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CASE #: 70205-0-1

WASHINGTON COURT OF APPEALS
DIVISION ONE

RUSSELL JAMES JENSEN, JR. A/K/A JAMIE JENSEN,

Appellant

v.

REGINALD & BRENDA WREN,

Respondents

Appeal from Washington Superior Court
for Snohomish County
No. 10-2-03262-1
Hearing dated January 25, 2012
Judge Ellen J. Fair

APPELLANTS' REPLY BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON

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STATEMENT OF THE CASE IN REPLY

Although the Wrens “Brief of Respondents” goes on for several pages, the Wrens take issue with only one action of Jensen, that he brought a motion for summary judgment that could not be heard in a timely manner before the scheduled trial date. The Wrens' first item in their brief addresses the standard for review. Items 2 through 5 all say the same thing, Jensen scheduled a motion for summary judgment that could not be heard before the trial. The Wrens note, but then seem to ignore, the companion motion to continue the trial to allow for the summary judgment motion and to allow Jensen's client to receive her discovery answers that had been withheld by the misconduct of the Wrens. If he had been successful, Jensen's actions would have avoided the four-day trial.

But most importantly, the Wrens make no suggestion of any kind that Jensen's actions were in bad faith, were for an improper purpose, or were for any purpose other than the promotion of a reasonable presentation and conclusion of the case. The trial court also did not make a finding of bad faith.

Jensen's Opening Brief adequately addresses Items 2 through 5 of the Brief of Respondents.

Then, unfortunately, the Wrens add to the misconduct that they already committed by including an Item 6. In addition to failing to provide answers to discovery, the Wrens have now included in Item 6 of their responsive documents a reference to the trial that occurred after any actions in this appeal, a reference to an unrelated case involving Jensen, and a citation to an unpublished opinion, all clear and obvious violations of the rules of appellate procedure. The Wrens have no good-faith response to this appeal so they choose to make a bad faith response.

From the outset, there has never been any suggestion that Jensen's actions were based on any intention otherwise than the fair, expedient, and economical determination of this case. In order for Rule 11**Error! Bookmark not defined.** sanctions to be issued the Court must find that Jensen acted in bad faith. The brief of respondents addresses only the procedural aspects of case without alleging or proving bad faith. The order for sanctions cannot stand.

The basic issues on appeal, as stated in Jensen's brief, remain the same. However, the brief of the Wrens create a new set of issues.

ARGUMENT IN REPLY

1. The respondents are limited to the record on appeal and may not bring in extraneous facts that were not before the trial court.

Events that occurred after the issuance of the order that is the basis of this appeal would be irrelevant and, under any circumstances, are not part of the Record on Review,

The rules state that the record before the appellate court will consist of a report of the proceedings and the clerks papers. And the facts that become part of either litigants' appellate brief must contain only facts that come from that record. Rule 10.3 (5) RAP, states that "Reference to the record must be included for each factual statement."

With that in mind, can the respondents present new facts to the court, facts that are not part of the record on appeal? The rule has always been no, only the Record on Review can be referenced by either of the parties, pursuant to Title 9, RAP. The courts have held, in another case that:

This transcript is not part of the record. RAP 10.3(5) requires that all factual statements must be supported by reference to the record. Sunderland's reference to a document not in the record violates this rule.

In re Adoption of R.L.M., 156 P.3d 940, 138 Wn.App. 276 (Wash.App.

Div. 1 2007). See also *Truly v. Heuft*, 158 P.3d 1276, 138 Wn.App. 913 (Wash.App. Div. 1 2007)

The respondents make no reference to the court record when they introduced the events of the trial that occurred after the execution of the order that is at issue here. The events of the trial in this case had no bearing on the appeal currently before the court. This appeal is only taken from the order of the Superior Court regarding sanctions. The Wrens appear to take the position that any material is fair game, regardless of the rules of appellate procedure.

2. The respondents may not present facts from an unrelated case that is not part of the court record and was not presented to the trial court.

Can the Wrens present new facts to this court on appeal regarding an unrelated case from a year earlier regarding Jensen?

Events that occurred in an unrelated case would be irrelevant and, under any circumstances, are not part of the Record on Review, pursuant to Title 9, RAP, *In re Adoption of R.L.M.*, supra, and, if brought to the trial court level, would have been excluded as irrelevant. Rule 404 ER.

For this issue, as for the issues stated above, a party may only reference matters that were referred in the Superior Court and that have become part of the record on appeal. Otherwise, any party could bring in

any new and potentially damaging material without limitation. This court would have to be burdened with trying to understand the unrelated case particularly and, as in this case, when there was no effort of any kind to explain the history of the other case, the burden would be even greater.

The Wrens only purpose for bringing in unrelated cases to this court appear to be to prejudice the court against Jensen. This is an improper purpose for citing an unrelated case.

3. Citing to an unpublished opinion is prohibited by Rule 14.1 GR, which states “A party may not cite as an authority an unpublished opinion of the Court of Appeals.”

Can the Wrens make reference to and unpublished case as authority to support their position in this appeal?

Unpublished opinions cannot be used as authority to support a position in this court. This is a very clear and distinct rule. “A party may not cite as an authority an unpublished opinion of the Court of Appeals.” Rule 14.1 GR. Appellant can only speculate as to why respondent's counsel, William B. Foster, would violate such a clear and obvious rule. The appellate court chooses to leave certain cases unpublished. There must be a reason that the cases are unpublished. Apparently Mr. Foster never inquired into the basis for leaving certain cases are unpublished.

4. Liberties with the appellate court's procedures.

In addition to the three points presented above, the court will note that the Wrens have taken other liberties with appellate procedure. The appellate court allows a party to include an appendix to their brief, but the material that can be included in the appendix is quite limited. It may not include "materials not contained in the record on review without permission from the appellate court, except as provided in Rule 10.4 (c)." Rule 10.3(8) RAP. None of that matters included in the Wrens appendix satisfies this rule.

Jensen moves the court to exclude the offending references to the trial court decision, the unrelated case and the improper citation of an unpublished case, plus all of the appendix of respondents.

Because the [supporting documents] were not part of the record for review, . . . we grant Walsh's motion to strike the documents. *City of Sumner v. Walsh*, 61 P.3d 1111, 148 Wn.2d 490 (Wash. 2003)

This motion is made pursuant to Rule 17.1 RAP.

At this point Jensen would ask the court to take notice that this entire appeal was caused by the Wrens' application for sanctions against Jensen, claiming procedural error on Jensen's part. Yet the Wrens make abundant procedural errors, all with the appearance of bad faith, to support their claim against Jensen. For those reasons sanctions against the Wrens and their counsel, pursuant to Rule 18.9, RAP, are sought and requested by

Jensen for their response to this appeal. See also *Kinney v. Cook*, 208 P.3d 1, 150 Wn.App. 187, 195. (Wash.App. Div. 3 2009).

CONCLUSION

The trial court improperly awarded Rule 11 sanctions against appellant. The order awarding sanctions should be overturned.

DATED this 7th day of August, 2013.

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