

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Appellant,

v.

LOVERA M. BLACKCROW,

Respondent.

No. 40459-1-II

UNPUBLISHED OPINION

Armstrong, J. — The Clallam County Superior Court imposed CR 11 sanctions on a deputy prosecuting attorney for two misstatements of fact in a motion that she had submitted to the court. Because the motion was not meritless and the misstated facts were not material to the underlying motion, we hold that CR 11 sanctions are not appropriate in this case and, therefore, reverse.

**FACTS**

On August 16th, 2009, Lovera Blackcrow’s car collided with Roger Mallicott’s motorcycle, injuring and ultimately killing Mallicott’s passenger, Shelly Bartlett. The State charged both Blackcrow and Mallicott with driving under the influence and vehicular homicide, in violation of RCW 46.61.502 and RCW 46.61.520(1)(a).

According to the police report, an officer asked Mallicott if he would be willing to perform field sobriety tests and Mallicott responded that he wanted to contact his attorney:

[Mallicott] said, “Wait, I’m not sure I should be doing this[.] I’m a member of a club (Amigos) and we have procedures for this.” Mallicott then stated that he wanted to call his attorney before submitting to the field sobriety tests. Mallicott called information on his cellular telephone and asked for the telephone number for Karen Unger, a local defense attorney. . . . The answering machine answered the telephone at Unger’s office and Mallicott left a message for her to call.

Clerk's Papers (CP) at 25-26. Unger subsequently appeared on behalf of Blackcrow, and Mallicott was represented by another attorney.

The State, represented by a deputy prosecuting attorney, moved to sever Blackcrow's and Mallicott's cases for trial. In one of the four arguments raised in the motion, the State argued that a conflict of interest might exist and incorrectly asserted that Mallicott was a member of the Hells Angels Motorcycle Club and that Unger was the attorney for that club:

The State also reasonably anticipates that defendant Blackcrow will attempt to capitalize on the fact that defendant Mallicott is a member of the Hells Angels and a convicted felon while attempting to paint herself in a more favorable light. The State would also note the potential conflict of interest caused by the fact that defendant Blackcrow's attorney was, apparently, at the time of the collision the attorney for the Hells Angels and the attorney defendant Mallicott attempted to contact for legal advice at the scene of the collision.

CP at 35.<sup>1</sup>

Unger opposed the motion and moved for CR 11 sanctions. She denied that a conflict of interest existed based on Mallicott's failed attempt to contact her, denied ever representing the Hells Angels, and argued, "This kind of baseless accusation in and of itself supports the finding of a CR 11 violation." CP at 32.

In response, the State submitted the police report showing that Mallicott had stated he was a member of the Amigos and attempted to contact Unger, and explained, "The State wrote

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<sup>1</sup> The State also argued under *State v. Jones*, 93 Wn. App. 166, 171-72, 968 P.2d 888 (1998), that (1) it anticipated the defenses would be antagonistic to the point of being irreconcilable and mutually exclusive; (2) it would be difficult for a jury to separate the evidence as it related to each defendant when determining guilt or innocence; and (3) because there was sufficient evidence to charge Mallicott with vehicular homicide by acting with disregard to the safety of others, there was a disparity in the weight of the evidence against the two defendants.

the previous motion from memory and mistakenly identified the motorcycle gang/club as the Hells Angeles [sic].” CP at 22. The State also submitted a second, independent response, prepared by the Clallam County prosecuting attorney, arguing that *Bruton*<sup>2</sup> issues required severing the two cases.

The trial court granted Unger’s motion and imposed a \$500 sanction. The court found that the deputy prosecuting attorney “had a duty to review the investigative reports and get her facts straight before filing her motion,” and that the misstatements of fact in her motion to sever were “disparaging toward Ms. Unger [and] potentially damaging to [her] reputation.” CP at 13. The court concluded that by signing the pleading and certifying its accuracy, the deputy prosecuting attorney had breached CR 11. But the court also found that there was no evidence the deputy prosecuting attorney had acted with a malicious purpose and that “the motion to sever itself was not frivolous and was brought in good faith.” CP at 13-14.

Finally, the trial court heard additional arguments from the State on the *Bruton* issues. The State also presented additional documents showing that Unger had previously represented Mallicott in 2007. The trial court ruled that there was insufficient evidence to establish a conflict of interest, but granted the motion to sever Blackcrow’s and Mallicott’s cases based on the *Bruton* issues.

#### ANALYSIS

The State challenges the trial court’s award of CR 11 sanctions, arguing that sanctions are not appropriate where the trial court found that the motion was not frivolous and was brought in

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<sup>2</sup> *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

good faith. The State also argues that the misstated facts were not material to the motion as a whole and, while inaccurate, were not completely baseless—Mallicott is a member of a motorcycle club, the Amigos, and it was not unreasonable to infer that Unger might be the attorney for that club based on Mallicott’s attempt to contact her immediately after the accident.

We review an award of CR 11 sanctions for an abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). CR 11 requires attorneys to sign and date every pleading, motion, and legal memorandum filed with the court.<sup>3</sup> That signature certifies that

to the best of the . . . attorney’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) [the pleading, motion or memorandum] is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

CR 11(a). In other words, “CR 11 addresses two types of problems relating to pleadings, motions and legal memoranda: filings which are not ‘well grounded in fact and . . . warranted by . . . law’ and filings interposed for ‘any improper purpose.’” *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992) (quoting CR 11). “The purpose behind the rule is to deter baseless filings, not filings which may have merit.” *Bryant*, 119 Wn.2d at 220. “In deciding whether the trial court abused its discretion, we must keep in mind that “[t]he purpose behind CR 11 is to deter *baseless* filings and to curb abuses of the judicial system.” *Biggs*, 124 Wn.2d at

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<sup>3</sup> CR 11 is applicable to criminal cases under CrR 8.2, which provides: “Rules 3.5 and 3.6 and CR 7(b) shall govern motions in criminal cases.” CR 7(b)(3) provides: “All motions shall be signed in accordance with rule 11.”

197 (quoting *Bryant*, 119 Wn.2d at 219) (emphasis in original).

Here, the trial court's sanctions award was based on two misstatements of fact in the State's motion to sever. But the State's argument that Unger might have a conflict of interest based on Mallicott's attempt to contact her immediately after his arrest was not baseless—as the State later discovered, Unger had in fact represented Mallicott in the past. And the State's motion as a whole was neither baseless nor filed for an improper purpose. *See Bryant*, 119 Wn.2d at 217, 220. On the contrary, the trial court expressly found that the motion was not frivolous and was brought in good faith, and ultimately granted the motion to sever.

Furthermore, the trial court found that the factual misstatements were not made for a malicious purpose but were the result of a mistake. Because CR 11 is similar to Rule 11, Washington courts may look to federal decisions interpreting Rule 11 for guidance. *Bryant*, 119 Wn.2d at 218-19. And federal courts have held that inadvertent factual errors are not an appropriate basis for Rule 11 sanctions. *See, e.g., Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co.*, 8 F.3d 441, 449-50 (7th Cir. 1993) (“Although [the plaintiff's] factual error was admittedly a serious one, and one with which the district court was understandably perturbed, the error was inadvertent and therefore not sanctionable.”); *Griggs v. BIC Corp.*, 844 F. Supp. 190, 202 (M.D. Pa. 1994) (“We agree that, in certain respects, Plaintiffs' arguments misconstrued the record. We do not, however, find evidence that any such confusion was deliberate. . . . We will deny Defendant's motion [for Rule 11 sanctions].”).<sup>4</sup>

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<sup>4</sup> Finally, we note that our Supreme Court has stated that practitioners should give informal notice to the other party before filing a CR 11 motion “to encourage early and informal settlement.” *Biggs*, 124 Wn.2d at 198 n.2. Lack of such notice “should be considered by a trial court in fashioning an appropriate sanction.” *Biggs*, 124 Wn.2d at 198 n.2. Here, the State filed its motion to sever on February 8, 2010, and Unger filed her motion for CR 11 sanctions on

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Because this sanctions award was based on an inadvertent factual error, and the State's argument that a potential conflict of interest existed was not meritless or filed for an improper purpose, imposing CR 11 sanctions would be inconsistent with the rule's purpose of deterring baseless filings and curbing abuses of the judicial system. *See Biggs*, 124 Wn.2d at 197; *Bryant*, 119 Wn.2d at 217, 220. Accordingly, we hold that CR 11 sanctions are not appropriate here.

Reversed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Armstrong, J.

We concur:

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Hunt, J.

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Worswick, A.C.J.

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February 9, 2010. Although Unger informed the trial court that she had brought the issue to the Clallam County prosecuting attorney's attention on the day that she received the State's motion, Unger did not give the State time to retract or correct its motion before moving for sanctions.