECAUSE THE MOTION TO SEVER WAS GROUNDED IN FACT, LAW, AND FILED IN GOOD FAITH.

The purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). The court rule sanctions two types of filings: (1) those that lack a factual or legal basis (baseless filings), and (2) those that are filed for an improper purpose. *Bryant v. Joseph Tree*, 119 Wn.2d 210, 219-20, 829 P.2d 1099 (1992). This Court reviews an order of CR 11 sanctions for an abuse of discretion. *Biggs*, 124 Wn.2d at 197.

1. The DPA filed the motion to sever because the two trials presented a *Bruton* issue.

According to Ms. Unger, the DPA recklessly/dishonestly argued that a conflict of interest existed in the present case. *See* Brief of Appellant at 2-8. Ms. Unger claims that “[t]hese falsities were the basis of a motion that would ultimately result in a severance of defendants and the county expense of having [two] separate trials.” *See* Brief of Respondent at 8. Thus, Ms. Unger believes the \$500 sanction is warranted because the DPA’s motion was not well grounded in fact. Ms. Unger is incorrect.

¹ The Clallam County Prosecuting Attorney’s Office affirms the arguments that it presented in its opening brief, filed May 18, 2010.

The DPA filed her motion to sever due to the *Bruton* issues that would arise if the two trials remained joined. At the scene of the crime, Mr. Mallicott and Ms. Blackcrow both made statements that inculpated themselves and the other. CP 25-26. *See also* CP 18-19, 33-35; RP (2/5/2010) at 4; RP (2/19/2010) at 18-19. Because these statements did not reasonably relate to a third party, the State could not introduce them at trial without violating the spirit of *Bruton v. United States*. 391 U.S. 123, 130-37, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). *See also* CrR 4.4(c)(2); *State v. Jones*, 93 Wn. App. 166, 968 P.2d 888 (1998). It was the *Bruton* issues, not the potential conflict of interest, which compelled the State to file the motion. CP 18-19, 33-35; RP (2/5/2010) at 4; RP (2/19/2010) at 19.

Additionally, the trial court granted the motion because the *Bruton* issues required separate trials. CP 15; RP (2/26/2010) at 12, 19-21. The trial court found and concluded that (1) the DPA filed her motion in good faith, and (2) the DPA's motion was not frivolous. CP 9-10. In light of these facts, the motion to sever was neither baseless, nor an abuse of the judicial system. The sanction is unwarranted. *See Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994) (“[T]he purpose behind CR 11 is to deter *baseless* filings and to curb abuses of the judicial system.”).

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2. The DPA's concern for the potential conflict of interest was grounded in fact and law.

Rather than address the real factual and legal basis for the DPA's motion, Ms. Unger focuses exclusively on the DPA's concern that a potential conflict of interest may have existed. *See* Brief of Respondent at 2-8. According to Ms. Unger, the DPA "failed to produce any evidence to support the assertions in her motion." *See* Brief of Respondent at 5-6. This Court should reject Ms. Unger's argument.

While the DPA in-artfully explained from whence her concern derived, the underlying facts supported the State's belief that a conflict may have existed in the case. First, Mr. Mallicott informed police that his motorcycle club had certain protocols its members are to follow when contacted by law enforcement. CP 25. Second, Mr. Mallicott stated that he wanted to call *his* attorney. CP 25. Third, Mr. Mallicott made two attempts to contact Ms. Unger, leaving her a message on her voice mail. CP 26. Fourth, Ms. Unger entered a notice of appearance on behalf of Mr. Mallicott's co-defendant. CP 36. Finally, Ms. Unger had in fact previously represented Mr. Mallicott. CP 49-56; RP (2/26/2010) at 11-12, 25-29. These facts validated the DPA's concern. *See* CP 35.

Furthermore, the DPA had a legal obligation to raise the potential conflict before the trial court. *United States v. Friedman*, 854 F.2d 535,

572 (2nd Cir. 1988); *Mannhalt v. Reed*, 847 F.2d 576, 583-84 (9th Cir. 1988). *See also State v. Dhawliwal*, 150 Wn.2d 559, 566-576, 79 P.3d 432 (2003). The State repeatedly emphasized that it raised the potential conflict so that the trial court could make any inquiry it believed appropriate. RP (2/19/2010) at 18-19; RP (2/26/2010) at 5, 25-26. In its findings/conclusions, the trial court even stated:

If the inference from Defendant Mallicott's statement that Ms. Unger had previously been or was currently his attorney was true, Ms. Unger's representation of Defendant Blackcrow might constitute a potential conflict, and particularly so if the cases were joined [...] ...

CP 8. In light of the relevant case law, and the trial court's own legal conclusion, the DPA's decision to call attention to the potential conflict was proper. The sanction is unwarranted.

3. The DPA's misstated facts and mistaken inference do not justify the sanction award.

Ms. Unger's ire is readily apparent. Ms. Unger berates the DPA for making two supplementary assertions in the original motion to sever: (1) the DPA misstated Mr. Mallicott's gang affiliation, claiming he was a member of the Hells Angels, and (2) the DPA inferred that Ms. Unger was the attorney for the Hells Angels. *See* Brief of Appellant at 6. However, CR 11 sanctions are not predicated on an attorney's mistakes, but only on "baseless filings" and "abuses of the judicial system." *See Biggs*, 124

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Wn.2d at 197. As argued above, the DPA's motion, and her concern regarding the potential conflict, was not baseless. Additionally, the trial court expressly found/concluded that (1) there was no evidence to show the DPA misstated the facts to serve a malicious purpose, and (2) the DPA filed the motion in good faith. CP 9-10. In light of the facts of this case, and the purpose of CR 11, sanctions are not warranted.

4. The DPA made a reasonable inquiry before she filed the motion to sever.

Ms. Unger argues the DPA failed to make a "reasonable inquiry" and prepared the motion in an irresponsible manner. *See* Brief of Respondent at 3-8. While Ms. Unger correctly cites *Cooter & Gell v. Hartmarx Corp.* for the proposition that CR 11 sanctions provide the necessary "incentive to 'stop, think and investigate more carefully before serving and filing papers[,]'" *see* Brief of Respondent at 5, her reliance on the case is misplaced.

In *Cooter & Gell*, the Respondent filed a breach of contract action against the Appellant. 496 U.S. 384, 388, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). The Appellant responded by filing a counterclaim. *Id.* The District Court granted summary judgment for the Respondent in its suit against the Appellant, and a jury returned a verdict in favor of the Respondent on the Appellant's counterclaim. *Id.*

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The *Cooter & Gell* Appellant was not satisfied with the outcome at trial and filed two anti-trust complaints against the Respondent. 496 U.S. at 388. One of the complaints, the one that resulted in sanctions, “alleged a nationwide conspiracy to fix prices and to eliminate competition through an exclusive retail agent policy and uniform pricing scheme, as well as other unfair competition practices such as resale price maintenance and territorial restrictions.” *Id.* at 389. The Appellant’s entire action rested on certain “telephone calls to salespersons in a number of men’s clothing stores in New York City, Philadelphia, Baltimore, and Washington D.C.” *Id.* The Appellant “inferred from this research that only one store in each major metropolitan area nationwide sold [the Respondent’s] suits.” *Id.*

The *Cooter & Gell* Appellant eventually recognized that its suit was frivolous and moved to dismiss the complaint. *Id.* However, the trial court awarded CR 11 sanctions because “the allegations in the complaint regarding exclusive retail agency arrangements for [one of the Respondent subsidiary’s] clothing were completely baseless because petitioner researched only the availability of [a second subsidiary’s] menswear.” *Id.* at 390. Additionally, “the petitioner’s limited survey of only four Eastern cities did not support the allegation that respondents had exclusive retailer agreements in every major city in the United States.” *Id.* The Court of

Appeals and the United States Supreme Court held that sanctions were proper in light of these “fatal deficiencies.” *Id.* at 390, 409.

The present case is readily distinguished from the baseless action that resulted in sanctions in *Cooter & Gell*. While the DPA’s decision to prepare a motion from memory was not advisable, the motion did not suffer any fatal deficiencies. Unlike the filing in *Cooter & Gell*, which was devoid of any merit, the DPA’s motion was grounded in fact and law. *See above*. Additionally, the DPA supplied the trial court with the material facts from the police reports and the applicable case law that compelled two separate trials. *See above*. As such, the DPA conducted the requisite inquiry into the facts and law to support the contested filing. The sanction is not warranted.

While the DPA regrettably misstated certain supplementary facts and drew an incorrect inference, *Cooter & Gell* does not require an attorney to present a flawless filing. *See* 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). Such a standard would be impossible to satisfy in light of criminal practitioners’ voluminous caseloads. The DPA is human, and humans are fallible. The DPA’s mistake does not merit sanctions.

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B. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED A \$500 SANCTION BECAUSE IT DID NOT CONSIDER LESS SEVERE ALTERNATIVES TO REMEDY THE ALLEGED HARM.

When deciding upon a sanction, the trial court should impose the least severe sanction necessary to carry out the purpose of the rule and remedy the alleged harm. *Biggs v. Vail*, 124 Wn.2d 193, 197, 201-02, 876 P.2d 448 (1994). CR 11 should not be used as a wealth shifting mechanism. *Id.* at 201. The burden is on the movant to justify the request for sanctions. *Id.* at 202.

1. The defense did not justify a monetary sanction because it never quantified the injury/harm it suffered.

Ms. Unger argues the trial court sufficiently supported its sanction award by finding that portions of the motion were incorrect and disparaging to defense counsel. *See* Brief of Respondent at 10-11. However, the trial court's determination, that "no amount less than \$500 is sufficient to remedy the disparaging and inaccurate statement[,]" was purely speculative.

When a trial court considers a monetary sanction, it is customary for the injured party provide a statement of costs and attorney's fees directly incurred from the baseless filing. *See e.g., Cooter & Gell*, 496 U.S. 384, 389, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990); *Hicks v. Edwards*,

75 Wn. App. 156, 161, 876 P.2d 953 (1994). However, Ms. Unger never quantified how the DPA's misstatements adversely affected her practice, nor did she inform the court as to how much time she, or her associate, expended to address the DPA's incorrect statements and inference. Without this information, Ms. Unger's argument that the trial court selected the least severe sanction necessary to give effect to court rule and remedy the alleged harm fails.

2. The trial court abused its discretion because it did not consider a lesser sanction that would deter similar conduct in the future.

Ms. Unger refuses to accept the State's public apology, arguing that if the trial court had allowed the State to correct its mistake after the fact, the deterrent purpose of CR 11 becomes moot. *See* Brief of Respondent at 10. However, the deterrent effect of CR 11 would have been preserved had the trial court imposed a lesser sanction, *e.g.* admonishment/censure.

First, Ms. Unger's argument ignores established case law that instructs the lower courts to afford an offending party time to remedy an alleged CR 11 violation before resorting to sanctions. *See Biggs*, 142 Wn.2d at 198. Thus, the trial court is not obligated to resort immediately to sanctions to ensure the efficacy of CR 11. Furthermore, the trial court

should only impose sanctions where the contested error is so egregious or is regularly committed. *See MacDonald v. Korum Ford*, 80 Wn. App. 877, 892, 912 P.2d 1052 (1996) (“[S]anctions [should] be reserved for ‘egregious conduct and not be viewed as simply another weapon in a litigator’s arsenal.’”).

Second, the DPA admitted that she made a mistake. CP 22; RP (2/16/2010) at 10. The DPA’s supervisor, the elected prosecutor, publicly apologized to Ms. Unger. RP (2/16/2010) at 18. Judge Wood, who presided over a discovery hearing requested by the defense, stated there was “not a whole lot of foundation” to support the Hells Angels reference and that the trial court expects the DPA to make sure its information is accurate and relevant to the case. RP (2/16/2010) at 10-11. In light of these facts, there was zero risk that the challenged conduct would present itself anew. A lesser sanction, *e.g.* admonishment/censure, would have provided the requisite deterrent to the alleged CR 11 violation in this case. The monetary sanction was not warranted.

II. CONCLUSION.

It is unfortunate that cooler heads did not prevail in the present case. The DPA made a mistake, but that mistake did not render her motion

to sever “baseless” or an “abuse of the judicial system.” The DPA’s mistake does not support a monetary sanction.

While the trial court’s decision to sanction a party is reviewed for an abuse of discretion, the \$500 sanction was unwarranted because (1) the DPA’s motion was supported by fact and law, (2) the DPA’s motion was filed in good faith and ultimately granted, (3) the defense did not justify a monetary sanction award, and (4) the trial court did not consider the less severe deterrent necessary to carry out the purpose of the rule and remedy the alleged harm.

For the foregoing reasons, the Clallam County Prosecuting Attorney’s Office respectfully requests that this Court reverse the trial court’s ruling and vacate the order that imposed a \$500 sanction against the State.

DATED October 27, 2010.

DEBORAH S. KELLY, Prosecuting Attorney



Brian Patrick Wendt, WSBA # 40537
Deputy Prosecuting Attorney