FILED
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Court of Appeals
Division III
State of Washington

No. 303802

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

GREGORY ROSE and CATHERINE ROSE, and the marital community comprised thereof,

Plaintiffs,

v.

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

Defendant/Respondent,

v.

ROBERT W. MITCHELL,

Appellant.

RESPONSE OF RESPONDENT FMS, INC. d/b/a OKLAHOMA FMS, INC. TO BRIEF OF *AMICUS CURIAE*

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. Arguments of Counsel Are Not Substantive Evidence.. . . 2

B. ULA Misrepresents the Facts of Record. 3

C. Public Policy Does Not Support Providing So-Called "Consumer Attorneys" a Free Pass on the Civil Rules. . . 13

CONCLUSION 17

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

Bunck v. McAulay,
84 Wash. 473, 480, 147 P. 33 (1915) 2

Jones v. Hogan,
56 Wn.2d 23, 351 P.2d 153 (1960).....2

Strandberg v. Northern Pac. Rwy. Co.,
59 Wn.2d 259, 367 P.2d 137 (1961).....2

FEDERAL CASES

Alibrandi v. Financial Outsourcing Services, Inc.,
333 F. 3d 82 (2d Cir. 2003).....14

WASHINGTON STATE RULES

CR 5.....13

CR 11(a) 5, 7

CR 26(g) 9

CR 30(b)(6).....9

CR 56(g) 13

RAP 9.1 3

RPC 3.1 12

RPC 3.3 12

RPC 3.4 12

FEDERAL STATUTES

Fair Debt Collection Practices Act,
§ 1692a(6)(F)(iii).....6, 14

I. INTRODUCTION

Respondent FMS, Inc. (FMS) did not oppose the motion of University Legal Assistance (ULA) to file its proposed brief as *amicus curiae* as it is simply more efficient to respond directly to the numerous flaws in ULA's arguments on the merits. Fundamentally, ULA's arguments, both on behalf of Mr. Mitchell in particular and so-called "consumer attorneys" more generally, are simply that: bare legal argument without foundation in the law, facts, common sense, or record. *Amicus* briefs can perform an important function. But this one does not.

ULA relies, not on the evidence of record in the clerk's papers, with which the brief's author may be unfamiliar, but on citations to Mr. Mitchell's self-serving arguments at the summary judgment and sanctions hearings available in the report of proceedings (RP). This, despite the fact the trial court found that Mr. Mitchell's arguments contained false representations of material fact – a finding supported by substantial evidence in the record. Yet, ULA cites to Mr. Mitchell's arguments at the hearings as if they were actual objective evidence, which – of course – they are not. Accordingly, this Court should disregard the bulk of ULA's brief as bare arguments on behalf of Mr. Mitchell unsupported by the

record.

Similarly, the Court should disregard the remainder of ULA's brief because, when not defending Mr. Mitchell in particular, ULA makes a generalized appeal to this Court to hold so-called "consumer attorneys" to a lower standard of conduct under the Civil Rules than other attorneys licensed to practice in Washington. In short, it is an insult to the vast majority of attorneys, including "consumer attorneys," who – unlike Mr. Mitchell – represent their clients with at least the minimum level of honesty and professionalism expected of every member of the bar in this state, and do their best to litigate their cases in compliance with the Civil Rules.

II. ARGUMENT

A. Arguments of Counsel Are Not Substantive Evidence.

It is the long-standing law of this state (going back almost 100 years) that the argument of counsel is not evidence. *See, e.g., Strandberg v. Northern Pac. Rwy. Co.*, 59 Wn.2d 259, 265, 367 P.2d 137 (1961), *citing Jones v. Hogan*, 56 Wn.2d 23, 351 P.2d 153 (1960); *Bunck v. McAulay*, 84 Wash. 473, 480, 147 P. 33 (1915). ULA's entire brief contains not a single citation to the evidence of record in the clerk's

papers. While the report of proceedings is part of the record on review (RAP 9.1), it is evidence only of what was said and done at the hearings. It is not substantive evidence of the underlying facts argued by counsel. Yet, ULA's brief relies exclusively on citations to Mr. Mitchell's arguments at the hearings to support its own arguments to this Court. *See* ULA brief at 4-8, 11-12.

ULA's exclusive reliance on Mr. Mitchell's representation of the underlying facts at oral argument is particularly problematic here where the trial court found that Mr. Mitchell made material misrepresentations concerning those same facts in the same hearings on which ULA's brief relies. *See* RP 11-12, 14-15, 42, 44-45; *Cf.* CP 594-625, 699-705, 1114-1125. The learned trial court, who actually witnessed Mr. Mitchell's performance and who was intimately familiar with the evidence, sanctioned Mr. Mitchell for multiple deliberate violations of the Civil Rules and the law. And all of that is supported in the record.

B. <u>ULA Misrepresents the Facts of Record</u>.

It is unclear whether ULA is practicing the "zealous advocacy" of a self-described "consumer attorney" or simply engaging in a reckless disregard for the facts. In either case, its exclusive reliance on the report

of proceedings to repeatedly misrepresent the facts in this Court is inexcusable. This is not to say that ULA's false statements are necessarily deliberate or intentional, but – at a minimum – they reflect an abject failure to review the clerk's papers, which would have revealed the misrepresentations and, hopefully, prevented them. These misrepresentations include the following unsupported statements:

(1) "Mr. Mitchell provided FMS's counsel the opportunity to review his client's complaint prior to filing it. Furthermore, Mr. Mitchell gave opposing counsel approximately two months to research the issues included in his unfiled complaint." ULA brief at 4.

These assertions are false, misleading, and totally beside the point. Mr. Mitchell did not provide the complaint to FMS's "counsel." He served the unfiled complaint on FMS in late April 2010 (CP 296, 315), and he was communicating with FMS's internal compliance officer and general counsel, not its litigation counsel. *See* CP 293. FMS's counsel – the referenced "opposing counsel" – did not even see the complaint until July 9, 2010, ten days after it was filed on June 29, 2010. *Compare* ULA brief at 4, *with* CP 385, ¶ 4.

ULA's argument seems to suggest that Mr. Mitchell's service of an

unfiled complaint on FMS somehow relieved him of his CR 11 duty to conduct a prefiling investigation, reasonable under the circumstances, before then filing the complaint simply because he provided FMS time to set him straight. Respectfully, this is not the opposing party's burden and it never has been under the Civil Rules. *See* CR 11(a). Although FMS did, in fact, inform Mr. Mitchell that the Roses' debt to Kohl's was "neither in default nor otherwise 'charged off,' but merely outstanding," it was under no obligation to do so. CP 319. Nor was it required to provide Mr. Mitchell conclusive proof of that fact to save him from his impending violation of CR 11. CP 316-20. Certification under CR 11(a) that a pleading was filed only after "an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . ." is the sole responsibility of the attorney signing and filing the pleading, not the party against whom the pleading is filed. CR 11(a). And every attorney knows that.

(2) "FMS' (sic) assertion that the account was 'delinquent' directly conflicted [with] information Mr. Mitchell received from Kohl's in-house counsel indicating the account was in default."

This statement is demonstrably incorrect. The fact is, Mr. Mitchell received no such information from "Kohl's in-house counsel." He received some equivocal information from a clerk responding to Mr. Mitchell's illegal subpoena many months after he filed the complaint and the Roses' claims had been dismissed. *See* CP 797-823. The statement submitted to the trial court by Kohl's under penalty of perjury confirmed that the debt was not in default when FMS began trying to contact the Roses. *See* CP 989-90. This fact – which the Roses confirmed in their own declaration submitted on summary judgment – was fatal to the Roses' claims under the federal Fair Debt Collection Practices Act. *See* 15 U.S.C. 1692a(6)(F)(iii) (the term "debt collector" does not include any person collecting on a debt "which was not in default at the time it was obtained by such person"); CP 543, ln. 6. Regardless, all of this was long after filing of the complaint in June 2010, and only provided further evidence of what FMS maintained all along, i.e., that the debt was not in default at the time FMS was trying to contact the Roses. And Mr. Mitchell's months

after the fact inquiries to Kohl's could not possibly satisfy the reasonable pre-filing inquiry required under CR 11(a). Chronologically, it doesn't fit.

(3) "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." ULA brief at 5.

This statement is patently wrong. Contrary to Mr. Mitchell's false representations to counsel for FMS and the trial court, he actually had access to the file maintained by his clients, the Roses, with the billing statements and other communications from Kohl's, including the communication that their account had been put into "non-default collection status." CP 543, ln. 6. If he was unsure whether the account was still in "non-default" or in default status with Kohl's, all he had to do was call or write a letter to Kohl's on behalf of the Roses to find out. Indisputably, he did not.

(4) "Despite the Defendant's assertions, there is no evidence that Mr. Mitchell ever lied to the Defendant." ULA brief at 6.

This might arguably be true if one only consults the report of proceedings, as ULA did. But, while some of Mr. Mitchell's lies were made at the hearings before the trial judge, the actual evidence that he lied

is in the clerk's papers. For example, Mr. Mitchell repeated at the hearing that his clients told him, "We think we threw [the responsive records] away when we moved." RP 46:10. Mr. Mitchell knew this to be false because he started representing them in 2009 in a foreclosure action and, having successfully stopped the foreclosure, the Roses still lived in the same house. *See* CP 169. So they did not move and the records were still in existence.

(5) "Mr. Mitchell's discovery requests were necessitated by the Defendant's evasive and non-responsive answers to discovery requests from Mr. Mitchell." ULA brief at 7.

It is impossible to see how this bald assertion makes any sense at all when Mr. Mitchell served all of plaintiffs' discovery before filing the complaint in June 2010. If FMS's answers in August had been "evasive and non-responsive," the solution would have been a CR 26(i) conference and motion to compel. The solution would not be serving more discovery, which is not what Mr. Mitchell did anyway. Thus, ULA's argument is self-contradictory and, indeed, frivolous on its face.

(6) "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." ULA brief at 7.

In fairness, FMS does not know whether or not Mr. Mitchell was truthful in representing to the trial court that his discovery to FMS was "pattern discovery that I have used in fifty to a hundred cases" without complaint, but, then, neither does ULA. Nor should it accept those statements at face value as if they were gospel. The law requires actual provable evidence.

Similarly, we do not know how many corporate defendants located half way across the country Mr. Mitchell has sued and improperly demanded appear at his office in Spokane for deposition pursuant to CR 30(b)(6). More to the point, whether Mr. Mitchell's statement was truthful is irrelevant to whether serving that particular discovery on FMS, and Mr. Mitchell's subsequent harassment of FMS and its counsel to comply with it, violated CR 26(g). As that issue is fully briefed by FMS in its response to appellant's brief, FMS will not belabor the merits here. *See* FMS Resp. to Appellant's brief at pp. 8-10, 38-39. Suffice to say here, ULA's argument lacks any factual basis in the record and defies all logic.

(7) "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 Defendant. Moreover, Mr. Mitchell was effectively barred by defendant from deposing employees of Defendant who would have been able to interpret the records provided to Mr. Mitchell." ULA brief at 8.

These are two related issues. First, the bare assertion that the FMS call log could not be interpreted by anyone other than the defendant is not supported by any objective evidence. Second, the similarly bare assertion that FMS "effectively barred" Mr. Mitchell from deposing its employees to interpret it for him is demonstrably false.

Mr. Mitchell ***never*** requested depositions of any particular FMS employees, only a CR 30(b)(6) deposition of the company. Second, FMS ***never*** refused to appear for a CR 30(b)(6) deposition, and actually offered six separate dates for the deposition. *See* CP 474. Rather, as a corporation located in Tulsa, Oklahoma, FMS refused to appear for a CR 30(b)(6) deposition at Mr. Mitchell's Spokane office, as he unreasonably demanded. CP 479. And, more to the point, FMS's counsel provided Mr. Mitchell ample authority for FMS's position. *See* CP 482-84. Mr. Mitchell eventually backed down, admitting he could take the deposition by phone, but he intended to fly to Tulsa later. *See* CP 486. He failed to

do so before summary judgment was granted.

None of this "forced" Mr. Mitchell to submit anything on summary judgment the truth and veracity of which he could not affirm under penalty of perjury. But, as the trial court found, that is precisely what he did.

(8) "As a result of 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. 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." ULA brief at 8.

This assertion is closely related to item (7), above, and is similarly demonstrably false. First, FMS disputes that the call log could not be interpreted by someone of ordinary intelligence making a diligent effort to do so. Notwithstanding all that has passed in this matter, FMS does not dispute that Mr. Mitchell is someone of at least ordinary intelligence. What is at issue is Mr. Mitchell's actual effort to read the call log and other false statements that were not even dependent on the call log.

After the initial false statements where made in both the Roses' and Mr. Mitchell's declarations on summary judgment, Mr. Rose's

deposition was taken under oath. During that deposition he was walked through the call log. *See* CP 405 at 42:7-45; CP 408 at 55:11-56:12. So, to the extent they were actually confused when the declarations were filed, both Mr. Rose and Mr. Mitchell knew after the deposition that the statements of fact concerning calls to Mrs. Rose's workplace and the number of voice messages left were wrong and in need of correction. Yet, Mr. Mitchell did nothing. And an attorney, even a "consumer protection" attorney, is an officer of the court bound by the Civil Rules, as well as the Rules of Professional Conduct. *Cf.* RPC Rules 3.1, 3.3, and 3.4

Regardless, Mr. Mitchell knew or should have known – independent of the call log – that when he filed his declaration on summary judgment that his assertion FMS left "at least 19 more voicemail messages" at the Roses' home number was false, as his clients certainly would know whether or not that many voice messages were left at their home number, as opposed to the one voice message referenced in the call log. So hiding behind the call log is no excuse for the false representation in court.

In addition, ULA ignores the fact that Mr. Mitchell filed additional declarations on a motion for reconsideration of the order on summary

judgment that he failed to serve on counsel for FMS in clear violation of the Rules for Superior Court. CP 249-50, 389-90; *Cf.* CR 5. Because these were filed in relation to a motion for summary judgment, those declarations were subject to CR 56(g), and were filed in bad faith and/or for an improper purpose to mislead the trial court without providing FMS an opportunity to respond.

Finally, even if the trial court's findings with regard to its ruling on CR 56(g) were legally insufficient, that would require a remand for entry of further findings. It would not absolve Mr. Mitchell of his blatant misconduct.

C. Public Policy Does Not Support Providing So-Called "Consumer Attorneys" a Free Pass on the Civil Rules.

After pontificating on the good purposes of the consumer protection statutes, ULA's brief repeats the same false statements about Mr. Mitchell's conduct before finally actually talking about public policy in the state of Washington. *See* ULA brief at 8-13. The representations about Mr. Mitchell's conduct have already been addressed above. The public policy arguments asserted by ULA lack merit.

First, ULA asserts "a disturbing trend among creditors and third party debt collectors in the State of Washington," in which they engage in

"a shell game which makes it nearly impossible for debtors to determine whether their debts are in default, or merely in arrears." ULA brief at 11. There is nothing whatever to support this assertion.

The FDCPA provision regarding the default or non-default status of the debt at issue here has been litigated in state and federal courts across the country, a portion of which were cited to the trial court and in FMS's response to appellant's opening brief. Counsel for FMS is unaware of any case in any jurisdiction finding the existence of any such "shell game" against debtors. Rather, all Mr. Mitchell or the Roses needed to do before filing the complaint was inquire of Kohl's whether the account was in default. They simply did not do that, despite some two months passing between service of the complaint on FMS and its actual filing in the Stevens County Superior Court.

This is not complicated, nor is the exemption under 15 U.S.C. §1692a(6)(F)(iii) an "apparent new safe harbor for creditors and third party collectors." ULA brief at 11. The *Alibrandi* case from the respected federal Second Circuit Court of Appeals discussing the exemption in detail is now ten years old, and the statute at issue is older than that. *See Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 86-87 (2d Cir.

2003). Yet, ULA cites not a single case of creditors and/or third party collectors engaging in a "shell game" taking advantage of the exemption under the FDCPA to prejudice the legitimate rights of consumers.

The fact is, the statutory exemption was written into the FDCPA by the United States Congress for a reason, and no court in these United States, state or federal, can ignore it. Nor can plaintiff's counsel ignore it in pursuing claims under the FDCPA. Nevertheless, despite all this, ULA argues that Mr. Mitchell should not be sanctioned, both for the reasons FMS already addressed *supra*, and some new ones FMS addresses here.

ULA asserts that "Mr. Mitchell has been forced to reduce his consumer law practice as a result of the trial court's ruling." ULA brief at 12. Significantly, there is no evidence of this, not even argument from Mr. Mitchell at the sanctions hearing that he would have to reduce his consumer law practice. It is simply an assumption by ULA, made up of whole cloth.

ULA then asserts that Mr. Mitchell took the Roses' case pro bono. *Id.* It seems Mr. Mitchell's definition of "pro bono" is that when you take a plaintiff's case on contingency and lose, it is a "pro bono" case. Practically speaking, that may be true. But the fact is, Mr. Mitchell filed

the complaint after the claims for injunctive relief were already mooted by FMS closing the file and sending it back to Kohl's. *See* CP 68-69. At that point, he had accomplished the only thing his clients asked him to do, which was to make FMS stop calling them. CP 178. Yet, he filed the complaint anyway.

In addition, as discussed *supra*, his clients had no actual damages. So what was the $5,000 demand for? And where was the money going to go had FMS paid it? It simply stretches belief and is disingenuous to maintain – as Mr. Mitchell did – that he took this case "for a can of beef jerky," suggesting he would not have taken any of that $5,000 to cover his fees and costs incurred in drafting the complaint, serving FMS, and corresponding with FMS – all pre-filing – or that, had he prevailed in the case, he would not have submitted a cost bill for his fees and costs incurred. That is not "pro bono" representation, but a contingent fee arrangement, whether he had a written contract with the Roses or not. Losing the case does not change that.

Finally, ULA argues, "[t]he 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." ULA brief at 12-13. This is, perhaps, the most troubling assertion in ULA's brief because it completely misses what FMS's motion for sanctions and the trial court's rulings were about. They were not about sanctioning an attorney for "good faith mistakes," but sanctioning Mr. Mitchell's persistent bad faith pattern of deliberate and intentional violations of the Civil Rules throughout the case.

No honest and diligent attorney, including a so-called "consumer attorney," need fear incurring the types of sanctions at issue here because such an attorney would never engage in the type of misconduct engaged in by Mr. Mitchell. And it is simply offensive and wrong-headed to argue that, solely because Mr. Mitchell engages in a "consumer law" practice, he should not be sanctioned like any other attorney who committed the same egregious pattern of violations of the Civil Rules.

CONCLUSION

Given the appalling lack of reference to the Clerk's Papers, or the actual evidence before the Stevens County Superior Court, one can only wonder about the real reasons ULA sought to submit a brief as *amicus curiae* in this case. Was it done as a favor to a former student and member

of the clinic, or because ULA actually believes that the Civil Rules should apply differently to so-called "consumer attorneys" than they do to every other attorney in this state, or was it because ULA has an ongoing relationship with Mr. Mitchell that it failed to disclose to this Court in its motion for leave to file a brief as "friend of the court"? *See* RP 35:25-36:1 ("I take lots of referrals from the ULA, University Legal Assistance Program."). Whatever the reason, its brief is wrong on the facts, the law, and public policy.

Accordingly, this Court should reject each and every argument raised by ULA, affirm the trial court's $70,546.44 award of sanctions against appellant Robert Mitchell, and grant FMS its fees and costs on this appeal.

RESPECTFULLY SUBMITTED this 8th day of March 2013.

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CERTIFICATE OF SERVICE

I certify that on the day and date indicated below, I caused to be filed and served the foregoing on behalf of Respondent FMS, Inc. d/b/a Oklahoma FMS, Inc. on the following counsel as indicated below.

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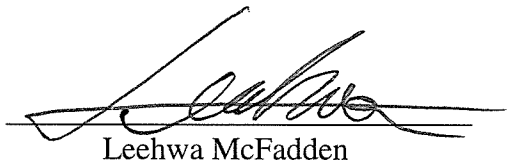
I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 8th day of March, 2013 at Seattle, Washington.



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