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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 303802

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

**GREGORY ROSE AND CATHERINE ROSE, and the marital
community composed thereof,
Petitioner**

v.

**FMS, Inc., d/b/a OKLAHOMA FMS, INC., an Oklahoma
Corporation,
Respondent**

**APPEAL FROM THE SUPERIOR COURT
OF STEVENS COUNTY**

AMICUS BRIEF FOR THE PETITIONER



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TABLE OF CONTENTS

I. INTEREST OF AMICUS	1
II. STATEMENT OF ISSUES ADDRESSED BY AMICUS CURIEA... 1	
A. The trial court failed to fully and necessarily articulate its grounds for sanctioning Mr. Mitchell; and	1
B. The trial court’s improper ruling will have a chilling effect on consumer advocacy in the future, contrary to the purpose of the Washington Consumer Protection Act and public policy.....	1
III. ARGUMENT	2
A. The Trial Court Failed to Fully and Necessarily Articulate its Grounds for Sanctioning Mr. Mitchell.....	2
1. Basis for Removal of CR 11 Sanctions.....	2
2. Basis for Removal of CR 26(g) Sanctions.....	5
3. Basis for Removal of CR 56(g) Sanctions.....	7
B. The Trial Court’s Ruling Violates Public Policy and will have a Chilling Effect on Consumer Advocacy.....	8
IV. CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases

<i>Baker v. G.C. Servs. Corp.</i> , 677 F.2d 775 (9th Cir. 1982)	9, 11
<i>Biggs v. Vail</i> , 124 Wn.2d 193 (1994)	2, 3
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210 (1992)	3
<i>Clipse v. State</i> , 61 Wn.App. 94 (1991)	6
<i>Doe v. Spokane & Inland Empire Blood Bank</i> , 55 Wn.App. 106 (1989)	3
<i>Eastway Constr. Corp. v. City of New York</i> , 762 F.2d 243 (2d Cir. 1985)	4
<i>Fox v. Citicorp Credit Servs., Inc.</i> , 15 F.3d 1507 (9th Cir. 1994)	9, 11
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778 (1986)	10, 11
<i>Healey v. Chelsea Res., Ltd.</i> , 947 F.2d 611 (2d Cir. 1991)	3
<i>Hockley v. Hargitt</i> , 82 Wn.2d 337 (1973)	10, 11
<i>Irwin v. Mascott</i> , 94 F. Supp. 2d 1062 (N.D. Cal. 2000)	9, 11
<i>Johnson v. Riddle</i> , 305 F.3d 1107 (10th Cir. 2002)	9, 11
<i>Just Dirt, Inc. v. Knight Excavating, Inc.</i> , 138 Wn.App. 409, 157 P.3d 431 (2007)	7
<i>Lightfoot v. MacDonald</i> , 86 Wn.2d 331 (1976)	11

<i>Mar Oil, S.A. v. Morrissey</i> , 982 F.2d 830 (2d Cir. 1993).....	3
<i>Miller v. Badgley</i> , 51 Wn.App. 285 (1988)	11, 12
<i>Neigel v. Harrell</i> , 82 Wn.App. 782 (1996)	2
<i>Scott v. Cingular Wireless</i> , 160 Wn.2d 843 (2007)	10, 11
<i>Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299 (1993)	3

Washington Court Rules

CR 11	1, 2, 3, 5
CR 26(g).....	passim
CR 56(g).....	1, 2, 7, 8

Statutes

15 U.S.C. § 1692.....	9, 11
RCW 19.16	9
RCW 19.16.250(13).....	9
RCW 19.16.250(13)(a)	9
RCW 19.86	9, 10
RCW 19.86.090	10
RCW 19.86.920	10

Other Authorities

<i>Advisory Committee Notes to the Federal Rules of Civil Procedure</i> , 97 F.R.D. 165 (1983)	6
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I. INTEREST OF AMICUS

Amicus Curiae is University Legal Assistance (ULA). ULA is a nonprofit public interest legal clinic located in Gonzaga University School of Law's Center for Law and Justice. ULA provides legal services to elderly and low income clients who might not otherwise have access to legal services. As part of the services provided by ULA, it offers clients assistance with consumer protection issues, which include Consumer Protection Act violations, mortgage modifications, unfair lending practices, and unfair debt collection practices.

This amicus brief prepared on behalf of Mr. Mitchell addresses the extent of an attorney's duty to investigate the facts of his or her client's case. This amicus brief also addresses the impropriety of the trial court's ruling in light of the facts before the trial court. Since ULA represents clients in consumer protection cases, the issues raised by Mr. Mitchell in his Petition for Review are of concern to ULA.

II. STATEMENT OF ISSUES ADDRESSED BY AMICUS CURIEA

This Court should remove sanctions against Petitioner's counsel, Robert Mitchell, pursuant to CR 11, CR 26(g), and CR 56(g) for two reasons.

- A. The trial court failed to fully and necessarily articulate its grounds for sanctioning Mr. Mitchell; and
- B. The trial court's improper ruling will have a chilling effect on consumer advocacy in the future, contrary to the purpose of the Washington Consumer Protection Act and public policy.

III. ARGUMENT

A. The Trial Court Failed to Fully and Necessarily Articulate its Grounds for Sanctioning Mr. Mitchell.

In the case at bar, the Superior Court of Stevens County determined that Mr. Mitchell should be sanctioned for his alleged violations of CR 11, CR 26(g), and CR 56(g). However, the trial court failed to sufficiently articulate its basis for awarding such sanctions. Moreover, even if the Court was justified in awarding sanctions, it failed to justify the severity of the sanctions imposed. Accordingly, the order imposing sanctions against Mr. Mitchell should be removed for lack of necessary findings.

1. Basis for Removal of CR 11 Sanctions.

CR 11 requires a signing attorney to certify that he or she has conducted a *reasonable inquiry* into the factual and legal basis of a complaint, and that it is grounded in fact and “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law[.]” CR 11 (emphasis added). It has been long held that CR 11 is not intended to be “a fee shifting mechanism, but rather . . . a deterrent to frivolous pleadings.” *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994). CR 11 is not intended “to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.” *Neigel v. Harrell*, 82 Wn.App. 782, 919 P.2d 630 (1996).

In applying CR 11 sanctions, courts should employ an objective standard in evaluating an attorney's conduct, and the appropriate level of

pre-filing investigation is to be tested by inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted.” *Biggs* at 197, 876 P.2d 448; *See also Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). If a trial court deems sanctions to be necessary, “the trial court should impose the *least severe* sanction necessary to carry out the purpose of the rule.” *Bryant*, at 225, 829 P.2d 1099 (emphasis added). Case law has long stated that “CR 11 sanctions are not appropriate where other court rules more specifically apply.” *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339-40, 858 P.2d 1054 (1993).

Several federal courts have held that it is improper for a trial court to impose CR 11 sanctions purely because an attorney failed to properly assess the court's determination of his or her client's credibility. *See, e.g., Mar Oil, S.A. v. Morrissey*, 982 F.2d 830, 844 (2d Cir. 1993) (an unfavorable credibility assessment is rarely a sufficient basis for an award of CR 11 sanctions); *Healey v. Chelsea Res., Ltd.*, 947 F.2d 611, 626 (2d Cir. 1991). CR 11 is directed to remedy situations “where it is patently clear that a claim has absolutely no chance of success,” and courts “must strive to avoid the wisdom of hindsight in determining whether a pleading was valid when signed, and *any and all doubts must be resolved in favor of the signer.*” *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn.App. 106, 122, 780 P.2d 853 (1989) (quoting *Eastway Constr.*

Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985)) (emphasis added).

In the case at hand, the Court never claimed that Mr. Mitchell's argument was unwarranted by existing law in the State of Washington. In fact, in the Defendant's summary judgment proceeding, the court noted that the law regarding default and delinquency is "a little bit counter intuitive, because you think . . . it's in arrears. That means it's in default." RP 8:19-21.

As noted by Mr. Mitchell at trial, FMS called his client 149 times in less than 6 weeks. RP 3:23-24; 4:2-6; 17:18-20; and 18:4-7. Moreover, Mr. Mitchell noted that approximately a quarter of the charges on his client's account were past due charges. RP 37:18-21. Mr. Mitchell's client received multiple letters which stated in bold that "[t]his is an attempt to collect a debt." RP 13:6-9. Finally, the account was over four months past due at the time that it was assigned to FMS. RP 13:21-23. All of these facts, added together, would lead a reasonable person to believe that the account was in default.

Mr. Mitchell provided FMS' counsel the opportunity to review his client's complaint prior to filing it. RP 36:21-23. Furthermore, Mr. Mitchell gave opposing counsel approximately two months to research the issues included in his unfiled complaint. RP 37:9-11. In response, FMS' counsel stated that his client's account was merely 'delinquent.' RP 42:7-24. FMS' assertion that the account was 'delinquent' directly conflicted

information Mr. Mitchell received from Kohl's in-house counsel indicating that the account was in default. RP 42:7-15. Indeed, there was no way for Mr. Mitchell to find out the true status of his client's account without filing a lawsuit against FMS.

In light of these facts, it is difficult to know what more Mr. Mitchell could have, or should have, done in order to comply with the mandates of CR 11. The Court never made any mention that Mr. Mitchell's claim was frivolous. Accordingly, CR 11 sanctions imposed against Mr. Mitchell should be removed for lack of adequate findings.

2. Basis for Removal of CR 26(g) Sanctions.

CR 26(g) provides, in relevant part, that if a party is represented by counsel, "at least one attorney of record must sign every discovery request, response, or objection." CR 26(g). The attorney's signature "constitutes a certification that he has read the request, response, or objection, and that *to the best of his knowledge, information, and belief formed after a reasonable inquiry* it is . . . consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." CR 26(g) (emphasis added).

CR 26(g) further provides that discovery requests should not be used for "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Likewise, discovery requests should not be "unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation."

In *Clipse v. State*, the court noted that CR 26(g) follows Rule 26(g) of the Federal Rules of Civil Procedure and was adopted in Washington in 1985. *Clipse v. State*, 61 Wn.App. 94, 808 P.2d 777 (1991). The Advisory Committee Notes to the federal rule offer some guidance. *Advisory Committee Notes*, 97 F.R.D. 165 (1983). The rule notes that an attorney's duty to make a "reasonable inquiry" into the factual basis of a response, request, or objection is satisfied if:

the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances . . . In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case so long as that reliance is appropriate under the circumstances.

Id. at 219.

In the case at hand, the Defendant asserted that Mr. Mitchell lied when he claimed that Kohl's refused to release necessary documentation in discovery. RP 44:18-24. Nonetheless, Mr. Mitchell had gone so far as to subpoena Kohl's in order to receive the documents requested by the Defendant. RP 45:3-10 and 46:20-25. Mr. Mitchell further advised his clients to continue searching for the relevant documents requested by the Defendant. RP 45:3-10.

When the requested documentation was found by Mr. Mitchell's client, the Defendant quickly asserted that Mr. Mitchell had lied to them. RP 46:18-24. Despite the Defendant's assertions, there is no evidence that Mr. Mitchell ever lied to the Defendant. Indeed, Mr. Mitchell was diligent and performed a good faith investigation in order to retrieve the

documents requested. RP 44:8-25. It is difficult to understand what more Mr. Mitchell could have, or should have, done under the circumstances to obtain the documents requested in a timely manner.

The Defendant further makes the illogical claim that Mr. Mitchell sought discovery for an improper purpose. RP 44:17-21. This claim is conclusory and adds nothing to the actual facts of the case. Indeed, Mr. Mitchell's discovery requests were necessitated by the Defendant's evasive and non-responsive answers to discovery requests from Mr. Mitchell. As Mr. Mitchell noted at the sanctions hearing, his pattern discovery propounded to FMS was standard and had been used several times by Mr. Mitchell without objection. RP 45:20-24. In light of the foregoing facts, there is inadequate evidence to suggest that Mr. Mitchell committed any act warranting sanctions under CR 26(g).

3. Basis for Removal of CR 56(g) Sanctions.

CR 56(g) provides sanctions for "affidavits made in bad faith." CR 56(g). It also provides sanctions for affidavits used "solely for the purpose of delay." *Id.* CR 56(g) sanctions are not appropriate where a court fails to identify a specific affidavit filed in bad faith, or used for the sole purpose of delay. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn.App. 409, 157 P.3d 431 (2007).

In *Just Dirt, Inc. v. Knight Excavating, Inc.*, the reviewing court noted that in a motion for attorney fees, the respondent and the trial court failed to "enter findings identifying any sanctionable actions." *Id.* at 416. Moreover, the court "did not otherwise explain its reasons for imposing

sanctions.” *Id.* Finally, the court noted that zealous and contentious representation does not amount to a sanctionable offense. *Id.* at 419. Accordingly, the reviewing court had “no basis for awarding fees” to the respondent under CR 56(g). *Id.* at 420.

As previously noted, in the case at hand, the trial court failed to articulate what more Mr. Mitchell should have done to clarify the information he was provided by the Defendant. As Mr. Mitchell noted at the sanctions hearing, the information he was provided by the Defendant was almost cryptic and could not be interpreted by anyone other than the Defendant. RP 47:6-48:7. Moreover, Mr. Mitchell was effectively barred by the Defendant from deposing employees of the Defendant who would have been able to interpret the records provided to Mr. Mitchell. RP 48:7-21.

As a result of the Defendant’s lack of assistance, Mr. Mitchell was forced to interpret the records in good faith based on his limited knowledge of the records he was provided. RP 48:2-7. There is no indication that Mr. Mitchell ever signed any affidavit in bad faith; nor is there any indication that Mr. Mitchell signed any affidavit for the sole purpose of delaying litigation. Accordingly, CR 56(g) sanctions imposed against Mr. Mitchell should be removed for lack of sufficient findings.

B. The Trial Court’s Ruling Violates Public Policy and will have a Chilling Effect on Consumer Advocacy.

Federal lawmakers have realized the great importance of encouraging consumer advocacy in light an ever-increasing surge of unfair

and deceptive practices, especially in the realm of debt collection. Congress passed the Fair Debt Collection Practices Act (FDCPA) in order to “eliminate abusive debt collection practices by debt collectors . . . and to promote consistent State action to protect consumers against debt collection abuses.” 15 U.S.C. § 1692. The FDCPA is a “remedial strict liability statute which must be liberally construed in favor of consumers. *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002); *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507 (9th Cir. 1994); *Irwin v. Mascott*, 94 F. Supp. 2d 1062 (N.D. Cal. 2000); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775 (9th Cir. 1982).

Washington lawmakers were also aware of the abuses that debt collectors inflict on consumers. For that reason, the Washington State Legislature promulgated the Washington Agency Collection Act offering further protection to consumers in the State of Washington. RCW 19.16. The Washington Agency Collection Act forbids collectors from communicating with debtors “in such a manner as to harass, intimidate, threaten, or embarrass a debtor.” RCW 19.16.250(13). The Act presumes harassment where a debtor is contacted “more than three times in a single week.” RCW 19.16.250(13)(a).

In addition to the FDCPA and the Washington Agency Collection Act, the Washington Consumer Protection Act (CPA) provides additional protection for consumers. RCW 19.86. The overarching purpose of the CPA is to “complement the body of federal law governing . . . deceptive,

and fraudulent acts or practices in order to protect the public.” RCW 19.86.920. The CPA states that its provisions are to be “liberally construed that its beneficial purposes may be served.” *Id.* The CPA specifically authorizes courts to award treble damages to consumers who prove the elements of a CPA violation. RCW 19.86.090.

The CPA was designed to encourage consumers to file actions exactly like the one at bar to not only protect their own rights, but the rights of society as a whole. *See* RCW 19.86.920; *see also: Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 783-84, 719 P.2d 531 (1986)(holding consumers bringing actions under the CPA do not merely vindicate their own rights; they represent the public interest and may seek injunctive relief even when the injunction would not directly affect their own private interests; *See also Hockley v. Hargitt*, 82 Wn.2d 337, 349-50, 510 P.2d 1123 (1973)(stating “Congress intended private action to be the main vehicle for enforcing the Act:” “The committee views this legislation as primarily self-enforcing; consumers who have been subject to collection abuses will be enforcing compliance. *See also Scott v. Cingular Wireless*, 160 Wn.2d 843, 161 P.3d 1000 (2007).

The purpose of the CPA is to encourage private attorneys and citizens to act as private attorneys general by filing claims exactly like the one at bar in an effort to police industry and prevent unfair and deceptive practices. RCW 19.86.920; *Hangman Ridge Training Stables, Inc. v.*

Safeco Title Ins. Co., 105 Wn.2d 778, 783-84, 719 P.2d 531 (1986);
Hockley v. Hargitt, 82 Wn.2d 337, 349-50, 510 P.2d 1123 (1973);
Lightfoot v. MacDonald, 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976); *Scott*
v. Cingular Wireless, 160 Wn.2d 843, 161 P.3d 1000 (2007); 15 U.S.C. §
1692, et seq.; *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002); *Fox v.*
Citicorp Credit Servs., Inc., 15 F.3d 1507 (9th Cir. 1994); *Irwin v.*
Mascott, 94 F. Supp. 2d 1062 (N.D. Cal. 2000); *Baker v. G.C. Servs.*
Corp., 677 F.2d 775 (9th Cir. 1982).

The Plaintiff's case reveals a disturbing trend among creditors and third party debt collectors in the State of Washington. Many creditors and third party collectors are engaging in a shell game which makes it nearly impossible for debtors to determine whether their debts are in default, or merely in arrears. As noted at the sanctions hearing, Mr. Mitchell made a good faith inquiry into the status of his client's debt. RP 43:14-44:6.

There was no possible way for Mr. Mitchell to learn the status of his client's debt without filing a lawsuit. Nonetheless, in filing a lawsuit, the trial court held that Mr. Mitchell's claim was meritless since the debt was merely 'delinquent,' thus rendering the FDCPA inapplicable. In light of this new apparent safe harbor for creditors and third party collectors, the problem in this case will likely be perpetuated in the future.

As the court noted in *Miller v. Badgley*, two of the principal purposes of sanctions are to **deter** wrongful behavior and to **educate** attorneys. *Miller v. Badgley*, 51 Wn.App. 285, 303, 753 P.2d 530, (1988)

(review denied, 111 Wn.2d 1007). The trial court's sanctions failed to accomplish their principal purposes in two ways. First, the sanctions against Mr. Mitchell are not of a deterring nature; rather they are entirely punitive in nature. Mr. Mitchell has been forced to reduce his consumer law practice as a result of the trial court's ruling. As noted at the sanctions hearing, Mr. Mitchell essentially provided services for his client on a pro bono basis. RP 35:13-15; 49:15; and 49:18. He was primarily seeking injunctive relief for his client who had received 149 phone calls in less than 6 weeks. RP 3:23-24; 4:2-6; 17:18-20; and 18:4-7. The trial court's ruling will likely bankrupt Mr. Mitchell and cause him to no longer engage in consumer advocacy. RP 36:6-7.

Second, the trial court failed to educate Mr. Mitchell on what he should have done. Following the trial court's ruling, there looms a cloud of uncertainty over how to proceed with FDCPA claims where the status of a debt is unknown. All Mr. Mitchell had to rely on was a self-serving statement by the Defendant that the debt was 'delinquent.' RP 42:12-14. Many creditors reserve the unilateral right to declare a debt to be in default at any time, with or without notice to the debtor. RP 38:18-25. Creditors and collection agencies will continue to play this shell game as long as this apparent safe harbor is ignored by the courts.

The trial court's ruling will have a crippling effect on consumer advocacy groups and the public in general. ULA has a particular interest

in the trial court's ruling since we must be able to diligently represent our clients without fear of impending sanctions for good faith mistakes.

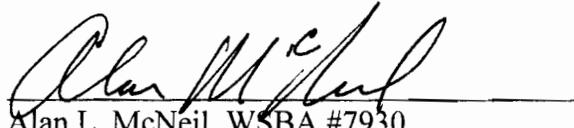
IV. CONCLUSION

For the foregoing reasons, sanctions imposed on Mr. Mitchell by the Superior Court should be removed.

Respectfully submitted on this 14th day of Feb, 2013,

by:

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