

NO. 71556-9-1

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

SOCIUS LAW GROUP, PLLC and
HECKER WAKEFIELD FEILBERG, P.S.

Appellants,

vs.

MARK BRITTON and BRIGID CONYBEARE BRITTON,
husband and wife

Respondents.

REPLY OF APPELLANTS

Adam R. Asher, WSBA #35517
SOCIUS LAW GROUP, PLLC
Attorneys for Appellants
Two Union Square
601 Union Street, Suite 4950
Seattle, WA 98101.3951
206.838.9100

Stephan D. Wakefield, WSBA
#22762
HECKER WAKEFIELD & FEILBERG,
P.S.
Attorneys for Appellants
321 First Avenue West
Seattle, WA 98119
206.447.1900

COPIED BY COURT REPORTER
 STATE OF WASHINGTON
 2/14/19 10:12:05

ORIGINAL

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION.....	1
II. LEGAL ARGUMENT.....	4
A. The Objection to Over-length Interrogatories	4
B. The Work Product Objection	6
C. Summary Judgment Was Not Frivolous .	9
1. The Witness Statement Has No Conflict.....	9
2. Summary Judgment Was Appropriate.....	12
D. The Ex Parte Contact Claim Is Surprising	15
E. The Trial Court Failed to Apportion Award	16
F. Miscellaneous Problems With the Order	18
III. CONCLUSION.....	21

TABLE OF AUTHORITIES

Page (s)

CASES

Baker v. Alderman,
150 F.R.D. 202 (M.D. Fla. 1993) 17

Chaplin v. Sanders,
100 Wn.2d 853, 676 P.2d 431 (1984) 11

In re MacGibbon,
139 Wn. App. 496, 161 P.3d 441 (2007) 17

Just Dirt, Inc. v. Knight Excavating, Inc.,
138 Wn. App. 409, 157 P.3d 431 (2007) 17

Limstrom v. Ladenburg,
136 Wn.2d 595, 963 P.2d 859 (1998) 8-9

Madden v. Foley,
83 Wn. App. 385, 922 P.2d 1364 (1996) 17

North Coast Elec. v. Selig,
136 Wn. App. 636, 151 P.3d 211 (2007) 6, 9,
15-16,
21

Shelton v. Strickland,
106 Wn. App. 45, 21 P.3d 1179 (2001) 11

Soter v. Cowles Pub. Co.,
131 Wn. App. 882, 130 P.3d 840 (2006) 8

RULES

CR 11 17

CR 26(b) (4) 8

KCLR 26(b) (2) (B) 5

OTHER AUTHORITIES

15A Wash. Prac., Handbook Civil Procedure
§ 8.9 (2013-2014 ed.) 17

I. INTRODUCTION

As set forth in their Opening Brief, Appellants Socius Law Group, PLLC and Hecker Wakefield & Feilberg, P.S., jointly represented Peter and Tamara Musser (Appellants will be referred to as the "Mussers"), to defend an adverse possession suit brought by Respondents Mark and Brigid Britton (the "Brittons").¹ The subject appeal is of a Sanction Order against the Appellants which does not explain or identify how each alleged act giving rise to the sanction was improper. Meanwhile, the Brittons' Brief admits that the sanction was not based on "one single act of misconduct, but rather on the Appellants' course of misconduct" (See P.13, Britton Response). The reality is, when each alleged act is actually examined, there was no misconduct at all. It does not appear that the trial court

¹ Peter and Tamara Musser are not part of this appeal; only their prior counsel.

even considered the Mussers' position.

This Reply will address each act of misconduct raised by the Brittons. It will focus on the trial court's failure to examine the underlying factual and legal basis upon which it determined that each act was improper. Specifically:

i) The Mussers improperly withheld a witness name from discovery responses. The Sanction Order does not address that the Brittons requested the witness name in an improper Interrogatory which was over the limit set by Local King County Rule. The Mussers properly objected and the Brittons did not raise even a possible dispute for two and one half months;

ii) The Mussers improperly withheld a witness statement. The Sanction Order does not analyze, or even mention, that the Mussers did not turn over the statement because it was Work Product (ironically, a position taken by the Brittons with a witness statement provided to

them);

iii) The Mussers filed an unwinnable summary judgment motion knowing the withheld witness statement conflicted with it.

Fundamentally, the witness statement of an inadmissible subjective belief and her later detailed Declaration outlining her specific observations, do not conflict. The Sanction Order also does not address the Brittons' lack of evidence to establish adverse possession. The Musser summary judgment was legitimate. In fact, the Brittons later voluntarily reduced the area sought by adverse possession, in recognition of the failure of their claim; and

iv) Appellant Socius Law Group lied to the Court through an ex parte communication intending to hide the above bad acts. The Sanction Order does not explain how counsel's email to the bailiff seeking several new potential hearing

dates constituted misconduct.²

Ultimately, the lower Court abused its discretion by not considering the Mussers' position. The Sanction Order should be reversed.

II. LEGAL ARGUMENT

A. The Objection to Over-length Interrogatories

The Brittons claim the Mussers improperly withheld a witness name through the discovery process. To support the allegation, they claim only that the Mussers "fail to acknowledge that the number of interrogatories propounded by Respondents did not exceed the limit of 40" (See Response, P.15). The statement is not supported by any facts or legal authority.

In reality, the Brittons propounded written Interrogatories to the Mussers that were over the limit (See Brief, P. 18). Pursuant to King

² The Sanction was entered against not only Socius Law Group, but also its clients personally, as well as co-counsel, Hecker Wakefield & Feilberg, P.S. even though they were not involved with the communication.

County Local Rule for Superior Court, no party may serve more than 40 interrogatories including "discrete subparts". See KCLR 26(b)(2)(B). The Britton Interrogatory requesting witness names was within an Interrogatory which was over the limit imposed by King County Local Rule when adding all prior interrogatories and subparts. CP 49-69. Specifically, many Interrogatories contained multiple subparts. For example, Interrogatory Numbers 2, 4, 5, 11, 13, 19, 20 and 21 all contain numerous subparts (i.e. Interrogatory No. 21 alone contains five subparts) which when added together, total over 40 Interrogatories. CP 52-54, 57-58, 61-62, 67.

Based on the above, the Mussers submitted a clear and specific objection. CP 67. Upon receiving it, the Brittons did nothing for two and one half months. CP 99-100. When they did raise an issue in a conversation with the Appellant Socius Law Group counsel, he again counted the Interrogatories to confirm that the

subject interrogatory was over the limit. CP 99. Nonetheless, to be cooperative, the Mussers answered the interrogatory and provided the witness names. CP 99.

Other than the unsupported allegation that the number of Interrogatories was under the 40 limit, the Brittons do not address the issue or explain how the Mussers acted improperly. Unfortunately, the Court's Sanction Order provides no greater explanation finding only that the act was somehow improper. Ultimately, a sanction order must make explicit findings regarding the alleged violation of the civil rules. See North Coast Elec. v. Selig, 136 Wn. App 636, 151 P.3d 211 (2007). The Court abused its discretion by not explicitly finding how the objection to the over-length Interrogatory was improper.

B. The Work Product Objection

The Brittons next argue that the Mussers improperly failed to provide the witnesses'

written statement through discovery (See Brief, P.14). Their Response Brief does not cite one case or provide any substantive argument, only stating: "it is undisputed that the 2012 Smith Statement was not timely produced. . ." See Response, P. 14). Yet, there is a significant dispute on this point.

After litigation commenced, the Mussers naturally began work on the case. As part of the process, they obtained a written statement from a witness with whom they had been working to obtain her photographs, written statement, invoices and other possibly relevant documents. CP 102-104. When responding to the Brittons' written discovery, the Mussers did not provide the written statement and instead, objected on the basis of work product in their Response to the Britton Request for Production of Documents Number 19. CP 67-68. It was clearly obtained by the Mussers as part of their work on the case. The Brittons did not dispute the objection and

instead, made the exact same objection to disclosure of a statement they received from a different witness. CP 202.

The Mussers had a good faith objection to providing the statement based on work product. The doctrine provides that written documents obtained in "anticipation of litigation", are protected from discovery by an opposing party unless there is "substantial need" and the party cannot obtain the material without "undue hardship" through "other means". See CR 26(b)(4). It cannot be stressed enough that the doctrine applies to written statements of fact "gathered" or "obtained" by an attorney in preparation for litigation. See Limstrom v. Ladenburg, 136 Wn.2d 595, 611, 963 P.2d 859 (1998); See also, Soter v. Cowles Pub. Co., 131 Wn. App 882, 130 P.3d 840 (2006).

Based on the above, the subject witness statement "gathered" or "obtained" by the Mussers through their efforts of working on the case

after commencement of litigation, was properly withheld through discovery. The only argument refuting that the subject witness statement was not work product (again with no reliance on case law or court rule), involved the recipient to whom it was written: "To Whom It May Concern" (See Brief, P.14). Again as set forth above, the work product doctrine applies to written factual statements obtained by counsel in preparation of litigation. See Limstrom at 611.

Unfortunately, the Sanction Order contains nothing to explain the reason that withholding the written statement was improper. Again, the Court Order must explicitly set forth the basis of the improper conduct. See North Coast Elec. at 636. The Court abused its discretion by not explicitly setting forth the basis explaining the impropriety for claiming the witness statement as work product.

C. Summary Judgment Was Not Frivolous

1. The Witness Statement Has No Conflict

The Brittons argue that the subject witness statement is in conflict with the later Declaration used to partially support the Mussers' Summary Judgment Motion, rendering it frivolous (See Brief, P.17). To support the Motion, the Mussers used the subject witness to provide specific testimony through a Declaration about her explicit maintenance of trees, shrubs and plants within the area sought by the Brittons through adverse possession. CP 109-112. The prior written statement which she drafted on her own, provided a subjective belief that there was one section in the disputed area where the Mussers' boundary line appeared further into the Brittons' garden than she previously thought. CP 102-04. In short, the Brittons claim the prior subjective belief of the witness conflicted with her later Declaration.

Ultimately, the unsworn statement does not provide any foundation for the belief, discuss whether the witness did any work in the specific

discussed area, or whether she even saw the Brittons use the area. It provides only one instance of the witnesses' subjective belief based on completely unknown factors. CP 102-04. The subjective belief which the Brittons argue is evidence of that belief, is inadmissible hearsay. In fact, Washington courts have long held that a person's subjective belief of whether one has a true interest in land or not, is completely irrelevant to an adverse possession analysis. See Chaplin v. Sanders, 100 Wn.2d 853 at 863, 676 P.2d 431 (1984); See also, Shelton v. Strickland, 106 Wn. App 45 at 51, 21 P.3d 1179 (2001). Instead, adverse possession must be determined exclusively on the "basis of the manner" that the owner actually "treats the property". See Chaplin at 861.

Unlike her prior belief which has no foundation, when asked to explicitly discuss her actual physical work on specific plants, trees and shrubs in the chaotic disputed area, the

witness was able to absolutely, without question, accurately explain her maintenance throughout the entire area. CP 109-112. Again, the sworn, completely accurate Declaration carefully dissects the entire area by reference to specific plants, trees and shrubs. CP 109-112. There is no hearsay. It is also noteworthy that the same witness provided another Declaration to even better explain that there is no conflict with her earlier subjective belief and later Declaration setting forth her specific acts. CP 625-26.

In essence, the Brittons attempt to make a mountain out of less than a molehill by claiming that the prior statement by the witness regarding unanalyzed, inadmissible and subjective beliefs, somehow contradicts objective observations.

2. Summary Judgment Was Appropriate

After filing suit to obtain property from the Mussers under adverse possession, the Brittons prepared a diagram to the area sought which indicated a chaotically meandering new

boundary. CP 329. There was no fence or any other long-standing structure to identify a boundary line as the area was comprised of trees, shrubs and other plants. CP 329. Thus, to establish their adverse possession claim, the Brittons needed to prove exclusive use of the area which again, had no clear boundary.

As set forth in the Musser Opening Brief, the Brittons did not have a witness who could establish that the Brittons and their landscapers alone maintained each specific bush, plant and shrub within the chaotic area. They could thus not establish the exclusivity element of adverse possession, meaning their claim to the area was susceptible to dismissal on Summary Judgment. To support the motion, the Mussers used the subject witness declaration setting forth her specific maintenance of each plant to defeat any exclusivity claim. CP 109-112. Frankly, even the Brittons acknowledged that they had no legitimate basis to the entire area sought by

later withdrawing their claim to a large area before the Musser Summary Judgment Motion was heard. CP 714, 717.

Even if there was an inconsistency with the prior unexplained subjective belief and the witnesses' later declaration discussing her actual observations, the inconsistency did not render summary judgment impossible to win. The Brittons are incorrect that summary judgment is an all or nothing proposition. As set forth in the Musser Opening Brief, the courts have the power, which they exercise often, to partially grant summary judgment motions. In this case, the "inconsistency" relates to a small area of the entire section sought by the Brittons. Thus, if the trial court found that the inconsistency created an issue of fact, it could have denied summary judgment as to that area, but otherwise granted summary judgment to dismiss the other sections sought by the Brittons. In this regard, the Brittons later withdrew a large portion of

their claim in recognition that it had no merit. This fact alone legitimizes the Musser Summary Judgment Motion.

Again, the Court Order must explicitly set forth the basis of improper conduct. See North Coast Elec. at 636. The court abused its discretion in awarding an unsupported sanction without any reasoned explanation.

D. The Ex Parte Contact Claim Is Surprising

As part of their alleged pattern of misconduct, the Brittons claim that counsel for Socius Law Group essentially lied to the Court to hide all the above deceitful conduct (See Brief, P. 19). In truth, a quick review of the two sentence email to the Court bailiff sets forth the entire intent. CP 166. Counsel was clearly wondering if the Bailiff had several prospective future dates which may work as a new hearing date for Appellants' Summary Judgment Motion. Again, given the above set of circumstances, including the late filed motion to supplement, it appeared

likely that Respondents would want time to depose the subject witness to better understand her testimony and her prior statement. In fact, at the time he contacted the Court bailiff, counsel also contacted Respondents' counsel to apprise him of the proposal. CP 211.

Despite the trivial nature of the email, the Sanction Order found that it "undermines the integrity of the Court". CP 224. There is no explanation as to how, why or in what possible fashion the email could be anything other than a request for alternative motion dates. CP 221-225. As set forth above, a Court Order must explicitly set forth the basis of the improper conduct. See North Coast Elec. at 636. The Court abused its discretion in awarding an unsupported sanction.

E. The Trial Court Failed to Apportion Award

The Brittons argue that there is no authority supporting the Musser request that the trial court segregate the portion of the summary

judgment motion found to violate CR 11 from the remaining portions. Contrary to the position, the authority cited in the Musser Opening Brief specifically provides that a CR 11 award must be so apportioned. Just Dirt, Inc. v. Knight Excavating, Inc., 138 Wn. App. 409, 157 P.3d 431 (2007) (trial court's failure to expressly limit an award of attorney fees to those incurred in responding to specified sanctionable conduct will, on appeal, result in a remand for recalculation); In re MacGibbon, 139 Wn. App. 496, 161 P.3d 441 (2007); Madden v. Foley, 83 Wn. App. 385, 922 P.2d 1364 (1996); see also, 15A Wash. Prac., Handbook Civil Procedure § 8.9 (2013-2014 ed.) (citing Baker v. Alderman, 150 F.R.D. 202 (M.D. Fla. 1993)) (imposition of Rule 11 sanctions requires that the award be "properly itemized" in terms of the perceived misconduct)). Here, the trial court failed to apportion the alleged sanctionable conduct from the portions of the summary judgment motion that had merit,

including the portion over which the Brittons later withdrew their claim. The failure was clear error.

The Brittons and trial court appear to be under the mistaken belief that if a summary judgment motion cannot be 100% granted, the only outcome is denial of the motion. As set forth above, courts have the power to grant (or deny) motions in part. Thus, if the trial court thought the "inconsistent" testimony created an issue of fact, it could have denied summary judgment over the portion of the claim affected by such testimony, but otherwise granted the remaining portions of the motion. The "all or nothing" approach is inconsistent with established practice and the law. By failing to properly segregate the award, the lower court abused its discretion.

F. Miscellaneous Problems With the Order

While perhaps not as substantive, the Sanction Order contains other troubling problems

which highlight concerns that the trial court did not fully consider the Appellants' position. First, it provides that the trial court heard oral argument; this provision is inaccurate. CP 222. Instead, the trial court originally scheduled an oral argument hearing but oddly and without notice, entered the Sanction Order several days before the hearing. The Mussers never had the opportunity to argue the case to the trial court, as had been indicated in the Sanction Order.

Second, the Sanction Order does not specifically identify the briefing or supporting documents which were relied upon when rendering the decision. CP 222. It is uncertain if the trial court actually reviewed the Mussers' substantial submittals in response to the Brittons' Motion for Sanctions.

Third, the Sanction Order makes no attempt to apportion blame between the two Appellate law firms and their clients. Instead, it simply

enters a Sanction against all of them with no attempt to assign which actions give rise to a sanction against which party. CP 221-225. For example, there is no finding of wrongdoing by the Appellants' clients but they were nonetheless included in the Sanction.

Fourth, as set forth in the Mussers' Opening Brief, many fee items sought by the Brittons in their fee application were not related to the subject Summary Judgment motion (See Appellant Brief, P.45 citing CP 171-72). In fact, the Brittons used the work on later motions. The Sanction Order made no attempt to limit the fees. CP 221-225.

Finally, the computation of the sanction amount contains an obvious error on its face. CP 221. In fact, the Brittons even admitted the error in their Response to the Mussers' Reconsideration Motion. CP 254. The trial court thereafter had an opportunity to correct it on reconsideration, but did nothing.

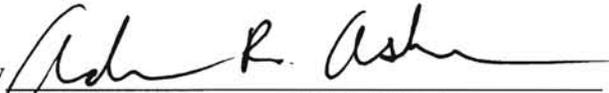
Frankly, the above problems and inconsistencies highlight why a severe sanction must be clear, well thought out and specifically set forth the facts giving rise to it. See North Coast Elec. at 636. With all due respect, it does not appear that the trial court carefully considered all facts or legal argument when awarding the sanction. As such, the Court abused its discretion.

III. CONCLUSION

The Sanction Order does not explain the basis for finding improper conduct worthy of a severe sanction. The Court thus abused its discretion and the Sanction Order should be reversed.

DATED this 15th day of August, 2014.

SOCIUS LAW GROUP, PLLC

By 

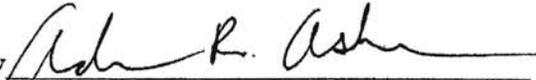
Adam R. Asher, WSBA#35517
Attorneys for Appellant
Socius Law Group, PLLC

HECKER WAKEFIELD & FEILBERG, P.S.

By _____
Stephan D. Wakefield, WSBA#22762
Attorneys for Appellant
Law Office of Hecker
Wakefield & Feilberg, P.S

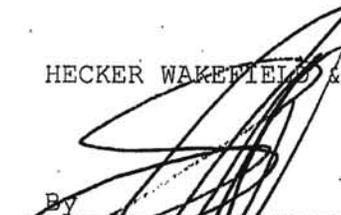
DATED this 15th day of August, 2014.

SOCIUS LAW GROUP, PLLC

By 

Adam R. Asher, WSBA#35517
Attorneys for Appellant
Socius Law Group, PLLC

HECKER WAKEFIELD & FEILBERG, P.S.

By 

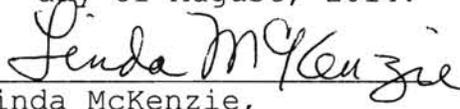
Stephen D. Wakefield, WSBA#22762
Attorneys for Appellant
Law Office of Hecker
Wakefield & Feilberg, P.S

I. CERTIFICATE OF SERVICE

I certify that on the 15th day of August, 2014, I caused a true and correct copy of this Reply Brief of Appellants to be served on the following in the manner indicated below:

<i>Counsel for Respondents</i>	[] By U.S. Mail
Scott Sleight	[] By Federal Express
Matthew Paxton	[x] By Legal Messenger
Ahlers & Cressman PLLC	[] By Facsimile
999 Third Avenue,	[] By Email
Suite 3800	<u>dhubacka@ac-lawyers.com</u>
Seattle, WA 98104	<u>sleight@ac-lawyers.com</u>

Dated: Seattle, WA, this ¹⁵~~14~~^{um} day of August, 2014.


Linda McKenzie,
Legal Assistant