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No. 70741-8-1

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

Manuel Cruz, Gilberto Ramirez, and Epifanio Rios,
Respondents

v.

Abel Chavez and Jane Doe Chavez, and the marital community
thereof; and Chavez Landscaping, LLC, a Washington Limited
Liability Company,
Appellants

BRIEF OF RESPONDENTS

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I. ISSUES

1. Did the trial court abuse its discretion in awarding monetary sanctions against the appellants and in favor of Mr. Rios for discovery and ethical violations?
2. Did the trial court abuse its discretion in declining to enforce a “settlement agreement” negotiated by appellants and appellants’ counsel directly with Mr. Ramirez at a time when both appellants and appellants’ counsel knew that Mr. Ramirez was represented by counsel?
 - a. Is the behavior of appellants’ counsel a direct violation of RPC 4.2 which prohibits an attorney from communicating with a person known to be represented by another attorney?
 - b. Under the facts as described to the trial court, did the court abuse its discretion in finding that the “settlement agreement” fell below the standards required by CR 2A?
3. Are appellants entitled to an award of attorney fees on appeal?

II. STATEMENT OF THE CASE

A. PROCEDURAL FACTS

Defendants at the trial court level (hereinafter "Appellants") have appealed an order and judgment entered on July 3, 2013 by Snohomish County Superior Court Judge Marybeth Dingley. The two remaining Plaintiffs in Superior Court (hereinafter "Respondents") are Gilberto Ramirez and Epifanio Rios.

At its heart, this case involves a claim by Respondents against Appellants for unpaid wages. The case involves claims by the Respondents that Appellants knowingly took advantage of them. The three original Plaintiffs are Hispanic. None of them speak English. Plaintiff Rios is illiterate, understands Spanish only, and neither reads nor writes Spanish or English. CP 270.

Respondents worked long hours as landscapers in the business owned and operated by the Appellants. Appellants, in turn, did not pay the Respondents for their labor. Because of the Respondents status, their lack of English skills, and tremendous unequal bargaining position, the Appellants were able to take advantage of the Respondents, under paying their wages by literally tens of thousands of dollars. CP 270-271. This background is important as we evaluate the motions which resulted in the

orders and judgment entered by Judge Dingley. That is, even as this case progressed, Appellants continued to attempt to take advantage of the Respondents, even in direct violation of the court rules and ethical rules.

This action was filed in Snohomish County Superior Court in June, 2011. CP 358-362. The discovery process was difficult. Prior to Judge Dingley's order, the Appellants and their attorney had already been sanctioned at least twice (on one occasion sua sponte) for discovery violations and manipulating the court system. CP 355. Judge Dingley was well aware of this history. CP 271.

Ultimately, Respondents' claims proceeded through arbitration pursuant to the Superior Court Mandatory Arbitration Rules. Arbitrator Lorna Corrigan entered an award and amended arbitration award in favor of both of the Respondents. The award to Mr. Ramirez was in the principal sum of \$15,848.44 and prevailing party attorney fees and costs totalling \$16,517.43. See Appendix 1. Following entry of the arbitration award, the appellants filed a request for trial de novo. CP 271.

At all times, the Appellants in this matter were represented by Michael Jacobson. At all times, the Respondents in this matter were represented by John Frawley. CP 272.

The motions before Judge Dingley essentially addressed two issues. First, following the adverse arbitration award against them, the Appellants contacted Gilberto Ramirez directly and without notice to Mr. Ramirez's attorney. The Appellants alleged that they obtained a "settlement agreement" with Mr. Ramirez. The Appellants sought to enforce that agreement and, in response, the Respondents resisted the enforcement of the agreement and requested that the court deny enforcement. CP 300-306.

The second motions upon which Judge Dingley entered an order relate to misrepresentations by the Appellants and their attorney and direct communications by the Appellants with one of the employers of Respondent Epifanio Rios. In short and as will be more fully discussed below, the Appellants' attorney contacted the employer of Mr. Rios, represented that he (Mr. Jacobson) was actually the attorney for Mr. Rios, and submitted requests for information and discovery requests to the employer, signing those submissions as the attorney for Mr. Rios. This was done, of course, without notice to Mr. Rios or to Mr. Rios's attorney. CP 300-306 and CP 270-277.

Because the two motions involved distinct and somewhat different underlying factual backgrounds, we will address the factual background of each issue separately.

B. SETTLEMENT AGREEMENT FACTS

As indicated above, at all relevant times, Mr. Ramirez was represented by John Frawley. This fact was known to the Appellants and their attorney. The Appellants have been continuously represented by Mr. Jacobson. CP 272.

Appellants alleged to the trial court that they had obtained an “release agreement” from Mr. Ramirez on or about September 4, 2012. CP 310-312. The “release agreement” was written in Spanish. CP 279. The Appellants presented a translation to the court prepared by Maria Dopps. CP 282-285.

At least as of September 4, 2012, the Appellants and their attorney allege that they believed that they had reached a settlement agreement with Mr. Ramirez. However, neither the Appellants nor their attorney communicated these facts to the attorney for the Respondents, to the Respondents themselves, or to the court. In fact, the Appellants and their attorney affirmatively encouraged both Mr. Ramirez and the other Respondents not to communicate with their own attorney. CP 260-262. Interestingly,

neither the Appellants nor their attorneys deny these facts and tacitly acknowledge that they encouraged the Respondents to terminate communication with Respondents' counsel.

Between September 4, 2012 and the ultimate trial date in this matter, February 11, 2013, the Appellants communicated with counsel, the court, and with the mediator (retired Judge Steve Scott) on multiple occasions. Never once did the Appellants reveal to the court, to counsel, or to the mediator that they have achieved "a settlement" with Mr. Ramirez. Instead, the Appellants concealed the fact that they had communicated directly with Mr. Ramirez and encouraged Mr. Ramirez not to communicate with his own attorney. By way of example related to this concealment, consider the following facts:

1. In October of 2012, the Respondents brought a motion for an order to enter judgment against the Appellants and strike the jury demand of the Appellants. That motion was heard before Judge David Kurtz. The Appellants appeared at that hearing and argued against entry of the judgment. This would have been an ideal time to let Judge Kurtz and counsel know that the Appellants believed they had a settlement, but there was no mention of that fact.

2. On October 23, 2012, Judge Michael Downes heard a motion to continue the trial. Again, the Appellants appeared and argued that motion. Again, the Appellants did not disclose to Judge Downes or to counsel that they had what they believed to be a settlement agreement with one of the Respondents. Instead, the Appellants continued to conceal this fact.
3. On October 11, 2012, Appellants' counsel served upon Respondents a notice requiring "plaintiff" Gilberto Ramirez to appear for trial. A second notice was served on Mr. Ramirez to appear at the continued trial date in February, 2013.
4. In anticipation of the mediation in this matter, the Appellants submitted an entire three ring binder, complete with 54 exhibits and supplemental exhibits. The Appellants argued at length regarding their liability to Mr. Ramirez. This mediation material was submitted in February, 2013. Still, in that pre-mediation submission, the Appellants did not reveal to the mediator or to the Respondents' counsel their belief that they had "settled" with Mr. Ramirez. In fact, once at the mediation, the Appellants even refused to produce a copy of the settlement agreement until late in the evening of the mediation and only then because it was demanded by the mediator.

CP 272-273.

This case was ultimately called for trial as scheduled on Monday, February 11, 2013, some five days after the mediation session and some five days after the purported settlement had first been revealed to the Respondents. On the preceding Friday, one court day before trial (February 8, 2013), Appellants' counsel filed a motion to enforce the settlement agreement and to dismiss Mr. Ramirez as a plaintiff. For the very first time, the Appellants revealed to the court that they thought that they had a settlement with Mr. Ramirez. CP 273.

Judge Downes, the presiding judge, denied the defendants motion related to Mr. Ramirez. At the trial call on February 11, 2013. Judge Downes indicated "There's a problem here. Its concerning..." In fact, Judge Downes became so upset at the explanation provided by defendants' counsel that he had to leave the bench and take a break. Ultimately, Judge Downes returned to the bench and denied the Appellants' motion for enforcement of the "settlement agreement", refusing to dismiss the complaint of Mr. Ramirez. CP 273.

Interestingly, at the time of hearing before Judge Downes on February 11, 2013, Mr. Jacobson, counsel for the Appellants, revealed that he had made a tactical decision and that there was “strategic” purpose in concealing the purported settlement with Mr. Ramirez. Mr. Jacobson explained to Judge Downes that he “wanted to read his [Ramirez] deposition testimony to the jury. And if he did not appear at the proceeding and he had been dismissed beforehand, I would not have been able to read his deposition testimony to the jury under Rule 32(a)(2).” Apparently, Mr. Jacobson felt that concealing the purported settlement, while at the same time encouraging Mr. Ramirez not to communicate with his attorney or appear at trial and continuing to treat Mr. Ramirez as a plaintiff in the matter, was somehow justified. Judge Downes did not agree. CP 274.

Despite the fact that the motion to enforce the settlement agreement had been denied by Judge Downes, the Appellants renewed their motion before Judge Dingley in June, 2013. CP 310-312. In opposition, the Respondents filed a motion to deny enforcement of that settlement agreement. Judge Dingley received the written explanation of counsel for the Appellants regarding his preparation of the agreement which was alleged to

have been signed by Mr. Ramirez, the presentation of that agreement to Mr. Ramirez, as well as Mr. Chavez's own version of the facts. Judge Dingley also heard from the Respondents, including a declaration from Manuel Cruz, one of the original plaintiffs in this matter, confirming that he had also been contacted directly by appellants and their counsel had been advised by the Appellants not to contact his own attorney. Mr. Cruz also spoke with Mr. Ramirez who confirmed the following facts regarding his "settlement" and the process employed by Appellants and Appellants' counsel:

1. Mr. Ramirez was given a sum of money;
2. Mr. Ramirez was presented with "a paper" prepared by Mr. Jacobson;
3. Mr. Ramirez signed the document prepared by Mr. Jacobson and the document was returned to Mr. Jacobson by Mr. Chavez;
4. Mr. Ramirez was instructed that there was "no need" to contact his attorney and he "must not" contact his attorney again.

CP 261.

At the time that the case was heard by Judge Dingley, Mr. Jacobson, attorney for the Appellants, explained to Judge Dingley that it was his view that it was perfectly acceptable for an attorney to assist his client in communicating with a party that he knows is represented. In fact, Judge Dingley quoted Mr. Jacobson's comment in her order to the effect that "a lawyer is entitled to coach a client about communications" with represented parties. CP 118, lines 26-30.

Ultimately, Judge Dingley noted concerns about the manner in which the release was presented to Mr. Ramirez, the fact that the written language was unclear and would be difficult for a non-native speaker to understand, the fact that Mr. Jacobson was "coaching" his client in the process of obtaining a release from a represented party, the fact that the existence of the release had been concealed from the attorney for the Respondents and from the court for many months, and ultimately the fact that the release did not comply with the provisions of CR 2A. The court denied enforcement of the "release agreement." CP 117-120.

Appellants have appealed the decision of Judge Dingley on this issue. In something of a shotgun approach, the Appellants appear to allege that CR 2A does not apply, that it was acceptable

to negotiate an agreement with a represented party without notice to counsel or the court, and, as a final matter, that the court was required to allow "28 days' notice" before ruling on the issues related to the agreement. Appellant's (sic) Opening Brief, page 4-5. As will be discussed below, none of these claimed deficiencies justify the relief requested by the Appellants.

C. RIOS DISCOVERY VIOLATION FACTS

The factual background related to the Appellants discovery violations involving Mr. Rios' employer is strikingly similar to and equally as troubling as the pattern of conduct related to the Ramirez "release agreement." Again, the behaviour of the Appellants and counsel can only be characterized as significant ethical violations and failure to follow the simplest rules of the court.

During a pretrial deposition, Mr. Rios revealed that he had been employed at one time by AgriMACS. AgriMACS is a large commercial agricultural employer in eastern Washington. Mr. Rios readily revealed the identity of his employer, making no attempt to conceal the identity of the employer. CP 275.

Taking the information from Mr. Rios' deposition regarding his employment, Appellants' counsel then set on a course of conduct which is difficult to understand. Appellants' counsel

contacted AgriMACS directly, representing that he (Mr. Jacobson) was the attorney for Mr. Rios. Based upon this representation that he was Mr. Rios' attorney, Mr. Jacobson obtained employment and tax records which are not only privileged and confidential, but affirmatively protected by federal statute. CP 276.

The president of AgriMACS, Tim McLaughlin, recounted his interaction with Mr. Jacobson in a declaration filed with the court. As recounted by Mr. McLaughlin, AgriMACS has a strict company policy regarding release of information about its employees. The company does not release any information or data about its employees unless the employee or the employee's legal representative contacts the entity. AgriMACS fully recognizes the need for confidentiality and the privacy concerns regarding federal tax records. CP 263-264.

In July, 2012, Mr. Jacobson contacted AgriMACS, representing that he was the attorney for Mr. Rios. Mr. Jacobson requested information regarding Mr. Rios' date of hire, his termination, his tax records, and his pay records. Not only did Mr. Jacobson represent that he was the attorney for Mr. Rios, but he subsequently served two subpoenas on AgriMACS and signed both

of those subpoenas the "Attorney for the Plaintiff" (Epifanio Rios). CP 263-269 and CP 275-277.

Although CR 45 requires prior notice of the issuance of a subpoena duces tecum requesting the production of records, no notice was provided by the Appellants to the Respondents or to Respondents' counsel. In fact, once again, Appellants and Appellants' counsel concealed what they had done until the eve of trial. CP 270-277.

In response and at the trial court level, Appellants' counsel made the following allegations. First, Appellants' counsel suggested that Mr. McLaughlin was simply lying. Second, Appellants' counsel indicated that it was pure coincidence that he had signed two subpoenas (and indeed a third subpoena that was produced during the motion process) as the attorney for the plaintiffs, when he knew full well that he was not the attorney for the plaintiffs. Third, Appellants' counsel claimed that he had no duty to notify the Respondents of the deposition nor to provide advanced notice of his intent to obtain records from the employer. Finally, ignoring the federally protected confidentiality of the tax records, Appellants' counsel suggested that there was no duty to disclose the fact that he was seeking these confidential records (nor did Appellants'

counsel even acknowledge the confidentiality of the records). CP 171-175.

Once again, Appellants' counsel appeared at the hearing before Judge Dingley. Essentially, the very same arguments recounted above were repeated to Judge Dingley. Please note that at no time up to and including the hearing before Judge Dingley did the Appellants assert that either the Appellants or their counsel would be relieved of the imposition of sanctions by any settlement agreement that they had previously negotiated.

Only after Judge Dingley had issued her ruling imposing sanctions for the violation of the discovery rules did the Appellants and Appellants' counsel claim that they were relieved of their responsibility for these discovery violations by a settlement negotiated with Mr. Rios. In what was characterized as a "CR 59a motion to reconsider", the Appellants filed 102 pages of material, for the first time asserting that there was a "settlement and release" which prevented the Respondents from obtaining relief on the motions that had been heard by Judge Dingley. CP 11-113. One wonders, if the Appellants truly believe that this is the case, why they did not raise this issue before Judge Dingley issued her ruling. In any event, Judge Dingley summarily denied the

Appellants' motion to reconsider in a single page order. CP 10. Judge Dingley took this action without input from the Respondents, the Respondents not being offered the opportunity to respond to the volume of materials filed by Appellants' counsel.

III. ARGUMENT

A. RAMIREZ RELEASE AGREEMENT

1. Procedural Issue

Before turning to the substantive issues, let us first dispose of the procedural issue raised by the Appellants. The Appellants claim that they were entitled to "a full CR 56(c) 28-Day notice" before the court could rule on the enforceability of the "release agreement." Chavez Opening Brief, page 29. These assertions by appellants are both factually unsupported without any legal support.

First, what the Appellants' claim overlooks here is that the Appellants scheduled the hearing date in this matter. On June 11, 2013, Appellants' counsel filed a "motion to enforce settlement and dismiss plaintiff Ramirez." CP 307-309. It was Appellants' counsel who scheduled the hearing two weeks later on June 25, 2013. The Appellants chose the timeline, not the Respondents. Further, at no time prior to the hearing did the Appellants complain about the schedule and the Respondents raised no objection to that

schedule. If anyone had a right to object to the schedule created by the Appellants, it was the Respondents. It appears that the Appellants believe that they have created a procedural problem and are now trying to benefit. If this is error created by the Appellants, they have no basis to request relief from this court.

Even if the respondents had been responsible for choosing the hearing date and noting the motion before the court, there is no legal authority for the appellants' argument. The appellants cite Brinkerhoff v. Campbell, 99 Wn.App 692, 994 P.2d 911 (2000) for the proposition that "summary judgment standards govern" a motion under CR 2A. However, Brinkerhoff indicated only that the substantive standards of CR 56 apply. It does not stand for the proposition that the 28 day notice requirement of CR 56(c) is required for any motion dealing with enforcement of a CR2A agreement. Appellants were obviously aware of this fact when, as recounted above, they chose to file a motion for enforcement of the settlement agreement on two weeks notice to the respondents. There is simply no legal authority supporting the appellants' suggestion that there was a procedural error in the court's handling of the motion.

Finally on this narrow procedural issue, the appellants in this matter did not object at the trial court level to the hearing date or scheduling in this matter. Having failed to timely object, the appellants have waived the right to appeal on this issue. White v. Kent Medical Center, Inc., P.S., 61 Wn.App 163, 810 P.2d 4 (1991). A litigant may not remain silent regarding claimed error and later raise the issue on appeal. The litigant must provide the trial court with the opportunity to correct any alleged error and may not gamble on the outcome of the hearing and later raise an objection as to the underlying procedure. Having raised no objection at the trial court level, the appellants have waived any claim on this issue.

2. There is no substantive basis to overturn Judge Dingley's decision

Turning to the substantive issues to be resolved, there are a number of undisputed facts which can be gleaned from the various pleadings filed by the Appellants and the Respondents in the submissions to Judge Dingley. Those undisputed facts include the following:

1. By way of direct contact with Mr. Ramirez and without consulting Mr. Ramirez's attorney, the Appellants reached what they believe to be an "agreement" with Mr. Ramirez;

2. Mr. Chavez took a “paper from my lawyer” to Mr. Ramirez to sign, this being the purported settlement agreement;
3. Mr. Ramirez was told by the Appellants that there was no need to have further contact with his attorney;
4. The existence of the settlement agreement was concealed from Respondents’ attorney for more than five months;
5. The existence of the settlement agreement was concealed from the court for more than five months;
6. Appellants’ counsel signed multiple pleadings with the court between the date of the settlement agreement and one day before trial (when the settlement agreement was ultimately revealed) in which the Appellants did not reveal the settlement agreement; and
7. The Appellants waited until one day before trial and filed an untimely motion to enforce the agreement.

Given these undisputed facts, Judge Dingley’s denial of enforcement of the “release agreement” was legally correct.

First, the manner in which this “agreement” was negotiated was a direct violation of the rules of professional conduct. RPC 4.2 provides as follows:

In representing a client a lawyer shall not communicate about the subject of the representation with a person a lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or the court.

Mr. Jacobson addressed the court regarding this issue and his comment was “a lawyer is entitled to coach a client about communications with represented parties.” Judge Dingley was so startled by this assertion that she actually included the quote of Mr. Jacobson’s comment in her written order.

Mr. Jacobson, for his part, asserted that the comments to RPC 4.2 authorized his conduct in creating a contract for his client to take to an adverse party, in advising his client on the negotiation of that agreement, and in participating with this client in suggesting that the adverse party need not contact counsel and should not contact counsel thereafter. Apparently, Mr. Jacobson’s assertion is that since he had no “in person” communication with Mr. Ramirez, but only “coaching” his client in that communication, he was authorized to do so.

What the Appellants' position on this issue ignores is both the purpose of RPC 4.2 and that portion of official comment (4) to RPC 4.2 which provides "a lawyer may not make a communication prohibited by this rule through the acts of another. See Rule 8.4(a)." The reference to RPC 8.4(a) is important as it spells out a series of acts which amount to professional misconduct.

In short, providing a settlement agreement to be taken by a defendant to a plaintiff for execution falls squarely within conduct prohibited by the ethical rules. A lawyer simply may not insulate himself by having his client distribute material directly to a represented party. A lawyer may not "coach a client" as an end run around counsel for a represented party.

Important here is that the document obtained by the Appellants was obtained in violation of RPC 4.2. The purpose of RPC 4.2 is to prevent situations in which a represented party is taken advantage of by adverse counsel. See, e.g., Engstrom v. Goodman, 166 Wn.App 905, 271 P.3d 359 (2012); In re Disciplinary Proceeding Against Carmic, 146 Wn.2d 582, 48 P.3d 311 (2002). A document obtained in violation of RPC 4.2 may appropriately be stricken and ignored by the court. Engstrom v. Gooman, *id.* That is, striking the document from the record is the

appropriate sanction for a violation of the rule. This case falls squarely within this doctrine. Judge Dingley was correct, for this reason alone, to refuse enforcement of the “release agreement” negotiated with an adverse party through the assistance of counsel.

If the ethical violations alone were not enough to sustain the ruling of Judge Dingley, then CR 2A makes clear that this “release agreement” should not be enforced. CR 2A provides as follows:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

For a settlement agreement to be enforced by the court under CR 2A, the agreement must be:

1. “Made and assented to in open court or on the record...”, or
2. Entered in the minutes of the court, or
3. In writing and subscribed by the attorneys denying the same.

In essence, CR 2A prevents the very behaviour in which these Appellants have engaged; CR 2A prohibits an end-run bypassing counsel in an effort to achieve a settlement agreement with a represented party.

In our opening brief, appellants first misstate the standard under which CR 2A agreements are reviewed and, then, ignore the court's obligation to evaluate the process which led to the execution of that agreement.

When a party moves to enforce a settlement agreement under CR 2A, the moving party carries the burden of proving that there is no genuine dispute over the existence or material terms of the agreement. The court must read each parties' submissions in the light most favourable to the non-moving party, in this case the respondents. Brinkeroff, id at 696-697. If there is an issue of material fact regarding enforceability of the agreement, that issue should be resolved by a fact finding hearing, in this case trial. The trial court abuses its discretion if it enforces the agreement without first holding that evidentiary hearing. Brinkeroff, at 697.

As an overlay to this summary judgment standard, the trial court has discretion to relieve a party from a stipulation when it is shown that the relief is necessary to prevent injustice. Baird v.

Baird, 6 Wn.App 587 494 P.2d 1397 (1972). As we can see from the findings recited by Judge Dingley in her order, that is exactly what she did here. Judge Dingley first questioned whether there was truly an agreement given the doubt surrounding the negotiation with Mr. Ramirez, the bypass of counsel, and the drafting of an agreement to terms which were difficult to understand by a non-English speaker. To say the least, given the behaviour of appellants and appellants' counsel, the negotiation with Mr. Ramirez was at least tainted, if not actually unethical. Judge Dingley was correct in denying enforcement of the release agreement. In fact, if Judge Dingley had enforced that agreement without a full fact finding on the issue, it would have been reversible error.

The only case cite by the Appellants in support of their position is inapposite. The Appellants repeatedly cite Patterson v. Taylor, 93 Wn.2d 579, 969 P.2d 1106 (1999) for the proposition that a settlement signed by the parties alone is enforceable without the signature of counsel. This argument misses the mark.

Patterson involved an agreement which was acknowledged by all parties and negotiated with the help of a professional mediator. There was no attempt to conceal the agreement from counsel or the court and, in fact, the process in that case appears

to have been completely transparent. The terms of the agreement were clear and written in language which all understood.

By contrast, we have none of the indicia of reliability or good faith in this case. There certainly was no transparency in the negotiation of the agreement. To the contrary, Mr. Ramirez was advised to terminate his communication with this attorney. Not only was the agreement not fully disclosed to counsel and the court, but the Appellants and their attorney affirmatively concealed the agreement from the court for more than five months. Counsel for the Appellants appeared in court at least six times between the date that the "release agreement" was allegedly reached with Mr. Ramirez and at all times represented that Mr. Ramirez was still an active plaintiff in the case. In fact, counsel for the Appellants even served a CR 32 notice on Respondents' counsel requiring that Mr. Ramirez appear at trial as a plaintiff to testify.

Please note that our legislature has weighed in on a similar issue. The legislative branch concluded that it would be inappropriate to allow a defendant to bypass the attorney for a represented party in an attempt to negotiate a settlement. Washington Administrative Code Section 287-30-330 (19) makes it an unfair practice for an insurance carrier to negotiate or attempt to

settle a claim directly with a claimant who is represented by counsel without the knowledge or consent of the attorney. Consistent with the Rules of Professional Conduct and Civil Rules cited above, our state government has concluded that it would be unfair and inappropriate to encourage settlements such as those suggested by the Appellants.

Next, similar to the discussion above with regard to the appellants' failure to object to the timeliness of the hearing in this matter, appellants have waived any objection regarding the evidence that was submitted and considered by Judge Dingley. In their opening brief, appellants make much of the fact that respondent Manuel Cruz presented a declaration detailing the attempts by appellants and counsel to convince him to settle without the assistance of his own attorney. Mr. Cruz further testified in his declaration that he spoke with Mr. Ramirez regarding appellants and appellants' counsel's contact with Mr. Ramirez. There was no objection at the trial court level to the declaration of Mr. Cruz nor was there any motion to strike any portion of that declaration. Further, there was no testimony presented which contradicted Mr. Cruz's recitation of what had been told to him by Mr. Chavez and the appellants. Also, Mr. Chavez seemed to

acknowledge that Mr. Ramirez's testimony, as recounted by appellant Cruz, was accurate. In any event, there was no objection raised at the trial court level to any of the material presented by Mr. Cruz and, having failed to object, the appellants have waived that objection. See White v. Kent Medical Center, Inc., P.S., id.

Please remember that the net effect of Judge Dingledy's ruling is simply that this case should go forward to trial. Recall that the case was arbitrated more than two years ago and a substantial award entered in favour of Mr. Ramirez. Mr. Ramirez has now been prevented by this appeal from noting this case for trial or proceeding to trial. Had the case been noted for trial, rather than an appeal filed, trial would now be concluded and the case would be resolved. Instead, the appeal of this issue has only resulted in another lengthy delay in Mr. Ramirez ultimately obtaining relief on his claims.

B. RIOS DISCOVERY SANCTIONS

Here, the Appellants are appealing the imposition of discovery sanctions pursuant to CR 26. As a starting point, we note that discovery sanctions are left to the discretion of the trial judge. The purpose of discovery sanctions is to deter, punish, compensate, and to educate. Where compensation to a litigant is

appropriate, then sanctions should also include a compensation award. Mayer v. STO Industries, Inc., 156 Wn.2d 677, 132 P.3d 115 (2006).

The Appellants do not suggest that the sanctions imposed by Judge Dingley were not within her discretion nor do they allege that they were excessive. Instead, the Appellants' only claim in their opening brief is that sanctions were inappropriate as they had been relieved of this responsibility in a settlement agreement reached with Mr. Rios.

Before looking at the settlement agreement reached with Mr. Rios, we need to understand the underlying claims of Mr. Rios. Mr. Rios' claims involve allegations that he was paid less than the minimum wage owed to him under Washington law and that his wages had been wrongfully withheld by his employers. Those claims come with the right to recover double damages and, important here, the prevailing party is also entitled to an award of attorney fees. RCW 49.48.030 and RCW 49.52.070. These fees are awarded as "prevailing party" attorney fees incurred in the process of collecting wages. The "prevailing party" fees are to be distinguished from discovery sanctions under CR 26.

We turn now to the settlement agreement which is cited by the Appellants as the only authority for their arguments. The release provision releases the Appellants from liability as to “claims for prevailing party counsel fees...” CP 86, paragraph 2. The language chosen in the agreement was specifically limited to “prevailing party counsel fees” and did not include discovery sanctions to be imposed by the court. That is, the settlement agreement between Mr. Rios and the Appellants was drafted to release only “prevailing party” attorney fees such as those awarded by Arbitrator Corrigan, not as a release of attorneys fees based upon other considerations. The agreement was carefully drawn to preserve fees for discovery sanctions.

Again, as indicated above, please note that this issue was not raised by the Appellants in their argument to Judge Dingley, but only added later following Judge Dingley’s ruling. The reason for that is that the Appellants knew full well that the settlement agreement negotiated with Mr. Rios did not include a release for these discovery sanctions.

Interestingly, Mr. Jacobson, the attorney for the Appellants, has not appealed from the ruling of Judge Dingley. Judge Dingley’s judgment for sanctions was entered against the

Appellants and Mr. Jacobson jointly and severely. Mr. Jacobson is certainly not relieved of any responsibility for the discovery sanctions by the CR 2A agreement negotiated with Mr. Rios. As above, one wonders whether this case was appropriate for appeal given the limited nature of the issue involved and given the fact that Mr. Jacobson will ultimately be responsible for the award of sanctions no matter how this court rules in its ultimate disposition of this case.

In closing on this issue, as indicated above, the decision to grant monetary sanctions is clearly within the judicial discretion of the trial court and there is no allegation that Judge Dingley abused her discretion in this case. The decision was factual and clearly supported by the evidence. It is appropriate that the court affirm Judge Dingley's decision on this issue.

C. ATTORNEY FEES ON APPEAL

On the issue of the Appellants' appeal of the discovery sanctions, it is appropriate that the court award additional attorney fees on appeal. This portion of the appeal relates only to the discovery violations that lead to sanctions against the Appellants and their counsel. As these sanctions are likely to be upheld on appeal, it is appropriate to award attorney fees for the necessity of

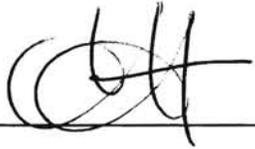
responding to the appeal and for the time and cost spent in that response. Magana v. Hyundai Motor America, 167 Wn.2d 570, 220 P.3d 191 (2009); Washington Motorsports Limited Partnership v. Spokane Raceway Park, Inc., 168 Wn.App 710, 282 P.3d 1107 (2012). Respondents are asking for an award of attorney fees for responding to the appeal of discovery sanctions. Respondents will submit a detailed calculation of fees and costs upon entry of an order affirming the trial court.

IV. CONCLUSION

Judge Dingley did not abuse her discretion in awarding discovery sanctions for the discovery and ethical violations of appellants and appellants' counsel. Further, given the fact that respondents were entitled to an award of attorney fees at the trial court level, this court should award fees and costs to respondents for attorney fees and costs expended at the appellate level.

As to the issue of the "settlement agreement" negotiated with Mr. Ramirez directly by appellants and appellants' counsel, Judge Dingley was fully justified in denying enforcement of that purported agreement and did not abuse her discretion. Judge Dingley's order should be affirmed on this issue as well.

Date: May 29, 2014



John Frawley, WSBA #11819

Attorney for Respondents

CERTIFICATE OF SERVICE

I certify that on the 23 day of May, 2014, I caused a true and correct copy of this Designation of Clerk's Papers to be served on the following in the manner indicated below:

Hand Delivered

Counsel for Defendants/Appellants

Michael Jacobson

119 First Avenue, Ste 200

Seattle, WA 98104



John Frawley, WSBA #11819

Appendix 1

NEWTON • KIGHT L.L.P.

ATTORNEYS AT LAW

Street Address:

1820 32nd STREET, EVERETT, WA 98201

Mailing Address:

P. O. BOX 79, EVERETT, WA 98206



SENIOR PARTNERS:

HENRY T. NEWTON

BRUCE E. JONES

MANAGING PARTNERS:

LORNA S. CORRIGAN

M GEOFFREY G. JONES

PARTNERS:

THOMAS A HULTEN

THOMAS L. COOPER

RETIRED:

R. MICHAEL KIGHT

AREA CODE 425
TELEPHONE 259-5106
TELEFAX 339-4145

www.NewtonKight.com

April 24, 2012

John Frawley
Attorney at Law
5800 - 236th Street S. W.
Mountlake Terrace: Washington 98043

Michael A. Jacobson
Attorney at Law
119 First Avenue South, Suite 200
Seattle, Washington 98104

RE: Cruz v. Chavez

Dear Counsel:

Thank you for your patience in awaiting the arbitration award in the above-referenced matter. A copy of that Award is enclosed for each of you. Both of you worked very hard to present your clients' factually and legally rather complex claims and defenses in this matter, and I want you to know that I expended many hours in reviewing exhibits, notes of testimony, legal theories and legal authorities. As a courtesy to you and your clients, and not in lieu or contravention of the award, I write to briefly explain the more significant bases for my decision.

I concluded first that the statute of limitations applicable to the bond, RCW 18.27.040(3), had expired. and that the bond claim was barred. In contrast, I determined that RCW 4.16.270, which extends statutes of limitations based on payments made, was applicable here to the oral employment contracts. I also agreed with the plaintiffs' position that payments made are applied, absent a contrary agreement of the parties, to

John Frawley
Michael A. Jacobson
April 24, 2012
Page 2

the earliest debt due. The three-year statute of limitations did not bar the plaintiffs' claims for wages.

With respect to the start and end time for wages claimed, I concluded first that although I believed the testimony that Mr. Chavez told Mr. Cruz he would only be paid from the start time at the job, the employees were in fact required by the employer to show up at the business location, and there had to perform tasks such as checking and loading the tools, and gassing the truck (which gas was paid for by the employer). There was no convincing rebuttal testimony that communal travel from the business location was a convenience offered the employees rather than a requirement of the job. I note in this regard that the employer never questioned the inclusion of "wait time" in the past. Consequently, and regardless of any agreement between the employer and the employee, the "wait time" must be paid time under Washington law.

Similarly, with respect to the lunch break, it is true that the employer must provide a half-hour meal break each day. The law does not mandate that the break be unpaid, however, and again, the employer here has in the past paid for hours reported by the employees without deductions. I did not deduct any amounts for lunch breaks.

The plaintiffs' reports of their respective working hours (including those made on behalf of Mr. Rios, who cannot read or write), were certainly contested at the arbitration, but I found those reports to have been credible, by a preponderance of the evidence. I did not find that the evidence of the \$8,000 amount rose to the burden of proof of the affirmative defense of accord and satisfaction as to Mr. Cruz. The exception to Mr. Cruz's records was that I accepted the testimony that Mr. Chavez paid the \$2,500 amount to the immigration consultant, and that the payment was intended by the parties to reduce sums owed to Mr. Cruz for wages. I think it credible that Mr. Chavez in fact paid that amount. If Mr. Chavez made additional cash payments not admitted by the plaintiffs, he did so without adequate records, and at his peril under Washington law.

I did find that there were bona-fide disputes as to each plaintiffs wage claim, either in whole or in part. On that basis, I denied the claim under RCW 49.52.070 for double damages. However, the plaintiffs proved a liquidated sum as that concept is defined under Washington law, and therefore were entitled to prejudgment interest.

John Frawley
Michael A. Jacobson
April 24, 2012
Page 3

Lastly, I found both corporate and personal liability on the part of the LLC and Mr. Chavez, as well as on the part of his marital community. Mr. Chavez did not dispute his control over the LLC, and admitted that he had made various payments to the plaintiffs. He clearly controlled the decision to pay wages, and under Washington law, that authority results in personal liability.

I hope this is of interest to you in understanding the bases for my Award. Please note that the exhibits and pleadings you have supplied to me will be destroyed unless you make arrangements to and pick them up from my offices within thirty days of the date of the Award.

Very truly yours, /

A handwritten signature in cursive script, appearing to read "Lorna S. Corrigan".

LORNA S. CORRIGAN

LSC:vk
cruzchavez.lta.wpd
Enc. Award

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH**

CRUZ, ET AL.

No. 11-2-05911-0

Plaintiff,

vs.

ARBITRATION AWARD

CHAVEZ, ET UX., ET AL.

Defendant.

The issues in arbitration having been heard on February 22 and 29, 2012, I make the following award:

1. The Plaintiffs' claims against American Contractors Indemnity Company are dismissed with prejudice and without costs.
2. Plaintiff Cruz is awarded judgment jointly and severally against Chavez Landscaping LLC; Abel Chavez individually; and the marital community of Abel Chavez and Jane Doe Chavez; in the principal sum of \$25,143.50, together with prejudgment interest through the date of this award in the sum of \$6,034.44.
3. Plaintiff Ramirez is awarded judgment jointly and severally against Chavez Landscaping LLC; Abel Chavez individually; and the marital community of Abel Chavez and Jane Doe Chavez; in the principal sum of \$12,884.50, together with prejudgment interest through the date of this award in the sum of \$2,963.44.
4. Plaintiff Rios is awarded judgment jointly and severally against Chavez Landscaping LLC; Abel Chavez individually; and the marital community of Abel Chavez and Jane Doe Chavez; in the principal sum of \$20,510, together with prejudgment interest through the date of this award in the sum of \$7,793.80.
5. The Plaintiffs' claims for double damages pursuant to RCW 49.52.070 are denied.
6. The Plaintiffs may apply for an award of costs and reasonable attorneys' fees.

Twenty days after the award has been filed with the County Clerk, if no party has sought a Trial de Novo, any party on six days' notice to all other parties, may present to the Presiding Judge or Court Commissioner a judgment on the Arbitration Award for entry as final judgment in this case.

Was any part of this award based on the failure of a party to participate:

(Check one)

- Yes
 No

If yes, please identify the party and explain:

Dated: APRIL 24, 2012.


LORNA S. CORRIGAN, ARBITRATOR

(File original with County Clerk; and provide copies to the Director of Arbitration and all other parties)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

CRUZ, ET AL.

Plaintiff,

vs.

CHAVEZ, ET UX., ET AL.

Defendant.

No. 11-2-05911-0

ARBITRATOR'S CERTIFICATE
OF MAILING

I, LORNA S. CORRIGAN, Attorney at Law, hereby certify that I mailed a copy of the attached Arbitration Award which is incorporated by reference herein, to the following persons:

John Frawley
Attorney at Law
5800 - 236th Street S. W.
Mountlake Terrace, Washington 98043

Michael A. Jacobson
Attorney at Law
119 First Avenue South, Suite 200
Seattle, Washington 98104

on the 24th day of April, 2012, at a United States Post Office, First Class postage prepaid.


LORNA S. CORRIGAN (WSBA #13101)

COPY RECEIVED
MAY 18 2012
J. B. WILSON, P.S.

FILED

MAY 17 2012

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH**

CRUZ, ET AL.

No. 11-2-05911-0

Plaintiff,

vs.

**AMENDED
ARBITRATION AWARD**

CHAVEZ, ET UX., ET AL.

Defendant.

The issues in arbitration having been heard on February 22 and 29, 2012, I make the following award:

1. The plaintiffs' claims against American Contractors Indemnity Company are dismissed with prejudice and without costs.
2. Plaintiff Cruz is awarded judgment jointly and severally against Chavez Landscaping LLC; Abel Chavez individually; and the marital community of Abel Chavez and Jane Doe Chavez; in the principal sum of \$25,143.50, together with prejudgment interest through the date of this award in the sum of \$6,034.44.
3. Plaintiff Ramirez is awarded judgment jointly and severally against Chavez Landscaping LLC; Abel Chavez individually; and the marital community of Abel Chavez and Jane Doe Chavez; in the principal sum of \$12,884.50, together with prejudgment interest through the date of this award in the sum of \$2,963.44.
4. Plaintiff Rios is awarded judgment jointly and severally against Chavez Landscaping LLC; Abel Chavez individually; and the marital community of Abel Chavez and Jane Doe Chavez; in the principal sum of \$20,510, together with prejudgment interest through the date of this award in the sum of \$7,793.80.
5. The Plaintiffs' claims for double damages pursuant to RCW 49.52.070 are denied.
6. Plaintiff Cruz is awarded, jointly and severally against Chavez Landscaping LLC; Abel Chavez individually; and the marital community of Abel Chavez and Jane Doe Chavez; attorney's fees in the sum of \$18,468.53, and costs in the sum of \$614.45.

7. Plaintiff Ramirez is awarded jointly and severally against Chavez Landscaping LLC; Abel Chavez individually; and the marital community of Abel Chavez and Jane Doe Chavez; attorney's fees in the sum of \$15,940.13, and costs in the sum of \$577.30.
8. Plaintiff Rios is awarded jointly and severally against Chavez Landscaping LLC; Abel Chavez individually; and the marital community of Abel Chavez and Jane Doe Chavez; fees in the sum of \$14,891.33, and costs in the sum of \$538.78.

Twenty days after the award has been filed with the County Clerk, if no party has sought a Trial de Novo, any party on six day's notice to all other parties, may present to the Presiding Judge or Court Commissioner a judgment on the Arbitration Award for entry as final judgment in this case.

Was any part of this award based on the failure of a party to participate:

(Check one)

- Yes
 No

If yes, please identify the party and explain:

Dated: MAY 17, 2012.

S/

LORNA S. CORRIGAN, ARBITRATOR

(File original with County Clerk; and provide copies to the Director of Arbitration and all other parties)

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7
8 COURT OF APPEALS, DIVISION ONE
9 STATE OF WASHINGTON

10
11 GILBERTO RAMIREZ and EPIFANIO RIOS,
12 Respondents,

No. 707418
CERTIFICATE OF SERVICE

13 v.

14 ABEL CHAVEZ and JANE DOE CHAVEZ, and the
15 marital community thereof; and CHAVEZ
16 LANDSCAPING LLC, a limited liability company,
17 Appellants

18 CERTIFICATE OF SERVICE

19 I certify that on the 15 day of May, 2014, I caused a true and correct copy of this
20 Respondents' Brief to be served on the following in the manner indicated below:

21
22 Hand Delivered

23 Counsel for Defendants/Appellants
24 Michael Jacobson
25 119 First Avenue, Ste 200
26 Seattle, WA 98104

27
28 

29 John Frawley, WSBA #11819

FILED
COURT OF APPEALS DIVISION ONE
JULY 27 PM 2:53