

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROD L. CULBERT, an individual,)	No. 27775-5-III
)	
Appellant,)	
)	
v.)	Division Three
)	
ESTATE OF BETTY ANN KOEHLER,)	
through its Administrator, Loree)	
Tachell,)	
)	
Respondent.)	UNPUBLISHED OPINION

Korsmo, J. — Rod L. Culbert appeals the dismissal of his claim against the estate of his intimate partner and the imposition of sanctions for discovery violations and pursuing litigation contrary to CR 11. The trial court properly dismissed the action under Washington precedent. The trial court also did not abuse its discretion when it imposed the sanctions. We affirm.

FACTS

Mr. Culbert and Betty Ann Koehler began living together in a loving and

committed relationship in 1983. They shared the same bedroom until Ms. Koehler became ill in the late 1990s. About 1990, the couple moved into a house in Spokane that Ms. Koehler had purchased in 1967.

The couple maintained separate finances. Mr. Culbert explained that they did so because he had a trucking business and they wanted to protect Ms. Koehler from liability related to the business. As a result, Mr. Culbert paid nothing toward the house; he did not pay rent, utilities, or taxes. He did make repairs and improvements to the property.

Ms. Koehler retired in 1996 with total disability. Mr. Culbert sold his trucking business and retired early in order to care for her full time. Ms. Koehler died in 2007. Mr. Culbert filed a creditor's claim for \$175,000 against Ms. Koehler's estate. The estate denied the claim and Mr. Culbert filed suit February 20, 2008. His amended complaint sought \$175,000 for his "interest in the estate."

The estate served a set of interrogatories on May 27, 2008. On July 1, counsel for the estate sent a letter to Mr. Culbert's counsel asserting that the interrogatory answers were overdue and asking to have a discovery conference by telephone on July 7 at 10:00 a.m. The estate's counsel asserts that the two attorneys did converse on the telephone and that Mr. Culbert's counsel assured him that discovery answers would be forthcoming. However, Mr. Culbert's counsel asserts that he has no records concerning a discovery

conference on July 7.

The estate filed a motion on July 30 to compel discovery and impose sanctions on Mr. Culbert. The motions were continued for hearing to September 23. On August 21, the estate moved for summary judgment and attorney fees and costs under CR 11.

Mr. Culbert's counsel faxed the interrogatory answers to the estate's counsel the night before the discovery hearing. The answers had been signed by Mr. Culbert on August 12. At the hearing, Mr. Culbert argued that there had been no discovery conference, so sanctions were inappropriate. The trial court found CR 26(i) had been complied with and imposed a \$500 sanction. Mr. Culbert was also bound by the answers submitted.

The court issued a memorandum opinion November 13 that granted summary judgment to the estate and dismissed Mr. Culbert's claim. After supplemental briefing, the court concluded that there was no factual basis for Mr. Culbert's claim and that his counsel continued to pursue the case despite this knowledge. The court sanctioned counsel and awarded the estate \$5,156.50.

Mr. Culbert and his counsel timely appealed to this court.

ANALYSIS

Summary Judgment. This court reviews a summary judgment *de novo*, performing

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the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id.* If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id.*

The moving party bears the initial burden of establishing that it is entitled to judgment because there are no disputed issues of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If a defendant makes that initial showing, then the burden shifts to the plaintiff to establish there is a genuine issue for the trier-of-fact. *Id.* at 225-226. The plaintiff may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, it must put forth evidence showing the existence of a triable issue. *Id.*

Courts will equitably divide the “community-like property” of parties involved in a committed intimate relationship. *Soltero v. Wimer*, 159 Wn.2d 428, 430, 435, 150 P.3d 552 (2007). However, it is only property that would be considered community property if held by a married couple that is subject to division by the court. *Id.* at 435. The separate property of the parties “is not subject to distribution.” *Id.* at 430. The same

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rules apply when one or both parties to the relationship are deceased. *Olver v. Fowler*, 161 Wn.2d 655, 658, 168 P.3d 348 (2007).

The trial court correctly applied this settled law to the facts of this case. Mr. Culbert established that the parties were in a committed intimate relationship. However, he identified no property held in common by the parties. Instead, he filed his claim against the separate property in Ms. Koehler's estate. He had no interest in that property. *Soltero; Olver*. The conclusion here is the same as in *Soltero*:

Since the trial judge identified no community-like assets to distribute, no equitable distribution under the meretricious relationship doctrine is possible.

Soltero, 159 Wn.2d at 435. *Accord, Olver*, 161 Wn.2d at 668-669; *Connell v. Francisco*, 127 Wn.2d 339, 349-351, 898 P.2d 831 (1995).

Ms. Koehler did not provide for Mr. Culbert by will and there was no community-like property acquired during the relationship for the court to divide because the parties kept separate financial identities even after retirement. There was no material issue of fact that required trial of this case. Summary judgment was properly granted.

Discovery Sanction. Mr. Culbert also challenges the award of \$500 in sanctions for the late provision of the interrogatory answers. A trial court's decision on discovery sanctions is reviewed for abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). "A trial court abuses its

discretion when its order is manifestly unreasonable or based on untenable grounds.” *Id.*
at 339.

CR 26(i) states:

Motions; Conference of Counsel Required. The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsel’s certification that the conference requirements of this rule have been met.

Appellant raises several arguments against the sanction ruling. First, he argues that there was no discovery conference as required by CR 26(i) and that the court therefore lacked authority to impose any sanction. The trouble with that argument, however, is that the trial court expressly found that the attorneys did consult by telephone, something that the rule expressly authorizes. The declaration of the estate’s counsel provides a factual basis for that finding. He said that the attorneys spoke on the telephone on July 7. Mr. Culbert’s counsel did not expressly disagree with that assertion, but only declared that he had no record of such a meeting. This evidence allowed the trial court to determine that counsel had actually conferred.

Mr. Culbert next argues that the motion did not properly certify that a discovery

conference had taken place. Even if that is correct, it is of no matter. A trial court has authority to hear a motion to compel or to sanction in the absence of a CR 26(i) certificate, or if the certificate is defective in some manner. *Amy v. Kmart of Wash., LLC*, 153 Wn. App. 846, 223 P.3d 1247 (2009).

Mr. Culbert also argues that the trial court abused its discretion in sanctioning him for late discovery. The trial court expressly found that Mr. Culbert and his counsel “willfully failed to respond to discovery as required by the Civil Rules.” Clerk’s Papers (CP) 131. Commenting during the hearing, the court asked counsel, “did you in your heart of hearts think these interrogatory answers were going to be satisfactory?” and noted that “the answers appear to be less than useful in most instances.” CP 91. Appellant’s counsel argued that no sanctions should be imposed because the answers were provided before the hearing. The trial court awarded an “extremely low” \$500 sanction because the answers were quite late and the estate was required to file a motion to compel in order to receive them. CP 92.

The tardy transmission of the answers on the eve of the motion to compel was a tenable basis for sanctioning Mr. Culbert. By that point the estate had incurred the expense of compelling the answer so that it could know what this lawsuit was about. There was no abuse of discretion in awarding the sanction.

Mr. Culbert also argues that the tardiness should have been forgiven in light of the fact that Mr. Culbert had no access to his records after he was evicted from Ms. Koehler's house and because his counsel was seriously injured in a motorcycle accident on August 9. The primary problem with these arguments is that Mr. Culbert never presented them to the trial court at the September 23 sanction hearing. Instead, they were raised in an objection when the proposed findings were noted for presentment. There was no motion for reconsideration; the trial court was never asked to pass on the adequacy or efficacy of these explanations. The trial court cannot have abused its discretion when it was never asked to consider these facts in its exercise of discretion.

There was no abuse of discretion in awarding the estate \$500 for its efforts to compel the late discovery.

CR 11 Sanction. Mr. Culbert's counsel also challenges the CR 11 sanction awarded the estate for pursuing this litigation after it became apparent there was no community-like property to divide. As with CR 26, an award under CR 11 is reviewed for abuse of discretion. *Fisons*, 122 Wn.2d at 338; *McNeil v. Powers*, 123 Wn. App. 577, 590, 97 P.3d 760 (2004).

In relevant part, CR 11(a) states:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an

inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it 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

A trial court must enter findings concerning the failure of counsel to meet the CR 11 standards. *McNeil*, 123 Wn. App. at 590-591. That was done here.

The trial court found that there was no factual basis to support the claim and focused on Mr. Culbert's own testimony that he and Ms. Koehler did not pool their finances. The court also determined that the facts did not support a claim for equitable distribution of Ms. Koehler's estate. CP 221. Appellant does not assign error to any of these findings.¹ An unchallenged factual finding is treated as a verity on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

We agree that there was no factual basis for pursuing the claim for equitable distribution. While the parties had engaged in a committed intimate relationship, there was no community-like property to divide. Mr. Culbert expressly stated on multiple occasions that the parties had always maintained separate finances. If there was any community-like property, he should have known that fact and told his attorney. Counsel likewise should have discovered that fact early in his investigation.

Counsel also never argued for any extension, change, or reversal of existing law

¹ Most of the findings relied upon by respondent appear to be legal conclusions and we will treat them as such.

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concerning distribution of property belonging to couples who had been in a committed relationship. In that circumstance, he should have realized that the pleaded cause of action was not viable and either amended the complaint or dismissed it. Instead, counsel insisted on keeping matters alive even though there appeared to be no basis for further investigation. These facts certainly presented a tenable basis for sanctioning counsel under CR 11. There was no factual basis for the complaint under existing law and no argument that the law should be changed.

The court did not abuse its discretion when it entered the CR 11 award.

Attorney Fees. Respondent seeks attorney fees under RAP 18.9 and RCW 4.84.150, arguing that the appeal is frivolous. We disagree. While the appeal is without merit, it presented non-frivolous issues concerning the sanction awards and we do not believe that it was brought for purposes of delay. Accordingly, we deny the request for attorney fees. Respondent is entitled to its costs and statutory fees as the prevailing party in this court. RAP 14.1; RAP 14.2

The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in

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the Washington Appellate Reports, but it will be filed for public record pursuant to RCW
2.06.040.

Korsmo, J.

WE CONCUR:

Brown, A.C.J.

Sweeney, J.