No. 487616

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

MICHAEL MONTGOMERY,

Plaintiff/Respondent,

And

DENNIS MONTGOMERY and MIA MONTGOMERY,
husband and wife,

Defendants/Appellants,

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STATE OF WASHINGTON
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BRIEF OF APPELLANTS

Appeal from Pierce County Superior
Court No. 13-2-13036-5

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TABLE OF CONTENTS

TABLE OF CONTENTS.....I

TABLE OF AUTHORITIES.....II

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....4

III. ISSUES PERTINENT TO ASSIGNMENTS OF ERROR.....5

IV. STATEMENT OF THE CASE.....7

A. Undisputed Facts.....7

B. Disputed Facts.....8

V. LEGAL ARGUMENT.....12

VI. CONCLUSION.....21

VI. APPENDICES

TABLE OF AUTHORITIES

Cases

CR 56 4

Salvatore vs. State of Florida, 366 So.2d 745 (1978); cert. denied 444 US 885, 100 S. Ct. 177, 62 Law Ed. 2d 115 (1979) 13

Ferguson vs. State, 417 So. 2d 639 (1982) 13

Black's Law Dictionary, Abridged 8th Edition (2005) 14

Micro Enhancement International, Inc. vs. Cooper's & Lybrand, LLP., 110 Wn. App. 412, 40 P3d 1206 (2002) 15

Rivers vs. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 41 P.3d 1175 (2002) 15

ER 201 16

Spokane Research & Defense Fund vs. City of Spokane, 155 Wn.2d 89, 98-99 (2005) 16

Walston vs. Boeing Co., 334 P.3d 519, 521 (2014) 18

Preston vs. Duncan, 55 Wn.2d 678, 682, 349 P.2d 605 (1960) 18

Scott vs. Pacific West Mountain Resort, 119 Wn.2d 484, 502-03, 834 P2d 6 (1992) 18

Thoma vs. C.J. Montag & Sons, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959) 18

LaPlante vs. State, 85 Wn2d 154, 159, 531 P2d 299 (1975) 19

Morris vs. McNicol, 83 Wn.2d 491, 495, 519 P.2d 7 (1974) 19

I. INTRODUCTION

Michael Montgomery sued his father and step-mother, Dennis and Mia Montgomery for conversion of his personal property. It was disclosed for the first time at trial that Michael Montgomery had given his mother, Pamela Reed, a general power of attorney in January 2013 months before the sale of the personal property, and in that same month, Pamela Reed had directed Mia Montgomery to sell the property, a message Mia passed on to her husband, Dennis Montgomery, who was not on speaking terms with his ex-wife or his son at that time. The only persons who knew of the existence of the power of attorney prior to trial were Pamela Reed and Michael Montgomery. Once it was discovered at trial that Pamela Reed had the authority to dispose of Michael's assets via the power of attorney, plaintiff's attorney objected to any defense that might involve the power of attorney, claiming prejudice and after much colloquy the court invited plaintiff to request a mistrial with the promise that the court would grant sanctions. By that time, Pamela Reed had already testified that she had a general power of attorney, so that evidence was before the jury, although the power of attorney itself was never admitted, and plaintiff never finished their case in chief, nor were the defendants

given an opportunity to present a defense. In a subsequent order, the court granted the sanctions requested by plaintiff's attorney.

A new trial was scheduled, and many months later, plaintiff moved for summary judgment on an order shortening time shortly before trial, and shortly before trial, the court granted the plaintiff's motion on liability, claiming there was insufficient proof that Pamela Reed was acting within the authority of the power of attorney given to her by plaintiff when she told Mia Montgomery to sell the personal property. All theories of defense on liability were dismissed, including all those included in the notice of intent to amend filed by the defendants not long after the mistrial and their discovery of the existence of the power of attorney.

Appellants respectfully assert that the trial court's granting of the mistrial, much more the granting of sanctions related to the mistrial, was erroneous and an abuse of discretion. Specifically, the trial court saw the introduction of the power of attorney given to Pamela Reed as being prejudicial to plaintiff's claim and basically blamed the defendants for not disclosing in discovery a specific phone conversation that Mia Montgomery had with Pamela Reed wherein Pamela Reed agreed to the sale of the plaintiff's personal property. Of course, even the court acknowledged that, without the power of attorney, even Pamela Reed's agreement was irrelevant if she did not have a power of

attorney or was not acting pursuant to that power of attorney. In other words, the court granted sanctions in favor of the plaintiff and against the defendants for not disclosing evidence that was otherwise irrelevant given the issues that had been joined, until the disclosure of the power of attorney at trial. Notwithstanding this claim of non-disclosure, both Mia Montgomery and Dennis Montgomery stated in interrogatory answers, as well as in deposition, that all the family, including Pamela Reed had agreed that the personal property be sold. However, for whatever reason, the court did not deem this sufficient disclosure relative to the introduction to the power of attorney. The court could have, in lieu of a mistrial, listened to the evidence to determine whether or not the power of attorney was, in fact, being used by Pamela Reed in her direction to Mia Montgomery, and then direct the jury accordingly in the court's instructions. However, the court stated that it did not like the way the evidence was coming in for the plaintiff and that the case was a "mess" and chose to end the trial.

It should be apparent that if anyone was in a position to appreciate the existence and legal effect of the power of attorney it would have been the person who executed it and the person to whose benefit it ran, and the best that can be said was that the defendants knew that Pamela Reed was attempting to obtain a

power of attorney from her son in January 2013, but the existence of that agreement was never provided to the defendants.

Shortly before the second trial, the court granted plaintiff's summary judgment motion, and the court abused its discretion in that regard as well, violating the basic tenant of CR 56 by viewing the evidence in a light most favorable to the moving party, as opposed to the non-moving party. If that summary judgment motion had been denied, defendants would have been able to present their case which would have included the affirmative defenses set forth in their notice of intent, and allow the jury to determine whether or not Pamela Reed acted within the scope of her power of attorney to direct, or acquiesce to the sale of plaintiff's personal property.

II. ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law and fact in inviting plaintiff to request a mistrial with the promise of sanctions being granted by the court, and then granting a mistrial and awarding sanctions, particularly when there was no prejudice to the plaintiff who was aware well before trial of the existence of the power of attorney, and defendants did not become aware of the same until its existence was disclosed in trial.

2. The trial court erred as a matter of law, whether or not the mistrial could be justified, by inviting plaintiff to request

sanctions and then granting the same against the defendants, who were guilty of no wrong doing or non-disclosure in discovery, as is apparent from the interrogatory answers and deposition responses they provided. The court's ruling granting sanctions was an abuse of discretion.

3. The trial court erred as a matter of law and fact in granting plaintiff's motion for summary judgment on the issue of liability in violation of CR 56, and by removing admittedly disputed material facts from the jury's consideration, and depriving defendants of a trial on the merits concerning liability.

III. ISSUES PERTINENT TO ASSIGMENTS OF ERROR

1. Did the court abuse its discretion by offering sanctions to be awarded against defendants if plaintiff would agree to request a mistrial? (Assignments of Error 1 and 2).

2. Did the court abuse its discretion by declaring a mistrial because the court did not like the way the evidence was coming in during plaintiff's case? (Assignments of Error 1 and 2).

3. Did the court abuse its discretion by granting a mistrial with sanctions against the defendants where no court order was violated, defendants responded to discovery requests appropriately, there was no evidence defendants withheld or failed to disclose information, and the court itself found that any such information was irrelevant in any event in the absence of the

existence of a power of attorney known only to the plaintiff until it was disclosed at trial? (Assignments of Error 1 and 2).

4. Did the trial court fail to properly apply CR 56 and supporting case law in granting plaintiff's motion for summary judgment by drawing inferences from facts, not in a light most favorable to defendants/appellants, but in favor of the plaintiff/respondent? (Assignment of Error 3).

5. Did the trial court speculate on the credibility of any party in granting the plaintiff's summary judgment motion? (Assignment of Error 3).

6. Did the trial court fail, based on the facts submitted by defendants in opposition to plaintiff's summary judgment motion, to consider inferences raised by those facts that supported the many defenses raised in defendants' answer and the notice of intent to amend filed by the defendants after discovering the existence of the power of attorney? (Assignment of Error 3).

7. Did the trial court properly determine on summary judgment that plaintiff's attorney in fact was not acting as such when she told defendants to sell plaintiff's property or was that a factual matter to be determined by a jury? (Assignment of Error 3).

8. Did the trial court, assuming plaintiff's attorney in fact was acting as such when she told the defendants to sell the property at issue, improperly grant the plaintiff's summary

judgment on the basis that defendants did not know at the time she was speaking for the plaintiff as his attorney in fact? (Assignment of Error 3).

IV. STATEMENT OF THE CASE

A. Undisputed Facts

In December of 2012 plaintiff Michael Montgomery was convicted of wire fraud in federal court in Tacoma and sentenced to a lengthy prison term. He was immediately taken into custody, which came as a surprise to Michael, as well as other family members. (CP 1-4) (CP 520-525) At that point in time he was residing in Colorado, and on order to save his personal belongings, his father, Dennis Montgomery, traveled with his ex-wife's partner to Colorado to pick up Michael's personal belongings. (CP 1-4) He did so, and upon his return, much of the personal belongings of Michael were stored in Dennis' garage when it was found that his ex-wife, Pamela Reed, had failed to obtain storage for those items. (CP 520-525) The plaintiff, Michael Montgomery, had not made arrangements for storage, not having the funds to do so for any length of time, although he asked his mother to sell his vehicle and use those proceeds to store his property, which she refused to do. (CP 529-532)

Although Dennis Montgomery wanted to sell the personal belongings initially, he eventually conceded he shouldn't do so if

Although Dennis Montgomery wanted to sell the personal belongings initially, he eventually conceded he shouldn't do so if any other family member wanted to take the property and store it for Michael. (CP 529-532) (5/6/ RP 20) (5/7 RP 47-48) No one came forward to do so, so he made arrangements to sell the property in a commercially reasonable manner. (CP 520-525)

B. Disputed Facts

During this time, Michael Montgomery had provided his mother, Pamela Reed, with a general power of attorney, authorizing her to handle his assets as she saw fit. (5/7 RP 62-65) She obtained that power of attorney in January, and during that month she also directed Mia Montgomery, in a phone conversation, to sell the personal property that Dennis was holding. Exhibit 8 and (5/7 RP 84) The sale occurred well after January. (CP 520-525)

After the sale of plaintiff's personal property, he commenced a lawsuit against his father, Dennis Montgomery and step-mother Mia Montgomery in September of 2013. (CP 1-4) Defendants' answered the complaint in January of 2014 alleging as affirmative defenses, in part, that plaintiff was responsible for his own injuries, or others who were not party to the lawsuit, including his mother, Pamela Reed, who was to have found storage for the personal property, but did not do so. (CP 5-9)

The matter went to trial before a six person jury on May 4, 2015. There were a number of exchanges between the court and counsel regarding defenses that were to be offered in trial, all of which are pertinent to understanding the basis for the trial court's decisions which are the subject of this appeal. (5/7 RP 122-145 and 157-177)

Ultimately, the defendants and their counsel discovered during trial from Paul Montgomery, the son of Pamela Reed and Dennis Montgomery, that Pamela Reed had been given a general power of attorney in January of 2013 by Michael Montgomery. (5/7 RP 147) Defense counsel explored the existence of the power of attorney and its origination during cross examination of Pamela Reed. (5/7 RP 62-67)

After it became apparent that the defense intended to raise the issue that Pamela Reed's phone call to Mia Montgomery in January of 2013 directing or acquiescing in the sale of the personal property owned by plaintiff was done in her capacity as the attorney in fact for the plaintiff, an objection was made that this defense, specifically, had not been pled and that it was prejudicial to the plaintiff. (5/7 RP 122-145, and RP 157-177)

While acknowledging that this legal defense had not been raised previously, the defendants having no knowledge of the existence of the power of attorney, the factual basis had been pled

in the answer, i.e. that the entire family had agreed to the sale of the property, and the interrogatory answers and deposition responses established that Pamela Reed had agreed to the sale of the property in dispute. (CP 5-9, CP 179-188 and CP 189-194)

The court adjourned on Thursday and the next court day, Monday, May 11, the entire proceeding centered around the issue of the power of attorney and whether defendants had been forthcoming in their interrogatory and deposition responses. (5/11 RP 6) It was during this time that the plaintiff claimed prejudice and that the discovery responses from the defendants were, given the current situation, "outrageous" and that plaintiff should have some relief from the court. (5/11 RP 6 and 5/11 RP 33) At that time, the judge offered to grant a mistrial, with sanctions, characterizing the defendants' discovery responses as being deceptive, even though the court admitted that any evidence that Pamela Reed agreed to or directed the sale of personal property was irrelevant, absent the existence of the power of attorney. (5/11 RP 33)

The court then engaged in a lengthy, for lack of a better description, cross examination of Dennis Montgomery, which examination was designed to apprise and clarify for the court so that the court could "show myself what the facts were...as Mr. Montgomery understands it." (5/11 RP 16-29)

At the close of the lengthy session which should be read carefully by this court (5/11 RP 4-60), the court granted the mistrial and awarded sanctions, which were the subject of a later contested hearing, (CP 197-207), and set forth in an order dated September 4, 2015. (5/11 RP 60). (9/4 RP 3-15), (CP 270-272).

The matter was rescheduled for trial, and shortly after the court order granting sanctions, defendants' filed a notice of intent to amend their answer to include numerous affirmative defenses, based largely on the existence of the power of attorney granted to Pamela Reed. (CP 273-274) Nothing further took place other than the notice of discretionary review which was accepted and ruled upon and is referenced in the appendices in this case. (Appendix I)

Shortly before trial, plaintiff moved for summary judgment, (CP 414-497), on the issue of liability, on shortened time. The court heard the motion, which defendants contested, and granted plaintiff's motion on the issue of liability, stating, in effect, there was not sufficient proof that Pamela Reed was acting pursuant to her power of attorney when she agreed to the sale of plaintiff's personal property, all the while admitting the facts were disputed about whether she had directed, or acquiesced in, the sale of that property. (12/4 RP 1-21) (CP 535-536) The court denied defendant's motion for reconsideration. (1/8 RP 1-14) (CP 591-592)

Plaintiff went to trial on the issue of damages alone, and ultimately the jury entered a verdict of $24,000.00 and judgment was entered on the verdict against the defendants. (CP 633-635) The plaintiff in his complaint had referenced a claim of $150,000.00 and plaintiff's attorney disregarded that claim and relied on the expert testimony submitted by plaintiff proposed a value of approximately $43,000.00. (CP 1-4) (1/12 RP 122)

Defendants contend that the declarations of Dennis Montgomery, Mia Montgomery and Paul Montgomery (CP 520-525, CP 526-528, CP 529-532) established, in toto, factual issues material to the affirmative defenses offered in the notice of intent to amend that should have been heard by the jury, and specifically the declaration of Mia Montgomery relating her phone conversation with Pamela Reed who at the time had received a power of attorney from Michael Montgomery and told Mia to "tell Dennis to go ahead and sell the property since no one could afford to pay for storage," including her. (CP 526-528)

Given this direction, although Dennis was surprised at her statement, he "saw no other option other than to sell the items at auction." (CP 520-525)

V. LEGAL ARGUMENT

This is a case involving two trials, the first was ended prematurely, and before the defense could put on its case, in a court

ordered mistrial invited by the judge, who made it even more enticing to the plaintiff by offering an award of sanctions against the defendants. The mistrial was granted due to the introduction of evidence known by the plaintiff well before trial, but not discovered by the defendants until the trial had begun. The reason for granting the mistrial, practically on its own motion, was due to the court's perception that the defendants, not the plaintiff, had withheld "crucial" information in discovery responses. Ironically, the crucial information would have been otherwise irrelevant but for the existence of the power of attorney that had been granted by the plaintiff to his mother. Although the defendants had answered discovery responses in interrogatories as well as in deposition indicating that the mother had agreed to the sale of the personal property, and although the defendants had never been asked in interrogatory or in deposition what specific conversations they might have had with plaintiff's mother, Pamela Reed, the court somehow found deception was involved on the part of the defendants. Apparently this was the basis for the court's award of sanctions.

Before the second trial, on an order shortening time, and well after plaintiff was aware that the power of attorney issue would be raised in the second trial in the form of a defense that the attorney in fact for the plaintiff had given permission for the

defendants to sell plaintiff's personal property, the court granted the summary judgment motion, despite a declaration from Mia Montgomery, as well as the declarations of Dennis and Paul Montgomery, indicating that Pamela Reed had been given a power of attorney in January by the plaintiff, and it was "at or about the time" she received the power of attorney that she directed the defendants to sell the property, or at the very least, acquiesced in the same. The sale of the property did not occur until months later and the property itself was not turned over to the auctioneers until February. No attempts were made by the attorney in fact to stop the sale of plaintiff's personal property after she had directed, or acquiesced in, the sale of the same.

Since the court's discretion is involved in granting a mistrial, only an abuse of discretion will result in the mistrial being overruled or reversed, which, of course, in many ways is pointless, because nothing can be done about it by the time it reaches the Court of Appeals. Nonetheless, in determining whether to declare a mistrial, the trial court must decide whether the error is so prejudicial and fundamental that expenditure of further time and expense would be wasteful, if not futile. Although the judge has the power to declare a mistrial and discharge a jury, this power should be "exercised with great care and only in cases of absolute necessity." *Salvatore vs. State of Florida*, 366 So.2d 745 (1978);

cert. denied 444 US 885, 100 S. Ct. 177, 62 Law Ed. 2d 115 (1979). For instance, sticking with Florida, in *Ferguson vs. State*, 417 So. 2d 639 (1982) the defendant moved for a mistrial because of allegedly improper comment made by the prosecution during closing argument. The prosecution stated that defense counsel was asking the jury to find a scape goat for defendant's guilt, putting the blame on someone who had already been found guilty. The appellate court found the lower court had properly denied the motion for mistrial because the prosecutor's comment fell within the bounds of "fair reply."

Although the above involved criminal cases, the concepts of "great care" and "fair reply" apply to this case.

The trial court could have resolved this matter in the first trial by simply allowing the case to go forward and let the jury decide whether or not the person holding the power of attorney was exercising it at the time she advised defendants to sell the personal property. This would be the only fair way to proceed, since the plaintiff obviously knew about the power of attorney at the time he executed it in January of 2013, along with the person who held the power of attorney, Pamela Reed. Since the defense was not requesting a mistrial, the court obviously felt that the plaintiff had been prejudiced in some way by this inadvertent disclosure by plaintiff and plaintiff's witness.

In neither trial, were defendants given an opportunity to present their defenses on liability.

Black's Law Dictionary, Abridged 8th Edition (2005) offers a definition of mistrial that would suggest the trial court over stepped the bounds of discretion:

> **Mistrial**. A trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings.

The rest of the definition deals with hung juries, but one might be led to ask what was the procedural error or "serious misconduct" on the part of anyone that would lead to the granting of a mistrial, much less sanctions attached to that mistrial order.

Assuming the trial court was acting within its discretion to grant a mistrial due to some procedural error, currently unidentified, as there is no evidence that serious misconduct occurred at any point in the proceedings, the trial court abused its discretion in granting sanctions against the defendants.

Since pre-trial discovery was the court's focus in granting the mistrial, the laws involving discovery and sanctions should be applicable. Inadvertent oversight, if there was any, may not be willful and may not justify sanctions if there is no substantial prejudice. *Micro Enhancement International, Inc. vs. Cooper's & Lybrand*, LLP., 110 Wn. App. 412, 40 P3d 1206 (2002).

There was no non-disclosure by the defendants in their interrogatory answers or deposition responses because, in both, Mr. and Mrs. Montgomery clearly indicate that Pamela Reed agreed or acquiesced in the sale or auction of plaintiff's personal items.

At one point in the proceedings, the trial court even acknowledged that such an agreement by Pamela Reed would have little relevance to any defenses that might be offered by the defendants, absent the power of attorney that had been given to Pamela Reed by her son, the plaintiff.

There is no evidence indicating anyone but Michael Montgomery and Pamela Reed knew what power of attorney was signed and when, and what effect it might have on the legal rights of the plaintiff when Pamela Reed voiced her approval of the sale.

When sanctions are granted, the trial court must set forth its reasons for the same and clearly state them on the record so that a meaningful review can be had on appeal. *Rivers vs. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002).

Without the disclosure of the power of attorney, there would be no need to order a mistrial, since any statement by plaintiff's mother about selling the property would be irrelevant and certainly not binding on the plaintiff.

Since the defendants had no knowledge of the power of attorney, they could not be held responsible for the mistrial after the disclosure of the existence of the power of attorney, even if they had not mentioned Pamela Reed's direction and/or acquiescence in the sale because her comments would have no impact whatsoever on the rights and responsibilities of the litigants.

The mistrial should be negated, overruled or reversed and, if only as a practical matter, the Court of Appeals chooses not to do so, it is imperative that the Court of Appeals reverse or overrule the order granting sanctions.

Appellants request this court to take judicial notice of the procedural history of this appeal including the proceedings and briefs related to the discretionary review that was granted on the above matter. ER 201; *Spokane Research & Defense Fund vs. City of Spokane*, 155 Wn.2d 89, 98-99 (2005).

This brings us to the summary judgment order entered finding liability on the part of the defendants for conversion of plaintiff's property and limiting the trial to damages only and prohibiting any defenses to the damage claim, such as failure to mitigate, abandonment, etc.

The declarations submitted in opposition to the summary judgment motion establish that Pamela Reed, with her power of

attorney, could have picked up Michael's personal belongings before they were sold at any time from mid-January on, if not sooner. The declarations also establish that in a recent conversation with Mia, Pamela told her to sell the items in January 2013. These items were not sent to auction until February and were not sold until April. (CP 529-532)

There are clear inferences from the facts before the trial court that Pamela Reed was acting pursuant to her power of attorney at the time she told the defendants to sell the property, and it was clear that the trial court was parsing its opinion stating that, in effect, it was not clear that Pamela Reed was acting as an attorney in fact at the time she told the defendants to sell the property, and in fact, she denied that she had told them that at trial, all facts that were disputed by the defense.

It is axiomatic that all evidence, and inferences that can be drawn therefrom on a motion for summary judgment should be viewed in a light most favorable to the non-moving party.

CR 56(c) states that the evidence submitted by the moving party must "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." In the comments to the rule, it is noted that "the movant bears the difficult burden of demonstrating that all reasonable people would reach the same conclusion when presented with the

evidence and considering all reasonable inferences that can be drawn therefrom." Citing *Walston vs. Boeing Co.*, 334 P.3d 519, 521 (2014). This is a strict standard, confirmed by *Waslton*, *supra*, *Preston vs. Duncan*, 55 Wn.2d 678, 682, 349 P.2d 605 (1960) and *Scott vs. Pacific West Mountain Resort*, 119 Wn.2d 484, 502-03, 834 P2d 6 (1992).

As the court clearly indicated in *Thoma vs. C.J. Montag & Sons*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959), the summary judgment procedure should not be used to try an issue of fact.

The trial court indicated in its decision in granting the summary judgment that Pamela Reed's intentions were not clear, and the courts have held that summary judgment is generally not well suited to actions where the issues of fact include the intent, knowledge, good faith and/or the negligence of a party or other persons. See *Preston, supra* 55 Wn. 2d at 681 and *LaPlante vs. State*, 85 Wn2d 154, 159, 531 P2d 299 (1975). The trial court was also dubious about whether Pamela Reed ever stated that the property should be sold, indicating that was contrary to her trial testimony, notwithstanding her alleged statement to sell the property. When it comes to summary judgment, the reasonableness of a party's actions is a material issue of fact, and it is generally improper to grant summary judgment when that is an issue. *Morris vs. McNicol*, 83 Wn.2d 491, 495, 519 P.2d 7 (1974).

The summary judgment granted by the trial court was, in effect, a judgment on the merits as it relates to liability and that ruling deprived defendants of the ability to present their case, which was founded on the many affirmative defenses alleged in the notice of intent to amend, and which were based on the power of attorney and other factors. Even Pamela Reed's acts of omission in failing to pick up the property or to otherwise protect it, given the existence of the power of attorney, arguably constituted abandonment of the same by the attorney in fact, another justification for sale of the property. The trial court's precipitous ruling on summary judgment effectively ended the case for the defendants, notwithstanding many disputed material facts.

VI. CONCLUSION

The defendants were never allowed to address issues of liability in trial, were punished for their lack of knowledge about the existence of a power of attorney that was disclosed during the course of trial, sanctions awarded against them, and then in the second trial were again deprived of their ability to address liability issues raised by the existence of the power of attorney and, in effect, were denied a fair trial on the merits in not one, but two trials.

The award of sanctions should be overturned, or reversed, and the matter should be sent back to the trial court for trial on the merits, while leaving the damage award of $24,000.00 since there were no impediments or defenses allowed to plaintiff's presentation of his damage claim. Defendant should be allowed to present all defenses that they were deprived of presenting to the trier of fact, both on liability and damages, at the next trial.

Dated this 22nd day of August, 2016.

Respectfully submitted,

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By _____
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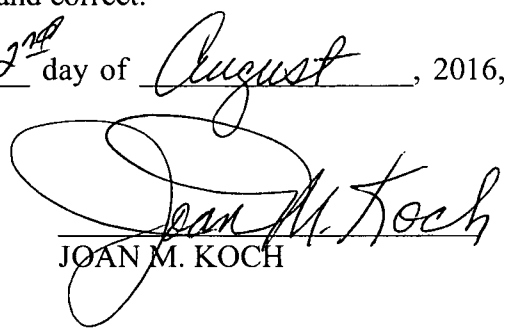
Attorney for Appellants

CERTIFICATE OF DELIVERY

On this day, I caused to be delivered by ABC LEGAL MESSENGER a true and accurate copy of the foregoing Brief of Appellants to Casey Arbenz of The Hester Law Group. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of August, 2016, at Tacoma, Washington.



JOAN M. KOCH

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