

No.63719-3-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ESATTE OF SHIRLEY A. HARTY, J. PATRICK HARTY,
BENJAMIN HARTY AND JASON HARTY

Plaintiffs-Appellants,

v.

GREG HARTY,

Defendant-Respondent.

RESPONDENT'S SUPPLEMENTAL RESPONSE BRIEF

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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 AUG 26 PM 2:46

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 2

TABLE OF AUTHORITY

CASES

In re Estate of Black,
116 Wn.2d 476, 66 P.3d 670 (2003)2

Just Dirt, Inc. v. Knight Excavating, Inc.,
138 Wn. App. 409, 157 P.3d 431 (2007).....9, 10

Wilson v. Henckle,
45 Wn. App. 162, 724 P.2d 1069 (1986).....9

STATUTES

RCW 11.96A.1502

RCW 11.96A.150(1)..... 10

I. INTRODUCTION

J. Patrick Harty has appealed a post trial award of sanctions issued by the trial court under CR 11. This dispute began when Greg Harty's older brother, Pat, followed through on the threat he had issued when he said to Greg, "I'll sue you just to f*** with you". What followed was a mean spirited legal attack. Pat enlisted his wife and two adult sons to join forces to nullify an *inter vivos* transaction whereby Pat and Greg Harty's mother had made Greg Harty a joint owner with a right of survivorship to several bank accounts that, together, contained the majority of her financial assets.

The trial court dismissed the Petitioners' claims at the conclusion of their case in chief, and then made a fee award in favor of Greg Harty and against J. Patrick Harty and his marital community, and against their sons, Jason and Benjamin Harty, jointly and severally. The Petitioners/Appellants have appealed the dismissal of their claims and the award of fees. In the main appeal, Pat Harty argues that his wife was merely a witness in the case, and that their marital community could not be held liable for attorneys' fees and costs awarded to Greg Harty as the prevailing party.

II. FACTUAL BACKGROUND

As background to this supplemental appeal, after the conclusion of the trial, Greg Harty presented Findings of Fact and Conclusions of Law. Petitioners formally objected to entry of Greg Harty's proposed Findings and Conclusions. Among the Findings and Conclusions was a determination that Greg Harty was a prevailing Party under TEDRA, entitled to an award of attorneys' fees and costs, in an amount to be determined by a fee application submitted for that purpose. (CP 193-205) Petitioners made a motion for reconsideration of the entry of the Findings and Conclusions. (CP 206-234). That motion was denied. (CP 235). Greg Harty then made application for an award of attorneys' fees under RCW 11.96A.150 against the J. Patrick Harty marital community, as well as against Pat's sons, Jason Harty and Benjamin Harty, jointly and severally. (CP 236-292). Under the Trusts and Estates Dispute Resolution Act ("TEDRA"), "because of the almost limitless sets of factual circumstances that might arise in a probate proceeding, the legislature wisely left the matter of fees to the trial court, directing only that the award be made as justice requires." *In re Estate of Black*, 116 Wn.2d 476, 66 P.3d 670 (2003).

Petitioners resisted the motion. (CP 293-309; 325-360). They argued (a) that no fees should be awarded; (b) that should fees be awarded in favor of Greg, the award should be only against the probate estate (which was by then insolvent, because Pat had, as the personal representative to the estate, applied its assets toward litigating against Greg); and (c) that any fee award against his adult sons should be proportionate to what his sons might have recovered in the lawsuit if they had been successful. Pat went on to explain in surprising detail what his family financial assets consisted of, including the disclosure that he had no separate, non-community assets. Across 24 pages of briefing, Petitioners never made the argument that the marital community was not properly exposed to a fee award. (Cp 325-360) They simply argued that fees should not be awarded, or that any fee award should be against the insolvent probate estate.

The trial court entered judgment for fees and costs, jointly and severally, against J. Patrick Harty and his marital community, and against Jason and Benjamin Harty. (CP 313-316). In so doing, and presumably in reaction to the Petitioners' exhaustive citation to authority

as to when courts will impose attorneys' fees against parties individually, the trial court added to the judgment in handwriting:

the Ct. found much of the testimony to be mean spirited and filed as a means to punish Greg Harty rather than one designed to resolve a genuine dispute re Shirley Harty's intent. A fee award from the estate accomplishes what the petitioners did not achieve through trial. Fundamental fairness and the court's prior findings require the entry of this order.

(CP 316). The type of vexatious intent described by the trial court, *sua sponte*, is precisely the type of finding that justified *in personam* fee awards in TEDRA cases, under legal authority cited by the Petitioners in opposition to the fee request.

Dissatisfied, Pat Harty made a motion for reconsideration, arguing the same points made in opposition to the original motion for fees, but adding for the first time that judgment should not be entered against the Harty marital community. (CP 361-406) By order dated May 5, 2009, the court invited a written response from Greg Harty directed only to the issue of who should be named in the judgment for fees and costs. (CP 409). Greg Harty filed a response on May 13, 2009. (CP 410-422). Notably, Greg Harty's Response stated:

Because this prosecution was a "family project", with unknowable agreements amongst the family members, it is

easy to show that Chris played her part. Even relatively unsophisticated clients know that, when they commence a lawsuit, they might not win, and they still will have to pay their own lawyers. It bears mention that the legal expense incurred *by the petitioners* in pursuit of this lawsuit exceeded the value of the probate estate. Liability for the payment of the difference would obviously have to be paid by Pat and Chris's community assets, because those are the only assets they have (Pat has testified that he has no separate assets, and his sons Ben and Jason are young men without the financial wherewithal to undertake a large bill for attorneys fees and costs). Accordingly, and presumably with the blessing of family members, Pat's marital community was exposed to the downside risk of funding an unsuccessful litigation effort. Because the members of the marital community were motivated to fight for the perceived rights of their sons, and to risk community assets to do so, liability to Greg properly rests with the marital community.

(CP 416-417). Unbeknownst to Greg Harty, that is *exactly* what Pat and Christine Harty had done – after the filing of the motion for reconsideration and before the court entered its order denying the motion – Pat and Christine Harty pledged their largest *community* asset to secure their eventual faithful payment of the bills they owed in the unsuccessful effort to sue Greg.

In the first breath, Pat asked the court not to grant Greg's fee request, on the grounds that the magnitude of Greg's claim would cause Pat's family severe and lasting financial hardship, laying out for the

court everything of value that the Pat Harty household owns and what it is worth. In the next breath, Pat argued that the court should reconsider its award against the Pat Harty marital community, because pursuit of the lawsuit was strictly a Pat Harty undertaking, in his separate capacity. And then, “under their breath” Pat and Christine Harty pledge their single largest financial asset to the lawyers that Pat Harty claimed were retained strictly in pursuit of Pat’s separate project, with the marital community having no stake in the matter whatsoever.

Greg’s entire point, of course, was to show that the “real party in interest” to the petition was Pat Harty and his marital community. Greg Harty had no notice of the silent pledge of collateral the marital community had made to its lawyers while the motion for reconsideration was pending. The court had no notice of it either. It was misleading at the very least for Pat Harty to announce that the lawsuit against Greg was solely his separate undertaking, and not to inform the court expressly that his marital community was on the hook for attorneys fees for the same undertaking, and had pledged community assets to secure the obligation. Pat and Christine Harty had, at the very least, indulged a misleading atmosphere. Full disclosure of the facts would have harmed

Petitioners' chances of convincing the court to reverse itself on the fee award.

With this factual backdrop, Greg Harty made a motion for a supplemental award of fees as a sanction under CR 11. One of Petitioners' arguments is that an award of sanctions under CR 11 cannot be imposed against them because they did not personally sign the motion pleadings that failed to disclose the secret arrangement with the deed of trust. That argument is specious. CR 11 states, in pertinent part:

If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, *may impose upon the person who signed it, a represented party, or both*, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

The plain language of the rule allows the court to impose a sanction upon "the represented party". The court determines in its discretion who, between the party represented and the attorney who may have signed offending pleadings, is culpable for violation of the rule.

Belatedly on appeal, Pat Harty argues that the transaction pertaining to the pledge of security was fully compliant with RPC 1.8, and that Pat and Christine Harty obtained advice from counsel other than

their trial counsel. That should be comforting to Pat and Christine Harty, but it has little to do with the issue before this court. It was never Greg Harty's argument that Pat and Christine Harty were tricked or strong armed into pledging their home to secure an obligation to pay fees. Quite the opposite, Greg Harty believes that the marital community owes the debt, and willingly pledged community assets to secure payment of it. Greg Harty's point is that failure to disclose the security transaction to Greg Harty and to the court gave rise to the CR 11 motion. Pat and Christine Harty state in their most recent brief:

The fact that in an unrelated transaction at a later time, Christine Harty agreed to subject to the community home a Deed of Trust securing the attorney's fee obligation to counsel for appellants should not and cannot render her liable for the attorney's fees.

Appellants' Supplemental Brief at 5.

This passage triggers several responsive arguments. First, the collateral pledge was not an "unrelated transaction". It was the means by which the Patrick Harty marital community agreed to fund the fee obligation it incurred in its unsuccessful lawsuit against Greg Harty. This transaction was "related" in every sense of the word. Second, the collateral pledge did not occur "at a later time". It occurred while the

Superior Court was being told by Pat and Christine Harty that Christine had nothing to do with the lawsuit against Greg, and that the Pat Harty marital community could not be held legally responsible for the fee award in Greg's favor. Literally as the court was being told that the Pat Harty marital community was the legal equivalent of a bystander to the lawsuit, that same marital community was pledging its largest asset to secure payment of the cost of the lawsuit! And third, the marital community pledged an asset to secure a **community** obligation to pay its lawyers for the unsuccessful lawsuit.

The trial court agreed that Petitioners' motion for reconsideration was not well grounded in fact or that Petitioners' denials of factual contentions were not warranted on the evidence. Upon making this determination, the trial court exercised its discretion to impose the sanction of awarding to Greg Harty that amount of expense he incurred in defending Petitioners' motion for reconsideration. The trial court's decision is reviewable on appeal under an abuse of discretion standard. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 157 P.3d 431 (2007). The trial court in this case was "close" to the evidence, having listened to seven days of trial testimony and argument. Under its

inherent power, and under CR 11, a court has authority to assess litigation expenses against a party or the party's attorney for bad faith litigation conduct. *Wilson v. Henckle*, 45 Wn. App. 162, 724 P.2d 1069 (1986). Sanctions under CR 11 should not exceed fees and costs incurred for a party to respond to a pleading signed in violation of the rule. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 157 P.3d 431 (2007). Here, the sanctions do not exceed Greg Harty's actual fees and costs incurred in defending against the motion.

In their brief, Petitioners argue that the motion for reconsideration of the trial court's award of fees under TEDRA was based on the plain language of RCW 11.96A.150(1). So, they imply, it really does not matter what Christine Harty may have done to accommodate payment of fees incurred in the unsuccessful lawsuit. This is "pretzel logic". Greg Harty argues that the Pat Harty marital community was the real party in interest, and that the fee award is properly made against the marital community under the language of RCW 11.96A.150(1). Greg Harty argues that it does not matter whether or not Christine Harty was named by name in the caption of the lawsuit (in fact, no one is named in the caption as the party undertaking suit).

Greg Harty asked the court to consider the actual facts and circumstances, and to determine who were the “real” Petitioners.

Christine Harty, under Petitioners’ description, was just a witness to the lawsuit, and not a party. Thus, the bill for attorneys fees incurred in pursuit of the unsuccessful legal effort would have been Pat Harty’s sole and separate debt. If that were true, both Pat and Christine would argue strenuously to the attorneys for the Petitioner that they must look only to Pat Harty’s (non-existent) separate assets for payment. In other words, the Harty marital community has every logical economic and legal reason to make the same arguments to their attorneys that they make to Greg Harty and the court.

Greg Harty is not seeking to force Pat and Christine Harty to waive their attorney-client privilege, or their spousal privilege, to explain the circumstances under which their largest community asset was pledged to secure an allegedly separate debt that Pat Harty could not possibly pay. The entire point of Greg Harty’s motion for a supplemental judgment was that the *non-disclosure* of the security arrangement, while Petitioners’ motion for reconsideration was pending, prevented Greg Harty and the court from knowing the complete truth,

and prevented Greg Harty from making use of those facts in his response to the motion for reconsideration. Had Pat and Christine Harty revealed their secret security pledge at the time of the motion for reconsideration, Greg Harty would have spent paragraphs explaining the significance of that transaction, and asking the court for sanctions under CR 11 earlier in time. Nothing in the record suggests such a motion would have been denied if it had been brought as part of the motion for reconsideration.

CR 11 exists to deter baseless filings and to curb abuses of the judicial system. The supplemental judgment in this case was a sanction awarded in pursuit of that goal, in the exercise of the trial court's sound discretion. Petitioners fell far short of persuading the trial court as to the substantive merits of their claims. The trial court included its own unsolicited comment to the effect that the Petitioners' litigation efforts were mean spirited, and not aimed at revealing truth as much as inflicting harm upon Greg Harty. Petitioners tirelessly moved to reconsider each of the trial court's decisions. Belatedly arguing that Christine Harty was not really a party to the proceeding, the Petitioners actively hid from the court facts that directly undermined the arguments they were advancing. For this, the court issued its sanction under CR

11. This was not an abuse of the trial court's discretion. The Supplemental Judgment should remain undisturbed on appeal.

RESPECTFULLY SUBMITTED this 26th day of August, 2010.

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that on this 26th day of August, 2010, I caused to be served true and correct copies of the following documents:

1. Respondent's Supplemental Response Brief; and
2. Certificate of Service

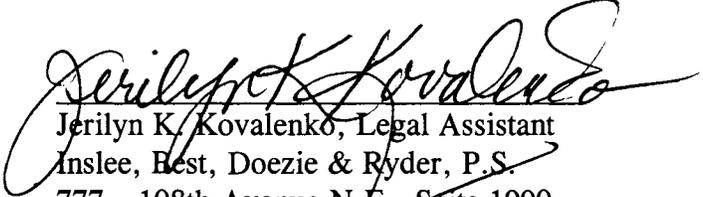
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DATED this 26th day of August, 2010, at Bellevue,
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