

FILED

OCT 14 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29872-8

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

WASHINGTON MOTORSPORTS LIMITED PARTNERSHIP, a/k/a
Washington Motorsports, Ltd., by and through Barry W. Davidson, in his
capacity as Receiver and as Acting Managing General Partner,

Respondents,

v.

SPOKANE RACEWAY PARK, INC.,
a Washington for profit corporation and General Partner of Washington
Motorsports Limited Partnership,

Defendant, and

JEROME SHULKIN,

Appellant.

SUPERIOR COURT CASE NO. 03-2-06856-4

BRIEF OF APPELLANT

Shulkin Hutton Inc., P.S.,
Jerome Shulkin, WSBA # 2198
7900 SE 28th Street, Suite 302
Mercer Island, WA 98004
Tel.: 206-623-3515

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A. ASSIGNMENTS OF ERROR

1. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the order of March 22, 2011, imposing a monetary sanction, pursuant to CR 26(g) for failure to properly sign a certification, as attorney for the former principal limited partner of the receivership estate, who failed to respond to Interrogatories.
2. The trial court erred in that she included an alleged similar violation of CR 26(g), for a similar offense by the same limited partner in 2009.
3. The trial court erred in her interpretation of CR 26(g), when she sanctioned the attorney for the limited partner; that limited partner being the object of the offense of not responding to the interrogatories.
4. The trial court erred in ordering any sanction, and the amount thereof, when she had previously sanctioned the offender, the same limited partner, for failure to respond to the same interrogatories.

The trial court erred when she adopted the grievances proposed by the Respondent and failed to provide a hearing thereon.

2. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Is an attorney, whose only alleged offense was that he did not properly sign the certification, as provided for in CR 26(g), and whose client has been previously sanctioned for failure to respond to the interrogatories submitted, liable for the costs

and attorney fees incurred by the counsel for Respondent and, if so, if the violation demands a mandatory punishment, is that which was imposed mandatory?

Did Judge Plese, who sanctioned the Appellant, apply the proper test in finding a violation of CR 26(g)?

Was the ruling of Judge Plese on February 17, 2011, entered on 3/22/2011 (see CP pp. 195-201), which sanctioned the Appellant, appropriate as to an alleged offense in 2009, similar to the offense motioned for by Respondent, relating to a similar certification, where no such motion had been prayed for, and a different judge (Robert Austin) was at that time the judge presiding over the receivership in 2009-2010, before his retirement?

Were claims that Appellant acted frivolously (denied), have any relation to the central issue; that the certification prepared by Appellant, did not conform with and violated CR 26(g)?

B. STATEMENT OF THE CASE

While much of the record, Docket No. 54 through Docket No 1248, is of interest to establish a factual background of the case, it has little direct effect on this appeal status to sanctions v. Shulkin. The record is rather voluminous. It is collateral, but not specifically of interest to the issues.

This appeal, by attorney Jerome Shulkin is an appeal from a sanction imposed by a receivership court, the Honorable Annette Plese, orally at a telephonic hearing conducted on February 17, 2011 (see RP p. 29 lines 8-11), and the order imposing the

sanction on March 22, 2011 (see RP p. 57 lines 2-4). The sanction was imposed on the Motion of the Respondent by its counsel. See for example CP page 2 through 113.

C. ARGUMENTS IN RELATION TO ISSUES RAISED

Each issue will be addressed. By necessity, there will be some repetition and overlapping. This appeal will not resolve the issues between those associated with the receiver and trustee vs. Orville Moe and the majority of limited Partners. For the most part, those resolutions will await the closing of cases, the conclusion of interlocutory reasons for delays (other than, as here, the trial court ruled its sanction award to be Final).

1. Where the attorney for the offender is sanctioned, does the sanction demand a monetary award and in what amount.

a. Admittedly, the leading Washington Supreme Court case, *Washington State Physicians Insurance Exchange & Association v. Fisons Corporation*, set the ground rules, acknowledging that the standards for CR 26(g) had not yet been clearly determined prior to 1993. *Washington State Physicians Insurance Exchange & Association v. Fisons Corporation*, 122 Wn.2d 299, 858 P.2d 154 (Wash. 1993). While Respondent contends that the courts have ruled in a fashion that seems fixed, several tests have been established that apply to cases differently, depending on the specific facts therein. See *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (Wash. 1997), *Carlson v. Lake Chelan Community Hosp.*, 116 Wn.App. 718, 66 P.3d 1080 (Wash. App. Div. 3 2003), *Perry v. Costco*

Wholesale, Inc., 123 Wn. App. 783, 98 P.3d 1264 (Wash. App. Div. 1 2004), *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.3d 115 (Wash. 2006), and *Deutscher v. Gabel*, 149 Wn.App. 119, 202 P.3d 355 (Wash.app. Div. 1 2009). It is clear that there have been numerous stabs at the elements laid down, which have altered or clarified the rules, again, depending on the facts presented in each instance. For example, the court in *Burnet* established several factors to consider when discovery sanctions governed by CR 26(g) resulted in the trial court's imposition of the most severe sanctions against a party. In such instances, the trial court should apply the *Burnet* test that contains the following elements: 1) whether the trial court explicitly considered lesser sanctions; 2) whether the party's conduct giving rise to sanctions "willfully disregarded an order of the trial court;" and 3) whether the party's conduct substantially prejudiced the opponent." *Burnet* at 497. It would follow that the requirement for an analysis of these elements will potentially allow a trial court to choose not to impose a sanction for conduct in violation of CR 26(g). Otherwise, this analysis would be strictly an academic exercise and unnecessary.

The court in *Carlson* was faced with a trial court that had imposed a sanction where no court order was violated. The court did not require such an order for a sanction to be imposed. All that was necessary was that a party had violated CR 26(g). Although the court did state that if "a violation of CR 26 is found, the imposition of sanctions is **mandatory**." *Carlson* at 737 (emphasis added). The *Carlson* court also required, however, that the trial court "**must** consider all

surrounding circumstances and determine whether the attorney complied with” CR 26(g). *Carlson* at 738 (emphasis added). The court relied primarily on *Fisons*, and reiterated the test established there. Although derived from the same decision in *Fisons*, the courts in *Burnet* and *Carlson* reach different conclusions, based on the facts pertinent to each case.

Continuing along the lines of further refining CR 26(g) and *Fisons*, the court in *Perry* was asked to determine whether a monetary sanction is required when a party violates CR 26(g). The court in *Perry* ruled that CR 26(g) does not require a monetary sanction, and that the trial court, in granting a continuance, had fashioned the appropriate sanction. The court took into account the trial court’s consideration that “other remedial measures have already been taken and...plaintiff has not been prejudiced and...plaintiff has been afforded opportunity for discovery.” *Perry* at 806. The court in *Perry* relies on *Fisons* and again reiterates that sanctions are to be “tailored to the specific situation and no great sanction should be imposed than what is required for the particular case.” *Perry* at 807.

The Supreme Court of Washington takes a step further in *Mayer v. Sto Industries* in clarifying CR 26(g) and specifically limited the test established in *Burnet*. The facts of the *Mayer* case are similar to the case at hand, in that the conduct to be sanctioned was the certification by an attorney of discovery responses that were inadequate and evasive responses. However, the party that submitted the discovery responses, not the attorney that certified the responses, was sanctioned.

Furthermore, the Court continued in its holding that a trial court need not consider the *Burnet* test when imposing a sanction for discovery abuses. Even if the *Burnet* test did apply, the Court held that a monetary sanction against a party “could not be viewed as ‘one of the harsher remedies allowable.’” *Mayer* at 689. The most severe sanctions that can be imposed upon a party itself include dismissal, default, and exclusion of evidence, but not a monetary compensatory sanction. The holding in *Mayer* did not address a situation where sanctions are imposed on the attorney. It should be emphasized that the conduct of improper certification for which a sanction was imposed in *Mayer* was imputed on the party, and therefore the party, rather than the attorney, was punished for its conduct in providing improper discovery responses which were certified by its attorney.

Lastly, the *Deutscher* case was concerned with an attorney that committed sanctionable conduct under CR 26, and the court was faced with deciding whether a sanction for attorney’s fees directed at the attorney, rather than the party whom the attorney represented, was properly imposed. The conduct for which a sanction was imposed included the attorney’s candor, or lack thereof, towards the trial court when identifying a new witness at trial and representing to the court that the witness was discovered by chance at the last minute when in fact the witness had been disclosed to the attorney through deposition of another witness months before trial. The court in *Deutscher* held that the trial court properly relied on the law set forth in *Fisons* in determining that the attorney’s conduct was a discovery violation and fashioning a

proper sanction of attorney's fees. The court goes on to explain that the "driving force" for its imposition of a sanction was "its obligation to insist upon candor from attorneys. Misleading the court is never justified." *Deutscher* at 136. Additionally, "*Fisons* states that 'a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials.'" *Id* at 136.

b. The result is that the aims of the rule drafters are understood, but the punishment, though left with the trier of fact, vary from case to case. As shown by the recitation of cases above, discovery violations run the gamut. It is unclear, given the existing case law, exactly which rules apply with any given allegation of a violation that warrants sanctions without a clear evaluation of the facts of the case. It is clear that a hard and fast rule that a sanction is mandatory does not exist. Rather, careful analysis of each case, its facts, and the relevant actors are necessary when considering whether a discovery violation occurred and if violation necessitated a sanction to be imposed.

2. Appellant Shulkin, acknowledges the rule and its reasoning, but demonstrates his attention to the test in *Burnet* and its elements, and in the alternative, the guidelines set forth in *Fisons*, and asserts that Judge Plese failed to consider the law established in either of these cases. Shulkin satisfied the judgment against him, despite the sanction having already been imposed against Orville Moe, and should not be sanctioned to the degree and amount fixed awarded by Judge Plese.

The central issue is: Was there an abuse of process when Judge Plese made her ruling sanctioning the Appellant, not the actual offending party, for not properly signing the certification of a Response to a discovery request required by CR 26(g) as attorney for the client?

Reference is frequently made that CR 11 applies to abuse of discretion cases. However, CR 11 only applies to pleadings, motions and legal memoranda. CR 26(g) governs the certification procedure for discovery requests, responses and objections. *See* 9 David E. Breskin, *Washington Practice* § 11.1 (2000). CR 11 does not apply to discovery responses and is narrower in scope than corresponding Federal Rule. *See also, Fisons*. CR 11 does not apply where another and more specific court rule applies. Only the sanctions provided by CR 26(g) will be applied to a party's failure to respond to interrogatories or document production requests and an attorney is not subject to the sanctions contained in CR 11. *Id* at 339-340.

CR 26(g) was added to Washington's civil rules in 1985. *Id* at 340. Since the adoption of the rule, in addition to the aforementioned *Fisons* case, our Washington courts have addressed the rule several times. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210 at 223 (1992); *Clipse v. State*, 61Wn. App. (1991), where it was ruled that CR 26(g), not CR 11, governs discovery disclosures.

Jerome Shulkin, appellant here, does not dispute the law that a trial court's decision as to the imposition of sanctions for discovery abuse under CR 26(g) is reviewed under the abuse of discretion standard. A trial court abuses the discretion

where its order is manifestly unreasonable or based on untenable grounds. *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 315 (1992); *Watson v. Maier*, 64 Wn. App. 889, 896 (1992) review denied, 120 Wn.2d 1015 (1992). A trial court would necessarily abuse its discretion if it is based on an erroneous view of the law. *See Cooter & Gell*, 496 U.S. 384 at 405 (1990); *Fisons* 122 Wn.2d 299 at 339 (1993).

CR 26(g) is aimed at reducing delaying tactics, procedural harassment and mounting legal costs that frustrate those who seek to vindicate their rights in the courts, obstruct the judicial process, and bring the civil justice system into disrepute. *Fisons* at 341. The federal advisory committee notes describe the discovery process and problems that led to the enactment of rule 26(g) as follows:

“Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems....

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495 [67 S.Ct. 385, 91 L.Ed. 451] (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake....

... Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions.... The term "response" includes answers to interrogatories and to requests

to admit as well as responses to production requests....” *Id* at 341-342.

“On its face, Rule 26(g) requires an attorney signing a discovery response to certify that the attorney has read the response and that after a reasonable inquiry believes it is (1) consistent with the discovery rules and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; (2) not interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had, the amount in controversy, and the importance of the issues at stake in the litigation.” *Id* at 343.

“In applying the rules to the facts of the present case, the trial court should have asked whether the attorneys' certifications to the responses to the interrogatories and requests for production were made after reasonable inquiry and (1) were consistent with the rules, (2) were not interposed for any improper purpose and (3) were not unreasonable or unduly burdensome or expensive. The trial court did not have the benefit of our decision to guide it and it did not apply this standard in this case.

Instead, the trial court considered the opinions of attorneys and others as to whether sanctions should be imposed. This was error. Legal opinions on the ultimate legal issue Before the court are not properly considered under the guise of expert testimony. [79] It is the responsibility of the court deciding a sanction motion to interpret and apply the law.” *Id* at 344.

Given, not only the standard for review, but the objective as stated, the trial court here has already sanctioned Orville Moe for failure to appear and produce documents sought by the receiver, including the names and addresses of unit holders, business records, and to disclose his assets so the receiver could proceed to collect the

sanctions already imposed by Judge Plese and her predecessor, Judge Robert Austin. Orville Moe was sanctioned for his 2009 response, or lack thereof, to the same items addressed in the interrogatory at hand. WML did not intend to move for a sanction against Shulkin to include the earlier failure to respond.

“We let this one go. We didn’t move for sanctions against Mr. Shulkin...and we let it slide.” See transcript of hearing held Feb. 17, 2011, page 4.

A review of the facts surrounding the sanctions against Shulkin does not presume that he holds any of the documents or other matters sought by the receiver. The sole reason for Shulkin’s sanctions is that the attorney for the receiver, Aaron Goforth, wanted to force from Shulkin the whereabouts of his client, Orville Moe, and to put Shulkin into an untenable circumstance: either sign the Responses put in final form by another attorney, David Miller, which Shulkin believed were originally prepared by Shulkin, given to Mr. Miller, but not viewed in the form Mr. Miller was to present to Judge Plese, and confronted at a crucial moment to be filed with the Judge, but Mr. Miller refused to sign the 26(g) certification; or sign the certification as clarified in the hope that Orville Moe could be with his ailing wife before heart surgery, believing that the alternative could lead to sanctions against Shulkin if the response sought by the receiver did not conform with the Judge’s conditions for releasing Orville Moe from imminent arrest. So, it became; either refuse to sign and the client is in further violation of past sanctions, and arrest when the client himself

was under doctor's care, but Shulkin does not risk sanctions for refusal to certify the pleading, OR Shulkin runs the risk, but honors his ethical responsibility to his client.

Given what occurred, does this give rise to either a reduction in the amount of sanction or denial of sanction altogether. This is in the discretion of the Court, even though there is no certification or a faulty one. One objective standard identified, is that the attorney has made a reasonable inquiry, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response or to comply with the request. *Fisons* at 343.

That is what it all boiled down to. So, at this point Appellant Shulkin must demonstrate to the appellate court that the sanction imposed for the reasons given meet the Appellant's burden of proof and is so clear that reasonable minds could not differ on the sanctions.

One case where the sanctions were levied against the attorney (as opposed to the client) is: *Deutscher v. Gabel*, 149 Wn. App. 202 P.3rd 355 (Wn. App. Div. 1, 2009). There the attorney was sanctioned because she knew or could have known that a key witness was not disclosed by her client during discovery. That case differs from the case at hand because the allegation was that the certification by Shulkin did not conform with the attorney's responsibility to certify that he had read the pleading, made responsible inquiry and was well grounded in fact. Shulkin could not so sign. He was not knowledgeable with the facts WML was seeking; he believed, that the responses delivered to Judge Plese by attorney Mr. Miller were the same ones he had

prepared (but Mr. Miller did not furnish him with same); and Orville Moe had already been sanctioned for failure to respond to legitimate inquiry. Accordingly, WML had no proof whatsoever that Shulkin knew or should have known that the response served on the court by Mr. Miller was not that which Shulkin had drafted and had delivered to Orville Moe who passed them on to Miller. Unlike the *Deutscher* case, WML had no evidence of any sort that reflected on Shulkin; only a dispute that Shulkin put in 10 hours of preparation, should have examined the material prepared for filing with Judge Plese before submission to the court, and that the response Mr. Miller gave to the court was the same as prepared by Shulkin for Mr. Miller to deliver to the court, and the certification was the same as well.

Furthermore, when Mr. Miller gave the response to Judge Plese, who reviewed same, the Judge returned the material to Mr. Miller without filing or lodging same, or entering an order. There is no proof even that there was a certification attached to that delivered to the court. The copy Shulkin electronically sent to Goforth was a copy of what Shulkin thought was the original response and certification presented to Judge Plese.

To further understand the circumstances, one must review the exchange of E-mails between Goforth and Shulkin. (See Declaration of Jerome Shulkin, CP pp. 114-117). These exchanges clearly identify the dilemma facing Orville Moe and that of his wife. The point is: Shulkin was faced with trying to get the requests of both sides accommodated before the wife's operation and before Judge Plese would leave

town on the holiday vacation. Note that it was conceded that Orville Moe would appear for examination, and if for any reason, it was not acceptable, Orville Moe would abide by the ruling and face the consequences. That was ignored by Goforth and inhumane.

Admittedly, 9th circuit cases are not binding on this Court. Nevertheless, as a guideline, the ruling of that court in *Ahanchian v. Xenon Pictures, Inc*, 624 F.3d 1253 (9th Cir. 2010) in commenting on the standards of review, held that the rules of civil procedure are to be:

“II. STANDARD OF REVIEW

...Fed.R.Civ.P. 6(b)(1). This rule, like all the Federal Rules of Civil Procedure, " [is] to

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be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits." *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir.1983) (quoting *Staren v. American Nat'l Bank & Trust Co. of Chicago*, 529 F.2d 1257, 1263 (7th Cir.1976)); see also Fed.R.Civ.P. 1 (" [The Federal Rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."). Consequently, requests for extensions of time made before the applicable deadline has passed should " normally ... be granted in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party." 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (3d ed. 2004)." *Id* at 1258-1259.

“...Perhaps contributing to the district court's errors and certainly compounding the harshness of its rulings, defense counsel

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disavowed any nod to professional courtesy, instead engaging in hardball tactics designed to avoid resolution of the merits of this case. We feel compelled to address defense counsel's unrelenting opposition to Ahanchian's counsel's reasonable requests. Our adversarial system depends on the principle that all sides to a dispute must be given the opportunity to fully advocate their views of the issues presented in a case. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir.2003); *Iva Ikuko Toguri D'Aquino v. United States*, 192 F.2d 338, 367 (9th Cir.1951). Here, defense counsel took knowing advantage of the constrained time to respond created by the local rules, the three-day federal holiday, and Ahanchian's lead counsel's prescheduled out-of-state obligation....

...(" We do not approve of the ' hardball' tactics unfortunately used by some law firms today. The extension of normal courtesies and exercise of civility expedite litigation and are of substantial benefit to the administration of justice.").

Our adversarial system relies on attorneys to treat each other with a high degree of civility and respect. *See Bateman*, 231 F.3d at 1223 n. 2 (" [A]t the risk of sounding naive or nostalgic, we lament the decline of collegiality and fair-dealing in the legal profession today, and believe courts should do what they can to emphasize these values."); *Peterson v. BMI Refractories*, 124 F.3d 1386, 1396 (11th Cir.1997) (" There is no better guide to professional courtesy than the golden rule: you should treat opposing counsel the way you yourself would like to be treated."). Where, as here, there is no indication of bad faith, prejudice, or undue delay, attorneys should not oppose reasonable requests for extensions of time brought by their adversaries. *See Cal. Attorney Guidelines of Civility & Prof. § 6.*" *Id* at 1262-1263.

3. Are the claims of WML that Shulkin acted frivolously, used to allege or state that the certification signed by Shulkin to Orville Moe's Response to Interrogatories

were part of a design to mislead Judge Plese away from legitimate efforts by Shulkin to demonstrate his inquires into the facts surrounding the intense efforts to permit Orville Moe to be with his wife during her critical illness?

The response to this lies in the exchange of e-mails between Shulkin and Goforth leading to a critical date of December 28, 2010, when Judge Plese was scheduled to go on vacation. Deonne Moe's heart operation was scheduled for January 17, 2011. A good example of the continued harassment of the Orville Moe was Mr. Goforth's mockery of Orville Moe's efforts to comply with the court's demands. Orville Moe had offered to appear and testify, and if the court did not like the responses, he would abide by whatever punishment might be inflicted. That did not impress Mr. Goforth.

Appellant resents the accusations of being frivolous. Shulkin Hutton Inc. P.S., the Appellant's firm, went so far as to file a Chapter 11 case in Western Washington; an act jeopardizing the reputation of the firm (it is not insolvent), rather than face the inevitable; the continuing delays to ultimate justice (by referring to the claim of Interlocutory, rather than Final, when it is to the advantage of WML), coupled with evasion of critical facts and avoidance of due process hearings by reasserting acts of Orville Moe, even when he played no part in the facade.

D. CONCLUSION

Precisely, Appellant seeks a ruling which:

1. Recognizes the requirements of CR 26(g), and the court's obligations, yet recognizes that Appellant's efforts and defenses demonstrate that he complied with the rule, considering all the surrounding circumstances, given the urgencies presented, to fulfill his obligation to satisfy the requirements.

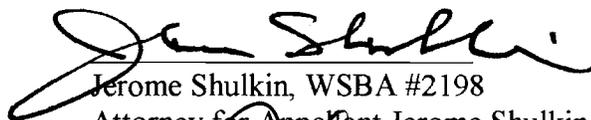
2. Finds that Appellant's efforts to comply with the requirement to demonstrate the necessities to avoid sanctions by an objective standard.

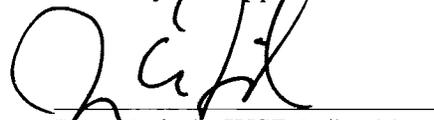
3. Finds that, where appropriate, Appellant recover such fees and costs which were reasonable to successfully defend against WML's Motions to dismiss the Appeal, on the grounds that the appeal was not timely filed and that all the filing fees were not properly paid; which Motions were sought by WML, and dismissed by this court. If so found, that the opportunity be granted Appellant to properly Motion for such an award.

4. Finds for such other relief as may be just and proper.

DATED this 13th day of October, 2011.

SHULKIN HUTTON INC., P.S.


Jerome Shulkin, WSBA #2198
Attorney for Appellant Jerome Shulkin


Jason Friedt, WSBA #35992
Attorney for Appellant Jerome Shulkin