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MAY 22 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 303802

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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

Plaintiffs,

vs.

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

Defendant-Respondent,

vs.

ROBERT W. MITCHELL,

Appellant.

BRIEF OF APPELLANT ROBERT W. MITCHELL

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I. INTRODUCTION

This is an appeal from a \$70,546.44 sanctions award against pro bono counsel for consumer debtors. The primary basis for the sanctions—consisting of all attorney fees and costs incurred by a collection agency, and including a substantial upward lodestar adjustment—involves the question of whether a “default” or declaration of default is necessary to trigger application of the Washington Collection Agency Act (CAA), Ch. 19.16 RCW; and the related question of whether the debtors were “in default” within the meaning of the CAA or the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 et seq., when their five months past-due account was assigned to a debt collector.

The issues presented by the appeal will determine whether debt collectors can avoid complying with the CAA or FDCPA, while nonetheless engaging in collection efforts, by unilaterally declaring that a past-due account is not “in default.” The availability of sanctions will determine whether consumer debtors will be able to obtain counsel under these circumstances.

ASSIGNMENT OF ERROR

The superior court erred by sanctioning counsel for the plaintiffs. CP 996-999 (letter ruling re: entitlement to sanction); CP 1135-36 (letter ruling re: amount of sanction); CP 1142-46 (order awarding sanction).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Were the plaintiff-debtors “in default” within the meaning of the FDCPA when their five months past-due account was assigned to a debt collector?

2. Is a default or declaration of default necessary to trigger the protections of the CAA?

3. Did the superior court abuse its discretion regarding the defendant-debt collector’s entitlement to a sanctions award against plaintiffs’ lawyer?

4. Did the superior court abuse its discretion regarding the amount of sanctions awarded, consisting of all of the defendant-debt collector’s attorney fees and costs plus a substantial upward lodestar adjustment?

5. Did the superior court abuse its discretion by failing to enter adequate findings regarding the entitlement to, and amount of, sanctions awarded?

STATEMENT OF THE CASE

After receiving 149 telephone calls from a debt collector in less than two months between March 17 and May 13, 2010, Gregory and Catherine Rose filed suit against the debt collector, FMS, Inc. (FMS), to stop the calling. CP 3-15 (complaint); CP 45 (FMS interrogatory answer admitting 149 calls); CP 50-56 & 303-09 (FMS call log showing number and dates of calls). The Roses sued under the CAA and the FDCPA. CP 3-15. They alleged a claim for violation of the CAA's prohibition against more than three communications in a single week. CP 11 (citing former RCW 19.16.250(12)(a)). They also alleged a claim for violation of the FDCPA's prohibition against "[c]ausing a telephone to ring . . . repeatedly or continuously with intent to annoy, abuse, or harass[.]" CP 9-10 (citing 15 U.S.C. § 1692d(5)).

A. The underlying debt.

The Roses' debt was incurred for charges on a credit card issued by Kohl's Department Store to Catherine Rose. Kohl's standard credit card agreement allowed purchases at the store "only for personal, family or household purposes." CP 565 (internal ¶ 1).¹ In exchange for credit to

¹ Several copies of Kohl's standard credit card agreement are the record. The cited copy is attached as Exhibit 32 to the declaration of FMS's counsel in support of its sanctions motion. CP 390-91 (referencing standard agreement); CP 565-67 (text of standard agreement). The standard agreement is further referenced in the declaration of Catherine

purchase such items, Ms. Rose agreed to pay for them over time, together with interest and other applicable charges. CP 565 (internal ¶ 3). Under the bold-faced heading entitled “**Default/Collection Costs,**” the agreement further provided that “[y]ou will be in default if you fail to pay any Minimum Payment by the time and date it is due[.]” CP 566 (internal ¶ 12, brackets added).

Using the credit card, Ms. Rose purchased clothing for her family and other items from the “Spokane North” Kohl’s store. CP 270-81 (purchase receipts).² Unfortunately, however, the Roses missed a number of payments. CP 265-69 (statements).³ By January 14, 2010, the Roses had already missed several minimum payments, incurred late fees, and their account was \$118 past due. CP 265. By February 14, 2010, they

Rose, which is attached as Exhibit 30 to the same declaration of FMS’s counsel. CP 390 (referencing declaration of Ms. Rose); CP 550 (Ms. Rose’s declaration, referencing agreement). Apparently, none of the parties has the original copy of the credit card agreement, if, indeed, one was ever given to Ms. Rose. For her part, Ms. Rose recollected that the standard agreement appeared to contain “similar if not identical language” to the agreement she entered. CP 550. For its part, FMS was unable to produce a copy of the agreement in response to discovery requests. CP 753. It does not appear that the original agreement would be material, in any event, as the agreement itself provides for amendment by Kohl’s. CP 565 (internal ¶ 2).

² The receipts are referenced in the declaration of Catherine Rose, which is attached as Exhibit 30 to the declaration of FMS’s counsel in support of its sanctions motion, but the receipts themselves were not attached to the declaration of FMS’s counsel. CP 390 (referencing declaration of Ms. Rose); CP 550 (Ms. Rose’s declaration, referencing receipts); CP 270-81 (receipts).

³ As with the receipts, the statements are referenced in the declaration of Ms. Rose, which is attached as Exhibit 30 to the declaration of FMS’s counsel in support of its sanctions motion, although the statements themselves are not attached. CP 390 (reference declaration of Ms. Rose); CP 550 (Ms. Rose’s declaration, referencing statements); CP 265-69 (statements).

missed another minimum payment, incurred late fees of \$29, and their account was \$222 past due. By March 14, 2010, they missed another minimum payment, incurred additional late fees of \$29, and their account was \$276 past due. CP 266-67.⁴

B. Collection efforts.

On March 16, 2010, the day before the calls began, Kohl's assigned the debt to FMS for collection. CP 187-89 (email & att. from Kohl's to FMS).⁵ At the time of the assignment, the debt was "five months behind." CP 184 (internal ¶ 2).

On March 17, 2010, when calls first began, FMS sent a letter to Ms. Rose, stating the debt was not "current," "past due" (three times), and "seriously past due." CP 191 & 311. On March 29, 2010, FMS sent a second letter to Ms. Rose, again stating the debt was not "current," "past due" (also three times), and "seriously delinquent." CP 193 & 312. On April 16, 2010, FMS sent a third letter to Ms. Rose, stating the debt was not "current," "past due" (twice)," and "6 payments past due." CP 195 & 313. All three letters stated, in bold-faced capital letters, that "**THIS IS**

⁴ The Roses explained that, at some point, they filed for bankruptcy protection, and Kohl's would not thereafter accept their payments. CP 42.

⁵ In the superior court, FMS was inconsistent in describing the nature and purpose of the assignment. *See* CP 45 (FMS interrogatory answer indicating debt "was assigned to FMS to assist in getting the account caught up before a default occurred"); CP 119 (FMS memo., lines 15-16, describing debt as "assigned to FMS for collection"); CP 149 (FMS memo., lines 8-11, twice describing debt as "assigned to FMS for collection"); CP 183-84 (internal ¶ 2, indicating debt was "referr[ed]" and "transfer[red]" to FMS).

AN ATTEMPT TO COLLECT A DEBT THIS COMMUNICATION IS FROM A DEBT COLLECTOR.” CP 191, 193, 195 & 311-13 (ellipses added). The third letter also referred to unspecified “further collection efforts” that would be forthcoming. CP 195 & 313.

After the third letter from FMS, as the telephone calls continued, the Roses served their complaint on FMS. CP 295 (internal ¶ 7 (acknowledging service); CP 315 (service cover letter). In response, in-house counsel for FMS sent a letter to the Roses’ lawyer, Robert Mitchell, claiming that “[d]uring the period FMS attempted to contact Ms. Rose, her account was neither in default nor otherwise ‘charged-off,’ but merely outstanding[,]” among other things. CP 319 (brackets added). After pre-filing settlement discussions proved unfruitful, the Roses subsequently filed their complaint with the superior court. CP 3-15.

C. Initial pleadings.

In their complaint, the Roses alleged that FMS is a “collection agency” within the meaning of the CAA, and a “debt collector” within the meaning of the FDCPA, as necessary to trigger application of these laws. CP 4 & 9 (internal ¶¶ 2.4-2.5 & 5.5). FMS admitted the allegations without qualification. CP 17 (internal ¶ III, stating “this defendant admits that FMS is a ‘debt collector’ as defined by the FDCPA, [and] a

‘collection agency’ as defined by the Washington Collection Agency Act”); CP 19 (internal ¶ XII, stating “this answering defendant admits that it is a ‘debt collector’ under the FDCPA”).

The Roses further alleged that the debt that FMS was trying to collect was in default. CP 4-5 (internal ¶¶ 4.1-4.2). FMS answered by stating that it “is without sufficient knowledge to either admit or deny the allegations” of the paragraphs alleging default. CP 18 (internal ¶ VII).⁶

D. Summary judgment proceedings.

After receiving the answer to their complaint and conducting discovery, the Roses moved for summary judgment in their favor. CP 31 (motion); CP 32-37 (memo.); CP 38-56 (declarations & exhibits). For its part, FMS filed a cross-motion for summary judgment, principally arguing that the telephone calls did not constitute “communications” within the meaning of the CAA or FDCPA, and that the calls were not harassing in any event. CP 106-23.

FMS did not cross-move for summary judgment on grounds that it was not a “collection agency” under the CPA or a “debt collector” under the FDCPA, nor did it cross-move for summary judgment on grounds that the Roses’ debt was not in default. CP 106-23. Instead, FMS responded to

⁶ As noted *infra*, the definition of “debt collector” under the FDCPA is based in part on the existence of a default. *See* 15 U.S.C. § 1692a(6)(F)(iii).

the Roses' motion for summary judgment on these and other grounds. CP 153-160. FMS did not seek sanctions in connection with its summary judgment motion or response.

Following a hearing on November 30, 2010, the superior court denied the Roses' motion for summary judgment and granted FMS's cross motion. CP 235-38 (order). The court appeared to rest its decision primarily on the conclusion that the Roses' debt was not in default. RP Nov. 30, 2010, at 22:15-23:11 (summary judgment hearing transcript). An untimely motion for reconsideration was filed but not served, and was subsequently withdrawn by the Roses. RP Feb. 15, 2011, at 29:15-17.

E. Sanctions proceedings.

Several months later, on February 7, 2011, after the time for appeal of the summary judgment order lapsed, FMS filed a motion for sanctions against the Roses' lawyer, Mr. Mitchell. CP 594-625. FMS sought sanctions under CR 11 on grounds that the complaint was frivolous because the Roses' account was not in default when assigned to FMS. CP 597-602 & 615-17 (motion). FMS sought sanctions under CR 26(g) for allegedly improper discovery requests and answers. CP 602-12 & 617-19. The complaints about discovery were based in part on the question of whether the Roses' debt was in default. CP 611. FMS also sought

sanctions under CR 56(g) for the withdrawn motion for reconsideration, also based in part on the issue of default. CP 612-14 & 621-22.

The superior court granted the motion for sanctions by letter ruling dated July 11, 2011, and rejected FMS's initial lump-sum request for attorneys' fees and costs as providing inadequate detail, but invited FMS to submit a more detailed affidavit of fees and costs. CP 997-99. In its letter ruling, the superior court explained the basis of its sanctions award as follows:

The motion for sanctions should be granted, on all three bases set forth in the initial motion for sanctions, and as to the more recent filings outside the rule, on the basis that the filings needlessly increased the costs of litigation, in violation of CR 11(a) and this court's inherent authority to control the litigation.

First: The suit was filed without sufficient inquiry into the facts and the law as required by CR 11(a). Mr. Mitchell filed the suit without sufficient research, factual or legal, into the question of whether the account was "in default" as that term of art applies to the various causes of action sued under.

Second, CR 26(g) would require sanctions, since the discovery violations defendant has claimed plaintiff's counsel committed are established. Mr. Mitchell did not make the efforts required by the discovery rules but instead answered the interrogatories and requests for admission and production in an offhand way, in a blatant attempt to thwart the reasonable discovery efforts of the defendant. And, Mr. Mitchell promulgated burdensome and unnecessary discovery in an effort to bully the defendant into a settlement.

Third, CR 56(g) also provides a basis for sanctions with respect to the materials submitted in regard to the summary judgment issues, for the reasons stated in the defendant's motion for this basis [sic].

I further conclude that there were misrepresentations of fact in Mr. Mitchell's oral statements made to the court on February 15, 2011, as argued in item 17 above. Further, Mr. Mitchell's incessant filing of declaration after declaration was clearly designed to delay the inevitable as well as to increase the costs of the litigation for the defendant.

Thus, the motion for sanctions with respect to each of these four subject areas should be granted.

CP 998. Upon receipt of more detailed fee and cost materials, the superior court issued a second letter ruling, awarding all fees and costs requested, and further applied 1.5 lodestar multiplier to the attorney fee portion of the award. CP 1135. An order awarding sanctions was subsequently entered with the court. CP 1142-46. From the award of sanctions, Mr. Mitchell appeals. CP 1172-77.

SUMMARY OF ARGUMENT

The superior court abused its discretion in imposing sanctions against debtors' counsel on grounds that the debtors were not "in default" because the legal and factual basis for the claim of default under the FDCPA is essentially correct, and no default or declaration of default is necessary to trigger application of the CAA.

The superior court further abused its discretion by imposing sanctions without sufficient findings to justify the entitlement to, or amount of, such sanctions, making meaningful appellate review impossible. The court should reverse and vacate the award of sanctions.

ARGUMENT

I. The superior court abused its discretion in sanctioning debtors' counsel on grounds that the debtors were not in default when their complaint was filed.

CR 11(a) requires pleadings to be signed by the attorney of record. The signature certifies that the attorney has read the pleading, and that to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law. CR 11(a)(1)-(2). A pleading that is signed in violation of the foregoing certification subjects the attorney to an appropriate sanction. CR 11(a).

The superior court imposed CR 11 sanctions against Robert Mitchell on grounds that the Roses' complaint was both factually and legally baseless with respect to the issue of default. CP 998. Sanctions are not appropriate simply because the factual or legal basis for a claim ultimately proves to be incorrect. *See Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). (stating "[t]he fact that a

complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions”). Where the claim is grounded in fact and warranted by existing law, CR 11 sanctions are inappropriate. *See id.*, 119 Wn.2d at 219-20. Sanctions are not meant to substitute for a fee shifting mechanism. *See id.* at 220.

In this case, the Roses’ complaint is neither factually nor legally baseless under the FDCPA or the CAA. Summary judgment should not have been granted against them. Whether or not they would have prevailed if they had appealed the summary judgment order, their lawyer should not have been sanctioned.

The superior court’s award of CR 11 sanctions is reviewed for an abuse of discretion. *See Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). Nonetheless, the exercise of discretion must be premised upon a correct view of the facts and the law. *See Magaña v. Hyundai Motor America*, 167 Wn.2d 570, 582-83, 220 P.3d 191 (2009) (involving sanctions under CR 37(b)). The appellate court reviews a sanctions award independently where the superior court misapprehends the facts, or misapplies the law. *See Bryant*, at 222-23; *see also Fisons v. Washington State Phys. Ins. Exch. & Ass’n*, 122 Wn.2d 299, 345-46, 858 P.2d 1054 (1993) (involving sanctions under CR 26(g)).

A. The Roses were “in default” within the meaning of the FDCPA, thereby triggering the protections of the Act.

The FDCPA was enacted to address the “abundant evidence of the use of abusive, deceptive, and unfair debt collection practices,” which “contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.” 15 U.S.C. § 1692(a) & (e). Among other things, the Act prohibits practices such as “[c]ausing a telephone to ring . . . repeatedly or continuously with intent to annoy, abuse, or harass any person[.]” 15 U.S.C. § 1692d(5) (brackets & ellipses added). Violations of this and other provisions result in civil liability for compensatory and statutory damages. 15 U.S.C. § 1692k(a).

The FDCPA applies broadly to businesses that employ interstate commerce to collect debts. *See De Dios v. International Realty & Investments*, 641 F.3d 1071, 1073 (9th Cir. 2011). A “debt collector” subject to the requirements and civil liability provisions of the FDCPA is defined to mean “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6). FMS unquestionably satisfies this definition, as admitted in its answer to the Roses’ complaint.

However, there is an exemption to the definition of a “debt collector” for “any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person[.]” 15 U.S.C. § 1692a(6)(F)(iii) (ellipses & brackets added). This exemption is the basis for the superior court’s award of CR 11 sanction against the Roses’ lawyer, Mr. Mitchell. CP 998.

The FDCPA does not define the term “in default.” *See* 15 U.S.C. § 1692a (definitions). “Whether a debt is in default is generally controlled by the terms of the contract creating the indebtedness and applicable state law.” *De Dios*, 641 F.3d at 1074-75 (quoting U.S. Fed. Trade Comm’n Advisory Op. to Cranmer (April 25, 1989)); *accord* U.S. Fed. Trade Comm’n Advisory Op. to de Mayo (May 23, 2002) (stating “whether a debt is in default is generally controlled by the terms of the contract creating the indebtedness and applicable state or federal law”). In this case, the terms of Kohl’s credit card agreement and state law establish that the Roses’ debt was in default when it was assigned to FMS. As a result, FMS must be deemed a debt collector subject to the FDCPA. This result is consistent with the ordinary meaning of the term default and FMS’s admission that it is a debt collector, and it is necessary to fulfill the purposes of the FDCPA.

1. Missing payments constitutes default under the terms of the contract.

The agreement defines a “default” in terms of “fail[ure] to pay any Minimum Payment by the time and date it is due[.]” CP 566 (brackets added). This language is plain on its face. *See Wm. Dickson Co. v. Pierce County*, 128 Wn.App. 488, 493, 116 P.3d 409 (2005) (applying plain meaning of contract terms); *see also Foster v. Knutson*, 84 Wn.2d 538, 545, 527 P.2d 1108 (1974) (stating “[a]n event of default is, within reason, what the parties have agreed in their contract that it would be and not what a court, exercising its own judgment, thinks it ought to be”). Under this contract language, it is evident that the Roses were in default when Kohl’s assigned their debt to FMS.

Notwithstanding the foregoing contract language, FMS argued in the superior court that failure to pay any minimum payment by the due date was not a default unless Kohl’s took some additional, unspecified step to *declare* a default. CP 622. FMS relied on a portion of the credit card agreement stating:

We reserve the right to delay or refrain from enforcing any of our rights under this Agreement without losing them. For example, we can extend the time for making certain payments without extending others or we can accept late or partial payments without waiving our right to have future payments made when they are due.

CP 566 (internal ¶ 9); CP 622 (quoting CP 566 in part). This provision does not alter the definition of default in any respect, nor does it require any affirmative declaration of default. It simply avoids waiver of any remedies that may arise from default.⁷

2. Missing payments is consistent with the ordinary meaning of default under state law.

The existence of default in this case is consistent with the ordinary meaning of the term. *See Wm. Dickson Co.*, 128 Wn.App. at 494 (discerning ordinary meaning of contract terms by reference to both Webster's and Black's Law Dictionary). The ordinary meaning of default is the failure to perform a legal or contractual duty, especially the failure to pay a debt when due. *See Black's Law Dictionary*, s.v. "default" (9th ed. 2009); Merriam-Webster Online, s.v. "default" (available at www.m-w.com; viewed May 17, 2012) (definitions 1 & 3); *see also Floor Decorators, Inc. v. Department of Labor & Indus.*, 44 Wn.App. 503, 508, 722 P.2d 884 (citing Black's definition of default with approval in

⁷ In connection with its discussion of this non-waiver of remedies language, FMS cites the Court of Appeals decision (later adopted by the Supreme Court) in *Colorado Structures, Inc. v. Insurance Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007), for the proposition that "the law permits but does not require a non-breaching promisee/obligee to declare a default." CP 622. Contrary to the inference drawn by FMS, *Colorado Structures* highlights the fact that the declaration of default is independent from the existence of a default. *See* 161 Wn.2d at 591 (stating "a principal is 'in default under the subcontract' when he or she has materially breached the subcontract, thereby permitting but not requiring the obligee to terminate the subcontract"). A default does not cease to exist simply because there is no declaration to that effect.

interpreting statute), *rev. granted*, 107 Wn.2d 1007 (1986), *appeal dismissed*; *Magee v. AllianceOne, Ltd.*, 487 F. Supp. 2d 1024, 1027 (S.D. Ind. 2007) (relying on Black’s definition of default under FDCPA).

The existence of default in this case is also consistent with Washington law defining default. *See Emrich v. Connell*, 41 Wn.App. 612, 626-27, 705 P.2d 288 (1985) (stating “[d]efault is broadly defined as any failure to perform a promise or obligation”), *rev’d on other grounds*, 105 Wn.2d 551, 716 P.2d 863 (1986); *Colorado Structures*, 161 Wn.2d at 591 & n.38, 167 P.3d 1125 (2007) (citing *Emrich* definition with approval); *Floor Decorators*, 44 Wn.App. at 508 (citing *Emrich* definition with approval). In order to avoid doing violence to the ordinary and legal meaning of default, the contractual definition of the term should be given effect.⁸

3. The existence of default is confirmed by FMS’s self-identification as a “debt collector.”

Under the FDCPA an individual or entity cannot be considered a debt collector unless the debt it attempts to collect is in default. *Alibrandi v. Financial Outsourcing Servs., Inc.*, 333 F.3d 82, 87-88 (2d Cir. 2003). Self-identification as a debt collector by use of the warnings and

⁸ The Kohl’s agreement contains a Delaware choice of law provision. CP 567 (internal ¶ 22). Delaware law appears to be in accord with Washington law with regard to defining undefined contract terms by their ordinary dictionary meanings. *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 740 (Del. 2006).

disclaimers required of such debt collectors under the FDCPA constitutes a declaration of default. *Id.* In this case, FMS repeatedly identified itself as a debt collector in bold-faced capital letters stating “**THIS IS AN ATTEMPT TO COLLECT A DEBT THIS COMMUNICATION IS FROM A DEBT COLLECTOR.**” CP 191, 193, 195 & 311-13 (ellipses added). By these statements, FMS effectively declared the Roses’ debt to be in default.

4. Considering missed payments as default is warranted by the purposes of the FDCPA.

The default exemption to the FDCPA definition of a debt collector was only intended to apply to those who service current accounts, such as mortgage service companies, and was not intended to protect those who collect past-due accounts. *De Dios*, 641 F.3d at 1745 n.3 (quoting S. Rep. No. 95-382 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698, and U.S. Fed. Trade Comm’n, *Staff Commentary on the Fair Debt Collection Practices Act* § 803, 53 Fed. Reg. 50097, 50103 (Dec. 13, 1988)). Thus, in *De Dios*, the court held that a property management company that collected rent from tenants was not a “debt collector” because it acquired the debt “before it was payable,” and the ostensible collection efforts “sought payment of amounts due prospectively.” *De Dios*, at 1074-75. Here, unlike *De Dios*, the Kohl’s account assigned to FMS was not

current. By FMS's own admission, the account was five months past due when it was assigned for collection. CP 184. Under these circumstances, deeming FMS as a debt collector is entirely consistent with the intent underlying the FDCPA.

If it were otherwise, FMS could easily avoid complying with the FDCPA simply by characterizing accounts assigned for collection as not being in default, and thereby frustrate the purposes of the Act. As explained in *Magee*, 487 F. Supp. 2d at 1027-28:

The express purpose of the FDCPA is to “eliminate abusive debt collection practices by debt collectors.” 15 U.S.C. § 1692(e). This purpose would be contravened if a creditor were unilaterally able to determine when and if an account was in default for FDCPA purposes and therefore whether the provisions of the FDCPA applied to the debt collection activities of the collection agency it hires

It is doubtful that such a result was intended by Congress when it drafted § 1692a(6)(F)(iii). Rather, it appears that Congress intended to distinguish between “[c]reditors, ‘who generally are restrained by the desire to protect their good will when collecting past due accounts,’ ” and “debt collectors, who may have ‘no future contact with the consumer and often are unconcerned with the consumer's opinion of them.’ ” *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir.2003) (quoting S. Rep. 95-382 at 2 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1696). A company hired to service the debt of another-that is, send bills and collect routine payments-falls under the “creditor” category, while a company . . . that is hired specifically because a debtor has missed a payment, and the creditor believes the debtor is more likely to bring her account current if she is contacted by a third-party debt collector than if she receives a routine bill from the creditor, falls

under the “debt collector” category It appears to the Court that it was these two situations that Congress intended to distinguish between when it included the exception for loans that were not “in default” in § 1692a(6)(F)(iii).

(Ellipses added.) To avoid frustrating the purposes of the FDCPA, an account with overdue payments being assessed late fees should be considered in default.

B. No default or declaration of default is necessary to trigger the protections of the CAA.

The CAA requires all collection agencies and out-of-state collection agencies to be licensed by the Washington State Department of Licensing. *See* RCW 19.16.110; *see also* RCW 19.16.100(2)-(4), (7) & (9) (defining terms). All such licensees and their employees are prohibited from “[c]ommunicat[ing] with a debtor or anyone else in such a manner as to harass, intimidate, threaten, or embarrass a debtor, including but not limited to communication . . . with unreasonable frequency[.]” Former RCW 19.16.250(12) (brackets & ellipses added).⁹ “A communication shall

⁹ RCW 19.16.250 was amended three times during the course of 2011. *See* Laws of 2011, 1st Special Sess., ch. 29, § 2 (correcting unintended deletion of phrase in subsection (17)); Laws of 2011, ch. 162, § 1 (amending subsections (8) and (21)); Laws of 2011, ch. 57, § 1 (amending existing subsections (8)-(10), (12), (16)-(17), adding new subsections (9), (18)-(19) and (23), and adding gender neutral language). The 2011 amendments did not alter the language of the statute applicable to this case, although subsection (12) was recodified as subsection (13) and the presumption of harassment arising from more than three communications per week was modified so that it did not apply to a collection agency’s responses to a debtor’s communications. *Compare* Laws of 2011, ch. 57, § 1 with Laws of 2001, ch. 217, § 4.

be presumed to have been made for the purposes of harassment if: (a) It is made with a debtor or spouse in any form, manner or place, more than three times in a single week[.]” Former RCW 19.16.250(12)(a) (brackets added). Violation of this provision is a per se violation of the Washington Consumer Protection Act, Ch. 19.86 RCW. *See* RCW 19.16.440. No default or declaration of default is required to allege or prove a violation of the CAA.

FMS’s status as a collection agency subject to the Act does not hinge upon default or declaration of default. Under the CAA, both in and out-of-state collection agencies are subject to the requirements of the Act. A “collection agency” is defined in pertinent part to mean “[a]ny person directly or indirectly engaged in . . . collecting or attempting to collect claims owed or due or asserted to be owed or due another person[.]” RCW 19.16.100(2)(a) (brackets & ellipses added). FMS satisfies this definition, as it admitted in its answer to the Roses’ complaint.

The definition of a collection agency specifically excludes an “out-of-state collection agency.” RCW 19.16.100(3)(e). However, FMS does not satisfy the definition of an out-of-state collection agency:

a person whose activities within this state are limited to collecting debts from debtors located in this state by means of interstate communications, including telephone, mail, or facsimile transmission, from the person's location in another state *on behalf of clients located outside of this*

state, but does not include any person who is excluded from the definition of the term “debt collector” under the federal fair debt collection practices act (15 U.S.C. Sec. 1692a(6)).

RCW 19.16.100(4) (*italics added*). FMS was collecting a debt on behalf of a client located within, not outside, the State of Washington. Catherine Rose used her Kohl’s credit card at the “Spokane North” store. Because FMS does not fall within the definition of an out-of-state collection agency on this basis, it is not excluded from the general definition of a collection agency.¹⁰

Nor does the concept of a “claim,” incorporated into the definition of a “collection agency,” entail default or declaration of default. A claim is simply defined to mean “any obligation for the payment of money or thing of value arising out of any agreement or contract, express or implied.” RCW 19.16.100(5). In sum, the protections of the CAA do not hinge upon the existence of default or declaration of default.

¹⁰ In the superior court, FMS relied on the last clause of the definition of an out-of-state collection agency to argue that it was excluded from the coverage of the CAA on the same grounds that it was exempt from the FDCPA, i.e., that the Roses’ debt was not in default. CP 157-58 (relying on *Walcker v. SN Commercial, LLC*, 2006 WL 3192503 (E.D. Wash., Nov. 2, 2006), *aff’d on other grounds*, 286 Fed. Appx. 455 (9th Cir., Jul. 28, 2008)). To the extent FMS is *not* exempt from the FDCPA, it would not be exempt from the CPA under FMS’s argument. Assuming for the sake of argument that FMS *is* exempt from the FDCPA, however, it would not satisfy the definition of an out-of-state collection agency in RCW 19.16.100(4), but it is not clear whether it would still fall under the general definition of a collection agency under RCW 19.16.100(2)(a). At any rate, the question is academic because FMS does not otherwise satisfy the definition of an out-of-state collection agency.

II. The superior court abused its discretion by failing to support its sanctions award with necessary findings.

The superior court's reasons for imposing sanctions should be clearly stated on the record so that meaningful appellate review can occur. *See Magaña*, 167 Wn.2d at 583 (involving CR 37(b)); *Biggs*, 124 Wn.2d at 202 (involving CR 11); *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn.App. 409, 415-16, 157 P.3d 431 (2007) (involving CR 11 and 56(g)). In the absence of explicit findings, a remand is warranted to develop an adequate record. *See Biggs*, at 202; *Just Dirt*, 138 Wn.App. at 415-16. The party seeking sanctions has the responsibility to procure formal written findings supporting its position, and it must abide the consequences of its failure to fulfill that duty. *See Just Dirt*, at 416.¹¹

Without proper findings it is impossible to meaningfully review whether the superior court complied with the requirements applicable to a sanctions award. The superior court's findings must relate the ostensibly sanctionable conduct to the appropriate rule. *See Fisons*, 122 Wn.2d at 339-40 (involving CR 26(g)). They must demonstrate that sanctions are

¹¹ Where a sanctions award creates the appearance of unfairness, the case should be remanded to a different judge. *See In re Yagman*, 796 F.2d 1165, 1188 (9th Cir. 1986), *amended*, 803 F.2d 1085 (1986), *mandamus granted sub nom. Brown v. Baden*, 815 F.2d 575, *cert. denied sub nom. Real v. Yagman*, 484 U.S. 963 (1987) (quoted with approval in *Biggs*, at 198). On a documentary record, this court may review the entitlement to sanctions, although it appears that the amount of sanctions is normally subject to remand. *See Bryant*, at 222-23; *Fisons*, at 345-46.

warranted under the circumstances, and justify the amount of the sanctions imposed. *See Biggs*, at 202. In all respects, the burden of proof rests upon the party seeking sanctions. *See id.*

With respect to the type and amount of sanction in particular, the least severe sanction necessary to serve the purposes of the applicable rules should be imposed. *See Magaña*, at 590; *Bryant*, at 201 (stating “CR 11 sanctions should be limited to the minimum necessary”). The purposes of sanctions orders are to deter, punish, compensate and educate. *See Fisons*, at 356. While sanctions may entail compensation to litigants, the sanctions rules are not a basis for fee-shifting. *See id.* Where a compensatory award is made, the amount should be limited to the amount reasonably expended in responding to the sanctionable conduct. *See Biggs*, at 201. Where the sanctions motion is delayed, the award should not exceed those fees which would have been incurred if the motion had been promptly filed. *See Biggs*, at 201.¹²

In this case, the requisite findings are lacking. CP 996-99, 1135-36 & 1142-46. The factual and legal basis for the superior court’s award of

¹² Normally, post-judgment entry of a sanctions award is impermissible in the absence of prompt notice of potential violations of the relevant sanctions rules. *See Biggs*, at 198. Such notice of the potential for sanctions serves the primary purpose of the sanctions rules by deterring blameworthy conduct in advance. *See id.* In the absence of prompt notice, the offending party has no opportunity to mitigate the sanction by altering his or her course of conduct accordingly. *See id.*

CR 11 sanctions has already been addressed above. With respect to the remaining awards of sanctions under CR 26(g), 56(g) and (presumably) the inherent authority of the court, the superior court fails to explicitly identify the ostensibly sanctionable conduct except in general terms. This hinders Mr. Mitchell's ability to appeal, as well as this court's ability to review FMS's entitlement to sanctions.

Additionally, with respect to all of the sanctions, there is a complete absence of findings, let alone explicit findings, regarding the amount of fees necessary to respond to the unspecified sanctionable conduct. Instead, the superior court simply awarded all of FMS's fees and costs. The absence of such findings is especially significant because FMS waited until after final judgment and the lapse of time for an appeal to seek sanctions, rather than filing a sanctions motion at the beginning of the case or in response to particular discovery.

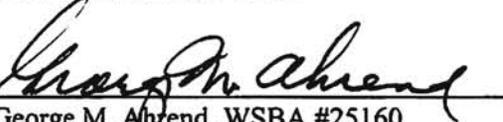
There are no findings demonstrating how the award in this case fosters the purposes of the sanctions rules. While the fact that the award is comprised of fees and costs, the upward lodestar adjustment contravenes the compensatory purpose that such an award is normally intended to serve and instead gives a windfall to FMS.

CONCLUSION

Based on the foregoing, Robert Mitchell respectfully asks the court to reverse and vacate the sanctions order entered by the superior court, and the related letter rulings on which it is based. CP 996-99, 1135-36 & 1142-46.

Submitted this 21st day of May, 2012.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On May 21, 2012, I served the document to which this is annexed as follows:

[] facsimile transmission to (206) 709-2722,

[X] email to: rmartens@martenslegal.com

jchee@martenslegal.com

sstolle@martenslegal.com

[X] First Class Mail, postage prepaid, and/or [] hand delivery, to the following address(es):

Richard L. Martens
Jane Jessica (Chee) Matthews
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Signed on May 21, 2012 at Moses Lake, Washington.